Autonomy or Subordination of Labour Law? The Debate beyond National Borders in 2015*

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Abstract: *The article presents the retrospective overview on the debate held in 2015 in 22 out of 28 journals affiliated with the International Association of Labour Law Journals (IALLJ). In their analysis, the authors decided to pay particular attention to the issue of autonomy and/or subordination of labour law from other disciplines and took therefore into account its relationship with international and humanitarian law, constitutional law (intended in a broad sense, i.e. considering the protection of social rights in a multilevel legal order) and economics.*

Key words*: labour law, autonomy, subordination.*

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Avtonomija ali podrejenost delovnega prava? Razprave v mednarodnem prostoru v letu 2015

Povzetek: *Članek predstavlja retrospektivni pregled razprav v letu 2015 v 22 od 28 revij, združenih v Mednarodnem združenju revij za delovno pravo (International Association of Labour Law Journals – IALLJ). Avtorji so v razpravah namenili posebno pozornost vprašanju avtonomije in/ali subordinacije delovnega prava glede na druge discipline in izpostavili njegovo razmerje do mednarodnega in humanitarnega prava, ustavnega prava (z namenom širšega pogleda na varstvo socialnih pravic v pravnem redu večih ravni) in ekonomije.*

Ključne besede: *delovno pravo, avtonomija, podrejenost*

1. INTRODUCTION: AUTONOMY OR SUBORDINATION OF LABOUR LAW?

The aim of this article is to examine some aspects of the very intense labour law debate which has taken place at international, European and national level during 2015. To this end, the majority of the journals forming part of the *International Association of Labour Law Journals* (IALLJ) have been taken into consideration. More specifically, the authors have analysed twenty-two journals out of a total of twenty-eight member journals belonging to the association in 2015. The

remaining six were not taken into account, essentially because of language barriers or difficulty in sourcing the published contributions[2].

Since the number of articles and topics analysed is very large, a selection has been made, as in recent years. However, in a departure from the choices made for the past retrospective overviews, mainly related to the quantitative and qualitative relevance of the chosen issues, the authors and the group of academics supporting their work decided to devote particular attention to the relationship of labour law with other legal and non-legal disciplines. This decision was taken for two different reasons. First of all, the fact that particularly in the wake of the most recent economic and financial crisis, the debate on this relationship has intensified: labour law reforms adopted in some southern European countries because of the crisis have led scholars to increase their research activity into it and its consequences. One of the most important issues analysed by labour lawyers was the role played by so-called austerity measures, i.e. mainly by economics, on these reforms and on the worsening of the position of employees, which was one of the most important of their outcomes. Scholars, in other words, started to question the autonomy of labour law from other disciplines and published, in 2015, a number of articles on this issue in the journals belonging to the IALLJ (and some of them, in particular). The second reason why the authors decided to dedicate this retrospective overview to the link between labour law and other disciplines is related to the fact that, in November 2016, one of the journals of the association, *Lavoro e Diritto* (LD), organised a congress for its thirtieth anniversary, aimed precisely at reflecting on autonomy and subordination of labour law.

Accordingly, in the next three sections, a number of IALLJ articles devoted to this topic will be analysed. Firstly, the relationship between labour law on the one hand and international and humanitarian law on the other will be considered, paying particular attention to the role played by the International Labour Organisation in promoting decent work conditions and fundamental rights in times of globalisation and economic crises. Secondly, the link between labour law and constitutional law from the perspective of protecting social rights in a multilevel legal order and the respective dialogue among courts at national, European and international

[2] We refer to the following journals: Análisis Laboral (Peru), Industrial Law Journal (South Africa), Labour and Social Law (Belarus), Labour Society and Law (Israel), Pecs Labour Law Journal (Hungary) and Russian Yearbook of Labour Law (Russia). The full list of the IALLJ member journals can be found at this website: www.labourlawjournals.com.

level will be examined in depth. Thirdly, the impact of the economic rationale on labour law within the framework of globalisation, the recent economic and financial crisis and the related reforms will be analysed. Finally, the authors will try to make some joint concluding remarks on the main current position of labour law in relation with the other disciplines, arising from the IALLJ articles considered.

2. LABOUR LAW, INTERNATIONAL AND HUMANITARIAN LAW

The international and humanitarian dimensions of law particularly influenced IALLJ authors in 2015. Although international law has started to play an important role again with regard to labour and social rights at the end of the twentieth century because of globalisation, its importance has grown significantly as a consequence of the most recent economic and financial crisis and the related reforms in some "weak" southern European countries (like Greece, Spain, Portugal, and Italy), characterised by so-called austerity measures. The interaction of these developments has firstly led the International Labour Organisation (ILO) to strengthen its commitment to fundamental rights and decent work, whose importance was solemnly recognised in the two most recent Declarations of the organisation - the ILO Declaration on Fundamental Principles and Rights at Work and the ILO Declaration on Social Justice for a Fair Globalisation - respectively adopted in Geneva in 1998 and 2008. Secondly, it induced a number of scholars to re-evaluate international labour standards (especially the core labour standards, i.e. fundamental rights) as a sort of countermeasure against the reduction of labour rights, at national level, by the said austerity measures, mainly pertaining to some key aspects of labour and social law, such as the protection against unfair dismissal, collective bargaining, and pension schemes. According to these developments, in 2015 too, many IALLJ articles were devoted to fundamental rights and decent work, although the link between these issues and economic crises became much less significant than in the previous years.

