



**REFLEXIVE LAW BEHIND THE GLOBALIZATION:  
A new perspective**

Francesca Scamardella

**Overture:**

*“O wonder!  
How many goodly creatures are there here!  
How beautious mankind is!  
O brave new world,  
That has such people in’t!”*

William Shakespeare, *The Tempest*,  
Act V, Scene I<sup>1</sup>

*“Community, Identity, Stability.  
(...) Everyone belongs to everyone else.  
(...) He’s being sent to a place where he’ll meet the most interesting set of men and  
women. (...) All the people who, for one reason or another, have got too self-  
consciously individual to fit into community life. All the people (...) who’ve got  
independent ideas of their own.  
Everyone, in a word, who’s anyone.”*

Aldous Huxley, *Brave New World* (2000)

*“The question, then, is what people do with their time; where they get their living and  
their self-image from. (...) A time is now coming in which we shall again move into  
different ways of living. It is a completely crazy world (...).*

Ulrick Beck, *The Brave New world of the Work* (2001)

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<sup>1</sup> Shakespeare, W., *The Tempest*, version consulted in Internet on the website:  
<http://www.thecapras.org/mcapra/miranda/tempest.html>

## I. INTRODUCTION: A SOCIO-ECONOMIC PERSPECTIVE OF GLOBALIZATION

As everybody knows, the word “globalization” has not one specific meaning. However, the sociology of globalization seems to oscillate between a Marxist view – “*dominance of the economic*” – and a Weberian perspective – “*pluralism involving economic, cultural and socio-political features*” (Beck 2001: 30).

The two definitions share the aspect of the existence of a *transnational social space*. With this expression scholars mean the possibility that persons and actions can interact at the same time staying in different spaces, transnationally integrated. “Transnational” means that everything (every individual, every government, every culture, every group) can live in a defined space but its action can cross the physical and geographical boundaries. Wallerstein (2001: 32-33) defines this image the “*world-system*”, meaning an economic framework where, because of the new role of the *space* and *time*, capitalism is increasing and the “profit maximization” is its own most relevant feature.

As Bauman<sup>2</sup> has argued, the first aim of the new World Market is to eliminate every obstacle to the freedom of the exchanges and the movement of capital. Acting in this direction transnational corporations (TNCs) look for labour force in poor countries where taxes are low and where the policy of the local governments does not create any kind of difficulty to the growth of the market. They work in poor countries but they like to “*live where it is nicest*” (Bauman 2001: 97). We could say that financial operations of capital are realized by companies through the new technologies in a transnational and virtual space, while the direct production of goods is realized in the local space. This process is indicated by Beck with the assumption “*Capital is global, work is local*” (Beck 2001: 27). This economic effect is increasing the difference between global *rich* and local *poor*. This elite lives with the “*Colombus’ syndrome*” (Beck 2001: 106), that consists in the desire to explore and conquer new spaces, in order to obtain more profit. They have discovered the possibility for accumulating capital with a minimum of efforts. One element links these elite with poor workers: time. But the perception is different. These global elites have the perception of the lack of time, while poor workers have an abundance of time.

Because of this situation, the employee is a subordinated party not only for his/her own position in the productive process but also for his/her own loss of power in the contracting process. Insecurity and flexibility are diffusing from the region of the so-called “third world” to the areas of the so-called “first world”. This effect is called by Beck as the “*Brazilianization of the West*” (Beck 2001: 95-97), because the features of a semi-industrialised society such as Brazil, are becoming the scenario of the Western society too. Low salary, part-time work, obscurity and insecurity in the work contraction are Brazilian characteristic of the work world “adopted” by the Western society too.

On another side, the socio-political features of globalization are well evidenced by Rosenau and Held, who analyze the end of the hegemony of the States (as understood after the Peace of Westfalia, 1648) and how the sharing of the international dimension has reduced their roles, increasing the power of the international organizations<sup>3</sup>. The growing influence of these new *supranational* players has caused a socio-political

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<sup>2</sup> I mean this expression in a broad sense, including also NGOs, such as Greenpeace

transformation. Under the new motto “*think globally, act locally!*” the decision-making processes have been transferred from national to transnational level. Beck defines the “global society” as the “*mosaic of national societies in which the various 'stones' (...) constitute geopolitical spaces that 'add up' to a sum total of nations*” (Beck 2001: 25).

The other social aspect well underlined by Rosenau and Held concerns the power of the technology and of the information. The technology has contributed to reduce the distances and to change the notion of time and space. Technological discoveries have changed the production, making productive processes faster more and more. “*Productivity and competitiveness in informational production are based on the generation of knowledge and information processing*”, has written Castells, analyzing public data concerning scientific research in some States (Castells 2000: 124). As Castells has pointed out, the new economy is “*global, informational and networked*” (Castells 2000: 77). For Castells is important to underline how globalization era is not characterized by an economy that shifts through the world, but it can be understood only in terms of contextual relations realized in the same temporal unit, even if parties are in different geographical area and, probably, they do not know each others. In this sense technology and informationalism are fundamental component of the New World and for the global market too, because they not only allow the realization of financial operations in the real time thanks to a *collapse of space and time*, but they are also able to provide for sharing and exchanging of information and knowledge.

