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Innovative regulatory methods on the periphery of labour law − Inputs from CSR, soft law, procurement law, company law and many more[1]

1. A broader perspective on labour law – An introduction

Nowadays, more and more labour law scholars are arguing in favour of a *broader, extended view of labour law.* It is not at all easy to clearly define the ideas of labour law in a changing world.[2] Even if we treat labour law as an ideologically stable, independent and coherent branch of law, there is a continuous and vital need to explore innovative means of regulation and enforcement. Thus, the plurality and the hybridization of labour law's regulatory mechanisms are recognized by many. Harry Arthurs, for example, states that "labour law itself is likely to evolve into a broader, more inclusive and perhaps more efficacious regime of social ordering, field of intellectual inquiry and domain of professional practice". He also acknowledges that "labour law scholarship will have to extend its reach to all policy domains that influence work relations or labour market outcomes".[3] Similarly, Vosko argues for "broadening labour law's focus from employment relations to work or labour market relations" in general.[4] Karl Klare also envisages a colourful and vibrant regulatory terrain for labour law when he states that the law regulating work cannot be fitted into a single overarching

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[2] See in details about the contemporary ideas of labour law: DAVIDOV, Guy & LANGILLE, Brian (eds.): *The Idea of Labour Law*, Oxford University Press 2011.

[3] ARTHURS, Harry: Labour Law after Labour, In: *The Idea of Labour Law*, DAVIDOV, Guy & LANGILLE, Brian (eds.), Oxford University Press 2011, pp. 13-30., p. 27, 29.

[4] VOSKO F. Leah: Out of the shadow?, In: *The Idea of Labour Law*, DAVIDOV, Guy & LANGILLE, Brian (eds.), Oxford University Press 2011, p. 368.

paradigm and labour law must pursue many different approaches.[5] Langille also believes in the expansion of labour law's justificatory horizons.[6] While Manfred Weiss does not see a vital need for a change of paradigm in labour law, he also recognizes some need for adaptation and the necessity for labour law to respond to the new realities in the area of employment in its broadest sense.[7]

One of the most evident e*xplanations* for the broader view of labour law is the more and more widely recognized contemporary phenomenon of a so-called *crisis in labour law*[8] and the obvious limitations of traditional labour law mechanisms. Moreover, some scholars also bring into question the very survival of labour law. In general, labour law is widely considered to be in crisis: the ineffectiveness of traditional labour law is often recognized both by labour law scholars[9] and practitioners. In other words: all over the world, a large and increasing number of employers fail to obey labour laws. It is also clear that there is a growing divergence between the law and the reality of the employment relationship.[10] As Davidov and Langille give their justification, "one of the most salient aspects of the crisis in labour law is its inability in an increasing number of cases to deliver the necessary rights and entitlements to workers".[11] Governments are under pressure to explore innovative ways to create facilitators for businesses for more general and systematic compliance with labour laws. As a consequence, new methods of enforcement strategies are needed, and these strategies mostly can be found beyond the conventional borders of labour law, sometimes on other fields of law. Thus, one of the several possible ways of broadening the scope of labour law is the building up of more strategic and organic, more coherent links with other, *related branches and fields of law*. This idea is also in line with Mitchell and Arup's theory: they argue for the reformulation of labour law as the 'law of labour market regulation', dismantling disciplinary boundaries among work-related distinctive areas of law (such as company law, for instance).[12] Indeed, the Labour Code in a country (if any as such) is far from comprising all labour-related regulation. Without doubt, the regulatory terrain and the complexity of labour law are expanding.

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[5] KARL, Klare: The Horizons of Transformative Labour Law and Employment Law, In: CONAGHAN, J. & FISCHL, M. & KARL, Klare (eds.): *Labour Law in the Era of Globalization*, Oxford University Press, 2002, pp. 3-29.

[6] LANGILLE, Brian: Labour Law's Theory of Justice, In: *The Idea of Labour Law*, DAVIDOV, Guy & LANGILLE, Brian (eds.), Oxford University Press 2011, p. 102.

[7] WEISS, Manfred: Re-Inventing Labour Law, In: *The Idea of Labour Law*, DAVIDOV, Guy & LANGILLE, Brian (eds.), Oxford University Press 2011, pp. 43-57.

[8] *Cf.* DAVIDOV, Guy: The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 26, pp. 61-82, 2010; ZAHN, Rebecca: *'Crisis in Labour Law'*, University of Kingston, 11th May 2012: (with N. Busby) 'European Labour Law in Crisis: the Demise of Social Rights?' etc.

[9] DAVIDOV, Guy & LANGILLE, Brian (eds.), *op. cit.* Introduction.

[10] *The Employment Relationship*, International Labour Conference, ILO, 95th Session, 2006, Report V(1). p. 15.

[11] DAVIDOV, Guy & LANGILLE, Brian: Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time has Now Come, In: *The Idea of Labour Law*, DAVIDOV, Guy & LANGILLE, Brian (eds.), Oxford University Press 2011, pp. 1-13.

[12] Cited by: FUDGE, Judy: Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law, In: *The Idea of Labour Law*, DAVIDOV, Guy & LANGILLE, Brian (eds.), Oxford University Press 2011, p. 125.

All in all, new legal means and new regulatory mechanisms are emerging outside of what is traditionally considered labour law, in an attempt to guarantee the same (or similar) goals. Some of these new regulatory methods aim to create positive incentives as an attempt to solve the deep compliance problems. Such innovative enforcement strategies are typically not intruding into the market as harshly as conventional labour laws, they rather have a market-friendly regulatory approach and a 'market constituting' / 'market-creating' role.[13] In other words: these regulatory methods often create a 'business case' for compliance, what is apparently an important added-value and facilitator for employers. The 'business case' can be manifested either in financial incentives (such as in the case of responsible procurement), or in the power of public opinion concerning employers' 'brand' (such as in the case of disclosure and reporting). The 'business case' behind these techniques might have the potential to appease the classical economic critiques of the field of labour law. It is also a common feature of these innovative regulatory methods that they find their roots in soft law, mostly in the concept and practice of Corporate Social Responsibility (CSR).