Moreover, concerning international law generally, in 2015 some IALLJ journals decided to publish articles, not only on migrant workers, but also on the social aspects of the dramatic and very complicated refugee crisis which has increasingly affected European countries over recent years.

Against this background, in the following subsections the IALLJ articles 2015 on fundamental rights and decent work and on the ways to make these instruments more effective will be analysed first. Subsequently, the essays concerning the protection of migrant workers and refugees will be considered.

2.1. Strengthening Fundamental Rights and Decent Work

Many IALLJ articles published in 2015 analysed some aspects of international labour law, focusing, in particular, on the role played by fundamental rights and decent work in a globalised world which, with difficulty, is endeavouring to emerge from one of the worst economic and financial crises ever experienced.

Starting with the most comprehensive issue, i.e. decent work, it should firstly be pointed out that some articles took this idea into account in a broad sense (for example analysing the link between decent work conditions and minimum wage: Kresal 2015). Most of them, however, considered in particular one of the four strategic objectives (or pillars) of the respective ILO agenda - enshrined in the so-called ILO Declaration on Social Justice for a Fair Globalisation 2008 -, according to which labour law can be really effective only within a well functioning and proactive tripartite context, at both international and national level. In this respect, they examined two of the main features of tripartism, i.e. industrial relations and collective bargaining, pointing out their importance for strengthening labour and social rights in general terms and, at the same time, the need to rethink their role and their goals, in order to take into account the continuous changes of the labour market and the current needs of working people.

Not surprisingly, then, a number of articles devoted to these issues began with a general question about the possible developments of industrial relations and collective bargaining, underlining the difficulties they are facing at present, because of their still traditional approach to labour and social law in general and to the employment relationship in particular. In this regard, authors took especially into account the need to accommodate industrial relations and collective bargaining systems, originally established in a Fordist world of work, with a completely different and globalised labour market, i.e. to modernise them, and to protect precarious working people more effectively (Hayter 2015, Hyman 2015, Fine 2015).

Moreover, IALLJ authors described the evolution and the current challenges of industrial relations and collective bargaining in the different regions of the world, paying attention both to western and to emerging countries.

Regarding western countries first of all, many articles examined the situation of a number of European states (Hyman 2015), pointing out the paradoxes of labour markets characterised by increasing individualisation and deterioration of employment relationships, decreasing unionisation and a market-oriented approach taken by EU institutions which could even worsen the labour conditions of European workers in the future (Kenue 2015). This problematic situation, which industrial relations and collective bargaining systems seem at present to be unable to effectively oppose, is well symbolised by the case of low-paid employment and income inequality under the wage-setting systems of some European countries. As a results of a comparative analysis of these countries, one scholar pointed out that collective wage bargaining is still more efficient than statutory minimum wages in combating inequalities, but intervention by the state would be in any case necessary in order to counteract the erosion of industrial relations institutions (Bosch 2015). Alongside some European countries, the United States were also taken into account where, following the crisis of traditional unionism, very interesting alternative initiatives (often community-based) aimed at protecting vulnerable workers have been established (so called "work centres": Bosch 2015).

Concerning, then, emerging countries, IALLJ authors 2015 focused on some features of their industrial relations and collective bargaining systems and affirmed that these systems not only share a number of problems with the western ones (like their erosion in the post-Fordist era), but also have to confront specific challenges related to their stage of development, such as poverty and the role played by the informal economy. In this context, the need to accommodate legislative reforms with emerging social movements willing to replace traditional representational patterns was particularly taken in consideration (Webster 2015, Sen, Lee 2015).

Moreover, some IALLJ authors elaborated new economic indicators to measure decent work conditions, in order to better understand progresses and steps backwards made by ILO member states (Ostermeier, Linde, Lay, Prediger 2015, Webster, Budlender, Orkin 2015). Within this framework, some of them in particular considered specific sectors (such as the textile and clothing industry: Gimet, Guilhon, Roux 2015) and states (such as Mozambique and India: Dibben, Wood, Williams 2015, Chatterjee, Kanbur 2015) and the interplay

between decent work and the informal economy (Williams 2015, Besim, Ekici, Jenkins 2015).

Next, regarding fundamental rights, it should firstly be noted that they are, again, one of the four strategic objectives (or pillars) of the decent work agenda, since the ILO Declaration on Social Justice for a Fair Globalisation 2008 clearly affirms that most of them must be considered as enabling rights, whose implementation is necessary to reach the other strategic objectives. According to the importance of fundamental rights for ensuring decent work conditions, many 2015 IALLJ articles were devoted to exactly this issue.

A first matter tackled by scholars concerned the fight against discrimination at the workplace with particular regard to gender. In this respect, a number of articles focused on the role of women in the labour market, pointing out the difficulties that they still encounter in reconciling their working activity with family responsibilities, especially in developing countries (Ricketts, Bernard 2015, Mathew 2015, Alfarhan 2015 and Kolev, Suárez Robles 2015, interestingly explaining the specific problems of indigenous women in Peru, who are doubly discriminated against, because of their gender and of their ethnicity).

In addition, one author proposed a noteworthy analysis of the possible impact on labour mobility of insufficiently developed (and therefore scarcely available) childcare provision in southern European countries: accordingly, the latter would be particularly reduced in these countries because couples (and especially women) would decide not to move away from their parents in order (in terms of work-life balance) to profit from their support, since they normally are already retired or in any case characterized by a low labour market participation rate (Mendez 2015).

