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Changes in the workplace and the dialogue of labor scholars in the "global village"

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* Forthcoming in the Journal of Comparative Labor Law & Policy, 2007. From the introduction of B. Aaron and K.V. Stone BRIDGING THE PAST AND THE FUTURE: A SYMPOSIUM ON COMPARATIVE LABOR LAW: "In October, 2005, a group of labor law scholars from eight countries gathered at UCLA for a conference on Comparative Labor Law: Bridging the Past and the Future. The purpose of the meeting was to consider what comparative labor law has meant in the past and what it might mean in the future. The meeting was notable because it included several members of a similar group that initially gathered at UCLA in 1966 and embarked on a twelve year collaborative in-depth study of labor law from a comparative perspective. That group, the Comparative Labor Law Group, ultimately produced three books and, perhaps more significantly, facilitated an international dialogue about labor regulation that has persisted until today. The group that met at UCLA in 2005 included two members of the original group and several scholars who were colleagues and students of the original group members, making it a genuine cross-generational exchange about the past and present of comparative labor law. The discussions were divided into four sessions, reflecting both historical and topical themes in comparative labor law. Beginning with an evaluation and assessment of the earlier comparative labor law project, the scholars then considered issues that are informed by a comparative treatment today – issues of convergence and divergence of labor regulatory systems, of comparative responses to globalization, and of future directions for research. The papers that were presented are collected here in order to share the ideas exchanged and invite further reflection on the goals, purposes, possibilities and pitfalls of comparative work in the labor law field".

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This essay comprises three connected but conceptually separate parts. The first part, which is prevalently methodological in nature, contains as yet provisional reflections on the use of the tools of comparative analysis in labour law.

This is a crucial issue that has to be reconsidered within the context of an era in which the territorial dimension of the regulation of labour relations no longer necessarily coincides with that of the nation state, and others become equally pertinent: the infranational, the European supranational and the global transnational dimensions. This was the guiding principle of the seminar from which the present paper originated.

The second part focuses on the contents of the dialogue between labour law experts worldwide when faced with the radical changes in labour in the post-Fordist era.

This transnational dialogue is an event which may be the prelude to the circulation of concepts and regulatory proposals, if not actual models, tending towards global governance of certain dynamics which are currently transforming labour.

It is therefore assumed that the international labour law community cannot but accept responsibility for an open-minded interpretation of fundamental social rights, leading towards their global affirmation and effectiveness; an interpretation which, given its openness, must of necessity be of a comparative nature, not least by virtue of the many positive examples provided by high courts operating at a national, supranational and transnational level.

This part will introduce a critique of certain cultural mindsets regarding the relationship between comparative legal analysis, national legal systems and market globalisation, attitudes which are not exhibited explicitly but, as often happens in dialogue between labour law scholars, come in the form of political and ideological pre-comprehension ; attitudes frequently hovering in the background when specific issues are dealt with.

The third and last part, which is closely connected with the previous one, presents a possible new cultural approach to some salient issues, chosen merely by way of example and treated in a general fashion: a) the problem of the relationship between territorial levels of regulation; b) the relationship between the weight and consistency of different regulatory sources (hard vs. soft law) and the related issues of governance. Reference to these issues confirms the increasingly axiological and normative, as compared with cultural and cognitive, function of comparative legal analysis in the era of globalisation.

The analysis of these issues is mainly inspired by the constructive critical relativism of Michael Ost and François van de Kerchove. The approach is one of trying to imagine a possible way of avoiding certain dangerous epistemic traps that are widespread in current labour law analysis in Italy and elsewhere: the neo-liberal drift or a Third Way top-down approach, or again, the conservative, uncritical defence of tradition.

An attempt will, however, be made not to lose sight of those legal principles that are an integral part of the labour law DNA and the values enshrined in the fundamental and constitutional social rights handed down by European "labour law" (legal) tradition.

I

1. Labour law and comparative method: the state of the art.

The positive lawyer who uses the tools of comparison when reflecting on the changes that are occurring has always found it a useful exercise for critical assessment of his own rooted convictions: what comparativists mean by the shedding of cultural provincialism or access to Arcadia¹. It is not far from the truth to state that, at the beginning of the third millennium, this is particularly evocative of new meanings and significance.

Now more than ever it seems impossible in any assessment of the changes occurring in national legal systems to avoid reference to intersecting, diversified dimensions and territorial levels of legal regulation; these levels are widely recognised as overlapping and mutually interrelated². Cross-reference is inevitable, not least because of the objective and unprecedented growth, in the last fifteen years, of regulatory and normative pluralism and also in communication between different legal systems, through a regular flow of communication or legal grafting³. This is the effect of what has been defined as legal globalisation, less studied than but closely connected with economic

¹ G. Gorla 1964, p. 933; B. Markesinis 2003; P. Legrand 1995, 2003. See also many of the essays in P. Lagrand and R. Munday 2003. The reference to Arcadia is from G. Alpa's introduction to the Italian translation of Markesinis, *L'arcadia del comparatista un saggio di storia e di metodo*.

² W. Twining 1999 p. 225.

³ In the EU system the flow of communication has not only concerned "*nomina*", that is, concepts, but also normative data and the juridical practice of the operators: see § 3 below. See also M. Lupoi 2001, p. 60 ff.; M. R. Ferrarese 2006. p. 42 ff; R. Bakker 1993, p. 339 who speaks of "Europeanization from below".

globalisation; a phenomenon to which the historically structural and probably irreversible crisis of state-centred legal positivism is connected⁴.

In its most universalistic and least specialised version⁵, the science of comparative law has aroused an awareness in the broader community of positive lawyers of the fact that it is this approach – together with historical and interdisciplinary analysis⁶ – that allows for a non-ideological view of the transformations taking place in law and society, leading to a re-dimensioning of the presumed or real eccentricities of national legal systems; contributing towards the dissolving of nationalistic and constitutional pride; broadening the horizons of legal analysis and taking as its object of study the living law, its effectiveness and, more recently, the intense, flourishing variability of the sources of regulation, beyond the limits of positivism and legal formalism⁷.