But, if we agree with the idea that the market is never free, as Karl Klare has argued, we should try to understand how law that rules the market and its components is changing. So, in this paper I will try to re-examine labour law after the revolution brought by globalization, attempting to understand why labour law is failing in giving protection to the workers' social rights. According to Klare, labour law needs to “*be immersed in transnational dialogue; escape the continuing grasp of the purported distinction between 'public' and 'private law'; reinterpret class in light of other social identities; conceive institutions and work relationship that combine flexibility with security; and assist in devising egalitarian development strategies*” (Conaghan, Fisci and Klare 2002: 28-29). I believe that labour law needs to be the final product of a dialogue among different social, political and economic actors, overpassing the boundaries of the national sovereignty and the competence of the single institutions.

Aim of this paper is to show how in the globalization context, both *positive* and *soft* law is unable to give concrete answers to the problems of labour world changed by the effects of globalization itself.

After this short introduction, concerning the main economic and sociological features of globalization, in the next paragraph I will explore legal changes caused by globalization, focusing on the labour standards changes. What I am going to examine in my theoretical approach will have a concrete feedback in the next sections (third and fourth paragraphs) where I will examine the concrete case of Pakistan about the Nike's scandal of children work. Finally I will attempt my theoretical approach of reflexive law, whose *ratio* comes from the incapacity of both *hard* and *soft* law in giving adequate answers to the opposite interests of the social parties.

## II. CHANGING LABOUR STANDARDS: “SOFT LAW” VERSUS “HARD LAW”

Moving towards the judicial transformations caused by globalization in order to understand how socio-economic changes are influencing labour relationships and Labour Law in general, I think that the first aspect is the rise of new flexible, fragmented and de-standardized legal categories. Law, says Teubner, is becoming “*peripheral, spontaneous, social*” (Teubner 2005), it does not consist in acts coming by a Parliament, but consists in agreements, arbitrators’ decisions, contracts. Could we call this new law *customary law*? For Teubner the answer is absolutely negative. Traditional customary law is based on an *opinio juris* consolidated in time, while this new law is a young and spontaneous law, always ready to every change.

The problem for Teubner regards the relation between the two well known categories of law: ‘validity’ and ‘normativity’. There is no any hierarchy; there is any constitutional system that is able to establish formal and substantial criteria of validity of these new norms. For Teubner the continuous request of validity, coming from the norms themselves, make the same rules judicial rules. By one side states and their bureaucracy are unable to follow speed economic changes and this incapacity is translated in terms of *de-jurisdiction*. By one other side economic power shifts towards a complete autonomy and for a no ingestion of states’ policy in economic plans oriented towards the maximization of profits.

Where does legitimacy of contemporary law come from? When Amnesty International claims an international legislative intervention toward human rights (not made *positive* through agreements or sentences) it is not the violation of these rights to legitimate a legislative intervention but it is the invocation coming from a not authorized actor. In other words, the need of law leads to the production of a new law (new, because processes of production are no-conformist processes) and this need legitimates law itself. It is the need of the invoked law to make the “neo-spontaneous” law legitimate! And this is not a vicious circuit!

This new spontaneous form of law is called *soft law*. Its main cognitive source is *lex mercatoria* consisting in a set of corporate acts, code of conducts, agreements among States and corporations, firms and other forms of regulative collaboration among private actors. Indeed *lex mercatoria* and *soft law* are not unknown legal sources. As it happened in the medieval era, when the merchants built a new law, made by uses and soft-agreement, for avoiding the application of the hard Roman law, also in the global economy multinational companies have re-adopted this kind of law, called, because of its origins, *lex mercatoria*. Another very famous experience of *lex mercatoria* has represented the beginning of the liberal theories with Adam Smith. It is well known the episode of the contrast between French merchants and King Louis XIV (the *Sun King*). When King Louis XIV asked merchants what they wanted by state, they answered “*laissez faire, laissez passé*”, meaning the need of freedom for economy from policy. In other words, *soft law* represents a form of legal experience that comes *in auge* when states’ control of economy is too strong and when policy is unable to give adequate answers to the economic needs.

Usages, contracts and arbitrators’ decisions replace positive law that comes from Parliaments. New models of contract (factoring, leasing, franchising, marketing...) do not present a political character. Contract is “*instrumental, because it is an agreement*

*among persons who have different aims*” (Ferrarese 2006: 85-86). In this sense it is not important what the part thinks or what is his/her political or religious belief; what is important is the function of the contract and the possibility for the contractors to achieve different objectives, sharing the same instrument.

Nowadays, in a context characterized of the presence of the *global village* where everybody can exchange, share information and knowledge, conclude financial operations, uniform his/her behaviour to the advertising messages overpassing national and geographical boundaries, *soft law* represents the possibility to be more flexible, escaping from legal barriers. *Soft law* allows concluding financial operations in real-time even if the parties stay in different geographical places and, probably, they do not know each other. This new kind of law is directed toward the needs of the economy and multinational companies. Probably, the most important feature of this law is its capacity to be transnational. Going toward different spaces, and overpassing geographical boundaries is a challenge for the national States, because their sovereignty is limited by the geographical borders.

Where *soft law* seems to do not offer adequate answers is social rights area. “*Today we live in a global economy, but not in a global society*” (Blanpain 2004: 4). It means that the economy is changing but there is always a social fragmentation and if *soft law* is able to follow economic transformations, it fails in offering solutions for the socio-political problems.