Some scholars then analysed the issue of gender discrimination in the light of the most recent economic and financial crisis, and more particularly in times of austerity measures, comparing different countries. Using Eurostat data concerning some European states (Italy, Ireland and Portugal) in the years in which the crisis broke and the following years, these scholars firstly pointed out that the gender gaps related to employment, unemployment and precarious work are decreasing. According to their analysis, however, this kind of development cannot be considered as positive, because it is the result of a general worsening in the working conditions which hit male employees in particular, precisely because of the economic and financial crisis and the related reforms which introduced austerity measures (Addabbo, Bastos, Falcão Casaca, Duvvury, Ní Léime 2015).

A last issue considered by IALLJ authors with regard to gender discrimination concerned the analysis of the gender unemployment gap and its developments in two European countries, Italy and the United Kingdom: a comparison of the labour force survey data of these countries for the period 2004-2013 clearly shows that the gap is bigger in Italy than in the United Kingdom, which makes Italian women particularly disadvantaged (Baussola, Mussida, Jenkins, Penfold 2015).

Another fundamental right considered by IALLJ authors in 2015 was freedom of association, or at least one of the most important aspects of it, i.e. the right to strike. In this respect, a number of articles were still devoted to the difficulties that the ILO encountered concerning the recognition of the right to strike at the International Labour Conference in 2012, to the reasons why these difficulties emerged and to the possible ways out of them. As is known, these problems arose from the fact that the fundamental ILO Conventions on freedom of association (No. 87/1948 and No. 98/1949) do not explicitly recognize the right to strike and that, nonetheless, the ILO monitoring system organs (the CEACR, Committee of Experts on the Application of Conventions and Recommendations and the CFA, Committee on Freedom of Association) affirmed the existence of this right in an interpretative way. This solution was accepted by all ILO constituents for many decades, but then abruptly criticized and rejected by the employers' group exactly in 2012 (du Toit 2015, Burcu Yildiz 2015, Borzaga, Salomone 2015).

Concluding this subsection, it should finally be recalled that some scholars have still striven to make use of ILO fundamental rights or, more generally, international labour law, to question the lawfulness of national reforms due to the economic and financial crisis (and characterized by austerity measures), especially in Spain (Guamán 2015).

2.2. The Protection of Migrant Workers and Refugees

The continuous rise of migration flows in recent years and the current refugee crisis (both affecting European countries in particular) induced many IALLJ authors, in 2015, to devote their research activity precisely to these issues.

Concerning first of all migrant workers, a number of articles examined the respective national legislation of some European Union (EU) member states in order to understand if and to which extent this legislation is (or was altered in order to be) in line with the obligations arising from EU law.

More particularly, and in accordance with the competences on migration conferred on the EU under the Amsterdam Treaty in 1997, the interaction between the domestic regulations of France, Germany, Italy, Poland and Sweden and three EU directives on labour migration (i.e. the Single Permit Directive, the Blue Card Directive, and the Directive on Seasonal Employment) were considered (Herzfeld Olsson 2015a).

Doing so, the authors of the five country reports took firstly into account that the said directives were adopted in different periods and that therefore they were characterized by a diverse degree of implementation. While the first two directives, the oldest ones, had been already enacted, the deadline for transposing the Directive on Seasonal employment was still pending (expiring at the end of October 2016: Herzfeld Olsson 2015b). Apart from that, which can partly explain the still absent convergence of national legislations on migration issues, the articles considered clearly showed how reluctant member states still are to cede their sovereignty and control over national borders and the domestic labour market to a supranational institution like the EU. As a consequence, not only were the negotiations which led to the adoption of the three directives complicated, but also the resulting pieces of legislation were highly fragmented and left the member states a high level of discretion in implementing them (Herzfeld Olsson 2015b).

This situation is very well reflected in the five country reports mentioned, which, analysing the impact of the directives on national law regarding migration for labour purposes, revealed the on-going significant divergence among member states both in a strict legal sense and from the point of view of the concrete results achieved in governing migration flows.

Indeed, the articles examined considered how a number of aspects which concern labour migration are regulated, such as the conditions for obtaining work permits and their characteristics, the employment and labour rights to which the migrant workers are entitled, how long it takes to get work permits, the possibility or otherwise of being joined by family members, etc. As the analysis of these and other aspects clearly showed, although some aspects of migration law were regulated at EU level, the domestic legal systems of the five countries are still very different.

In Germany, for example, legislation was modified in order to make labour migration more attractive (particularly in undermanned occupations): as a result, the number of migrant workers increased and most of them (84%) were highly

qualified people (Schubert, Schmitt 2015). Sweden, for its part, developed a quite unique immigration system, which since 2008 is no longer quota-based, but purely driven by employer-demand (Herzfeld Olsson 2015c). Italy's situation is particularly problematic, both because of its geographical position and of the complexity of the respective legislation. Being a country that receives a very large number of immigrants, Italy has developed complicated regulations, especially over the last years, in which the security aspect largely prevails over labour law, putting the latter in an ancillary position. Nonetheless, the number of undocumented migrant workers in Italy is particularly high (Chiaromonte 2015). Poland has been always perceived as a labour migration sending country: however, this could change quite quickly over the coming years and is only partly true, because a feature of the Polish labour market is the high number of seasonal migrant workers. In France, finally, after a long period of time in which labour migration policy was absolutely restrictive, the legislator decided to admit a larger number of migrant workers, especially if highly qualified (Jault-Seseke 2015).

