Brief Comment to the Manifesto on Sustainable Labour Law

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I.

I fully share and strongly support the general approach of the Manifesto. In particular I agree that the principles and values of the labour law tradition remain to be the guiding line, whereas institutions, norms and all the regulatory instruments are to be adapted to new realities. I also agree that this should not be done by abiding to extreme polarities but by an intermediary way which tries to find a balance between social, economic and environmental issues and to strive for sustainability. In short: I can subscribe to each sentence of the general approach and have nothing to add. My very few short comments only refer to special aspects treated in the chapters II. to XI.

In discussing specific issues the authors are very much focusing on Italy (in particular in reference to dismissal protection, to collective bargaining and to the welfare system) which is an advantage and a disadvantage at the same time. The advantage, of course, is that the problems can be presented in a very concrete way. The disadvantage however is that they are looked upon mainly through the lenses of the Italian institutional and normative framework.

II.

1. The authors' emphasis on life-long-learning as a decisive element of future labour market policy deserves strong support. Formerly it might have been sufficient to get trained for a job at the beginning of the career, thereby getting the skills needed throughout the professional life. This is no longer the case. In particular digitalisation not only makes many traditional skills obsolete but due to the exponential speed of technical innovations leads to an ongoing rapid change of required skills. Therefore, continuous up-skilling has become more urgent than ever before. Its content and its organization have to be fundamentally re-conceptualized. Law has to provide the framework for such opportunities of life-long learning to a bigger extent than ever. Workers must get the time and the resources to engage in continuous learning processes. Not only the Government but also the actors in collective bargaining as well as the actors in workers' participation schemes are confronted with this task. Joint efforts of all these actors are needed. That's why – to just give a concrete example – in 2019 in Germany a National Strategy on Continued Vocational Education

has been established. It is supposed to develop a comprehensive system of continued training for all employees.

The inclusion of all employees and of workers beyond the traditional employment relationship is of utmost importance, as again a look on the empirical situation in Germany shows. In spite of the high percentage of companies in Germany who have been engaged in measures of further training up to now only a very small part of the unskilled and semi-skilled participated in such training measures. Among the skilled the participation rate was much higher, almost 50 % and two thirds of the academics. In short this means that the more one is already skilled and educated, the better the chance to participate in programs of further training. This, of course, is an alarming situation because the risk to be substituted by digitalisation or other technological innovations is most probably the highest for those who are unskilled or semi-skilled.

Many questions are to be resolved in this context: whether there should be an individual right for all employees to participate in such training, what incentives for employees and employers should be envisaged, how the costs are to be shared between employees, employers and the state, how the responsibilities are to be shared between legislation and collective bargaining and last not least what should be the content of life-long-learning in view of the fact that due to the fast changing technological developments nobody knows what skills are required in the future. A long list of questions is to be answered.

The report by the ILO Global Commission on the Future of Work contains many helpful recommendations. Particularly the idea of an entitlement to training during working hours is to be supported. One might even go further and recommend an individual right for training during working hours, of course without loss of remuneration. In this context a measure taken in Germany again might provide helpful inspiration: to combine short time work in times of down-swing or structural transformation of the economy with the obligation to train people in the remaining time between full time and short time. This pattern has been widely executed during the COVID 19 crisis and already had turned out to be very successful during the financial crisis of 2008/2009.

And as far as the financing of continuous training is concerned, the establishment of an "employment insurance", as suggested by the Commission's report, also deserves strong support. Thereby, the costs for such a training scheme may be covered to a great extent by contributions of employers and employees together. The question, of course, remains, whether and how far such a training scheme which is not only in the interest of workers and employers but for the society as a whole is to be subsidised by the system of taxation.

The biggest problem, however, is the content of continued training. So far training has been focusing on skills required for the different well known professions. In the

future it will no longer be possible to focus on such well established skills. The new skills which are needed are unknown to a great extent. And they will quickly be replaced by others. Therefore, the report of the Global Commission is correct by insisting that in the future the focus has to be much more on "learning how to learn" in order to become able to adapt to new situations. This, of course, requires highly qualified teachers: an enormous challenge for all who are responsible for the educational system.