“*The impact of multinational enterprises is growing. Important decisions concerning investment, jobs, employment (...) are taken by a few often in far away headquarters, aiming at maximizing their interests world wide*” (Blanpain 2004: 119). The Transnational Corporations (TNC) decide whether to invest and where invest. They move the international market with their wealth and, of course, the economic power increases the political power too. This is the new scenario: if a great label, such as Nike or Reebok or Microsoft decide to invest in Pakistan or in India or in Colombia and these companies also decide labour and social standards using local governments’ weakness and applying legal forms of *soft law*, we can understand that they not only are influencing market, introducing a new product (a new sportive accessory or a new personal computer) but they are also influencing the destiny of a country, in terms of education, wealth, social rights and national strategies.

Considering this feature, the first consequence for the global work<sup>3</sup> is that labour standards are not regulated by national labour law. In fact, if globalization is acting on the work, changing the relationships and the forms of contraction through the TNCs’ power and because of their political influence, finally Labour Law itself is changing and it is becoming a whole of flexible and transnational set of rules. The participation of international and *supra*-national organizations to the decision-making process makes the process itself more opaque and it also reduces the popular participation and the force of the States (Ferrarese 2000). These institutions, in fact, using their economic power, influence political public decisions also reducing the force of the egalitarian and redistributive policies and making these policies weak more and more.

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<sup>3</sup> I use this expression to indicate works not limited by the national borders, but works involving different countries thanks the technology.

Which are the consequences?

Firstly, labour contract is able anymore to realize the perfect equilibrium between *coercion* and *freedom* (Conaghan et al. 2002). This point of balance between employer's power and employee's rights was realized through the forms of collective bargaining too and with the other forms of democratic participation. I can argue that 'the' labour contract should be the mirror of labour relations, involving every social party.

Nowadays contract has lost its dual structure. Now it has assumed a *triangular* structure because inside the relation between employer and employee new agencies have been inserted. Specific agencies have been created whose aim is to employ workers that will be "*used*" by a company for temporary works. The first labour relation is regulated by labour law; the second one is regulated by commercial labour. Of course, this "*dualism of employer*" and the adoption of commercial and labour law to the labour relations "*increase the complexity of the labour relation*"<sup>4</sup> and weaken employee's position because he is subjected to many employers.

Secondly, new forms of contract have been formulated and they are replacing standard models. The part-time model that is replacing the old formula of the full-time, weakness of the national markets and concurrence at a global level, technologies and telecommunications are changing the forms of contracts (Conaghan et al. 2002). For example, recent studies (Rosenzweig 2006: 134) have showed the growing of the model of the *outsourcing*, which represents the evidence of the economic differences and disparities among rich and poor countries. The term *outsourcing* means that the execution of a productive process of goods happens in poor countries. Multinational companies prefer to realize the productive phases of the whole process of production in poor countries where wages are low and local governments's power is weak. Which are the consequences? In those countries where goods were produced before of the adoption of the strategy of the outsourcing the number of workers without employment will increase, while in poor countries where the executive process is shifted there will be a number of employees paid with low wages and exploited for an illegal number of hours *per-day*.

The application of this global, flexible legislation in a transnational context has become a no-eliminable element for the success of the TNCs' strategies of production. The application of a labour legislation in a transnational context became the "*condition sine qua non* for economic globalization to be successful" (Blanpain 2004: 5). As I have argued, even though soft law takes in account only economic needs and requests coming from market, its decisions have direct social effects on the workers and on the society, in general. As Rodríguez-Garavito writes, hard law represents the model of the Fordist economy of the capitalism, while soft law, with its flexibility, represents a way to overpass the Fordist scheme (De Sousa Santos and Rodríguez-Garavito 2005: 77). Under the Fordist model production, mass consumption, wages, and social security were standardized. In the globalization era these elements have been invested by the risk. "*Whereas the Fordist regime brought about the standardization of work, the risk regime involves an individualization of work*" (Beck 2001: 70), writes Beck, trying to

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<sup>4</sup> See: Temporary Agency work in an enlarged European Union, European Foundation, 2006, page 1.

describe the risk regime. Under the Fordist regime people's lives were organized around the rhythms of the factory, characterized from the geographical localization. Under the risk regime, workers are expected to live flexible, being mobile. The despatialization, as a component of the global society, influences directly workers' lives. As Patricia Alleyne-Dettmers has resumed, 'Africa' is not a geographical place, but a "*transnational idea and the staging of that idea*" (Alleyne-Dettmers et al. 2001: 27). Soft law gives legitimacy to this new system, regulating the "*destandardized, fragmented, plural 'underemployment system' characterized by highly flexible, time-intensive and spatially decentralized forms of deregulated paid labour*" (Beck 2001: 77).

The application of the soft law represents the conflict between TNCs and 'Transnational advocacy networks' (TANs), because economic corporations tend to propose soft law and self-regulation in order to obtain profitability from their businesses and opposed to the inclusion of the hard law in the regional or transnational agreements. They prefer soft law because its flexibility involves also workers' conditions and labour standards. TNCs tend to criticize national labour law because of the strong bureaucracy, but we can understand that they perceive national law as an obstacle to their businesses.

This tendency is not accepted by TANs that are not contrary to the soft law, but they fight to obtain the respect of the codes of conduct by TNC and for the application of the International law. Their request appears justified from the illegal conditions in which workers are constrained to work (consider the Nike's case in Pakistan). Where is the *Brave New World* invoked by Miranda?