Comparative analysis has thus been considered by the labour law theory inspired by this approach to be a privileged way to gain deeper knowledge of the bearing structures of national systems of labour law, welfare and industrial relations, according to the method of knowledge by differentiation. This does not mean obliterating the teaching of Kahn Freund about the dangers of misuse of the *legal transplant*⁸, above all in trade union law, which is more heavily influenced than legislation concerning employment relationships by political institutions and the action and cultural resistance of large organisations of national interest; nor does it mean, however, neglecting the influence of different constitutional models on systems of industrial relations and labour law⁹.

⁴ The literature on juridical globalisation has become too vast to be summed up in a concise manner.

⁵ References to the anti-dogmatic cultural function of comparison with the use of metaphors such as the ship of Argos, a rhizome, a journey, or serendipity, is recurrent in the classics of comparative law. To mention only the great Italian school it would sufficient to cite authors such as Gorla, Sacco, Denti, Cappelletti, Lupoi, Aniani, Alpa, Pizzorusso, Mattei, Monateri and others, whose works abound with criticism of the overspecialisation of comparative science and the limits of "systemology"; in particular see U. Mattei and A. Di Robilant 2001, 109.

⁶ M. Graziadei 1999.

⁷ It is no coincidence that the profound innovation of Italian labour law studies, which was incubated in the '50s and '60s and achieved in the '70s and '80s, owes much to comparative studies and the approach inspired by normative and institutional pluralism, especially that of Gino Giugni and Massimo D'Antona; still to be analysed is the mutual influence between the evolution of the study of European social law and Italian labour law theory, as well as the effect of the former on the changes in cultural orientation taking place in the latter. For a first attempt, see M. Barbera and B. Caruso, publication forthcoming.

⁸ In his famous essay of 1974. Alan Watson's theory of the legal transplant was made known in Italy by the writings and theorisation of 'legal formants' by R. Sacco 1991.

⁹ O. Kahn Freund 1976

The use of micro-comparison in labour law – as in other disciplines, above all private law¹⁰ but also the law of civil procedure – was for some time substantially confined to a cognitive function, of undoubted use as a premise for strategies aiming at reforming national legal systems¹¹ insofar as a view of “foreign models” – essentially the national models of Western Europe and North America – showed the way towards domestic reform by learning from the mistakes of others¹².

Today the traditional virtues of the comparative method are certainly exalted but in a way transformed: they have become something else, although they retain their original “flavour”. The relationship between comparison and labour law can, indeed, be said to be aligned with what comparative law has traditionally maintained in its elected sphere of action: the regulation of contractual and commercial relations without neglecting assertive contents and values. Indeed, the recovery of this relationship is an integral part of the ideological unveiling of a relationship between law and the market that is axiologically oriented towards submitting the former to the dictates of the latter¹³. Recovery of the prescriptive, value-based dimension of comparative law (the values of juridical universalism based on rights and human dignity)¹⁴ also militates on the side of the choice to revisit the use of comparison as a theoretical tool not only for critical knowledge but also practical change (the “subversive” function of comparison)¹⁵. The findings of the international legal community, and not only those of supranational Courts, can in fact contribute towards re-proposing a *ius commune* that is open, at a supranational level, to the language of fundamental social rights.

¹⁰ On the concept of micro-comparison, see W. Twining 1999, p. 233 ff.

¹¹ For the Italian situation, see T. Treu 1979; B. Veneziani 1981; S. Sciarra 2002a.

¹² D. Kennedy 2003; G. Monateri 1998, p. 456 “A comparison which today, in fact, still aimed solely at demonstrating the various possible formulations of the rule, and the conceptual plurality of national expressions of the rule, would be destined to mark time and would be nothing other than realisation of the oxymoron of “merely dogmatic comparison”.

¹³ A. Supiot 2000.

¹⁴ On the relationship between legal comparison, global governance and the protection of universalistic values, see D. Kennedy 1997.

¹⁵ The expression is taken from H. Muir-Watt 2000 who attributes to juridical comparison the task of fulfilling a function that is critical of what exists and the creation of new juridical techniques. Traditionally, in the functionalistic approach, the comparative method is ascribed a number of functions (R. Scarciglia 2006, p. 40 ff.). These include its use: a) for initiatives of legislative policy and the compiling of normative texts; b) in the preparation of material to be presented before a judge; c) as a vehicle of doctrinal comparison; d) as an aid to the drawing up of international treaties and conventions; e) for the harmonisation and unification of legal systems (very much in vogue in Europe today, especially in private and contract law); f) for the systematic interpretation of legal institutes, this function having been proposed by a great Italian jurist: T. Ascarelli 1952, 10

There are two contextual elements that require a renewal of the debate concerning the relationship between labour law and comparative analysis, elements which were present in embryonic form as early as the '60s and '70s but developed due to subsequent events.

The first is the already mentioned phenomenon of globalisation. The second is the accentuation of the process of European integration (following the Maastricht agreement) which strongly affects social as well as market relations.

2. Globalisation, comparative analysis and labour law

The phenomenon of globalisation – and the related paradox of the two-faced nature of a modernity that homogenises and differentiates at the same time – force labour law experts to relinquish the view of national, state-produced, labour law as the only horizon of regulatory transformations to be confronted.

Globalisation undermines rooted certainties, for example the particularly prudent relationship labour lawyers have maintained with the comparative approach.

Some changes linked to globalisation also apply to social regulation, in which labour law is directly involved.

To the competition between legal systems on a worldwide scale is attributed the role of unhinging regulatory uniformity; in the current era of globalisation, it is believed to accentuate differences to such an extent as to undermine the traditional universalistic aims of comparative law: the myth (or objective, depending on one's point of view) of the international unification of law while respecting local identities. This is at the basis of interpretations of labour law systems strongly oriented towards re-nationalisation¹⁶.

It is, however, undoubtedly true that this trend, in a typically post-modern paradox, leads to both differentiation and de-differentiation; at the very least it prevents a rigid juxtaposition between normative uniformity and competition between systems: to compete with each other, legal systems have to be differently competitive and thus accentuate the difference between them, but at the same time they have to be "comparable" and thus "harmonised", as harmonisation is the main support of competition; this inevitably leads to a universalisation of the benefits of legal tools that contributes towards unhinging the principle of the territoriality of law and a diminishing of the identity and specificity of national legal systems.

¹⁶ S. Simitis 1994.