2. I very much agree when the authors stress the need to workers participation in achieving production objectives. I, however, would like to go much further. Employees are not supposed to be mere objects of management's decisions but must have an efficient opportunity to influence this decision-making. Already the founding fathers of labour law 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. The more the world of work is changing, the more important becomes the workers' involvement in management's decision-making. Such involvement increases the legitimacy and thereby the acceptability of management's decisions..

The transformation of working patterns 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. Whether mere information and consultation rights of workers' representatives are sufficient, may well be doubted. In particular in reference to the introduction and performance of new technologies workers' representatives should be on equal footing with management.

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, the higher will be the legitimacy of decision-making. This is true for all digital types of work ranging from tele-work or smart work to industry 4.0 where robots interact with each other and with human beings up to the platform economy where work is performed on demand via app or online by so called crowd workers. Therefore, a new catchword is now on the agenda: "cooperative turn".

However, the crucial question is whether under the conditions of the new world of work schemes of workers participation still can be organised. A look on the constitutive elements for efficient functioning of workers participation in

management's decision-making might be helpful. So far they have been (a) an identifiable workplace where employees are working together in the premises of the employer, (b) a hierarchical structure between management and employees with more or less homogeneous interests,(c) a relatively clear method and easily recognizing criteria on how to identify who is an employee and (d) an identifiable employer, namely a company to which the employees belong.

As the manifesto impressively shows, these preconditions have become more and more problematic. Therefore, the question whether and how workers' participation can survive in the future has become more important than ever.

The features of the new world of work are impressively described in the Manifesto. Just to recall the main elements I try to sum them up:

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 need to be present 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 employee, of course, is not disappearing. But it is less visible.

Not only the erosion of the workforce 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 "volatilility" 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. The enterprise often is turned into a merely virtual entity. 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 first challenge will be 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. The example of an initiative conducted by the powerful metal-workers-union in Germany shows that the results of such initiatives are quite promising, even if they are still in an experimental stage.

Another challenge will be to define who is the counterpart of worker representatives on the management side. This is getting more and more difficult the more company structures are scattered. And it is particularly difficult in the context of the platform-economy. Who – to just take this example - in case of crowd work is treated as employer, the platform operator or in case of crowd-work the crowd-sourcer or both of them? The categorization cannot be left to the platforms themselves. Objective criteria and a functional approach are necessary to identify the employer.

An almost unresolvable challenge is the fact that the workforce, again particularly in the context of crowd-working is trans-national. This leads to the question whether schemes of workers' representation can be established covering all workers, no matter to which country they belong. All those workers might be included to vote for the workers' representatives. And the workers' representatives might possibly speak for all of them. This would need trans-national regulation which is not easy to be developed.

Finally it has to be kept in mind that the procedure of decision-making has changed due to digitalisation. Management by algorithm plays an ever bigger role nowadays and in the future perhaps even more. One of the big problems in this context is the in-transparency of algorithmic decision-making. Therefore, an important task of workers' participation should be to make this mode of decision-making transparent in order to be able to evaluate it whether it is in line with the protective needs of the employees. This might be beyond the capacity of workers' representatives. Therefore, if this goal to increase transparency will not remain to be a mere illusion, it might be necessary to provide for workers' representatives easy and cost-free access to independent experts.

In short and to make the point: whether and in what way functioning and effective workers' participation in management's decision-making can be established in the digital era, is to a great extent an open question. I just wanted to show some difficulties connected with this task.

3. Trans-national regulation evidently is one of the main challenges for labour law. In discussing the available mechanisms the authors of the Manifesto in my view overestimate the impact of the soft law instruments and among them in particular the codes of conduct for Multi National Enterprises (MNE).