What could we do? How could resolve the contrast between opposite social parties that is increasing the legal debate too, in terms of oppositions between divergent legal categories?

What probably we need is an attempt of balance between the opposite interests. Some scholars (Lyon-Caen 1994; Conaghan et al. 2002) talk about of "third way" of the labour law in the global context. As I have already explained, legislative crisis that we are living depends by the incapacity of law to interpret and to re-interpret the transformations of the market. Respect to this sufferance lived by *hard law* new global players are reacting with the production of new forms of law, capable of a complete adaptation to the new needs. As Ferrarese has argued, "*our perspective is changing. We are leaving a hierarchical static vision of law. The famous pyramid is becoming a circumference because different forms of law are communicating each other. Superior sources of law are communicating with not-recognized rules for a general transmigration of laws. Pyramid has become a circumference*" (Ferrarese 2006: 86). In this scenario the only possible solution, indicated by the Italian scholar, is represented by the capacity of the private and public actors, of authorized and not-authorized players to understand these changes for mediating old legislative standards with new flexible forms of law<sup>5</sup>. What is important, in my opinion, is not the final legislative product, but the way in which the legislative process happens and how is implemented. That is to say that the procedural element should prevail on the substantive one. This is

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<sup>56</sup> *new contractual and arbitral instruments can be used only with the mediation of the warranties given by the hard law; guaranties capable to protect rights of every party involved in the singular relation*. By the same author, see also: (Ferrarese 2000)

the approach offered by reflexive law that could represent this *third way* and whose nature and features I will explore in the last section of this paper. But before to move towards the theoretical proposal, adopting a inductive methodology, I will indicate how concrete results, in terms of international agreements, resolutions and, acts, can be interpreted as the application of the ‘third way’ of labour law.

In this sense, firstly I would underline some international labour decisions and acts whose aim is the balance between economic investments and fundamental rights. Probably the most important act is the ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (MNE). It was adopted in 1977 - and revisited in 2000 - and its aim was the promotion of partnership and cooperation among multinational enterprises and governments in order to maximize the positive effect that the economic investments could realize for the socio-economic progress of the poor countries. The MNE Declaration has been used to draft some codes of conduct. For example in Nike’s code we can read that every Nike’s contractor and partner must adopt “*management practice that respect the rights of all employees, (...) promoting the health and well-being of all employees*”<sup>6</sup>. Another important agreement is the *North American Agreement on Labour Cooperation* (NAALC). This agreement tries to improve social dimension of the work, growing the working conditions and living standards. The agreement creates also a mechanism of cooperation among all parties introducing the system of the intergovernmental consultation to solve social conflicts and to enforce the labour law.

And finally, I will mention the Global Compact<sup>7</sup>, whose operative phase was launched on 26 July 2000 and was addressed to the companies, agencies and organizations to improve and defend workers’ rights.

The description of this new policy should show us that hard law - i.e. national law -, is not able to defend the workers’ rights because is not adaptable to the global space and because of its bureaucracy - i.e. strict legislative and administrative rules -, but also that multinational enterprises tend to apply soft law only to obtain economic advantages. Companies that have partners or contractors in a state should respect the national labour law of these countries<sup>8</sup>, but states are not always able to guarantee the correct application of their law. Considering this problem, the presence of the International Organizations, such as ILO or WRC<sup>9</sup> and TAN guarantee a correct agreement between soft law and hard law. Multinational companies should apply the Organizations’ principles in their private agreements and in their codes of conducts. TAN should supervise the correct application of these standards and principles. All that we need is a mobilization of the legal instruments, an interaction of different legal sources, which comes from the TAN’s activities, the codes of conduct, the private agreements and the

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<sup>6</sup> See: [www.nike.com](http://www.nike.com)

<sup>7</sup> The challenge came from Kofi Annan, ONU’s General Secretary, who in 1999 participating at The World Economic Forum launched this international initiative.

<sup>8</sup> Liz Claiborne, sourcing manager for Guatemala and Central America, expresses the importance of the compliance of the national labour law in these words: “*Each country we go to, we have to respect the country’s law. I mean, [for instance] we have to let our people know, all our contractors, that they must pay the minimum salary that’s recognized by the government of each country*”. (Blanpain R., Colucci, M. 2004:81).

<sup>9</sup> WRC (*Worker rights Consortium*) is an international independent organization whose main aim is to monitor rights’ workers stitching sportive dresses and accessories for the American university. It was founded in 2001 and it includes students, labour rights experts and universities administrators.



national law. The new labour law is the concrete effect of the dynamic dialogue among these forces. It is the consequence of a flexible economic activity, but is also the consequence of the pressure exercised against the TNCs. Finally it should be the mediation between *soft law* and *hard law*.

In the next two sections of this paper I will try to develop this discourse analyzing a concrete case: the Nike's scandal in Pakistan concerning the production of the soccer ball. Nike has been one of the main multinational whose economic empire has been built recurring to *soft law* forms that have allowed it to realize the executive processes of production to the poor countries using new forms of contracts, such as the so-called *outsourcing*. Agreements with local producers have allowed the growth of the whole production and the maximization of profits. But, at the same time, neither labour standards, nor workers' social rights have been respected. Children worked in bad conditions and without giving them any education. Women have been overworked without paying attention to their health and their needs.