At a transnational (global) level all this not only renders geographical boundaries more porous to the increasingly dynamic flow of capital, services and people, but also leads to an uncommon openness on the part of legal and institutional systems.

As has been stated, "in causing great transnational mobility of persons and above all knowledge, globalisation increases not only the so-called «circulation of models» (legal models – *author's note*), but also comparisons between rules, norms, sections of normative systems, case law, etc.", having the peculiar effect of grafting from one system to another¹⁷. This would appear to be behind the as yet sinuous, uncertain but visible emergence of a proper transnational law which is to be distinguished from both international law (both public and private) and supranational law referring to the specific dimension of the EU.

These analyses normally refer to private law and the so-called *lex mercatoria*, but they are starting to concern labour law as well. The various paths of research which connect juridical globalisation, labour law as a scientific discipline and the various breeding-grounds of transnational labour law sources assume a common premise: national labour law can at most be considered a local, and thus increasingly relative, if not insufficient, response to phenomena of global change that should rather be studied and investigated by a community that places at this level not only its cognitive strategy but also regulatory planning strategies pursued under the banner of classical social rights (especially of a collective nature such as the right to strike and freedom of association)¹⁸ and the reformulation of new rights more oriented towards the person and personal dignity: knowledge, training opportunities, the possibility to reconcile social, family and work commitments, the enhancement of capabilities, the right to a decent, adequate and satisfying job, etc.

On the cognitive level, the study of globalisation from a legal as well as an economic viewpoint yields results that concern above all culture, language and communication. In the international labour law community as well, globalisation has the oxymoronic effect of modernity: a new common language is forged. In many respects this language is uniform and simplified, but far from negating the differentiation and complexity of national dialects, it presupposes and almost agglutinates them.

It is a global juridical language referring to archetypes and infrastructures common to the various labour law systems that still take

¹⁷ M. R. Ferrarese 2002.

¹⁸ S. Sciarra 2002b

for granted the differentiation and complexity of national legal structures and systems, according to schemes of interpretation typical of classical comparative law but recently taken up again in significant studies by labour law experts and sociologists.

As has, however, been appropriately emphasised the greater communicability between the languages spoken by jurists on a global plane does not necessarily imply the construction of a juridical meta-language endowed with universality, nor the opportunity to use empirical generalisations regarding juridical phenomena. It is, on the other hand, necessary to adapt legal theory, especially that of labour law, to the new context of multilayer regulation which implies not only a territorial differentiation of sources but also interaction and the hybridisation of formants, cultures, models and legal fragments.

The meeting between the comparative method and labour law yields, as mentioned previously, diverging results, also of an axiological and prescriptive nature.

At a cultural level the application of a scheme typical of diffusionist comparative analysis: the exportation of a strong model like the economic analysis of law, prestigious because "successful" on the market of juridical culture and claimed to have hegemony over labour law as well. A model that is exported from the national context where it was incubated and developed (the prestigious American schools) and transferred to a global context.

An exportation of this kind postulates its universalisation. In this way, law and economics becomes *the*, rather than *an*, explanation of law: efficiency, the market, competitive balance, costs and benefits analysis are presented as a sort of universal equivalent of particular markets (the labour market), social subsystems (systems of industrial relations) and juridical subsystems (labour law), whose specific object (labour) is no longer considered to be sufficiently special (or sufficiently distinct from other goods) as to justify regulations inspired by parameters (or values) other than those of efficiency and competitive balance.

The global unification of markets inspires a trend towards harmonisation of the (de)-regulation of labour, above all when it intersects with the regulation of markets and competition: in the impact with the schemes regulating international competition, national labour law systems are as it were centrifuged and preserve only a fictitious identity (considered as merely the dross remaining of a past era, however glorious that past may have been). What is important is the functional equivalence of this regulation. After being treated with excessive concern for efficiency and functionality, the national identities of labour law systems do not disappear completely but they fade. At this point classical

comparison in its latest diffusionist, imitative and iterative version is exalted in labour law as well: it is sufficient not to stand in the way of the market and apply the canons of law and economics to the single institutions of national labour law to corroborate juridical globalisation and the uniformity of law, functional and in line with economic globalisation.

Techniques such as mutual recognition or a certain use of the OMC (and the related tools of peer review, benchmarking etc.) and application of them to the European Employment Strategy – in the specific EU dimension – are highly expressive of this trend.

But this outcome is not necessarily written in the Tables of the Law¹⁹. This type of meeting and cultural vision of the relationship between globalisation and comparative labour law clashes with another, axiologically antithetical view.

The labour law scholars community is following the directions of comparative law in re-launching the ancient universalistic hypothesis of a worldwide governance that appears to find its new foundation and legitimacy in economic globalisation.

So on the one hand globalisation re-proposes the problem of re-launching the traditionally hazy role of the great international organisations and international labour law.

On the other hand the increasingly evident mixture of public and private – with the regulatory role at a transnational level of private entities like multinational corporations – and the multilevel (local/global) dimension that globalisation brings lead to broad analyses of possible mixtures between *lex mercatoria* and *lex laboris*; of the relationship between soft regulation (unilateral codes of an ethical nature, social clauses inserted into commercial treaties) and hard regulation of standards of protection at an international level, which in turn paves the way to new processes of regulatory hybridisation²⁰; they induce reflections on the renewed and, from the '90s onwards, more significant process of the internationalisation of trade unions, collective bargaining and the instruments of industrial action in a transnational dimension²¹.

In this perspective antidiscrimination law is one of the most mature and symptomatic examples of a global law that unifies and, at the same time, produces plural regulations, with intersecting planes of

¹⁹ M. Barbera, B. Caruso, forthcoming.

²⁰ D. M. Trubek– P. Cottrell - M. Nance., (2005); D. M Trubek. - L. G Trubek (2006), B. Caruso 2006.

²¹ E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré 2006; D. M. Trubek – J. S. Rothstein 2001; B. Tessié 2005; W. N. Cooke 2005.

regulation and juridical cultures of various origins, in which the unified language of the new antidiscrimination social law is transmitted, in Europe, by both the supreme Courts and supranational legislation.