These codes of conduct have been established according to the recommendations in the guidelines of the OECD and the ILO or by the United Nation's global compact. These codes are by no means homogeneous. There are big differences but interestingly they all refer to the core fundamental rights as contained in the ILO Declaration of 1998. This in particular has to do with the fact that the global compact only is focusing on these core labour standards. Other important rights often are neglected, even if there are codes which refer to the whole set of ILO standards as well as to the law of the respective host country whose wording often has nothing to do with actual practice there. Not only the content of the codes is very different from each other but also the genesis of these codes. Originally most codes were unilaterally established by the companies. However, to an increasing extent there is a new generation of codes called "multi-stakeholder" initiatives. Human rights groups, community and development organizations participate in formulating such codes of conduct. Many of the codes only cover the relationship between the MNE and their employees. However, to an increasing extent sub-contractors as well as the whole supply chain and some time even clients are included.

All these codes are, of course, legally non binding. They are "light touch" regulations or "soft law". There is only a moral obligation of the MNE to respect them. The crucial problem of this soft law is monitoring, even if most codes provide for monitoring mechanisms. In the meantime there is a whole certification industry, checking the observance of the codes and granting a positive label in case no violation is found. It, however, is very doubtful whether this procedure tells something about the efficiency of the codes. Last not least it has to be kept in mind that the certifying agencies are paid by the companies. Therefore, this "social labelling" should not be taken too seriously. It has turned out that it is mainly an instrument for the companies` marketing policy. In short and to make the point: codes of conduct should not be overestimated, they are mainly to be understood as a tool to promote the companies' image. And in addition they most of the time are intended to keep out trade unions.

The authors of the Manifesto suggest that enforcement of the codes of conduct should be improved. They, however, do not indicate how this might happen. In my view there is only one possibility: to get rid of the alibi strategy "codes of conduct" and to replace them by agreements negotiated with trade unions. Such International Framework Agreements (IFA) exist and have a totally different quality compared to mere codes of conduct.

These agreements are concluded between global union federations and a growing number of MNE. Even if already in 1988 such an IFA was signed between the French transnational food company BSN (renamed Danone in 1994) and the International Union of Food Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) the IFA are a phenomenon which really started only in the first decade of the 21st century. Mainly two developments within the international trade

union camp made this new strategy possible: the transformation of the former International Trade Secretariats (ITS) into Global Union Federations (GUF) and the merger of the two largest international confederations, the International Confederation of Trade Unions (ICFTU) and the World Confederation of Labour (WCL) into the single International Trade Union Confederation in 2006. The conclusion of IFA, which normally takes several years, is rapidly increasing. Therefore, the fact that the number of IFA compared to codes of conduct is still relatively small, should not be overestimated. This will change soon. The bigger problem is that so far the MNE which have concluded IFA almost exclusively are based in Europe.

The IFA should not be confused with traditional collective agreements concluded by the two sides of industry on national level. They do not specify in detail terms and conditions of employment but rather set a framework for the relationship between the MNE and the trade unions, the workers, again mostly throughout the whole supply chain. They rather intend to establish frameworks of principle and are not intended to compete or conflict with collective bargaining agreements at national level.

Nevertheless – as already indicated - the IFA are a new quality compared to codes of conduct with which they should not be confused. Whereas codes of conduct to a great extent were intended to escape any engagement with trade unions, the GUF and their affiliates in the different countries are now recognized as partners with whom arrangements are to be made. As far as the content is concerned, the IFA reaffirm the ILO conventions to a much bigger extent as codes of conduct. In particular the IFA contain a machinery of joint monitoring which generally introduces three important tools: first joint monitoring committees that consist of management and workers' representatives and that are intended to meet regularly in order to assess progress or deal with conflicts; secondly proactive strategies aimed at creating a managerial culture respectful of the IFA; and finally the adoption of incentives for workers representatives at local, national and cross-border levels to report violations.

From a legal point of view there are many open questions in connection with IFA. There is still a lack of legal framework for the conclusion of such international agreements. They do not fit into the existing set of legal categories and, of course, there is no access to Courts in case of violations. And last not least: The conclusion of IFA is voluntary because there are still too many, legal and factual obstacles for international industrial action.

