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The ILO's supervisory bodies help to read EU law: the case of posting of workers

Summary: **1.** The ILO's supervisory bodies: times of crisis or success? **2.** Posting of workers in the multilevel system of regulation: the CEACR's "jurisprudence". **3.** Possible fields of cooperation between the ILO and the EU.

1. *The ILO's supervisory bodies: times of crisis or success?*

Over the years, the role of standards setting played by the International Labour Organisation has been essential for the worldwide juridical culture. Nevertheless, the normative function is partially useful for implementing labour rights without an effective system of monitoring, which is indeed one of the cornerstones of the current functioning of the International Labour Organisation.

The lack of punitive mechanisms able to enforce ILO's Conventions, even if they have been ratified, makes the existence of efficient supervisory bodies an essential aspect for the survival of the incomparable supranational organisation.

As well known, the ILO's supervisory structure is composed of the regular system and the special one[1]. An important pillar of this structure is the Committee of Experts on the Application of Conventions and Recommendations (CEACR), which takes part of the regular system.

[1] See PERTILE, *La crisi del sistema di supervisione dell'Oil nel suo contesto: il timore è fondato, ma agitarsi non serve a nulla*, in *LD*, 2019, p. 407 ff.; MAUPAIN, *The ILO Regular Supervisory System: A Model in Crisis?*, in *IOLR*, 2014, p. 117 ff.

Briefly, the ILO's regular supervisory process is articulated in these steps. Governments periodically submit to the CEACR reports on the application of ratified conventions and social parties representing employers and workers may comment them. Based on the received documentation, the Committee of Experts publishes observations in its annual report to discuss selected cases within the Tripartite Committee on the Application of Standards (CAS), which is a permanent supervisory body deputised to formulate recommendations to the States. The Committee of Experts can also send direct requests to Governments and employers' and workers' organizations asking for clarifications about some aspects or when some difficulties in the application of conventions are found.

The CEACR's activity is not limited to the monitoring of the correct application of the conventions, but it also includes the solution of interpretative issues.

This overlapping of functions is due to the non-implementation of Article 37 of the ILO Constitution, which states that the International Court of Justice is the only existing body with the explicit authority to interpret the Constitution or ILO conventions and furthermore provides for the possibility of appointing a tribunal to expedite the determination of a dispute or question relating to the interpretation of a convention[2].

In this perspective, exercising an extra duties' role the CEACR has produced a "quasi-jurisprudence"[3] able to have a great impact on fixing higher labour standards by developing a common meaning of the international norms.

Therefore, the CEACR has gained a central place to encourage a uniform implementation of labour standards. One has to investigate if the fear of this success has been the main factor leading to the 2012 crisis[4], when the Employers' delegates criticized, from a procedural point of view, the interpretative function of the CEACR and, from a substantive point of view, its

[2] See La Hovary, *Article 37 of the ILO Constitution: an unattainable solution to the issue of interpretation?*, in *CLLPJ*, 2017, p. 337 ff.

[3] Borelli, Cappuccio, *Chi monitora e come? Appunti sui meccanismi di supervisione dell'OIL*, in *LD*, 2019, p. 514.

[4] See Supiot, *Qui garde les gardiens? La guerre du dernier mot en droit social européen,* in Supiot (ed.), *Les Gardiens des droits sociaux en Europe. Les recours nationaux et internationaux en cas de remise en cause des droits sociaux par l'Union européenne. Actes du séminaire du 6 février 2015*, Semaine Sociale Lamy, 2016, p. 7; Borzaga, Salomone, *L'offensiva contro il diritto di sciopero e il sistema di monitoraggio dell'Oil*, in *LD*, 2015, p. 450.

"jurisprudence" recognizing the right to strike within Convention No. 87 (Freedom of Association and Protection of the Right to Organise). This opposition represents a watershed for the activity of the supervisory body, which from that moment on tried to be more cautious.

There is also another reason why the CEACR is considerable victim of its success[5]: it is so much overload of work that it cannot manage to analyse all reports received[6].

A restyling of the monitoring system is hard to be realized because of the presence of political, technical and structural problems; notwithstanding the difficulties, it should be a priority in the ILO agenda[7]. It is questionable the comment on the ineffectiveness of the International Labour Organization based on the lack of real enforcement measures at its disposal. Instead of complaining about the absence of sanction mechanisms, enhancing and reinforcing the existing systems as the monitoring one of the CEACR would be a more fruitful choice.