It thus happens that in the new horizontal, flat labour relations typical of the factory with no walls and no boundaries the traditional antidiscrimination tools forged within national boundaries in compliance with the different legal and constitutional traditions and jurisprudential and administrative practice of the various states, prove to be inadequate to cope with the changes taking place. The same discriminatory phenomena are prejudicial to rights and principles considered to be universal: individual dignity, the principle of equality and non-discrimination; rights and principles that are to be considered independent, in the global dimension, of any recognition they may be accorded by the constitutions of the nation states.

Certain interesting hypotheses thus postulate that the peculiar circularity of globalisation may make it possible to graft onto the legal system in which antidiscrimination law was incubated (the USA) new models of regulation and protection developed in another context (the latest generation of European antidiscrimination directives); and it is well known that European context was originally influenced by the American experience²².

Antidiscrimination law thus confirms its pioneering nature, almost as a sort of laboratory producing a new law globalised not only as far as language is concerned but also regarding positive regulation: in the case of the European Community by means of the technique of legislative harmonisation and also via the circulation of models of judicial protection through the supranational dialogue between the ECJ and national courts, although this is not geographically homogeneous; and even transnational by virtue of the original influence of the models developed by American courts on the jurisprudence of the European high courts, the ECHR and the ECJ²³.

3. Comparative method and "cross fertilisation": towards common labour law principles in Europe.

The construction of a European legal system represents, for scholars of comparative law, an adventure typical of *serendipity*: its "unforeseen, anomalous and strategic effects"²⁴ include the opportunity

²² K. Stone 2004, p. 157 ff.

²³ C. Kilpatrick 2001.

²⁴ R.K. Merton - E.G. Barber 2006, p. 18 (Italian edition).

to develop a new theory or broaden the existing theory of legal comparison. The theory referred to is that of "*cross fertilization*", that is, osmosis and continuous mutual hybridisation between legal systems²⁵ with the development of general principles of European law by the Court of Justice²⁶. It is no coincidence that the incidence of EU law, and thus the necessary circulation of the models of the Member states, is historically considered to be the ultimate and most sophisticated phase in the use of foreign law in a domestic legal system²⁷.

According to this approach "*The cross-fertilization between Community and national legal systems leads to Communitarization of national laws - understood as overturning national rules inconsistent with Community law and therefore substituting Community law for national rules - on the one hand, and to Europeanization of Community law - understood as procuring for Community law a firm foundation in the concepts and principles which the legal orders of the EU Member States have in common - on the other. All this transforms comparative law radically from a purely persuasive (and cognitive – author's note) branch of the law into one (regulatory, author's note) which has to fulfil a task of strategic importance*"²⁸.

Communitarisation – the top-down direction of the process – has the same effect as globalisation: it leads at the same time to *homogenisation* and *differentiation* of regulatory systems.

Homogenisation because it is an accepted fact that both the 'legal formants' – the Community legislator by means of the technique of normative harmonisation – and the 'Judicial actor' – the Court of Justice with its doctrines concerning the supremacy and uniform interpretation of Community law²⁹, the direct and indirect effect of directives, the

²⁵ According to R. Dehousse 1994, pp. 762-763, with the process of communitarisation which originated with the accentuation of integration policies in the '80s and accelerated with the Maastricht Treaty, "The national and Community legal systems are now so closely intertwined that one notices many instances of institutional osmosis: principles and institutions borrowed from national traditions are incorporated in Community rules and at times travel back, be it in a modified form, to the national level, as part of the Court's jurisprudence". See also A. Adinolfi 1994, 523-524.

²⁶ J.A. Usher 1998; T. Koopmans 1991, p. 57 ff.; L. Moccia 2005, pp. 969 ff, 983; A. Adinolfi 1994.

²⁷ Models considered by A. Somma 2001, p. XIV "blended into the regulations, directives, and the very language used by Community legislators and the Court of Justice of the European Community".

²⁸W. van Gerven 2001a, p. 435.

²⁹ On the milestone rulings of the Court of Justice that have marked the stages in the construction of the European system as an eccentric Constitutional system (ECJ 5 February 1963, van Gend & Loos, 26/62; ECJ 15 July 1964 . Flaminio Costa v E.N.E.L., 6/64 ,

competency of competencies, state accountability for non compliance, and with the use of general principles, for instance that of proportionality – are working towards the unification of law by comparison between the various systems³⁰. Following the European Council in Lisbon³¹, the method of continuous comparison of both legal structures and economic indicators with the Open Method of Coordination was also adopted by EU institutions³².

Differentiation because it is also an accepted fact that the communitarisation of national systems causes in each system a diversification of the various sub-sectors of the law, that is, between legal institutes affected by communitarisation – in the form of both harmonisation and the approximation of regulation – and institutes which remain unaffected: which increases the objective necessity, in order to give coherence and a systematic nature to an increasingly fragmented system, of recourse to what has been defined as the method of "internal comparison"³³.

This obviously also applies to labour law, the process being accentuated after the Maastricht Treaty. It was from this innovation of the institutional architecture of Europe, in fact, that the construction of the social dimension, and not only the economic and financial unification of the markets, received an undoubted impetus³⁴.

But the process is also characterised by an inverse dynamic: the drawing up of the general principles of European law by the European Court of Justice is also connected with what has been defined as a

European Court Reports 1964 p. 585), European Court Reports 1962 p. 1) see, J.H.H. Weiler 1999, in particular the essay *The Transformation of Europe*.

³⁰ F. Toriello 2000, p. 494, considers the general principles of European law to be 'superformants'. In his opinion comparativist argument has become part of the style of rulings passed by judges in European courts, by direct reference or as echoes of the conclusions of the advocates general (491). As far as European social law is concerned, paradigmatic of this style are the monumental conclusions of Advocate General Jacobs in the Albany case: ECJ Case C-67196, Albany v. Stichting Bedrijfspensioenfonds Textielindustrie, a proper essay in comparative law.

³¹ Extraordinary European Council, Lisbon 23-24 March 2000. Presidency Conclusions.

³² R. Dehousse 1994, rightly highlights the methodological difficulty of identifying the right level of analysis to which comparison between the laws of the single nation states is to be referred (the relationship between micro and macro comparison).