Alongside this interesting analysis of the impact of EU labour migration directives on some national legal systems, IALLJ scholars considered, in 2015, the refugee crisis which is affecting the EU. More particularly, a large number of articles of a special issue of the *Zeitschrift für internationales Arbeits- und Sozialrecht* (ZIAS) was devoted to the social protection of refugees and asylum seekers in different European countries (Reinhard 2015 for Spain, Hohnerlein 2015 for Italy, Diliagka 2015 for Greece, Kaufmann 2015 for France, Schweigler 2015 for Austria, Dijkhoff 2015 for the Netherlands, Misztal, Przybylowicz 2015 for Poland, Hack 2015 for Sweden, Wilman 2015 for the United Kingdom, Fichtner-Fülöp 2015 for Hungary, Sredkova 2015 for Bulgaria, Körtek 2015 for Turkey, Chesalina 2015 for Russia) and in the United States (Kahssay 2015), using the comparative method in order to explore the possibility of creating common standards for this kind of protection at EU level (Becker, Schlegelmilch 2015). The choice of reflecting on the social dimension of the refugee crisis by a labour and social law journal can be considered as particularly significant, because it means that labour and social lawyers are broadening their research interests beyond the purely economic dimension of migration and could therefore build up a fruitful dialogue with other branches of law, in particular international law.

3. THE PROTECTION OF SOCIAL RIGHTS IN THE MULTILEVEL LEGAL ORDER

Workers have been affected by a significant erosion of their fundamental rights in recent years. Neoliberal policies and austerity measures, held by EU member States and promoted by economic and financial lobbies at European and global level, have greatly weakened individual and collective fundamental rights, to the advantage of economic freedoms.

In this complex framework, resistance to the degradation and deregulation of fundamental rights has been led by Courts at different levels, both national (above all in southern European countries) and supranational, including the European Court of Justice (CJEU) and the European Court of Human Rights (ECtHR) – using ILO and other international labour standards.

The relationship between the different tools of protection of social rights in a multilevel legal order were, from different perspectives, analysed in many articles of the IALLJ journals in 2015. They can be divided into three main areas. The first one deals with the dialogue between national and international Courts to protect fundamental social rights. The second goes in depth into the non-discriminatory clauses in the multilevel legal order, in particular those related to age, race, gender and disabilities. The third subtopic focuses on the protection of collective rights in the multilevel judicial system, in particular trade union rights and the right to strike.

3.1. The Dialogue Between National and International Courts in the Protection of Fundamental Social Rights

The articles examined demonstrate that the multilevel dialogue between Courts supports the protection of fundamental social rights, by improving connections between the judicial decisions held at different levels and by prompting the integration between the national and international legal systems (Baylos 2015a).

Three main fields of analysis were investigated by the authors in 2015. At a preliminary level, their attention was directed to the historic role of national Courts as guarantors for the protection of fundamental rights and the restraint of the process of deregulation and degradation of individual and collective workers' rights. The Portuguese case was the most significant (Leal Amado 2015, Ribeiro

2015). Indeed, Portugal's Constitutional Court struck down several austerity measures proposed by the government after the Troika's conclusions, including salary cuts in the public sector, and stated that these measures contravened citizenship constitutional rights. In this way it defended the constitutional legal order and its principles from international and non-democratic acts (such as the "Memorandum of Understanding"). The dialogue between ordinary and Constitutional Courts was also intense in France (Escande Varnol 2015), between *Conseil Constitutioneel, Conseil d'Etat* and *Court de Cassation*, in Germany (Seifert 2015) and in Italy (Calafà 2015). However, in Spain it was particularly difficult, due to the crisis of the historical role of guarantor of its Constitutional Court (Baylos 2015a, Ballestrer Pastor 2015).

At a second level of analysis, authors delved into the mutual influence between national and supranational legal systems, especially with regard to the influence of constitutional principles by EU labour law, the European Convention of Human Rights (ECHR) and ILO labour standards. Much attention was paid to the latter, as well as to the standards for decent work as an international reference to strengthen the protection of fundamental rights. The European Social Charter has also deeply influenced the national legal systems. The European Committee for Social Rights (ECSR), for example, warned the Greek Government about the lack of compliance of its reforms, adopted to implement the Memorandum of Understanding, with the minimum standards of the European Social Charter (Cabeza 2015).

Lastly, at a third level of analysis, scholars carried out a detailed examination of the multilevel dialogue between national (ordinary and Constitutional) Courts and supranational Courts. To this end, they analysed three main levels of protection of fundamental workers' rights, defined by different judicial actors: the CJEU, the ECtHR and the ECSR, which is the highest level of guarantee of workers' social rights recognised in the European Social Charter (Cardona 2015, Končar 2015, Kresal 2015).

Analysing the role of the CJEU, some scholars (Orlandini 2015) underlined the "paradox" of the European Union integration and the asymmetry between EU economic and social rights. Fundamental rights are included in the principles of EU law: they are guaranteed by the Charter of Fundamental Rights (which, under art. 6.1 TEU, has the same legal force as the Treaties), by the ECHR and by the constitutional common traditions of the member states – ex art. 6.3 TEU (Lörcher Klaus 2015). However, EU policies, especially when they interfere

with economic freedoms, make social rights ineffective, with marked effect in the southern European States. In this sense, the role of CJEU in the protection of individual and collective rights is ambiguous, since it enforces only some of them, as we will analyse in the subsection 3.3.

Authors also underlined the role of ECtHR as the judicial actor which monitors the respect of human rights provisions set out in the ECHR. In particular, the dialogue between the ECtHR and other national and international actors was studied, by analysing the judgments concerning freedom of association, as we will see in subsection 3.3, and the prohibition of forced labour (Cabeza 2015).