In our paper we describe some illustrative examples for such innovative regulatory methods. Among others, we particularly refer to some related aspects of *procurement law, disclosure law and chain-responsibility.* However, the goal here is not to analyze these regulatory techniques in details. Rather, we focus on the idea to highlight some interplays between labour law and these related (but distinct) strands of regulatory methods in order to conceptualise innovative enforcement strategies for labour law. Nevertheless, such regulatory strategies might help to fill the gap where traditional labour laws have remained largely ineffective. These regulatory techniques are clearly outside the conventional, 'mainstream' scope of labour law, but they can have direct impact on labour standards. The cumulative effect of these innovative regulatory strategies might have the potential to contribute to the enhanced compliance with labour laws. All of these alternative regulatory strategies might also serve various labour-related ends, even if they are not 'labour laws' in a strict sense.

The broadening scope of labour law can also be conceptualised in the mirror of *regulatory theory*.[14] In line of this thinking, labour law can be seen as a broad 'regulatory space' instead of a narrowly defined branch of law. A 'regulatory space' is defined by the wide array of issues belonging to a given area of regulation. This 'space' may be filled by a range of various regulatory methods and approaches, among which hard and soft law measures, traditional and innovative regulatory concepts are combined. The regulatory theory, in its conventional understanding, also responds to the above mentioned enforcement crisis present also in labour law. As Fenwick and Novitz formulate it, "regulation theory is to explore the weakness in practice of such a 'command and control' approach to regulation, and of how regulators might respond to those limits in

[13] *Cf.:* DEAKIN, Simon: The Contribution of Labour Law to Economic and Human Development, In: *The Idea of Labour Law*, DAVIDOV, Guy & LANGILLE, Brian (eds.), Oxford University Press 2011, pp. 156-179.

[14] FENWICK, Colin & NOVITZ, Tonia: Conclusion: Regulating to Protect Workers' Human Rights, In: *Human Rights at Work* (ed. by FENWICK, Colin & NOVITZ, Tonia), Hart Publishing, Oxford and Portland, Oregon, 2010, pp. 585-617.

innovative ways."[15] This broader approach to regulation captures a wider range of regulatory techniques. In terms of labour law, the scope and regulatory strategies of labour law should be deployed in different ways than might conventionally be understood. The originally set, and to a large extent still valid basic purposes and values of labour law (i.e. 'protection') can be followed through different regulatory mechanisms. Among these mechanisms, other branches of law (such as public procurement law, company law, consumer protection law etc.) can also play a fruitful role. One of the ultimate goals of labour law is in fact the objective to achieve a *behavioural change* on the side of employers, in order to uphold decent working conditions. On the one hand, compliance with applicable labour laws is the absolute minimum of this expected regulatory goal. On the other hand, truly socially responsible (CSR-conscious) attitude is the desired other end of this regulatory goal. The desired behavioural change leading to compliance and to social responsibility can be achieved by way of different regulatory mechanisms. Regulators might use various regulatory strategies to promote and achieve the same goals and objectives. Sometimes traditional 'command and control' methods and hard sanctions are the most preferable mechanisms, sometimes innovative, indirect, tailor-made, more "light-touch" methods are needed. Furthermore, as Harry Arthurs describes it, "market dynamics are often a more powerful determinant of decent labour standards than regulatory legislation."[16] It means that in some cases private, market-based, self-regulatory (soft law) mechanisms can also be a source of innovation in terms of compliance strategies. All in all, a pluralist concept of labour regulation acknowledges that a variety of regulatory approaches might facilitate the advancement of substantive goals. According to Howe, a "broader view of what constitutes labour law is crucial to the future health and vitality of labour law scholarship."[17]

2. Basic concepts

In our paper we portray some symbolic examples for such innovative regulatory methods. Among others, we particularly refer to *procurement law, disclosure law and chain-responsibility*. However, the aim here is not to analyze these regulatory concepts in details. Rather, we try to draw attention to some interactions between labour law and these regulatory methods in order to conceptualise innovative enforcement strategies for labour law.

After sketching the basic concepts of these regulatory methods (Chapter 2.), we describe their soft-law roots (Chapter 3.). Then we take a step towards hard law and show some examples how these innovative regulatory mechanisms might percolate into hard law, and labour law more concretely (Chapter 4.). In the last part, before conclusions we underline some common features and potentials of these innovative regulatory methods (Chapter 5.).

Procurement law is one of the most plausible innovative regulatory techniques on the side-line of labour law what might be better utilized to advance compliance with labour laws. Procurers (most importantly public procurers, like

[15] Ibid. p. 605.
[16] ARTHURS, Harry *op. cit.* p. 18.
[17] *Cf.* HOWE, John: The Broad Idea of Labour Law, In: *The Idea of Labour Law*, DAVIDOV, Guy & LANGILLE, Brian (eds.), Oxford University Press 2011, p. 299-300.

governments when spending public money) can include 'social clauses' in tenders to facilitate compliance with certain labour standards. In the private sphere (in the practice of some big multinational companies) and in soft law there is a growing trend of 'ethical sourcing', but also European Union law as well as some national laws provide good examples for how social criteria might be taken into account in (public) procurement.[18] Responsible sourcing practices may create a direct, financial interest on the side of employers to comply with labour-related conditions. Thus, procurement can be an additional enforcement strategy for labour law, based on essentially financial incentives or rewards in return for expected performance.

In our context, *non-financial*[19] *corporate disclosure and reporting* refers to the practice of giving public information about environmental, social and governance performance. This activity can be voluntary (as part of the CSR-strategy) or, to some extent, in some jurisdictions (e.g. France, UK, Denmark) obligatory. The disclosure may take the form of a sustainability / CSR / ESG[20] / 'triple bottom line' / social report. Working conditions and employment practices are usually vital elements of the 'social' part of the report. The basic idea of non-financial reporting can be described by a well-known quote[21]: "sunlight is the best disinfectant." This refers to the benefits of openness and transparency[22], what is also very crucial in terms of labour law. The public accountability and transparency of labour practices might facilitate compliance and create a positive, upward spiral (as a so-called 'pulling force'). Employers might be involved in a positive, image- and market-based, self-regulatory competition based on the quality of employment standards and CSR-practices ("race to the top").[23] Such information strategies also have a wide educational role as they can encourage the adoption of decent employment practices by demonstrating best practices. Furthermore, not less importantly, non-financial information is increasingly essential for the persuasion of investors and for the engagement of stakeholders. On a more general level, social reporting can contribute to create public trust in enterprises (for example, also on the side of potential employees).