³³ van Gerven 2001b; 1998, p. 92. Approximation of laws is the legal terminology used in Community law, since its inception, to denote how the Member States approximate to the EC law rather than replace their national laws. Approximation may involve amendment or adaptations to national laws or the adoption of supplementary laws for example, but the means is left to the discretion of the Member States. Harmonization could imply, and normally implies, replacement of current national legislation.

³⁴ J. Kenner 2002, p. 293 ff.

process of Europeanisation from below³⁵, through an increasingly widespread activity of international consultancy and assistance by a new type of jurist, a practitioner and also a theorist endowed with a European culture who tends to homogenise not only his culture and legal education but also his language, thus influencing the *modus operandi* of the Courts.

3.1. Empirical evidence of the theory of cross-fertilization; the techniques and “formants” involved in the Europeanisation and homogenisation of national labour law systems.

Concerning the effect of regulatory homogenisation at a European level, several examples can be given of transformations of labour law rules brought about by the process of Europeanisation, transformations that testify to different forms of osmosis between legal systems and thus different ways in which the use of comparative analysis functions.

The examples are random since they are explicative of an consolidated circumstance: the unsystematic and occasional character of the process of social integration of European national systems; a process that pays dearly for the contradictions and nonlinearity of the process of political integration in the EU and its historic dependence on the functionalist creed.

The examples are, however, indicative – and this is significant for the relationship with the comparative method – of the fact that the process of regulatory homogenisation through the Europeanisation of the various legal systems has been brought about by impetus from different centres of regulation using different techniques.

They can be collocated along a continuum stretching from a strong (cohesive³⁶) integration of social systems with European social law directly affecting national legislation, to a weak integration in which supranational regulation leaves legislative differentiation at a national or sub-national level unaltered, despite the fact that it operates in the direction of convergence of objectives and results that imply the adoption of common policies.

It is also necessary to point out that the different “methods” do not in reality operate in watertight compartments, nor does traditional recourse to one exclude the other in either a diachronic or synchronic

³⁵ See note 3 above.

³⁶ The distinction between institutes of social law in which “functionalistic” harmonisation is achieved and those which achieve “cohesive” harmonisation was made by M. D’Antona 2000, pp 377 ff., especially 402.

sense: different methods can follow each other chronologically or operate simultaneously.

In particular the examples referred to make use of methods of regulatory integration and/or homogenisation through:

A) the *hard (or strong) 'legal formant'* who produces "*harmonisation*", that is, parallel and therefore "harmonic" processes of social regulation of the various national systems of the EU, even though the Member States retain sovereignty in applying European social legislation, with operative results, with respect to the objective/function of normative harmonisation, that may well diverge, depending for example on the greater or lesser effectiveness/efficiency of the implementation tools, and/or on the national administrative apparatus³⁷. Health and safety in the work environment is the most evident example of communitarisation by harmonisation (framework directive and detailed hard technical directives³⁸) even though, in confirmation of the possible hybridisation or the chronological succession of different methods, more recent intervention in this field has been increasingly characterised by the use of the tools of soft law aiming at light integration more by convergence of results than by normative harmonisation³⁹.

B) *The soft (or weak) 'legal formant'* who produces "random" regulatory "approximation", that is, the approaching of pieces of social regulation from the various systems which concentrate around minimum and/or common standards, leaving member states free, within certain limits, to differentiate. The directive regulating working time, rest and break periods, paid leave and night-time work⁴⁰ is an example of this type of random, patchy homogenisation of social regulation⁴¹. This process is guided using mixed, hybrid techniques: it does not exclude hard harmonization in certain areas, for example the prohibition of night work or the guarantee of paid holidays (Art. 7), onto which has been neatly grafted the function of consolidation and modification of differing

³⁷ V. Howes 2003.

³⁸ For a detailed overview of EU Health and Safety directives, see the website of the European Agency for Health and Safety in the Workplace: <http://osha.europa.eu/legislation/directives/>

³⁹ S. Smismans 2003

⁴⁰ Directive 2003/88/EC OJEU L29 18.11.2003

⁴¹ For a broad discussion, see G. Ricci 2005. According to M. Threlfall 2003 antidiscrimination directives should also be included among those aiming at "approximation" and not harmonisation. Antidiscrimination law, together with health and safety, belong to that part of European law in which general inderogable principles of European social and public order prevail; they produce cohesive harmonization: in this sense, see the highly acceptable views of S. Sciarra 2006.

national norms by the Court of Justice⁴²; but “soft” regulation for minimum standards or principles tends to prevail. The latter technique requires the adoption of certain basic rules or common principles, leaving legislators and national social actors broad scope for persistent regulatory differences between national systems, and merely specifying recourse to collective bargaining in certain sectors, for specific categories of workers (the technique of what is known as “conditional derogation”); or granting the pure and simple possibility of exemption from Community regulations by means of recourse to the individual/source contract, where legitimised by national law (the technique of unconditional derogation, also known as the *opting out* regime)⁴³.

Soft provisions aimed at bringing national legislations closer to each other but contained in normative structures whose effect should be one of harmonisation (directives) are also found in the so-called social directives (issued following a European trade union agreement, ex Art. 139 TCE) regulating flexible employment (part-time and fixed-term work)⁴⁴.

⁴² On the case BECTU ECJ C-173/99, see G. Ricci 2001. More recently, ECJ C-124-124/05 *Federatie Nederlandsde Vakbeweging v. Staat der Nederlanden*.

⁴³ C. Barnard- S. Deakin – R. Hobbs 2003.

⁴⁴ Examples of this technique are the following clauses:

Clause 5 of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work: Opportunities for part-time work

“1. In the context of Clause 1 of this Agreement and of the principle of non-discrimination between part-time and full-time workers:

(a) Member States, following consultations with the social partners in accordance with national law or practice, should identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them;

(b) the social partners, acting within their sphere of competence and through the procedures set out in collective agreements, should identify and review obstacles which may limit opportunities for part-time work and, where appropriate, eliminate them.

Or Clause 5 of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work (measures to prevent abuse):

“1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

(a) objective reasons justifying the renewal of such contracts or relationships;

(b) the maximum total duration of successive fixed-term employment contracts or relationships;

(c) the number of renewals of such contracts or relationships.