Was this a *Brave New World*? When the scandal was revealed thanks to reporters, Nike had to cooperate with international organizations and the Pakistani governments. Thanks to a mediation of opposite interests, workers' social protection has been established and international agreements, codes of conduct, legal reforms and resolutions have been implemented.

### III. A PARADIGMATIC CASE: CHILD LABOUR IN PAKISTAN

In 1991 Nike drafted a code of conduct that was distributed to the contract factories in 1992. Nike defined this code of conduct as "*a first step in a conscious strategy to improve working conditions in factories*"<sup>10</sup>. This act contains a special paragraph for the "*Child Labour*", where there is the legal duty for the contractors of not employing any person below the age of 18 to produce footwear and any person below the age of 16 to produce apparel, accessories or equipment<sup>11</sup>. In 1996 a photo was published in "Life" magazine. It portrayed a Pakistan child who was stitching a soccer ball with the label Nike. After this scandal "*an ILO study in the Sialkot district estimated more than 7,000 children between the ages of 5 and 14 stitched soccer balls. They worked in small shops or at home. Seventy per cent of the children work 8 to 9 hours a day, others 10 to a day, others 10 to 11 hours per day*"<sup>12</sup>. Although in Pakistan the child labour was illegal, the Government did not do anything to fight the illegal situation. Official statistics established that Pakistan Government spent for the Education only the 3% of the total gross domestic product, while for the military the percentage was over ten times of this amount.

Nike defended itself saying that it did not know the situation and that it was not responsible for the conditions of these young workers: indeed, Nike is not the employees of these kids but only a contracting party with local partners. Nike said that

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<sup>10</sup> See on the Nike's website ([www.nike.com](http://www.nike.com)) where it is possible to read Nike's Code of Conduct.

<sup>11</sup> Paragraph "Child Labor": "*The contractor does not employ any person below the age of 18 to produce footwear. The contractor does not employ any person below the age of 16 to produce apparel, accessories or equipment (...)*". [www.nike.com](http://www.nike.com)

<sup>12</sup> See on the website: [www.itcilo.it/english/actrav/telearn/global/ilo/guide/ilosoc.htm](http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/ilosoc.htm)

it produced only a model of life (like the label “*Just do it!*”), not a direct product. They said that the final good came from the policy of the “outsourcing”.

The local factories argued that they obtained the consensus of children’s parents, but an investigation showed clearly that the extreme conditions of poverty in the country forced families to relinquish their children for some dollars. It is a kind of “legal” and “known” slavery. A columnist Stephen Chapman from Libertarian newspaper argued: “*But why is it unconscionable for a poor country to allow child labour? Pakistan has a per-capita income of \$1,900 per year - meaning that the typical person subsists on barely \$5 per day. Is it a revelation - or a crime - that some parents willingly send their children off to work in a factory to survive? Is it cruel for Nike to give them the chance?*” (Azam 1999). But is it true that Nike did not know the conditions of its factories? And why it did not check them? Even if the Nike defended itself behind the phenomenon of the outsourcing and the new forms of the sub-contract, somebody argued that not only Nike knew very well the conditions in which its workers worked, but also that it chose these poor countries in order to allow their business to escape from the strict law of the western countries. In other words Nike used the acquiescence of the Governments of the poor countries and their silent acceptance of the illegal practices to grow its wealth. A Pakistan child earns 60 cents every day, producing two FIFA balls with Nike’s label. These two balls will be sell in a western country at a price ranging from 30 to 50 dollars!

Was Nike for Pakistani people the *nouveau Prospero*? Did Nike warranty *stability* to the Pakistani community, giving work and paying poor workers? Or the Pakistani case represents the attempt of the western capitalistic elite to colonize poor countries for satisfying their desire of “more profit”? Indeed did Pakistan become the *Brave New World* thanks to Nike? Or Pakistan was transformed in the *Brave New World (of work)*, in Beck’s meaning?

#### IV. NEW SOCIAL ACTORS IN THE GLOBAL LABOUR MARKET

Nike’s scandal represents a good example of the struggle among the different socio-economic actors in the global field of the labour market. Others big companies, such as Microsoft and Reebok, have been involved in similar scandals because of their workers’ conditions in the factories of the poor countries. At last, we could say that on the global labour market the struggle concerned, and still concerns, the attempt to achieve an equilibrium between “government” and “governance”, that is a way to indicate the agreement among workers and multinational companies. What I want to stress is the way in which this new labour law has been built, through the participation of the social actors to the legal discourse. In order to keep this part more understandable, I am going to analyze the legislative solution of the problem child work in Pakistan, trying to underline the transformations of the labour law.

Attempting to solve the problem of the labour children the Sialkot<sup>13</sup> Chamber of Commerce and Industry (SCCI) signed an agreement with ILO and UNICEF in 1997. This agreement, known as Atlanta Agreement, was “*aimed at prevention, phased withdrawal and eventual elimination of child labour*”. A direct consequence of this

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<sup>13</sup> Sialkot is a Pakistani province.

agreement was a project, so-called “*Elimination of Child Labour in the Soccer Ball Industry in Sialkot*”, supported by FIFA, US Department of Labour and SCCI. This project worked for the reduction of children labour through monitoring systems and the study of alternative possibilities for the children. In the Declaration on Fundamental Principles and Rights at Work (1998), the ILO has also fixed standards for the children’s security, establishing the minimum age for admission to work in order to respect the physical and psychic state of development of young people. The Government of Pakistan ratified the ILO Convention 182 on “*Worst Forms of Child Labour*” in 2001.