2. *Posting of workers in the multilevel system of regulation: the CEACR's "jurisprudence"*

The exercise of workers' mobility through transnational posting of workers is a subject that makes emergent challenges coming from the globalization, the competition between legal orders and the universality of some fundamental labour rights. All of these "big issues" are closely connected with the mission of the International Labour Organisation.

Markets' globalization including workers has produced one of the most dangerous risks: social dumping. The right of undertakings to provide services in the territory of another State and to post their workers temporarily jeopardises the principle of *lex loci laboris* by allowing the interplay of competition on labour cost.

[5] GRAVEL, *Les mécanismes de contrôle de l'OIT: bilan de leur efficacité et perspectives d'avenir*, in JAVILLIER, GERNIGON, POLITAKIS (eds.), *Les normes internationales du travail: un patrimoine pour l'avenir- Mélanges en l'honneur de Nicolas Valticos*, 2004, p. 8.

[6] See CEACR, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 110th Session of the International Labour Conference, 2022.

[7] See RYDER, *Opening remarks by Guy Ryder*, ILO Director-General, 108th Session of the International Labour Conference, 2019.

Social dumping is a manifest enemy of social justice, which is a target so important for the ILO as it appears in its Constitution[8]. The universal calling of the values founding the ILO is in ontological conflict with the possibility to exploit the gap between domestic labour disciplines to gain a competitive advantage on the market.

The effect of posting of workers, seen as a juridical and not only an economic phenomenon, is the producing of a competition between legal orders[9], taking into account the national level and the supranational one.

It must be highlighted that the domestic labour legislation is only one part of a more articulated puzzle of the applicable regulatory framework. The fragmentation of rules has reshaped international law[10]: the existence of a plurality of supranational organizations with autonomous disciplines places the States within a complex system which is difficult to be harmonized.

Transnational posting of workers matches the issue of the coherence of the multilevel system of regulation. One has to remind a case involving the role of the CEACR that is paradigmatic of the difficulty to find the right balance between the different applicable rules.

The reference is to the 2010 Report of the Committee of Experts that monitored the application in the United Kingdom of Convention No. 87. The Committee observed "with serious concern" that "the omnipresent threat of an action for damages that could bankrupt the Union, possible now in the light of the Viking and Laval judgements, creates a situation where the rights under the Convention cannot be exercised". Furthermore, on that occasion the CEACR made clear that "its task is not to judge the correctness of the ECJ's holdings in Viking and Laval as they set out an interpretation of the European Union law, based on varying and distinct rights in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level are such as to deny workers' freedom of association rights under Convention No. 87".

The different approaches with regard to the purpose of the regulatory discipline are the first aspect deserving to be underlined. On the one side, Convention No. 87 is directed to protect workers' rights; on the other side,

[8] See Treu, *OIL: un secolo per la giustizia sociale*, in *DLRI*, 2019, p. 463 ff.

[9] Giubboni, *Norme imperative applicabili al rapporto di lavoro, disciplina del distacco ed esercizio di libertà comunitarie*, in *DLM*, 2008, p. 543.

[10] Ferrarese, *Il diritto internazionale come scenario di ridefinizione della sovranità degli Stati*, in *SM*, 2017, p. 85.

the European discipline concerning posting of workers since 1996 is based on economic priorities[11].

The ILO Conventions through the interpretation of the competent bodies, namely the Committee on Freedom of Association and the Committee of Experts[12], has given birth to the so-called "international code of freedom of association"[13], despite a trouble genesis[14] and the persistence of the uncertainty concerning the meaning of freedom of association caused by the abovementioned Employers' assertions[15]. Since the beginning, the ILO has proved to ensure great attention to freedom of association, both in individual dimension and in the collective dimension, by considering it essential to sustained progress.

In a few words, in the European framework posting of workers faces this kind of problem: extending national labour law could be a restriction of freedom to provide services, considered only justifiable by overriding reasons of public policy and whether it is proportional (that is, the measure is suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it)[16].

The asymmetry between the international system and the European

[11] Zilio Grandi, *Il dumping sociale intracomunitario alla luce della più recente giurisprudenza CGE. Quando la libertà economica prevale sui diritti sociali*, in Atti del Convegno Nazionale Nuovi assetti delle fonti del diritto del lavoro, 2011, p. 53

[12] For the distinction between the two bodies see Brino, *L'azione normativa dell'Organizzazione internazionale del lavoro nella promozione dei diritti sociali fondamentali*, in Brino, Perulli, *Manuale di diritto internazionale del lavoro*, Giappichelli, 2015, p. 32 ff.