In these cases the European legislator, through what has also been defined as the method of 'reflexive harmonisation'⁴⁵, pursues the by no means easy objective of squaring the circle, trying to find a reasonable balance between the achievement of regulatory homogeneity on the one hand, with the normative drive of the EU towards 'approximation' between national legislations concentrated around certain common principles (of varying degrees of solidity and clarity), also using the resources of trade union bargaining; and on the other the necessary, persistent regulatory differentiation between working hours and the duration of work relationships, by virtue of the objective of flexibility pursued by the EU.

C) *The judicial and doctrinal* actors (or, in the Sacco's terminology, legal formants without formal enactment), who can produce both the types mentioned previously (harmonisation or approximation), the effects of their operations on the enacted 'legal formants' being unpredictable. There are various particularly congruent examples of how ECJ jurisprudence either autonomously or under the direct influence of academic jurists in the role of lawyers soliciting adjustments by national legislators, have brought about processes of homogenisation of national systems. The first example is the already mentioned ban on night work by women. The prohibition, considered by ECJ ruling as a protection measure not sufficiently penetrating as to justify a collision with the principle of equality between the sexes, considered a fundamental principle of the European legal system, was lifted thanks to ECJ decision in the late '80s, giving rise to a negative harmonisation, achieved by the removal of national legislations in contrast with the jurisprudentially established principle: specifically, the French and Italian regulations containing an undifferentiated prohibition of night work⁴⁶. The judicial impetus was followed by legislative ratification with the working time directive, which completed the "work" of ECJ with a process of positive normative harmonisation of European legislation on the limits of night work⁴⁷. The same effect of negative harmonisation was achieved by ECJ doctrine adverse to the state monopoly of employment agencies (case

And clause 6: Information and employment opportunities

"(...) 2. *As far as possible, employers should facilitate access by fixed-term workers to appropriate training opportunities to enhance their skills, career development and occupational mobility*".

⁴⁵ S. Deakin 2000

⁴⁶ ECJ 25 July 1991 (Alfred Stoeckel, C-345/89), European Court Reports 1991 p. I-4047; C. Kilpatrick 2001, 118 ff. ; A. Jemaud 2001, 237.

⁴⁷ G. Ricci 2005.

*Job Center II*⁴⁸), which also had the oblique effect of legitimising the supply of labour by private agencies, as happened in Italy where specific anti-fraudulence regulations limited intermediation in employment. In this case, however, there are at least three specific differences with respect to the previous example of night work: i) this time the effect of negative harmonisation achieved by ECJ case law is not connected to a social value (equality) considered as prevailing over another (protection), but to a "mercantile" value (free access for private enterprise to the market of the placement of labour), prevalently juxtaposed or, according to some Italian commentators, opposed⁴⁹, to the social value of state management of a typical social service; ii) unlike the previous case, the role of negative harmonisation played by ECJ jurisprudence was strongly solicited by academic, political and media lobbying, with the declared aim of bringing about domestic changes instrumentally occasioned by claims of adapting the domestic system to that of the EU and its market values, considered to be prevailing⁵⁰; iii) the negative harmonisation was not followed, as in the previous case, by positive harmonisation, not even with the start of a process of approximation by means of a directive with mostly soft rather than prescriptive contents, given that the draft directive on agency work has not yet encountered the political consensus necessary for it to be issued⁵¹. A further example of transformation of domestic law by virtue of the direct action of the supranational judicial actor is the case of the training contract: some new provisions contained in the recent reform of the Italian "first job" contract seem to echo directly the words of the Court of Justice ruling (Case C-310/99) which found against the Italian Republic for violating EU norms regulating state aid .

D) *The new technique of the Open Method of Coordination*, that is, the bringing about of political change by mimesis or moral suasion, or by political sanction, based on controls of authoritativeness (peer review) which exclude legal sanction; a method which produces processes of "convergence" of policies and results rather than approximation of regulation, that can be collocated in a broad spectrum (from minimum to maximum convergence, not necessarily in the direction of lowering social standards) according to the greater or lesser extent to which the method is institutionalised. This is the method which by its very nature suits the new multilevel style of European governance

⁴⁸ Job Centre Coop. Arl., Case C-55/96, (1997) ECR I-7119. See S. Sciarra 2001, 252 ff.

⁴⁹ M. Roccella 1998.

⁵⁰ S. Sciarra 2001.

⁵¹ L. Zappalà 2003.

which should be able to reconcile unity of objectives and differences in institutional regulation, also in view of the enlargement of the EU and the increased heterogeneity of systems the process involves. It is a method that, for all its specificity and individuality, can in a way be collocated in the composite and variegated area of (second-generation) soft law.

E) Finally, the *collective bargaining* which is to be considered a specific social regulatory technique and an autonomous source of law in the European legal system. Since it got past the stage of being an informal consultative procedure (social dialogue), collective bargaining at a European level has increased its regulatory functions, having a more effective role in bringing national social systems closer to each other. It acts, in fact, on social issues attributed to the concurrent competency of the EU according to concertation procedures constitutionally laid down by the European Treaty. As a functional equivalent of legislation, European collective bargaining has up to now played the same role as the social directives incorporating the agreement (the already mentioned directives regarding part-time work and fixed-term contracts, to which must be added the directive on parental leave); that is to say, the role of bringing national regulatory systems closer but only in a limited number of areas (as in case B). On the other hand, in its autonomous version (Art.139 TCE consolidated version) collective bargaining, thanks to the activity of European Works Councils⁵², is starting to affect processes of social regulation traditionally entrusted to national-level bargaining (for example, wages), gradually, using uncommon, oblique methods, playing the autonomous supranational regulatory role which was accorded by the European Treaty and which the European Constitution, if ratified, will sanction as a European social right. As matters stand, however, the effects are of convergence between sectors and concern a limited number of specific issues (telework, work-induced stress, non-discrimination, training, etc)⁵³.

II

4. Intensification of dialogue and homogeneity of language in the labour law community. The factual premises: the transformation of enterprise and labour

⁵² Once again it is impossible to mention the vast amount of relevant literature: see for all V. Telljohann 2006.

⁵³ J. Arrowsmith – P. Marginson 2006; B. Caruso, publication forthcoming; P. Marginson - K. Sisson 2004.