In US in 1998 was constituted an organization against Nike, United Students Against Sweatshops (USAS). This organization exercised pressure on the American University in order to convince them to not buy Nike’s sport clothes for the University teams. Anti-sweatshop movements’ struggle led seventy-five universities to adopt internal ethic codes of conduct and realized a monitoring organism, WRC (Worker Rights Consortium), to verify the application of these codes of conduct.

In 1999, Nike was one of the founders of the Fair Labor Association (FLA), whose aim is “*to combine the efforts of industry, civil society organizations, and colleges and universities to protect workers’ rights and improve working conditions worldwide by promoting adherence to international labor standards*”<sup>14</sup>. In 2001, in Mexico, the Kukdong case was globalized. Kukdong was a Nike’s factory. Workers created a labour union that received support by American Universities, ILO, NGOs and other territorial agencies. The intervention of these actors and their pressure against Nike gave union contracting power in accordance with the international labour standards.

Finally, in 2003 an ILO’s report<sup>15</sup> indicated that:

- *Over 10,000 children previously involved in illegal works have been given a second chance in life;*
- *255 non-formal education centres were established and 177 Village Education Committees were formed;*
- *10,572 children were educated.*

These data and the process supported in Pakistan can be interpreted in the sense that imbalance in the contracting processes between employers and employees has affected unions and bargaining organizations too that have lost their power in the making-decision processes. Low wages, no-full employment, changes in labour standards and new forms of contracts have involved in the labour discourse new global actors for protecting workers’ rights. Where local unions and organizations have failed because of the TNCs’s growing powers, new private institutions and international organizations, such as the UN agency, have led a struggle for protecting workers’ rights. The adopted strategies are different but the final aim is common: to balance employers and employees in the labour relations.

Trying to overpass these differences concerning activities and strategies, public and private actors are acting through common programmes that represent a *g-local*

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<sup>14</sup> From the FLA’s official website: <http://www.fairlabor.org/>

<sup>15</sup> Data published on the ILO’s website:

[http://www.ilo.org/public/english/standards/ipecc/publ/download/2004\\_soccerball\\_en](http://www.ilo.org/public/english/standards/ipecc/publ/download/2004_soccerball_en).

interaction among institutions. The ILO is continuing to act at an international level, trying to convince multinational companies to ratify conventions and to follow their own codes of conduct. At the same time, the ILO's agencies operate at the local level overseeing the efficiency of these programmes in the specific factories. At the local level, where the ILO's power seems to be reduced by the TNCs's force, struggles fought by private actors, such as TAN and students unions, pay more consistence to the institutional activity, giving a global resonance of the local events.

Surely Nike has not been a *Prospero* for Pakistan, but the way in which the case has been managed shows us that there is a way to build a *Brave New World* of work. It is what I am going to explore in the following part that will conclude this paper.

## V. REFLEXIVE LAW BEHIND GLOBALIZATION

Before of illustrating the way in which *reflexive law* model could represent the *third way* for the labour law in the globalized context, described in the previous paragraphs, I wish to illustrate the original concept of the *reflexive law*<sup>16</sup>. I should add that my application of the *reflexive* model seems to be supported by some scholars. In particular, in 2001 William Scheuerman published in *The Journal of Political Philosophy* (Scheuerman 2001: 81-102) an article entitled *Reflexive Law and the Challenges of Globalization* where he described the lacunae of the new forms of regulation (soft law and *lex mercatoria*) addressed to the demands of globalization. His proposal is to re-consider the *reflexive law*, as conceived by Teubner in the mid-1980s. In particular, Scheuerman considers as the recent literature is trying to recover the merits of the reflexive law<sup>17</sup>, underlying “*its potential relevance to the regulatory dilemmas of arenas as diverse as labor, consumer protection (...)*” (Scheurman 2001: 82)<sup>18</sup>. As Scheuerman<sup>19</sup> has written (Scheuerman 2004: 210), the trend of the *reflexive law* started with Teubner, but the concept has been integrated with the contribution of Habermas<sup>20</sup>, Luhmann<sup>21</sup>, and, Nonet and Selznick<sup>22</sup>.

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<sup>16</sup> The meanings of the word “reflexive” have been illustrated in the occasion of the Transnational Law Conference 2001, at the Centre of Transnational Law (CENTRAL) at the University of Münster on 26 October 2001 and published on the “German Law Journal No. 17 (01 November 2001) - Legal Culture” and that can be consulted on the website: [www.germanlawjournal.com](http://www.germanlawjournal.com)

<sup>17</sup> The application of the reflexive law to the labour law is well examined by Cohen (in Cohen, J., “Dilemmas of harassment law”, *Constellations*, 6 (1999) who says that reflexive law attempts to reform labour law “*so as to achieve salutary egalitarian purposes by institutionalizing appropriate incentives, norms, and guidelines while incorporative flexibility and respect for social autonomy and initiatives*”.

<sup>18</sup> About the recent literature considered by Scheurman, I want to underline that critical theorist have tried to integrate Teubner version of the reflexive law with Habermas' procedural theory.