It will be the ILO's task to establish a legal framework for these bargaining activities. Presently the ILO is already quite busy to support the parties of such IFA in the bargaining process and to offer help in case conflict resolution is needed.

4. The authors of the Manifesto seem to be quite satisfied by the strategies so far developed to cope with the problems implied by Global Supply Chains (GSC). They

mainly focus on the "Guiding Principles on Business and Human Rights" which were annexed in the famous Ruggie report and endorsed by the UN's Human Rights Council in 2011 and to the French law of 2017 (In the meantime there is also such a law in Germany and soon there might be even EU legislation in this context).

I doubt whether these strategies can resolve the problem mainly for two reasons: (a) the Guiding Principles as implemented by National Action Plans (NAP) are legally non binding and do not have a great effect so far and (b) legislation of individual countries and even regions is problematic for reasons of competititvity, an internationally binding instrument is needed.

Of course, there were steps which gave reason for hope. Important in this context was the Accord on Fire and Building Safety in Bangladesh**,** a legally binding agreement concluded after the Rana Plaza desaster between global brands, trade unions and the ILO designed to build a safe and healthy Bangladeshi Ready Made Garment (RMG) Industry. But this has come to an end in the meantime.

Even if this Accord could have been a model of how regulation of global supply chains could look like, it should not be ignored that it only was focusing on health and safety and only on one country. Health and safety is only one topic among many others. Minimum standards for wages, working time etc. are also urgently needed.

New hope came up when in 2016 the International Labour Office presented a report on "Decent work in Global Supply Chains" and when the topic was on the agenda of that year's International Labour Conference. However, the result was disappointing. The trade union camp's request for a respective convention was pushed back and the debate ended in joint conclusions at the lowest possible denominator according to which the ILO is supposed to develop an action plan on how to promote decent work on global supply chains, to advise and support stakeholders and to exchange information on best practices and to encourage companies to conduct "Human Rights Due Diligence". In short and to make the point: for the companies everything remains voluntary up to now.

Therefore, it was of utmost importance when in 2014 Ecuador and South Africa initiated in the UN Human Rights Council a resolution for a comprehensive binding instrument to be elaborated by a working group, the Open-Ended Intergovernmental Working Group (OEIGWG). This instrument would provide an international and uniform solution, no longer relying on national action plans, and – above all – it would have a legally binding effect. The resolution was passed, but against the votes of all industrialised countries which are members of the Human Rights Council but are profiting from the status quo.

In the meantime the OEIGWG has presented already different versions of a draft for a „Legally Binding Instrument to Regulate, in International Human Rights Law, the

Activities of Transnational Corporations and other Business Enterprises". The latest version has taken in account all reservations articulated against former drafts. It is comprehensive in many respects, not only as far as the coverage of companies is concerned but also as far as human rights are to be protected in GSC. Not only the core labour rights listed in the ILO Declaration of 1998 are included, but also all those contained in the UN International Covenant on Economic, Social and Cultural Rights whose Art. 7 reads:

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays"

The draft in particular provides not only for respect of all those rights and for efficient measures of prevention but for easy access to courts for victims in case of violation, for a far reaching shift of burden of proof and for adequate remedies in case of violation of these rights (including tough liability of the MNE). Without going into any details the transposition of this draft into a convention evidently would mean a totally new quality compared to the soft law instruments and to the so far existing laws of individual countries. However, there is still a far way to go. The resistance of those who profit of the status quo continues. There is hope that on the long run due to grown public consciousness and public pressure a convention and its ratification by many countries will be inescapable. This in my view would be a satisfying solution.

III.

I very much hope that it has become clear that my few observations are made in support of the spirit of the Manifesto whose general approach – as indicated in the beginning – I strongly support. My remarks are meant to be constructive.

Of course, there are still other details which I find problematic. To just give an example: I do not share the authors' excitement for "flexibility" as a guiding category for the labour law agenda. Due to the abuse of this catchword for triggering unacceptable imbalances in favour of excessive flexibility this notion should not serve any longer as guide of showing the way to the future. But since such details are of minor relevance and, of course, are debatable, I decided to ignore them in this brief comment.