Regarding the latter, the Court examined two cases of domestic slavery[3] and labour trafficking of women[4] and firmly condemned the treatment of people as commodities. In this sense, it reinterpreted the classical concept of slavery and included also labour trafficking, on the basis that it refers to the ownership of a person and considering him/her as a commodity. To this end, the Court directly referred to ILO Conventions No. 29 and 105 on the abolition of forced labour, reinforcing ILO and other international tools to define the contents of human rights (Cabeza 2015).

3.2. The Non-Discriminatory Clauses from a Multilevel Perspective Gender, Age, Race and Disabilities

In the second subtopic analysed, authors focused on the interpretation of non-discrimination principles on grounds of age, race and disabilities as general principles of EU law.

They paid particular attention to the Kücükdeveci case[5], where the CJEU regarded non-discrimination on the ground of age as a general principle of EU law (in connection with the Universal Declaration of Human Rights, and the European Convention for the protection of human rights and fundamental freedoms), considering Directive 2000/78 only an expression of that principle. In this sense, it stated that national legislation has to be interpreted in conformity with European Union law and EU principles (Calafà 2015; Guaglianone, Ravelli 2015) and has to be disapplied where in conflict with the latter.

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3 *Siliadin v. France* (dec.), 26.10.2005, App. n. 73316/01.
4 *Rantsev v. Cyprus and Russia* (dec.), 07.01.2010, App. n. 25965/04.
5 Judgment 19.01.2010, Seda Kücükdeveci, C-555/07.

Authors also examined other aspects of non-discrimination, which form a common EU legal framework (Baylos 2015b): discrimination on the ground of race (on the basis of ECHR and its Protocol 12) (Fernández Docampo 2015), of gender (including the protection of pregnancy) (Fernández Prieto 2015, Mulder 2015), and on the ground of disabilities, both at national (Lane, Videbaek, Munkholm 2015, Hitomi Nagano 2015) and supranational level (Joly 2015).

3.3. Collective Rights in the Multilevel Judicial System: Trade Union Rights and the Right to Strike

The third subtopic focuses on the protection of collective rights in the multilevel legal order (Durante 2015), analysing, from different perspectives, the respect paid to international social standards.

On the one hand, authors studied the exercise of the right to strike at national level, in contexts of outsourcing (Fernández Prol 2015). On the other hand, scholars analysed collective rights at supranational level and in particular two notorious cases of the CJEU: the Viking and Laval cases[6]. From a critical perspective, authors noted that the CJEU recognised the strike and collective bargaining as fundamental rights precisely to balance them with economic freedoms: the freedom of establishment (in the Viking case) and the provision of services (in the Laval case). On this basis, the CJEU considered the exercise of collective rights to be a potential restriction on economic freedoms, only justifiable under certain conditions: an overriding reason of public interest (such as the protection of workers), the suitability for ensuring the attainment of the legitimate objective pursued, and the strict limitation of the action to achieve that objective. Therefore, authors highlighted that the CJEU attributed an inferior level of guarantee to fundamental rights, depending on the application of the principle of proportionality (Orlandini 2015).

Moreover, the judgments referred to have opened a debate with other international actors regarding the guarantee of fundamental rights, particularly with regard to the ECHR, the ILO Conventions and the European Social Charter.

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[6] Judgment 11.12.2007, *Viking*, C-438/05, and Judgment 18.12.2007, *Laval un Partneri Ltd*, C-341/05.

With this aim, scholars examined the complex relations between the CJEU and the ECtHR, analysing above all if the ECtHR decisions are binding on the CJUE (Delfino 2015). Indeed, the ECHtR interpreted article 11 of the ECHR following the doctrine of the ILO Committee on Freedom of Association and ILO Committee of Experts and recognised the indissoluble nexus between the right to strike and the freedom of trade union association, protected by ILO Convention No. 87 and by the principles of the ILO Constitution. On this basis, it considered the violation of the right to strike as a violation of the art. 11 ECHR[7].

The ILO Committee of Experts highlighted the binding nature of ILO Convention No. 87 to guarantee the rights to strike and to workers' representation also with regard to posted workers.[8]

Lastly, the ECSR examined the Swedish *Laval law* and found a violation of the European Social Charter, in its articles 6.4 (right to strike) and 19 (migrant workers' rights): the *Laval law* discriminated between posted and national workers regarding the right to collective action.[9]

This interpretation is particularly relevant for the right to strike, along with the Report concerning Conclusions XX-3 (2014) of the European Social Charter, where the Court analysed the state of compliance of national legislation with the Charter regarding the collective bargaining and the right to strike.[10]

The Spanish case is a classic example (Cardona 2015, Desdentado 2015, González-Posada 2015). The ECSR found Spanish legislation not in compliance with many articles of the 1961 Charter, including reasonable working hours and notice of termination of employment, the minimum wage, and negotiation procedures. In particular, the Committee found that the Spanish law on the right to bargain collectively was passed without consultation of trade unions and employers' organisations, and that Act 3/2012 allows employers not to apply conditions already agreed in collective agreements.

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[7] *Danilenkov v. Russia* (dec.), 30.07.2009, App. n. 67336/01; *Saime Ozkan v. Turkey* (dec.), 15.09.2009, App. n. 22943/04; *Enerji Yapi-Yol Sen v. Turkey* (dec.), 21.04.2009, App. n. 68959/01.

[8] Report of the ILO Committee of Experts on the Application of Conventions and Recommendations, ILO 102nd Session, 2013, pp. 176-180.

[9] *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, case 85/2012, 03.07.2013.

[10] ECSR, *Report concerning Conclusions XX-3 (2014) of the European Social Charter*, GC (2015)21, 23.10.2015.