[13] Barreto Ghione, Baylos Grau, *Il ruolo dei principi internazionali e del Comitato OIL sulla libertà di associazione*, in Baylos Grau, Zoppoli L. (eds.), *La libertà sindacale nel mondo: nuovi profili e vecchi problemi. In memoria di Giulio Regeni*, in *QDLM*, 2019, n. 6, p. 49. The authors mention all relevant ILO Conventions in this field. See also Ferrara, *Libertà sindacale e tutela internazionale: il ruolo dell'Oil nel centenario della sua fondazione*, in *VTDL*, 2019, p. 743 ff.

[14] Borzaga, Mazzetti, *Core labour standards e decent work: un bilancio delle più recenti strategie dell'OIL*, in *LD*, 2019, p. 450.

[15] See Bellace, *ILO Convention no. 87 and the right to strike in an era of global trade*, in *CLLPJ*, 2018, p. 495. The author demonstrates how the ILO constituents have consistently recognized that there is a positive right to strike, which is inextricably linked to – and an inevitable corollary of – the right to freedom of association.

[16] For details about the evolution of the EU law on transnational posting of workers see Delfino, *Ultima direttiva sul distacco transnazionale dei lavoratori e trasposizione in Italia nel prisma del bilanciamento di interessi*, in *DLM*, 2021, p. 271 ff.; Cordella, *Distacco transnazionale, ordine pubblico e tutela del lavoro*, Giappichelli, 2020; Giubboni, Orlandini, *Mobilità del lavoro e dumping sociale in Europa, oggi*, in *DLRI*, 2018, p. 907 ff.

concerning the permissible restrictions to the right to strike and the right to take collective action concerns the lack of a test of proportionality of interests in the ILO Convention.

On 14 September 2011, the CEACR in the Communication to the European Parliament exhorted to invert the evaluation parameter: economic freedoms have to contend with the non-renounceable respect for social rights.

The impact of the abovementioned ECJ's judgments on the conception of the conflict between fundamental social rights and so-called fundamental economic freedoms is well known[17]: in this perspective, the freedom to conduct a business produces horizontal effects in so far as collectively organized workers have to take responsibility for the employer's interest in exploiting the opportunities coming from the internal market[18].

Although, there are some signals in a different direction recently: the European legislator is more social-oriented about the discipline concerning the posting of workers.

The legal framework has been modified by the Directive 2018/957/EU of 28 June 2018 amending Directive 96/71/EC with the general purpose to grant a more equal treatment to posted workers and local one by providing, first of all, a more consistent list of mandatory rules concerning the minimum protection in the hosting country.

The relevant reference for this survey is the protective clause of Article 1, paragraph 1, Directive 2018/957/EU, when states that "this Directive shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, to conclude and enforce collective agreements, or to take collective action in accordance with national law and/or practice".

This provision reinforced by the new legal framework could entail a turnaround to overcome the clash between domestic order and the legal

[17] Among a wide literature see SCIARRA, *Solidarity and Conflict European Social Law in Crisis*, Cambridge University Press, 2018; FREEDLAND, PRASSL, *Viking, Laval and Beyond*, Hart Publishing, 2014; DEAKIN, *Il Trattato di Lisbona, le sentenze Viking e Laval e la crisi finanziaria: in cerca di nuove basi per "l'economia sociale di mercato" europea*, in *RGL*, 2013, p. 683 ff.

[18] GIUBBONI, *Libertà d'impresa e diritto del lavoro nell'Unione Europea*, in *Cost.*, 2016, p. 112.

order of the European Union produced by the so-called Laval-quartet. It could be a chance to reshape the European balance in the social field, but the question remains whether the ECJ will try to limit the impact of this legislative intervention.

It is worth investigating how the ILO's supervisory bodies could intervene in this debate.

3. *Possible fields of cooperation between the ILO and the EU*

There might be chances to find fields of beneficial cooperation between the International Labour Organisation and the European Union, able to produce positive consequences for both the supranational organisations.

They are affected by different shortcomings, which could be solved in a complementary manner. On the one hand, the ILO, despite its ancient history, is strongly criticized for being ineffective, considering that it has no real enforcement measures at its disposal[19]. On the other hand, the European Union has been accused for decades of balancing workers' rights and economic freedoms in a way that is destructive of the Member States' social *acquis*.