The idea of *chain-responsibility* reflects the fact that businesses around the world have witnessed significant structural changes in recent decades. Owing to international business transactions and global production networks, the boundaries

[18] BARNARD, Catherine: Using Procurement Law to Enforce Labour Standards, In: *The Idea of Labour Law*, DAVIDOV, Guy & LANGILLE, Brian (eds.), Oxford University Press 2011.

[19] Measures that are not directly linked to financial performance but still impact a company or organisation's overall performance – and in many cases even the financial performance.

[20] Environmental, social and governance reporting (ESG). The term describes environmental, social and governance issues that investors are considering in the context of corporate behaviour. In order to maximize the sustainable value of a business, the company should be able to understand and consider the Environmental, Social and Governance (ESG) factors that determine its extra financial performance. They must also be able to measure them and to provide evidence on how they impact on financial drivers, so that these factors can be recognized and evaluated by the market.

[21] From U.S. Supreme Court Justice Louis Brandeis.

[22] Transparency: the disclosure of all material information and the capability to measure its results in a quantitative way through key indicators.

[23] HEPPLE, Bob (2005): *Labour laws and global trade*, Hart Publishing, Oxford and Portland, Oregon, p. 85.

of enterprises blur. The globalization of supply chain management is characterised by additional challenges (e.g. differing level of labour standards, complexity and decentralization of corporate structures) that add to the complexity of the relationship with suppliers. The increasing use of subcontracting led to concerns about the possible deterioration of labour rights, especially at the bottom of the supply chains. Traditionally, the client (principal contractor) has no direct legal liability for the labour rights of the employees of its subcontractor. Civil society organisations (NGOs, consumers' organisations etc.) put pressure on multinational enterprises to take responsibility for their supply chain (and for the workers employed also 'deep down' in the supply chains). However, it is very difficult to delineate how far does the responsibility of corporations (especially that of multinationals) reach, and it is even more difficult to design effective regulatory − self-regulatory and / or legislative − techniques to implement this responsibility. The core idea of such emerging regulatory experimentations is to make actors other than the direct employer co-responsible or liable for ensuring labour and social rights of workers employed in the supply chain with regard to, for example, minimum wages, social security contributions, occupational health & safety.[24] Such mechanisms might be interpreted as the breakthrough of the contractual relationship in employment law in terms of liability. The main goal is to block the circumvention of employers' responsibility and the abuse of workers' rights in supply chains.

3. The soft-law roots and links between labour and CSR

It is a joint feature of the described innovative regulatory methods that they find their roots in soft law[25], mostly in the concept and practice of Corporate Social Responsibility (CSR). Responsible procurement, social reporting, or supply chain controlling practices are all well grounded and proliferated in private, non-governmental soft regulation. These practices are applied under public social pressure rather than as a result of state regulation. However, one of the classical functions of soft law is the so-called 'pre-law' function: soft law measures may have the capacity for 'hardening', since they can be a first step in the process of legislation.[26] Soft law measures can also be a so-called 'testing field' of innovative regulatory concepts and source of inspiration or pattern for regulators. As such, ideas in soft law may pave the path for the adoption of hard laws in the future. This phenomenon can also be labelled as the 'spill over' function of soft law[27] and can represent the dynamic of a given field of law (in our case, the dynamic of labour law as a widely interpreted branch of regulation). However, it

[24] The idea of chain-responsibility might also be associated with the legal doctrine of 'enterprise liability'. Under this idea, individual entities (for example, otherwise legally unrelated corporations) can be held jointly liable for some action on the basis of being part of a shared enterprise.

[25] See for the general description of the role of soft law in labour law: DUPLESSIS, Isabelle: Soft international labour law: The preferred method of regulation in a decentralized society, In: *Governance, International Law & Corporate Social Responsibility*, International Institute for Labour Studies, Research Series 116., ILO, 2008; BLANPAIN, Roger and COLUCCI, Michele (2004): *The Globalization of Labour Standards, The Soft Law Track*, Kluwer Law International.

[26] *Cf.* SENDEN: *Soft Law in European Community Law*. Oxford: Hart Publishing (2004).

[27] *Cf.* ALHAMBRA, M. Antonio Garcia-Mun˜oz & TER HAAR, Beryl & KUN, Attila 'Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law'. *The International Journal of Comparative Labour Law and Industrial Relations* 27, no. 4 (2011): 337–363.

must be mentioned that hard law is generally lagging behind changes in self-regulatory practices and regulatory ideas. Furthermore, in these specific regulatory terrains (e.g. procurement, reporting, supply chain responsibility) extensive legal regulation could significantly undermine respective competitive market dynamics (thus, hard regulation is not always and not in all aspects necessarily needed).

If we consider *procurement law*, it is apparent that private contractors (especially big, CSR-conscious, brand-sensitive multinational firms) are increasingly under the pressure of public opinion to demand certain social clauses from their subcontractors. Among these social clauses, labour law compliance and/or enhanced labour standards can also be a factor as expectations. Thus, ethical and responsible sourcing can also be taken beyond minimum compliance and can embrace wider social considerations. What is even more important, labour law enforcement and compliance can be taken beyond the 'borders' or 'gates' of a given company by way of voluntary, self-regulatory commitments. Such ethical procurement considerations are typically formulated in codes of conduct (or in ethical sourcing guidelines) and are often referred to in private business contracts. At best, private enforcement strategies (such as monitoring, external or internal audits, certification processes etc.) and private sanctions (e.g. review or termination of the business contract) are also attached to these programmes to make it sure that suppliers respect certain (typically basic) labour rights. Companies can collaborate with other brands, NGOs and governments to verify that their products and services are produced in a way that provides dignity and respect for workers in global supply chains. In brief, these are the private, self-regulatory, CSR-related aspects of ethical sourcing.