These conclusions are particularly relevant at national level too, since the Spanish Constitutional Court in its judgments has confirmed the compliance of the Labour Reform (3/2012) with constitutional principles. However, the ECSR Conclusions seen above have contradicted this. Indeed, the ECSR rejected the crisis as a valid justification to adopt legal restrictions on social rights guaranteed by the European Social Charter (Guamán 2015).

As the authors have highlighted from various perspectives, the multilevel dialogue between the different actors (international, regional, national and transnational) is essential to support the protection of social rights. The main challenge is thus to build a supranational and multilevel model of protection of fundamental social rights to restrain the massive deregulation of national legal systems and to protect workers, taking a universalist perspective.

4. LABOUR LAW AND ECONOMICS

The relationship between labour law and economics is obvious and essential. Labour law cannot exist outside the reality of a given economic framework. Labour law is as much the result of a specific productive system as an institutional factor shaping that productive system. It affects and is affected by the economy, equally. Thus, relationships between labour law as an autonomous legal realm and economic policies and theories are complex, this fact being reflected in many articles of the journals of the IALLJ. To structure the analysis, four subtopics will group together those articles which, from different perspectives, have addressed the issue of the relationship between economics and labour law in 2015. The first one deals with labour law reforms as a result of and in the name of the economic crisis. The second brings together those articles analysing the EU's economic governance and its relationship with labour law. The third reviews articles about international trade agreements and other aspects of global commerce and labour law. Finally, the last subtopic is devoted to articles studying the conceptual analysis of labour law´s autonomy in relation to economics and economic structures.

4.1. Labour Law, the Economic Crisis and Reforms

In 2015, a number of articles of the journals associated to the IALLJ dealt with the issue of labour law reforms incited by the financial and economic crisis in the

EU member states. As in previous years, many essays examined the negative impact of these reforms in worker's rights in some EU member states. There was general European approach in the specific topic of dismissal, where the different reforms in various member states were analysed together, thus highlighting their common trends originating in a common strategy to re-regulate dismissal in the EU member states (Schömann 2015a, Schömann 2015b). But more frequently the focus was on the reforms carried out in a single state. Taking into account the differing intensity of the reforms throughout the different member states of the Union it is quite logical that, once again, the majority of these contributions were about the cases of Italy and Spain, although an interesting article dealing with the case of Portugal can be noted.

The economic and financial crisis has been the main driver behind austerity policies aimed at cutting public expenditure. Labour law reforms seeking for more flexibility in the labour market were conceived as necessary, given the economic situation, for fostering economic growth and employment creation via competitiveness. This illustrates how the rationale of labour law, that is, to protect worker's rights as the weaker parties in the employment relationship, was somehow lost in a number of reforms, which invariably invoked economic rationales, such as the need to balance public budgets, the fight against unemployment or the enhancement of flexibility, in order to justify the deregulation or weakening of those workers' rights. In this framework, the functional autonomy of labour law was blurred. In fact, it has been replaced by a simplistic conception of labour regulation as a cost and a burden for competitiveness, this conception being associated with certain neoliberal orthodox economic thinking. The role of the EU in this replacement process has been controversial and as such was criticized and highlighted in some articles.

The labour law reform in Italy has attracted much attention. It was presented as a case that illustrates the general crisis of the twentieth-century labour law narratives in the context of the economic crisis. The way forward, so far as Italy was concerned, was considered to be in the development of new paths between the national constitutionalism and the EU integration project (Caruso 2015). An overall analysis of the Italian labour law reform launched by the Renzi government in February 2015 under the auspices of the EU has been developed (Pizzoferrato 2015). Other authors focused their attention on specific aspects of the reform, such as the new employment contract with increasing protections (*contratto di lavoro a tutele crescenti*: Speziale 2015) or, from a broader perspective, the

impact of the austerity measures in the Italian public sector's collective bargaining, analysing the reaction to its intentional paralysis by the Italian Constitutional Court in its Judgment 178/2015 (Trillo Párraga 2015).

The Spanish case was also much studied, with a number of contributions in the Spanish journals, whose main focus was the role of the Spanish Constitutional Court and the impact of the austerity policies on social security reform brought about by law 23/2013, which shows the direct link between the crisis, the EU's austerity policies and the national reforms. These reforms were read in the light of international treaties and sources, looking for legal arguments to counterbalance the most damaging results (Llobera Vila 2015). Also in relation to the reforms in social security, the ruling in Case 49/2015 of the Spanish Constitutional Court regarding the suspension of pension indexation was analysed critically (Suárez Corujo 2015a) and, interestingly, also compared critically with the answer given by the Italian Constitutional Court to a similar problem, thus reflecting the profound disagreement of labour law scholars with the latest Spanish constitutional case-law (Suárez Corujo 2015b). This disagreement was further illustrated by an essay that highlighted how the Spanish Constitutional Court has shown poor legal reasoning, in which the economic crisis became a legal argument justifying the different social and labour law reforms. This trend started with the support given by the Court to the 2012 labour reform (Diaz Aznarte 2015). The role of this Court was commented not only in the Spanish journals, but also in a French one (Martín Puebla 2015).

Finally, as mentioned above, there was a contribution analysing the reforms of Portuguese labour law as a result of the economic crisis in Portugal. It addressed the reforms undertaken both in individual and collective labour law, relating the reforms to the crisis and the *conditionality* of the financial aid programme Portugal undertook, and explaining the consequences of these changes and the reaction in both Portuguese society and Portuguese social partners (Ribeiro 2015).