The recent amendment of the posting of workers Directive is a good occasion to empower the link between the supranational organizations.

The ILO's supervisory bodies could play a fundamental role to guide the interpretation of the abovementioned provision, in a way that approximates arrangements on union rights among the Member States which have ratified Convention No. 87.

The competition between international standards and European provisions is a problem of hierarchy of sources shaped differently in each constitutional order[20] and this difficulty must not be underestimated. In any case, whatever the place occupied at the national level by international and European sources, the CEACR's role must not be ignored: its "quasi-jurisprudence" could have an interpretative force to avoid the development of conditionality mechanisms which establish a superiority of economic free-

[19] See ONIDA, *Labour standards and ILO's effectiveness in the governance of globalization*, KITes Working papers, Internationalization and Technology Studies, Università Bocconi Milano, 2008.

[20] See THOMAS, OELZ, BEAUDONNET, *The use of international labour law in domestic courts: Theory, recent jurisprudence, and practical implication*, in JAVILLIER, GERNIGON, POLITAKIS (eds.), *cit.*, p. 257 ff.

doms on the recognizing of some fundamental rights, such as freedom of association.

The strongest objection to a similar solution relies on the fact that the ILO' s supervisory bodies use soft law's tools, whose capacity to influence national systems is weak.

Although abandoning the traditional way to judge the effectiveness of a legal system, it is possible to appreciate the virtues of the ILO's supervisory mechanisms through the CEACR, which consist in its technical and impartial structure, in the periodic nature of the monitoring's activity and the simplicity of access[21]. On a formal occasion, the CEACR, by describing its mandate, has explicitly recognized that "its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. […] The Committee's technical role and moral authority are well recognized [...] This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions"[22].

As stated about other monitoring bodies whose acts are deprived of binding effects[23], the principle of loyal cooperation should impose to take into account the opinions of the CEACR, because of its inherent belonging to the ILO and because of its function. The effect of a similar consideration is the subjection of domestic courts to the principle of aggravation of the motivational burden when they want to decide differently.

In this perspective, involving the jurisprudence of the CEACR within the so-called *judicial comity*[24] – namely the dialogue between courts by using

[21] Kilpatrick, *L'Europa della crisi si rivolge all'Oil: come è cambiata la mobilitazione sui diritti sociali e del lavoro*, in *RGL*, 2019, p. 181; Beaudonnet, *L'utilisation des sources universelles du droit international du travail par les jurisdictiones internes*, in *Bull. DCTSS*, 2005, p. 62.

[22] International Labour Conference (2015), 104th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, Geneva: ILO, 11.

[23] Amoroso, *Sull'obbligo della Corte Costituzionale Italiana di "prendere in considerazione" le decisioni del Comitato europeo dei diritti sociali*, in *La normativa italiana sui licenziamenti: quale compatibilità con la Costituzione e la Carta sociale europea? Atti del seminario in previsione dell'udienza pubblica della Corte Costituzionale del 25 settembre 2018 sulla questione di costituzionalità sul d. lgs n. 23/2015*, in *FQC*, 2018, p. 81 ff.

[24] See for details Remida, *Il ruolo della soft-law nella protezione multilivello dell'autonomia collettiva*, in *RGL*, 2013, p. 791.

legal or jurisprudential sources of different legal orders – should be a good way of beneficial cooperation. It is a different conception of the positioning of sources and constitutional bodies: not in the vertical language of the hierarchy, but the horizontal language of the "network"[25].

The CEACR's "jurisprudence" on freedom of association could be considered as a precious material concerning the possible relationship between the international and the European legal orders in the field of posting of workers. The final target is the "convergence of the parallel commitments"[26]: it is a paradoxical situation that the European Union through the voice of the Court of Justice, moreover in a field which is outside of the European competences, can require the Member States to violate the obligations derived from ratified international conventions.

In this scenario, primarily the CEACR could accomplish a harmonizing function to interpret the posting of workers Directive in a compatible way with the domestic and international protections.

The pressure coming from the international supervisory body could avoid that the abovementioned protective clause will be neutralised by the interpretation of the European Court of Justice[27], worried by safeguarding the priority of freedom to provide services. It is a realistic risk because the market-oriented approach of European law keeps connecting the posting of workers' Directive to freedom to provide services rather than to free movement of workers; this is a legal element that the European case law could enhance, as in the past.