<sup>19</sup> “*For two decades*”, writes Scheuerman, “*legal scholars have been discussing the merits of the reflexive paradigm of law, as first outlined in a series of innovative essays by the German legal scholar Gunther Teubner in the mid-1980s.*”

<sup>20</sup> As concerning Habermas, what I think is relevant for the discourse of “reflexive law” is the concept of “proceduralism” and “the ethic of discourse”. See: Habermas, J., *Etica del discorso*, Laterza, Roma-Bari, 2003; Habermas, J., *Fatti e norme*, Guerini e Associati, Milano, 1997; Habermas, J., “Legitimation Problems in the Modern State”, in Habermas J., *Communication and the Evolution of Society*, Beacon, Boston, 1979.

<sup>21</sup> About Luhmann's theory, it is very interesting to explore concepts of “autopoiesis” and the relationships between “system and environment”. The reflexive law model could be meant as an attempt of survivor (or understanding) of the social external complexity. See: Luhmann, N., *The Autopoiesis of Social Systems*, in F. Geyer and J. van der Zouwen (eds), “Sociocybernetic

*Reflexive law* has been defined a “*regulated self-regulation*”<sup>23</sup>. This expression symbolizes the Kantian perception of the “*freedom and autonomy as self-legislation whereas regulated*”, where the word “*regulated*” indicates “*Hegel’s hope for solidarity and rational integration of society through the State*”. Teubner stresses the ambiguous adjective “*reflexive*”, using also the Habermas and Luhmann’s theories.

Firstly, Teubner thinks that “*reflexive*” indicates the capacity of the law to come back to itself. According to this perspective, the procedural element is more important than the substantive one, because the capacity of a norm to do a circular process coming back on itself can be realized only in the procedural mechanism that regulates the production of the norm. Secondly, Teubner says that “*reflexive*” means “*capable of reflection*”, that is the capacity to be reasonable in the making-law process. This second meaning of the adjective “*reflexive*” makes the rationality of the law as its specific feature.

Habermas and Luhmann with their interest in the functions of the social structures (Luhmann) and for the communication (Habermas), rather than individuals and their actions, point out the regulation based on the communicative process - *rectius*: dialogical action among different actors. Nonet and Selznick underline the rational nature of the reflexive law, coming by the decision-making process and the final results<sup>24</sup>. In the process of the making-law institutional parts and social structures, that are the direct addressees of the regulation, participate to the same dialogical process and the immediate benefits can be appreciated in the final results, because the final legislative product is mediation among divergent interests. Rationality of law, in other words, comes from its capacity to favour cooperation and dialogue in a legislative discourse.

We should admit that reflexive law, as a “*self-regulated regulation*” has had a lot of criticisms, above all when scholars have tried to apply it to the global making-law process. In fact, if it is difficult to implement process of democratization<sup>25</sup> at the national level, we can understand that it is quite unrealistic to promote the participation of every social, economic, and political actor at a global level. Maybe, because of this criticisms, Teubner distinguished his version of self-regulated regulation from a radical democratic model “*in which the maximization of popular participation and some ideal or “absolute” equalization of power are taken to be overriding goals*” (Teubner 1983: 278) (but on the point see Scheuerman too. Scheuerman 2004: 212). In other words, Teubner wants to avoid that his proposal of reflexive law could be transformed in an unrealistic model of democratic participation. This interpretation seems to be confirmed when Teubner attempts to apply the reflexive law to the model of labour law. A version of reflexive law applied to the labour law, in fact, can allow to “*equalize*

Paradoxes”, Sage, London, 1986; Luhmann, N., *Law as a Social System*, School of Law, U.S.A., Northwestern University Law Review, Vol. 83, Nos. 1 & 2 (1989).

<sup>22</sup> See Nonet, P., Selznick, P., *Law and Society in Transition: Toward Responsive Law*, Harper, New York, 1978.

<sup>23</sup> See Callies, G.P., *Lex mercatoria: A Reflexive Law Guide to An Autonomous Legal System*, “German Law Journal”, Vol. 2 No. 17 (2001), where Callies develops three meanings of the adjective “*reflexive*”.

<sup>24</sup> See: Teubner, G., *Substantive and Reflexive Element in Modern Law*, in “Law & Society Review”, Vol. 17, No. 2 (1983).

<sup>25</sup> Here for democratization I mean “*participation*” to the political and law making processes.

*the bargaining power of those parties affected by specific arenas of social activity*" (Scheuerman 2001: 85).

In this case, we could say that there is no an utopian process of democratization, but only a kind of sensibility in terms of rational participation and of mediation of different interests.

However it is only in a second moment, as I have argued before, that scholars have attempted to approach reflexive law to the challenges of the globalization.

The principal question has regarded the relations between reflexive law and the phenomenon of the globalization, meant in terms of *time-space compression* and in terms of contrasts between *soft* and *hard* law. We have discussed too much in the first part of this paper about the changes concerning 'time' and 'space', about the role of the technologies and about the new *soft* legal categories involving labour debate. Here it is fundamental to investigate around the possibility of applying the reflexive law to these transformations of globalization.

In other words, the question is: can reflexive law be the solution to the Frank's dilemma<sup>26</sup>?