Corporate *non-financial / sustainability reporting* has a long history going back to environmental reporting.[28] Social reporting is a rather recent trend. Many companies now voluntarily produce annual reports (as part of their CSR-strategy) and there are a wide array of private screenings, ratings and reporting standards around. Some organisations do not have stand-alone social reports, but prefer to report their non-financial performance through existing reporting mechanisms. The key drivers and patterns for the quality of sustainability reports are the guidelines of the Global Reporting Initiative (GRI)[29], various award schemes or rankings. The simple dissemination of voluntary codes of conducts is also an alternative − immature − form of disclosure.

Responsible supply chain management (RSCM) has also become an important element of corporate social responsibility (CSR). Good self-regulatory practices in this area can make a significant contribution to supply chain stability and long-term efficiency. RSCM endorses the shared responsibility of all parties involved in the supply chain. RSCM can be defined as organisations using their purchasing power to effect positive change in the production cycle and work in partnership with suppliers in order to achieve this. Besides legislative acts (see later), such mechanisms might be laid down in collective labour agreements,

[28] The first environmental reports were published in the late 1980s by companies in the chemical industry which had serious image problems.

[29] The GRI enable all organizations worldwide to assess their sustainability performance and disclose the results in a similar way to financial reporting.

codes of conduct, private contracts, or simply in corporate policies etc. In fact, RSCM and ethical sourcing, as we have seen, are largely overlapping issues.

On a more general level, the *links between CSR*[30] *and labour law* are complex and probably less immediately obvious.[31] Nowadays, the 'fashion' of CSR is becoming more and more widespread and the notion of CSR itself is appearing as a managerial buzzword. Ideas of CSR nowadays permeate the business community and are becoming central to their reputation. In our paper we attempt to place this innovative regulatory 'trend' of voluntary CSR practices into the context of the labour law dimension. Without doubt, labour law is the legal root or the legal baseline of CSR concerning labour-related issues. However, in the context of economic globalisation, conventional "state law is no longer plausible as a benchmark for responsible corporate behaviour."[32] Conventional labour laws are unable to capture the whole spectrum of social responsibility. That is why it is important to analyze the emerging interplays and intersections between these two areas: the relatively "old" concept of labour law and the relatively "new" CSR-concept are competing for largely similar goals. The afore-mentioned similar goals are indeed incontestable ones, namely the protection and well-being of workers, or in other words: the socially responsible treatment of workers (in a wide sense). Theoretically, both labour law and CSR (more precisely: the so-called 'internal' aspects of CSR) are striving to fulfil these 'humanistic' goals, although through − for the first sight − very different practical mechanisms. Similarly, the core debate in CSR concerns the 'voluntarism versus regulation' track. As regards working conditions, CSR promises that profitability and good working conditions can go hand in hand. This paper is basically a theoretical one, trying to identify and reflect on some possible connections between the two areas. Surely, CSR-based regulatory approaches might play some role in achieving the ends of labour law and reversely, labour law can also play some role in achieving socially responsible performance (CSR).[33] As described above, thinking about the pressing need of the reconstruction and broadening of the concept of labour law, CSR practices might come naturally into the picture. The vague, flexible, voluntary, business-friendly and self-regulatory nature of CSR fits perfectly into the rapidly changing context of labour regulation in the broad sense. Such important phenomena as the rapid technological progress, the increased competition stemming from globalisation, the liberalization of trade, the domination of multinational corporations, changing consumer demand and

[30] The idea of CSR basically considers that a corporation is not just a self-centred profit making entity, but that the company and its actions are also integral part to the economy, society and the environment in which they occur. However, the overall agenda for CSR is rather disorganized and fragmented. More precisely: there is no internationally established definition on what CSR is.

[31] See for details: KUN, Attila & HAJDÚ, József: Conceptualization of Corporate Social Responsibility in the context of Labour Law, In: *Rethinking Corporate Governnance, From Shareholder Value to Stakeholder Value*, ed. by BLANPAIN, Roger, Wolters Kluwer 2011. pp. 175-194.

[32] ARTHURS, Harry (2002): Private Ordering and Worker's Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation; In: *Labour Law in an Era of Globalization*, ed. by: CONAGHAN, Joanne / FISCHL, Richard Michael / KLARE, Karl, Oxford University Press 2002; p. 473.

[33] *Cf.:* MAKOTO, Ishida (2009): *Corporate Social Responsibility (CSR), Socially Responsible Investment (SRI) and Labour Law in Japan − The Lessons from the Nomura Securities Case*; Conference Paper − World Congress: International Society for Labour and Social Security Law 1-4 September 2009, Sydney; Workshop 3: Labour Participation and Corporate Governance, p. 8.

significant growth of the services sector, the growth of worldwide network society and the emergence of even more complex global supply and production chains are favourable for the flexible CSR-idea. There is even more global discussion about CSR, while sometimes we might have the impression that classical methods of labour law are almost forgotten in the discussions. However, the two concepts are like "the two sides of the same coin" to some extent: labour law is a more systematic, more reliable, traditional, welfare state-centred, legal-like approach to social responsibility, while self-regulatory (internal) CSR has a more extensive, more indistinct, multi-stakeholder and multi-layered approach to the same issue. CSR is a much more business-friendly and softer articulation and packaging of the largely similar goals. As we have already discussed: although there are different tools and technical mechanisms in each regime, the overall goals of both regimes are more or less the same or overlapping at least: to find a balance between "business efficacy" and "social protection", to treat workers on a socially responsible manner and to modify corporations' internal culture in this respect.