4.2. The New Economic Governance of the European Union and Labour Law

A second group of articles dealt with the relationship between the European Union's economic governance and labour law. The response of the European Union (EU) to the economic and financial crisis has resulted in the strengthening

of its economic governance structures, thus developing stronger mechanisms of coordination of the economic and budgetary policies of the member states, with special intensity in those States with financial imbalances which have received any sort of financial assistance. European Economic Governance has been designed under an economic rationale and operates as a constraint upon social, employment and labour policies, both at EU and national level. Against this background, the social and employment policies of the EU must, within the European Semester, coordinate with the Union's economic policies. The result is the practical subordination of social policies to macroeconomics, and the autonomy of labour law is, once more, at stake. At national level, the EU's economic governance has been the driver of many of the labour law reforms addressed in the previous subsection, but some essays which focused on highlighting the connection between these national reforms and the European economic governance are reviewed here.

European economic governance has altered the architecture of the EU legal order. Some essays were extremely critical of these developments, since they increase the imbalance between the economic and the social dimensions of the European integration project. This imbalance often takes the form of a clash between social standards and the EU's economic freedoms. This was the point of departure adopted by some essays in the journals of the IALLJ in 2015, which developed a critique aimed at invalidating this reasoning and at exploring its consequences in relation to the minimum wage or critically analysed the EU Court of Justice's case-law, which is perceived as encouraging regulatory competition and social dumping (Countouris, Engblom 2015; Juncker 2015; Kresal 2015; Verschueren 2015). In this framework, European Economic Governance was perceived as further reinforcing the subordination of the national welfare arrangements to the needs of the supranational market, with important implications for the viability of the so-called European social model (Giubboni 2015). The Country Specific Recommendations of the European Semester, themselves a very tangible outcome of the European Economic Governance with direct impact in the national labour law orders, have been critically commented upon in one of the articles reviewed (López Ahumada, 2015). Also the understanding of free competition and its role in the completion of the internal market as a driver of the broader market regulation rationale, in relation to its impact on the formulation of social policy, was a topic studied in one of the contributions reviewed (Gómez Muñoz, 2015).

4.3. Globalization, International Trade Agreements and Labour Law

The third group of articles analysing the relationship between labour law and economics are those studying different international trade agreements and other aspects of international commerce in the framework of globalization. In 2015 a widespread political and academic debate arose about the bilateral trade agreements between the UE and the USA. This was reflected in a number of articles that dealt with the so-called *Transatlantic Trade and Investment Partnership* (TTIP) as well as other international agreements and their consequences for social and labour law. This debate emerged in the broader narrative of globalization and global trade and its relation to social standards and labour regulation. Once again the autonomy of labour law which, despite its growing internationalization, continues to be basically a national regulatory framework, is questioned. The irresistible globalization of the economy and trade renders it necessary and unavoidable for the national economies to further develop regulations to become even more competitive. This narrative often results in policies leading to a downward spiral of social dumping and regulatory competition. On the other hand, attempts are made to incorporate social standards and clauses in international commercial and investment agreements.

Focusing on the TTIP and its impact on social and labour rights, together with its critical evaluation, there were proposals for an inter-normative approach incorporating fundamental social rights into that treaty, with a clear reference to the ILO labour standards (Agustí-Panareda, Ebert, LeClercq 2015). The key concept was to find a way to protect labour law from deregulatory demands arising from the terms, or the interpretation of these terms, of the agreement, ensuring that commercial liberalization is compatible with social sustainability. A more developed approach than the mere reference to ILO standards is the case for the inclusion of a social clause (Perulli 2015).

The incorporation of labour provisions in these bilateral trade agreements of the EU as well as the principle of labour conditionality in the Generalized System of Preferences (GSP) in the EU's commercial policy was the topic of two essays in 2015. In the first one, the authors highlighted the widening and deepening presence of labour provisions in EU bilateral trade agreements and offered a multifaceted explanation of this trend (Van den Putte, Orbie 2015). In the other, on the contrary, the author developed a highly critical analysis of the way the EU was applying the GSP in its commercial relations with States whose governments

committed serious violations of fundamental labour rights or failed to provide protection for such violations when made by private actors (Vogt 2015).

Another relevant aspect in these international trade agreements, key to understanding labour law as an autonomous system, is the incorporation into them of systems for dispute resolution. The question about the implications of these dispute resolutions systems in relation to the regulatory capacities of the states appeared in one of the reviewed articles (Sancin 2015). From a broader perspective, the abovementioned relationship between globalization of the economy and labour regulation was also present in one of the articles reviewed (Vacarie 2015).

4.4. Economics, Company Law and Labour Law

The last of the proposed subtopics brings together two articles dealing with the very nature of the relationship between labour law, company law and economics. These articles propose a conceptual analysis of the autonomy of labour law in a literal sense. That is the reason why, although they are only two, they are on a different subtopic, highlighting the interest for the issue of the autonomy of labour law in 2015.

The first one was a review of theoretical, historical and quantitative empirical research into the effects of labour law regulation in the economy. The author defends the positive impact of labour law in economic growth and development, reason why the relationship between labour law and economics must be viewed not only as a subordination of the labour law rationale to economic reasons, but also as the inclusion of the workers' protection rationale in the economic policies, thus highlighting the complex role that labour regulation plays in the dynamics of capitalism as a developmental institution (Deakin 2015).