Some scholars think that with its potentialities reflexive law can be a fair balance between divergent interests. "*Reflexive law seems well suited to the imperatives of "high-speed" forms of transnational economic activity because it reduces unrealistic demands placed on central lawmaking while maximizing possibilities for specialized regulatory activity in accordance with the complex, rapid fire dictates of distinct economic activities*" (Scheuerman 2001: 93). In his article, Scheuerman gives us concrete examples of this idea. Global bankers need speed transactions and real time to conclude their financial operations. But they need also the stability of the market: the "*casino capitalism*", described by Susan Strange (1980), can have a negative effect on the global financial system. Reflexive law, in this case, could help parties to achieve a shared legal framework available to make stable the whole system.

In other words, we could say that reflexive law in the world market means the participation of every social and economic actor (NGOs, TNCs, ILO, labour unions, local agencies) to the making-law process for establishing shared labour standards for the protection of the workers' rights and for the capitalistic benefits.

This direction has been considered by Vincenzo Ferrari too, who has written: "*Not so shared is the understanding of law of the post-welfare society, that it is assuming form in the crisis of the Welfare State. For some scholars it seems, at the same time, mean and end of a never ending process of interaction among social parties (...). For others it seems to be a instrument of the social action coming from a high level, of regulation not so authoritative, "reductive of the complexity" through the mechanism linked to the binary structure of the judicial logic (...). Finally there are some scholars trying to mediate among extreme positions through the "reflexive" character of the modern law. For these scholars law gives only the external frame - static in its last borders but flexible*

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<sup>26</sup> For a modern reposition of Frank's dilemma, see Santos who has argued: "*law will be easily trapped in the dilemma: either to remain static and be ignored, or to keep up with social dynamics and be devalued as a normative reference* (Santos 1993:115).

*inside - that gives models for “deciding about the decisions, regulating the regulations, establish structure premises for the future decisions in terms of organizations, procedures and, competences”* (Ferrari 1993: 212). It seems that *last borders* of reflexive law should warrant respect and protection of fundamental rights, above all those of the weak parties. Only in this way can reflexive law constitute an adequate answer to the problems of labour law in global context.

Is this a possible and realistic conclusion? The answer to this question needs some general considerations about the concept of “democratization”. Who should be represented in the shared arenas of “regulated self-regulation”? And, who should represent any global player? At last, I think that a realistic discourse around the benefits of the reflexive law can not avoid to solve problems linked to the democratization. Reflexive law can help workers and weak parties only if the democratic participation and representation will be enforced and implemented at a global level.

### VI. CONCLUSIONS: WHY “BRAVE NEW WORLD”?

On August 20, 2007 Pietro Ichino<sup>27</sup> wrote an article on an Italian newspaper in which, talking about the Italian legislation in labour law matter, he argued: “*equality among workers must be built in the civil society, compensating for the deficit suffered by the weakest workers with a supply of a surplus of efficient services of formation, information and, assistance to the mobilization*”<sup>28</sup>.

Substantially Italian debate around labour law reform turns around issues of ‘*security*’ and ‘*equality*’. But Professor Ichino argues that the problem is the same in every country, because “*globalization of markets exposes workers of the western countries, above all the weak (workers), to the concurrency with workers of the Asia or western Europe. The rhythm of the technological evolution and globalization seem to ‘punish’ the weakest part of our workers, increasing the gap with the others in the research of a work and, when they find it, in the received treatment and in the grade of (in)stability*” (Ichino 2007) .

Which is the way indicated by Professor Ichino? Mobilization and flexibility seem to be the ‘magic’ world words and they could help worker, above all at the beginning of its entrance in labour world, in terms of looking for a better position. But for achieving this aim it is necessary to make flexibility secure! Is this a paradox? How can ‘flexibility’ be ‘secure’? I think that the two values can be conciliated. One good example in this sense comes from the Italian experience in the 70’s, when workers’ unions claimed for the legalization of the precarious forms of work. *Concertation* among legislator, politics parties and workers’ unions shifted towards the birth of new forms of contracts: the formula of the formation, for example. Social praxes were institutionalized for ensuring more protection to workers. It means that the regulation of these flexible forms of work gives security to workers in terms of protection of their social rights.

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<sup>27</sup> Italian Professor of Labour Law, University of the Studies of Milan, Department of Labour.

<sup>28</sup> Ichino, P., *Come si combatte la precarietà*, article published on the Italian journal named “Corriere della Sera”, August 20, 2007. See on the website: [www.corriere.it](http://www.corriere.it)

But here we are not talking about formal and substantive legislation, but, instead, system of social and political coordination and dialogue among all social parties involved and, secondly, of a rational legislative intervention capable of adjusting to socio-economic changes and, at the same time, to avoid that these changes can overpass the insurmountable limit of human rights.

As I have pointed out in this article, “reflexive” means the capacity of law to come back to itself and, the capacity of reflection, inside law itself. According to these definitions, the dialogue established among every player is characterized by the procedural element that gives importance to the way in which the rule is produced rather than the final legislative act. And the way in which law for regulating the TNC’s production with workers’ rights is produced comes only from the participation of every global actor to the legislative process, with intrinsic differences, concerning the nature of the single actor itself, but staying in equalitarian positions.

At the beginning of this work my question has been: “*Would reflexive law bring back the meaning of 'Brave New World' expression from Huxley and Beck's negative view to its origin meaning in Shakespeare's play?*”.

Die is cast: if we are able to win, it will depend by the capacity of state to implement processes of democratization at the local level, as well as at the global one, through the reflexive legislative instrument.

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