There is also a choice to view CSR as an innovative, inspirational background-ideology or guiding principle for labour law. Indeed, we can reaffirm that one of the main goals of labour law has always been and still is to regulate the 'social responsibilities' of corporations towards workers (considering them as the core stakeholders). CSR might also be an ideology to facilitate the expansion of the field of labour law to embrace various areas of law affecting the labour market and to concentrate on the employers' (corporations') responsibilities in the widest sense (*cf.*: the very notion, etymology of the term CSR, corporate social responsibility) instead of concentrating solely on the employer-employee relationship in the narrow sense. In this context, CSR may contribute to the widening and opening up of the horizon of labour law policies: instead of a dogmatically quite closed scholarship of traditional labour law, CSR affirms the need for a more complex and integrated public political approach towards labour issues. CSR may also be interpreted as a new ideology which attempts to make the classical values of labour law more attractive to employers. The innovative idea of CSR may also help to identify new fields for possible future labour regulation and give rise to direct consequences in regulation. In other words: CSR may also serve as a catalyst for labour law, bringing new ethical and regulatory dilemmas to the surface. Furthermore, it is also possible to interpret CSR as a new method of filling sensitive regulatory and governance gaps.[34]

On the other hand, it can not be neglected that the phenomenon of CSR can certainly give rise to suspicion and scepticism. According to many commentators, CSR could be characterized as a private sector response to inadequate and ineffective regulation of labour standards at both the domestic and the international level. "In this sense CSR could well represent the privatization of international labour law".[35] Clearly enough, there is a tendency to marginalize the role of public policy (e.g.: labour law) and to over-emphasize the role of multiple actors (e.g.: NGOs, consultancies) and fragmented motives (e.g.: the "business case" for CSR, prevention of reputational risks, social pressure, market-driven

[34] KUN, Attila & HAJDÚ, József *loc. cit.*

[35] BURKETT, Brian W. / CRAIG, John D.R. / LINK, Mathias (2004): *Corporate Social Responsibility and Codes of Conduct: The Privatization of International Labour Law*, Canadian Council on International Law Conference, Friday, October 15, 2004, Heenan Blaikie. p. 1.

incentives etc.) in the promotion of socially responsible business movement. We may also add that while development and innovation in (international and national) labour law have been quite slow (and controversial) in coming over the past several decades, the plethora of voluntary CSR initiatives has grown out of almost nowhere at a fast pace. The disproportional counter-evolution of the two fields is at least remarkable. CSR represents a highly individualized and fragmented approach to social responsibility, which may also have the potential to undermine the prestige of labour law (and established standards) in the long run. In other words: CSR-initiatives can also serve as means of pre-empting, bypassing, undermining or replacing labour law in the long run.[36]

After all, labour regulation and voluntary CSR initiatives can not be interpreted as mutually exclusive alternatives. According to Harry Arthurs, "to some extent the two systems exist in a state of symbiosis, and are more similar in their strategies and outcomes, more ideologically aligned, more mutually dependent and operationally integrated than in generally believed – but only to some extent."[37] In this paper we rather focus on the potentially mutually reinforcing and fruitful relationships between soft law (CSR) and labour law in a broad sense. The rise of the phenomenon of CSR may facilitate and justify moves away from traditional regulation and policing of corporate activity and decision-making.[38] Also in labour law (in a broad sense) one may recognize some shifts in regulatory approaches and it is possible to identify some recent, innovative legal and regulatory approaches and mechanisms which may be influenced (at least partly and / or indirectly) by the philosophy of CSR. Most of the regulatory techniques mentioned above in this paper are often clearly associated with the legal dimension of CSR (or corporate accountability). One can not forget that neither in EU-law nor in national laws, there are no concrete, specific legal requirements of CSR, but numerous fragmented pieces of recent legislation (either on EU- or national level) are indirectly associated with the scope of CSR. On the other hand, these new, alternative, sometimes indirect and multi-dimensional regulatory approaches also have some connections to labour law policy, since, at the end of the day, they are often striving to realize the traditional ends and aims of labour law (however, they are not formally, clearly labelled as "labour laws" in the narrow sense, and they are often using innovative, indirect mechanisms for their enforcement). These new regulatory approaches might have the potential to facilitate the compliance with labour laws and might generate "ripples" in the current, on-going debates about the reconstruction of labour law and might carry some seeds of reconstruction of rigid regulatory frameworks into modern regulatory approaches.

4. Regulatory innovations – some 'hardening' examples

[36] Alan C. Neal articulates this concern very sharply when he underlines that CSR-practices (e.g.: benchmarking and accreditation processes etc.) "bring with them the further danger that that regulators, seduced by an ostensibly objective "audit-trail" approach to corporate performance and regulatory compliance, will retreat from their role of regulators and enforcers of social and environmental standards." NEAL, Alan C. (2008): Corporate Social Responsibility: Governance Gain or Laissez-Faire Figleaf? *Comparative Labor Law & Policy Journal* v. 29 no. 4, Summer 2008. p. 459.

[37] ARTHURS, Harry (2002) *op. cit.* p. 484.

[38] Cf.: NEAL, Alan C. (2008) *op. cit.* p. 472.

State intervention into the labour market, as the fundamental pillar of labour law can take many forms. Besides the conventional, direct, basically 'command and control' approach of labour law, alternative, rather indirect regulatory means can also be applied, gaining inspiration from the above described CSR, soft law and self-regulatory practices. The original goals of labour law (such as social justice, employee-protection) should also be pursued through other, less invasive regulatory measures including public procurement law, company law, taxation etc. In such cases the state tries to steer and guide internal corporate governance mechanisms to capture certain public policy goals (such as compliance with labour laws).