The second, discussing another article, explores the connections between labour law and company law. In the author's view, it is interesting to study in more depth how labour law and company law complement one another, with the aim of reinforcing workers' rights within companies. It is an interesting point of view, since it reverses the direction in which the relationship between labour law and economic thinking is usually connected. The use of economic logic, namely the economic efficiency argument, to support defending the case for better consideration of workers' interest in companies is an interesting twist,

not without difficulty, in rethinking the relationships between labour law and economy (Moore 2015).

The review reinforces the initial reflections about the nature of the complex relations between labour law, economy and economic policies. The articles reviewed show different approaches to this relationship, showing many connections and interdependencies. The economic thinking behind regulatory policies poses many challenges to the autonomy of labour law and its function in complex market-economy societies, in the current context of globalisation. The dangers and negative impact of the relationship between labour law and economics have been widely highlighted, but at the same time there are other possibilities and ways of thinking about this relationship and to embed the social rationales of labour law in economic governance and economic policies is not an unthinkable endeavour. We have to keep our attention trained on further developments along these lines by labour law and industrial relations scholars.

5. CONCLUDING REMARKS

The central idea of this retrospective overview was to analyse the IALLJ articles under the main topic of "autonomy and subordination of labour law". It refers both to labour law regulation and to its main actors (Courts, legislators and social partners) and concerns their level of autonomy or dependence from the economic, social and political mainstream (Mariucci, 2016). To this end, the aim of the authors was to describe the essays in order to deepen the debate on the multiple meanings of this topic ("autonomy or subordination of labour law" from/ to what).

The analysis seemed to be especially significant when related to the current socio-economic context, globalisation and its effects on industrial relations, and to the prevalent political options, the neo-liberal policies and the austerity measures, which have deeply weakened individual and collective fundamental rights to the advantage of economic freedoms.

In this context, the autonomy (or subordination) of labour law was analysed from different perspectives.

At a first level, it dealt with the interference or mutual interdependence between labour law and other traditional fields of law, such as international law. A high level

of interaction can currently be detected between labour and humanitarian law, aiming at protecting migrant workers and refugees, and with international labour standards, referring to the ILO pillars of decent work and to the fundamental rights recognised in international and European Charters and Declarations.

At a second level of analysis, the "autonomy and subordination" of labour law could be analysed as the interaction between Courts and their use of supranational, international and national legal sources, including collective bargaining (Gottardi, 2016). To this end, "autonomy and subordination" also refers to their role in the interpretation of labour law and to the degree of autonomy - or dependence - their decisions have, in relation to the politic, social, economic and cultural mainstream (Ballestrero, 2016).

If so, the autonomy (or subordination) of labour law can also be defined as a result of the mutual influence between national and international legal systems, by creating multiple levels of protection of fundamental workers' rights. Indeed, in the complex globalised framework the resistance to the degradation and deregulation of fundamental rights is essentially led by Courts at different levels – both national and supranational – and supported by the international actors – on the one hand, the ILO Committees (of Experts and on Freedom of Association) and, on the other hand, the European Committee for Social Rights ECSR – using the ILO and other international labour standards. To this end, a section of the overview was dedicated to the different tools for the protection of social rights in the multilevel legal order and to the intense dialogue between national (ordinary and constitutional) and international Courts (the CJEU and the ECtHR), despite the asymmetries between economic and social rights at EU level. Two main examples were the non-discriminatory clauses and the protection of collective rights in the multilevel judicial system.

Lastly (at a third level), the "autonomy or subordination" of labour law could be read as the complex relationship between labour law, as an autonomous legal realm, and economic policies and theories. Although the relationship between labour law and economics is obvious and essential, the point is if labour law currently preserves its classic role in the protection of workers as the weakest party in employment relationships, or if it is subordinated to economic logic and values.

Indeed, the classic role of protection of workers' rights as the weakest party in employment relationships is lost in a number of reforms which have invoked economic rationales and have been adopted in the name of the economic and financial crisis. In this context the functional autonomy of labour law has been

blurred and replaced by a simplistic conception of labour regulation as a cost and a burden for competitiveness.

The deeper subordination of labour law to economics is evident from at least two perspectives: European Economic Governance and the role of international trade agreements. Firstly, European Economic Governance has altered the architecture of the EU legal order, to the advantage of economic freedoms; secondly, global commerce questions the autonomy of labour law, in the name of trade competition, producing social dumping and a significant erosion of workers' fundamental rights.

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LIST OF ABBREVIATIONS OF IALL JOURNALS

Arbeit und Recht = AuR
Australian Journal of Labour Law = AJLL
Bulletin of Comparative Labour Relations = BCLR
Canadian Labour & Employment Law Journal = CLELJ
Comparative Labor Law & Policy Journal = CLLPJ
Diritti Lavori Mercati = DLM
Employees & Employers: Labour Law and Social Security Review (Delavci in delodajalci) = E&E
Europäische Zeitschrift für Arbeitsrecht = EuZA
European Labour Law Journal = ELLJ
Giornale di Diritto del Lavoro e delle Relazioni Industriali = DLRI
Industrial Law Journal (U.K.) = ILJ
International Journal of Comparative Labour Law & Industrial Relations = IJCLLIR
International Labour Review = ILR
Japan Law Review = JLR
Lavoro e Diritto = LD
Derecho de las Relaciones Laborales = DRL
Revista de Derecho Social = RDS
Revue de Droit Comparé du Travail et de la Sécurité Sociale = RDCTSS
Revue de Droit du Travail = RDT
Rivista Giuridica del Lavoro e della Previdenza Sociale = RGL
Temas laborales = TL
Zeitschrift für internationales Arbeits- und Sozialrecht = ZIAS