A common premise in the global discourse of labour law experts is recognition of the profound change in the supply and organisation of labour. This change can be summarised as a transition from Fordism to Post-Fordism. The amount of economic and sociological investigation of the topic is endless⁵⁴. Another relatively consolidated common premise is that labour is changing due to endogenous factors, for example the impact of new technology, which some see as the driving and identifying force behind globalisation⁵⁵; and also due to osmosis between modern technology and training processes, which produce a new type of worker – the so-called knowledge worker – with new requirements, new needs, new interests, diversified and non-standard, claiming independence and autonomy and rejecting the uniform regulation of labour typical of the Fordist era, above all as regards emblems of labour regulation such as wages and working hours⁵⁶.

Another profound change endogenous to labour is the progressive feminisation of the workforce, which in certain respects is more conducive to the new organisation of labour and has flexibility requirements that were traditionally absent among Fordist-era factory workers.

But labour is changing above all because what was traditionally its main recipient, the firm or enterprise, is also being redesigned to keep up with market transformations. This is what is indicated as the model of flexible specialization, with the new production paradigm pivoting around the consumer and his often changing requirements. As is known, changes in enterprises concern both their systems of governance (decentralized decision-making) and their relationships with the territory, being fragmented into micro production units under exclusively financial central control, through processes of outsourcing concerning not only planning but also production, organisational and administrative functions.

These processes of outsourcing are so profound as to undermine the dualistic core/periphery paradigm of production and labour originally used to account for it. It is no coincidence that sociologists and economists prefer other paradigms to explain this form of business organisation that no longer concerns the simple dualism between core production and secondary peripheral functions: the current reality is business networks, or networks of businesses, etc.⁵⁷.

⁵⁴ Among many, see H. Beynon- T. Nichols (eds), 2006; K. V. W. Stone 2004; L. Dickens 2004; K. Kumar 2004.

⁵⁵ R. Sennet 2006.

⁵⁶ A. Gorz 2003; C. L. Fisk 2005.

⁵⁷ It is the transition indicated to great effect in the title of the volume by Katherine Stone, 2004, which despite focusing on the American system is the most effective labor law

Given these common premises, the discourse of labour law scholars in both the global community and national debate is divided as to the effect of changes in production methods on the model of regulation of labour and the possible need for a new scientific paradigm. In short, the shared problem – which has led to radically different responses, as we shall see – is whether, faced by a change in the contents and organisation of work, the interests connected with it, its culture and values, labour law as a science should change or at least adapt, and to what extent, and above all in which direction.

4.1 The reformist response of the labour law community: ontological pessimism; from the law to the market

For over a decade now, the future of labour law has been a common topic of debate among labour law scholars, relating initially to various national contexts and then increasingly to the global community. Three alternative positions would appear to emerge from this debate. These positions are often highly articulated ones that can be glimpsed in analyses of single issues or concepts (e.g. flexibility) but which can, at the cost of perhaps excessive conciseness, be traced back to common trends.

The first position derives from a basically pessimistic outlook. Faced with transformations that assign a central role to the market and enterprise acting at a global level, labour law, in the suffocating, outworn, old-fashioned garb tailored for it by politics and national legislators, is doomed to succumb. There are two versions of this approach, which start from the same premises but arrive at opposing outcomes: they could be called passive pessimism and reactive pessimism.

The first version, which is inspired by neo-liberal ideology, confines itself to the labour law crisis and its scientific and political defeat by economic globalisation. Its progressive but ineluctable incorporation as a sort of readjusted branch of company law, or its return to the womb of civil and contractual law, could be seen as the final stage in a process of extinction. The task of the labour law expert is to handle this process, rather like a doctor faced with the dilemma of euthanasia for a terminally ill patient⁵⁸.

The second version sees the progressive adjustment of labour law to the requirements of the market and businesses, along with the connected corollaries of efficiency and competitiveness, as the only way out, the only remedy against extinction, functional uselessness, or

summary of the changes that have come about in the factory without walls. See also M. L. Morin 2005

⁵⁸ For all, see R.A. Epstein 1995; 1985.

progressive lack of effectiveness. In this case, the “reactive” reform programme is epitomised in a highly ideological and in certain respects static *ex machina* version of the so-called Third Way.

This sophisticated and culturally intriguing concept, which is above all European does not accept the neo-liberal ideological simplification of a return to individual contracts⁵⁹. It rather supports a change of focus in labour regulation which constantly has to measure up, without completely losing its functions, to the dictates of economic analysis of law, company law and competition. This approach is politically reactive: the adjustment of labour law to the market and its dictates entails radical top-down reform and the abandoning of outdated ideological postulates in favour of new ones.

It is therefore claimed that in order to avoid unconditional political and cultural surrender to the market, labour law must not only accept but also actively contribute towards radical changes in both its function and regulatory models. As far as its function is concerned, the focus of regulation has to shift from the protection of rights to the organisation and promotion of the market and employment; from distribution to production. Labour flexibility in all its forms becomes a pervading paradigm and yardstick for all policies and regulatory action. If human dignity (where human is taken to mean the consumer rather than the worker) remains as a term of reference in developing legal language and models, it is a posthumous, decentralised one as compared with the focus on market and company efficiency. In this new paradigm the right to work and the fight against the social exclusion of outsiders are the “noble” justification for a reduction in employment standards for workers, or rather the fair redistribution of rights between core and peripheral workers, and not of power relationships within enterprise, which are held to be untouchable. Some concession is made only to self reform by enterprise toward a greater social responsibility.

A good example is legislation regarding dismissal: according to the supporters of this new paradigm, protection against dismissal is no longer a right irrespective of the efficiency of the company and the market, but is to be redesigned and gauged taking into account the fact that company survival and employment policies are primary collective values that supersede any interest in safeguarding individual jobs. New legislation on dismissals should therefore incorporate a different idea of justice: the legitimacy of individual dismissal decisions should only be assessed in terms of the convenience and economic benefits for the company and not

⁵⁹ Reference is made to two Italian authors and one English author as indicative of this cultural approach: M. Biagi 2003, P. Ichino 1996, 2001, and H. Collins 1997, 2000, 2001.

its effect on personal dignity. At any rate, responsibility for job protection should be shifted from companies to the labour market through training policies, the collective and social responsibilities of enterprises in certain market areas, and a new social security policy.