Scholars have long recognized the alternative opportunities offered by *public procurement law and government contracting* to help improve labour standards (as a compliance gap-filling measure).[39] However, legal development is much slower and less straight-forward.[40] There is always some uncertainty as to whether particular linkages between procurement and social policy / job quality objectives are permissible, for example in national laws, or in the light of the European Union's public procurement Directives. The legal basis for public procurement in the EU is provided by Directives 2004/17/EC and 2004/18/EC (the 'Procurement Directives'), which offer some scope[41] for taking account of social and labour-related considerations, provided in particular they are linked to the subject-matter of the contract and are proportionate to its requirements and as long as the principles of value for money and equal access for all EU suppliers are observed. The Directives leave substantial amounts of discretion to the Member States. In some national jurisdictions[42], responsible public procurement has been put in the centre of national CSR agendas. Furthermore, the new guide of the European Commission about socially responsible public procurement (SRPP) is a concrete tool to assist public authorities to purchase goods and services in a socially responsible way in line with EU rules.[43] It also highlights the contribution public procurement can make to stimulate greater social inclusion. The guide will allow public purchasers to integrate with greater confidence social considerations in public procurement, while ensuring equal access to all European interested bidders and guaranteeing 'the value for many' principle. The exercise is in line with the new Europe 2020 Strategy[44] and the EU goals for smart, sustainable and inclusive growth. According to the definition of the Commission, *'SRPP'* means procurement operations that take into account one or more of the following social considerations: employment opportunities, decent work, *compliance with social and labour rights*, social inclusion (including persons with disabilities), equal

[39] MCCRUDDEN, Christopher: Corporate Social Responsibility and Public Procurement, In: MCBARNET, Doren & VOICULESCU, Aurora & CAMBELL, Tom eds. (2007): *The new Corporate Accountability − CSR and the law*, Cambridge University Press.

[40] However, early international recognition of the topic can be seen in the following ILO instrument: C094 - Labour Clauses (Public Contracts) ILO Convention, 1949 (No. 94): Convention concerning Labour Clauses in Public Contracts (Entry into force: 20 Sep 1952), Adoption: Geneva, 32nd ILC session (29 Jun 1949).

[41] For a detailed analysis see: BARNARD, Catherine *loc. cit.*

[42] For example in Belgium, France etc.

[43] *'Buying Social': A guide on taking account of social considerations in public procurement*, European Commission, 2010.

[44] A strategy for smart, sustainable and inclusive growth, Brussels, 3.3.2010, COM(2010) 2020 final.

opportunities, accessibility design for all, taking account of sustainability criteria, including ethical trade issues and wider voluntary compliance with corporate social responsibility (CSR), while observing the principles enshrined in the Treaty for the European Union (TFEU) and the Procurement Directives. SRPP can be a powerful tool both for advancing sustainable development and for achieving the EU's (and Member States') social objectives. The Commission is committed that the EU should leverage policies in the field of public procurement to strengthen its social policy objectives. Member States and public authorities at all levels are invited to make full use of all possibilities offered by the current legal framework for public procurement. Furthermore, the Commission intends to facilitate the better integration of social and environmental considerations into public procurement as part of the upcoming review of the Public Procurement Directives.[45] Besides the stimulation of socially responsible public procurement (enabling model of law), in certain context, both EU[46] and national law explicitly oblige public bodies not to award public contracts under certain circumstances.[47]

As for *social reporting*, legal developments are slightly more explicit. The European Commission has announced recently that the EU will present a legislative proposal on the transparency of the social and environmental information provided by companies in all sectors.[48] Some Member States (like France[49], Denmark[50], UK[51]) have already introduced non-financial disclosure requirements that in some cases even go beyond existing EU legislation (currently, the so-called Modernisation Directive 2003/51/EC requires enterprises to disclose in their annual reports environmental and employee-related information to the extent necessary for an understanding of the company's development, performance or position). Generally, there is a trend towards more

[45] A renewed EU strategy 2011-14 for Corporate Social Responsibility, Brussels, 25.10.2011; COM(2011) 681 final.

[46] See for example: Directive 2004/18/EC Article 45. 2. d). According to this provision any economic operator may be excluded from participation in a contract where that economic operator has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate. The scope of *'grave professional misconduct'* can be defined by Member States and there is possibility for national legislators to include basic labour law compliance provisions at this point.

[47] For example, in Hungary public aids and tenders may not be awarded to employers who are systematically in breach of the requirements of 'sound labour relations'. See: 1/2012. (I. 26.) Decree of the Ministry for National Economy about 'sound labour relations' (NGM Rendelet a rendezett munkaügyi kapcsolatok feltételeiről és igazolásának módjáról).

[48] A renewed EU strategy 2011-14 for Corporate Social Responsibility, Brussels, 25.10.2011; COM(2011) 681 final p. 12.

[49] France was the first country to make public company reporting mandatory. The Act of 15 May 2001 on new economic regulations (the "NER" Act) requires public companies to include information on a series of topics in their annual report: status of employees, mobility of staff, work hours, social relations, health and safety, training, health policy, profits distribution and the amount of outsourcing. They must also describe the ways in which their sub-contractors respect ILO standards. DOUCIN Michel: *France's policy for reporting corporate social responsibility undertakings*, French Ministry of Foreign and European Affairs, 2009.

[50] In Denmark, the 1,100 biggest companies, as well as state-owned companies, institutional investors, mutual funds and listed financial businesses must provide information about their CSR policies on a "comply or explain" basis in their annual financial reports. *CSR − National Public Policies in the European Union*, European Commission, 2010. p. 26.

[51] 'Business Review', Companies Act 2006.

government-driven, regulatory initiatives related to reporting.[52] In the EU, most Member States have implemented some kind of measures for disclosure or provided companies with guidance or incentives to start reporting.[53]

The idea of chain-responsibility is not so well developed in positive law. However, there are some signs of development. Davidov notes on a general level that when employers turn to use intermediaries (such as subcontractors), courts must ask which relationship presents the real vulnerabilities for workers justifying labour law protection.[54] He states that "in many cases, notwithstanding the formal legal arrangement, it is the ultimate 'client' that will have to bear responsibility".[55] The core idea of chain responsibility arrangements must be to ensure that subcontracting does not result in escaping labour law's grasp, and liability is attached to the 'hub' company (the 'real' employer dominating the supply chain). Such mechanisms might extend corporations' labour law-related liability beyond corporate borders and in some cases, to some extent beyond national borders as well (because subcontracting chains more and more frequently engage companies from different states).

John Ruggie, United Nations (UN) Special Representative on Business and Human Rights, highlighted the state's duty to protect, the corporate responsibility to respect and access of victims to remedies as the core pillars of his framework.[56] In this regard, supply chain responsibility and 'due diligence' processes must be essential mechanisms.