Furthermore, a common ground of the protection of social rights facilitated by the intervention of international bodies could be an interest of the European Union too. More clearly, there is an opposite risk coming from the increase of mandatory rules of minimum protection realized by the 2018 Directive: it may be an inhibitor of freedom to provide services, dissuading Member States' companies from posting workers with inevitable consequences for the economic development of the internal market[28].

[25] Dorssemont, *A judicial pathway to overcome Laval and Viking*, in *Observatoire social européen. Research Paper*, 2011, p. 3.

[26] Maupain, *La mise en œuvre des conventions de l'OIT à l'épreuve de la supranationalité européenne*, in Supiot (ed.), *Les Gardiens des droits sociaux en Europe*, cit., p. 76.

[27] Allamprese, Borelli, Orlandini, *La nuova direttiva sul distacco transnazionale dei lavoratori*, in *RGL*, 2019, p. 135.

[28] De Carvalho, *The revision of the Posting of Workers Directive and the freedom to provide services in EU: towards a dead end?*, in *JT*, 2018, p. 731 ff.

In other terms, the lack of harmonisation in this matter could encourage a protectionism use of domestic labour rights. The stigma for this kind of distortive use of labour standards was expressed in the 1998 ILO Declaration on Fundamental Principles and Rights at work.

This must be avoided and it is a shared interest of both international organisations, especially when ideas of sovereignism are re-emerging, showing the existence of a strong tension between supranational legal frameworks and national prerogatives.

The CEACR's "jurisprudence", in this case, could cooperate to develop a uniform legal ground through a more clear interpretation of Convention No. 87.

From a wider perspective, it could be also possible that the CEACR expresses observations relating to the exercise of EU competences crossing principles and values protected by ILO Conventions. It would be necessary a creation of *ad hoc* subcommittee to avoid aggravating the already mentioned structural problem of the CEACR, that is to say, the overwork.

From EU point of view, there are other options to amplify the effect of harmonisation coming from the international regulatory level.

First of all, there is room to consider more thoroughly the CEACR's "jurisprudence" in the freedom of association's field. According to Article 156 TFEU, often neglected, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in matters relating to the right of association and collective bargaining between employers and workers; to this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation[29]. This provision could allow to enhance the international standards without threatening the distribution of competences.

Secondly, the chance of ratification of ILO Conventions by the European Union, as an autonomous entity, has been hypothesised[30]. Beyond the

[29] For details about this provision see DELFINO, *Il fenomeno sindacale e le "altre" fonti del diritto dell'Unione Europea*, in BAYLOS GRAU, ZOPPOLI L. (eds.), *cit.*, p. 221.

[30] See GALLARDO MOYA, *Convenzioni Oil*, in BAYLOS GRAU, CARUSO, D'ANTONA, SCIARRA (eds.), *Dizionario di diritto del lavoro comunitario*, Monduzzi editore, 1996, p. 295 ff.

presence of technical and constitutional problems of a similar solution, particularly evident in the case of freedom of association which is a field reserved to the domestic prerogatives, there is a prominent political obstacle: in the current period of crisis of EU democratic legitimacy, it is really difficult to imagine a similar homogeneous action.

Therefore, there is a lowest common denominator behind all the abovementioned proposals, namely the awareness that one of the most consistent weaknesses of the ILO is its "loneliness"[31]. The International Labour Organisation is unique in its originality, as a constant project characterized in terms of identity by the target of the social justice. It is urgent to remedy to it to produce a greater positive echo, despite the presence of numerous hurdles.

The ILO's approach to labour rights as fundamental rights has had increased resonance within the EU[32] and it is worth enforcing the communication channels to face in a combined way the globalization's challenges, which are crucial in the case of posting of workers.

[31] Perulli, *L'OIL e lo spirito di Filadelfia oggi: cent'anni di solitudine*, in *DLM*, 2019, p. 5 ff.

[32] See European Commission, *Analysis – in the light of the European Union acquis – of the ILO Conventions that have been classified by the International Labour Organisation as up to date*, Luxembourg: Publications Office of the European Union, 2014.

Abstract

The author explores whether it is possible to fix higher standards and methods of protection by joining forces of the International Labour Organisation and the European Union. The protective clause of Article 1, paragraph 1, Directive 2018/957/EU is considered a chance for the ILO's supervisory bodies to play a role in the interpretation of the provision in a way that approximates arrangements on union rights among the Member States which have ratified the ILO Convention No. 87.

Keywords

ILO, EU, CEACR, quasi-jurisprudence, posting of workers.