Similarly, the European Parliament adopted a resolution in 2009 on the social responsibility of subcontracting undertakings in production chains.[57] It called on public authorities and all stakeholders to do their utmost to increase the level of awareness among workers of their rights under the various instruments (such as labour law, collective agreements, codes of conduct) that regulate their employment relationship and working conditions in the undertakings for which they work and the contractual relationships in subcontracting chains. The Resolution also warned national public authorities to adopt or further develop legal provisions which exclude undertakings from public procurement, where they are found to have infringed labour law, collective agreements or codes of conduct. Most importantly, the Resolution expressed the need to establish a clear-cut Community legal instrument introducing joint and several liability at Community level. The envisaged Community instrument on chain liability would be a way of

[52] See also: Proposals for "*Establishing Mandatory Environmental and Social Reporting*", European Coalition For Corporate Justice (ECCJ) Legal Proposals to Improve Corporate Accountability for Human Rights Abuses (2008).
[53] *CSR – National Public Policies in the European Union*, European Commission, 2010. p. 26.
[54] The concept of joint and several liability also seems to be accepted by the European Court of Justice, at least in principle. *Cf.* Executive Summary, *Study on the protection of workers' rights in subcontracting processes in the European Union*, Project DG EMPL/B2-VC/2011/0015, Ghent University & University of Amsterdam.
[55] DAVIDOV, Guy: Re-Matching Labour Law With Their Purpose, In: *The Idea of Labour Law*, DAVIDOV, Guy & LANGILLE, Brian (eds.), Oxford University Press 2011, p. 189.
[56] "*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*", UN, 21 March 2011. 13.
[57] 26 March 2009 (2008/2249(INI)).

increasing transparency in subcontracting processes and of securing better enforcement of Community and national law.

The outcome of the public consultation on the Commission's Green Paper about "Modernising labour law to meet the challenges of the 21st century"[58] encouraged in this regard the Commission's intention to take the necessary steps to clarify the rights and obligations of the parties involved in subcontracting chains to avoid depriving workers of their ability to make effective use of their rights.

The European Commission conducted a study with the University of Edinburgh Law School on the "existing legal framework for human rights and environmental issues applicable to European companies operating outside the EU".[59] The final report was published in November 2010 and also analyses how labour laws can address corporate violations of human rights both within and outside the corporation (i.e. supply chain and subcontracting relationships).

Besides the above-mentioned international regulatory efforts and guidance about chain-responsibility, some countries adopted specific national liability schemes (Austria, Belgium, Finland, France, Germany, Italy, the Netherlands and Spain).[60] National schemes are very varied in their nature and scope. Certain aspects of labour conditions (such as health and safety, posting of workers) are more common to be regulated via chain-responsibility measures than others. Similarly, certain branches of the economy (such as the construction industry) are usually over-represented in the scope of the respective measures than others. Furthermore, some measures cover only some, limited tiers (typically first and second levels) of the chain of contractors. On the whole, currently, there is practically no European state (or EU Member State) with an all-encompassing, extensive, well-working system of full joint and several liability. Although the factual effectiveness of existing mechanisms, notably joint and several liability and chain liability schemes may be questionable and at best indirect, the respective regulatory 'experimentations' are still promising in the sense that they try to ensure the protection of workers rights in subcontracting processes. As we have already pointed out, the legal idea that principal contractors (or hub companies) should be responsible for (some of) the labour law obligations of their sub-contractors is in close relation with the corporate accountability and CSR movement.[61]

As a matter of *company law*, having regard to the interests of the company's employees has long been a requirement of the internal deliberations of a

[58] COM(2006)0708.
[59] http://www.law.ed.ac.uk/euenterpriseslf/
[60] *Cf.* European Parliament Resolution on the social responsibility of subcontracting undertakings in production chains 26 March 2009 (2008/2249(INI)), 9. See for further details: *Study on the protection of workers' rights in subcontracting processes in the European Union*, Project DG EMPL/B2-VC/2011/0015, Ghent University & University of Amsterdam.
[61] For general proposals see also: Proposals for "Enhancing Direct Liability of Parent Companies" and for "Establishing a Parental Company Duty of Care", European Coalition For Corporate Justice (ECCJ) Legal Proposals to Improve Corporate Accountability for Human Rights Abuses (2008).

company's directors.[62] Recent innovative and explicit company law reforms are to be stressed at this point. The most notable example is the Companies Act (2006) from the United Kingdom. The Act promotes the success of the company for the benefit of its members as a whole. Employees' interests are defined as one of the crucial substantive factors to be considered by directors in relation to their performance of their duties.[63] This is a clear, legally binding legislative guidance to directors in respect of how to fulfil their duties to reflect the interests of the various predefined stakeholder interests, including those of the company's employees. The rule puts some internal limit on the managerial prerogative. These legislative reforms are ideologically linked to CSR and the envisaged proper governance of the modern corporation. From the perspective of labour law, this regulatory model shows that the interest of employees can also be advanced reflexively through internal corporate governance rules and mechanisms, not just by way of external, labour law-type direct state interventions. However, these abstract obligations are rather symbolical; their practical effects are largely unpredictable.[64]

Another example for innovative, labour-related regulatory methods can be revealed when examining the possible *links between labour law on the one hand, and consumer protection law on the other hand.* For instance, some labour law protection might be achieved through consumer protection laws, when companies' non-compliance with their code of conduct is an instance of "misleading advertising."[65] On that way, some kind of legal accountability is attached to voluntary, self-regulatory commitments.

Various "light touch" regulatory approaches, regulated ways of self-regulation can also be detected in the recent development of labour laws. In such cases, for example, businesses are free to develop their own self-regulatory regimes under certain legally defined conditions or guidelines. These reflexive, responsive, soft regulatory models are also sound combination of the regulatory and the self-regulatory approaches.[66]

5. Common features

The new regulatory approaches described above are in line with Teubneriean logic of *reflexive* law[67], because they are influencing the internal decision-making

[62] WYNN-EVANS, Charles: The Companies Act 2006 and the Interest of Employees, *Industrial Law Journal*, Vol. 36, No. 2, June 2007, pp. 188-193.
[63] Section 172. (1) b.
[64] It can be mentioned that the new Hungarian Labour Code (Act. I. of 2012) also locates new, rather similar, very general, but overarching obligation on all employers to "take into account the interests of workers under the principle of equitable assessment" (Art. 6., Subsec. 3.). This obligation is part of the so-called "common rules of conduct" and the formulation of the rule gives considerable leeway for interpretation for the courts. This innovative requirement is key in work-related legal relationships as these are legal relationships characterised in their contents by subordination.
[65] See for example: Unfair Commercial Practices Directive - 2005/29/EC Article 6(2)(b).
[66] For example, in Hungary, « equal opportunity plans » are typically such "regulated self-regulatory" tools.
[67] For more details, see: TEUBNER, Gunther (1983): *Corporate Responsibility as a Problem of Company Constitution*, EUI Working Paper No. 51, Badia Fiesolana, San Domenico (FI);

processes of employers (as semi autonomous legal fields). For example, responsible public procurement laws motivate compliance-oriented self-regulation and internal responsible supply chain management. On the other hand, public authorities will also be motivated to set up self-regulatory organizational strategy for 'buying social'. Similarly, disclosure / reporting measures may induce internal reflection of enterprises about their own employment practices and social policies. Chain-responsibility measures motivate employers to be more diligent and cautious when choosing subcontractors. In this sense, these legal strategies are also *responsive* to the needs of economic actors. They offer more room for consistency with corporate business activity than conventional labour laws. In other words: they reconsider the constraints to business of traditional labour laws. In order to be able to rightly implement the essence of labour regulation, corporations need to internalize the values of labour law to certain extent. In this sense, such publicly induced self-regulatory initiatives can be seen as the product of a successful process of internalization or as a formal strategy for enhancing compliance. To put it differently: such regulatory approaches can be considered to be one tool for reflexively and responsively implementing the values and ends of labour law. In these regulatory ideas the conventionally reactive (sanctioning) nature of labour laws is replaced by a rather proactive attitude.

The new regulatory approaches described above are also innovative in a sense that they are *not out-dated style, rigid, paternalistic protective regulatory measures*, but they can be clearly linked to the 'competitivity' of the enterprise and 'flexibility' of management practices. In effect, they permit employers to experiment and comply proactively and creatively. However, it must be emphasized that these regulatory techniques can not substitute and undermine classical protective, mandatory labour laws. They can only be additional, alternative, adaptive, inspirational tools for enforcement. They have the potential to contribute to the desired enhanced and systematic organizational commitment to labour standards.

These new normative approaches − also in accordance with contemporary regulatory theories − prefer *procedural rules* over substantive rights.[68] To put it differently: they do not provide for new protective rights, they just focus on the innovative ways of stirring up compliance with existing standards. Furthermore, instead of guaranteeing new rights, they tend to facilitate internal corporate reflection and self-regulation. Procedural-like rules aim at regulating the actors' way of interaction (for example, in the framework of public procurement procedures concerning procurement laws, or in terms of public scrutiny and transparency regarding disclosure measures) rather than the substantive outcomes (obligations) themselves. As a consequence, such regulatory approaches are also often labelled as 'light-touch' regulation.[69]

ROGOWSKI, Ralf / WILTHAGEN, Ton eds. (1994): *Reflexive Labour Law*, Kluwer Law and Taxation Publishers.

[68] *Cf.* LANGILLE, Brian p. 117; GOLDIN, Adrián: Global Conceptualizations and Local Constructions, In: *The Idea of Labour Law*, DAVIDOV, Guy & LANGILLE, Brian (eds.), Oxford University Press 2011, p. 74.

[69] HOWE, John: *The Regulatory Impact of Using Public Procurement to Promote Better Labour in Corporate Supply Chains*, Legal Studies Research Papers No. 528, Melbourne Law School, 2010, p. 4.

As such, these regulatory methods also reflect the *transformation of the roles of states* "…from direct regulator of corporate activity to a phase of 'regulatory capitalism', where the state plays more of a role in enabling or facilitating economic activity and self-regulation.'[70] In this context, one of the main critiques to be raised against such regulatory innovations is that the state intends to shift certain parts of law-enforcement to private actors.

Labour-oriented procurement laws, reporting standards, supply-chain regulation represent a sound *combination of hard and soft law approaches*. They tend to mix state regulation (e.g.: public procurement procedures, reporting obligation) and private self-regulation (e.g.: compliance programmes for public procurements, reporting standards, codes of conduct regulating for responsible supply chain management etc.). In this regard, the idea of co-regulation and meta-regulation might also be called upon.[71] These mechanisms step into the enforcement gap left open by traditional, hard labour laws.

It is also observable that all of these new regulatory approaches are self-evidently cross-cutting issues and are *inter-linked* with each other (and these links are not just because of their mutual origin under the umbrella of CSR). For example, responsible procurement practices are often extended and combined with supply chain governance mechanisms. On the other hand, either mandatorily or voluntarily publicly reported corporate information (including social reports) can be the basic orientation for supplier- or subcontractor-selection.

Conclusions

The widely recognised crisis of labour law can also be turned into an opportunity for transformation and renewal. Innovative, additional regulatory methods borrowed from soft law and from other branches of law (such as procurement law, disclosure law, company law etc.) might help to fill the enforcement gaps of labour law in the long run. The above described regulatory methods are clear examples of the fact that the legal sources of labour law and the legal strategies aimed at the advancement of labour law-compliance are increasingly multifaceted, dispersed and decentred and can also be found beyond the conventional 'brackets' of labour law. Labour lawyers should be interested in the function and influence of other branches of law concerning working conditions. The most important conclusion of this paper is that such alternative enforcement methods of the values of labour law should also be considered as part of the thinking about the renewal and reconstruction of labour law. It must also be emphasized that the broader understanding of labour law not necessarily gives up the basic social, protective ideas of labour law. On the contrary, new means and new techniques should be applied to give effect to old values in a new social and economic context. To preserve and to put into effect labour law's guiding values, labour law must reach beyond its conventional domain.

[70] *Ibid.* p. 3.
[71] *Ibid*. p. 5.