As regards regulatory techniques, the new paradigm requires new replacements for the old labour law tools which aimed to achieve uniformity and protect collective interests, typical of labour regulation in the Fordist era (in Continental Europe inderogable laws and national contracts). It is necessary to use techniques incorporating the new paradigm of flexibility and differentiation: soft law mechanisms such as the OMC, company self-regulation, and decentralised bargaining at a company or territorial level. The approach does not exclude competitive regulation by sub-regional state sources: once again labour law regulation has to adapt to the diversification of local labour markets and the decentralisation of company governance structures.

In this perspective labour law has to deal less and less with protecting standard rights, focusing more on anti-discrimination techniques.

State courts seem to be inadequate at enforcing rights. They are considered to be incapable of recognising soft, bargained regulation. In addition, they are inefficient because their lengthy procedures (procedural rules) cannot keep pace with market trends. Finally, state courts are inadequate because they are traditionally and irreversibly bearers of cultural values of protection tied to the outdated, rigid, worker-protection paradigm typical of Fordist-era labour law⁶⁰. Instead of Employment Tribunals, preference is given to more agile forms of mediation and arbitration (ADR) that can come up with fair, possibly unappealable, agreements or decisions, where fairness is a synonym for market efficiency.

Traditional labour law certainties concerning trade union rights are also undermined in this perspective. The right to collective bargaining, for example, is no longer considered to be a market-independent variable and a supreme good to which the right to competitiveness has to adjust. The relationship is inverted: free competition is construed as an outer limit to the right to collective bargaining, which is treated in the same way as strikes in the British legal system. It is downgraded from the status of an inviolable constitutional right to that of an important but relative freedom (a sort of immunity), the bounds of which are determined, on a case-by-case basis and ex post, by the concrete

⁶⁰ This is expressly stated in The Italian Government's White Paper , inspired by M. Biagi; see A. Lo Faro 2002.

expression of a qualitatively superior freedom or fundamental right: that of businesses to compete freely without constraints⁶¹.

Above all at a European level, attempts at cultural modification of ECJ-made law according to this new concept of collective bargaining rights have been evident although up to now unsuccessful. The ruling in the Albany case, which was naturally criticised by the supporters of this new paradigm, is a vestige of resistance against this attempt to infiltrate market values into the traditional concept of social rights, thus structurally modifying the labour law paradigm.

4.2. The second approach: the "optimism of will". "Plus ça change....."

A second approach, radically different from the structurally pessimistic one briefly outlined above, is currently circulating in the international labour law community. It is summed up by the formula "Plus ça change, plus c'est la même chose." Here a certain optimistic faith in willpower (resistance to innovation) is predominant. This approach does not deny the transformations affecting labour and enterprise in the post-Fordist era. The phenomena connected with new production methods are, however, considered to be superstructural or quantitatively limited. A recurrent consideration in this approach is that the supporters of innovation and modification of the paradigm overestimate certain real data for purely ideological purposes – a sort of new version of false bourgeois conscience.

Consistently with this premise it is claimed that there is no reason for changing the basic structures of the post-war national labour law models typical of central and northern Continental Europe. These systems were the most effective responses to demands for equality and solidarity circulating in post-war Europe; they represented a proper counterbalance to the historical demand for freedom of action by enterprises. The main subjects and arbiters of this balancing action were the nation states, which passed strict laws granting individual protection and collective rights to both individuals and trade unions (in the form of auxiliary legislation), introducing imperative norms, violation of which was punishable by law, and granting jurisdiction to law court judges.

This model which centred on the State and the law proved in the long run to be more successful than the Anglo-American voluntary models based on the abstention of law and industrial pluralism, where labour law systems followed the same sad fate as national trade union movements.

⁶¹ P. Ichino 2001.

According to this analysis, the transformations which took place in the 80s and 90s, far from freeing labour, exacerbated the old inequalities, often reproducing servile labour: the post-Fordist organisation of work is not, in fact, devoid of phenomena of alienated mass labour in which neurosis, insecurity and widespread instability are the terms of the new "psychological contract".

The new systems of results-based pay or pay incentives, for example, are nothing more than updated versions, adjusted to new production methods, of piecework, which was thought to have been relegated to history. In addition, physical fatigue and exploitation have not disappeared but only geographically shifted, via delocalization processes, to other areas (the South and Far East of the world of globalised production). Inequalities have thus extended horizontally in systems where the post-Fordist organisation of labour is prevalent through the greater economic dependence, even of workers who are legally independent, on old and new economic powers; these systems have also produced new inequalities due to new forms of discrimination based on age, ethnic origin or race, in connection with the North-South planetary dimension of the immigration phenomenon. Income, social status and cultural inequalities have also deepened vertically, with the accentuation of traditional cleavage inside and outside national borders, between the poor and the rich, North and South. Where politics turns a blind eye it is the forces of nature that open up the Pandora's box of the failure of the global market: Katrina was a traumatic confirmation of this pessimistic diagnosis.

When seen under the microscope, the very novelties of post-Fordism (creativity, teamwork, the centrality of knowledge, employee autonomy) turn out to be a mystification: as the French say, it is only a *merchandisation de la différence et de la créativité*⁶². According to this negative vision of post-Fordism, the new autonomy introduced by the post-Fordist model was used for the sole purpose of increasing company control not only of a worker's body (as Taylorism did) but also of his intelligence, emotions and private life. An example is a company's power, thanks to modern technology, to control and exercise authority in places other than the traditional workplace (e.g. through telework). Post-Fordism has thus geared the creativity, intelligence and knowledge of the new generation of workers to market consumerism. Those who would appear to be the winners in this new way of working (the creative, knowledge workers) are not only an absolute minority but are under an optical illusion: the greater material benefits deriving from higher salaries

⁶² L. Boltanski- E. Chiapello 1999; P. Veltz 2000.

never compensate for the stress, insecurity and growing instability. The failure of the net economy and dot.com companies are the most significant empirical evidence of this.

4.2.1. ... The consequences for labour law

The consequences for the regulation of labour can be logically inferred. Given the sociological premises, there appears to be no reason for a profound restructuring of the scientific paradigm of labour law based on the protection of standard rights. At most ordinary maintenance operations are sufficient, above all its extension beyond the traditional circle of the subject being protected – the so-called standard worker.

According to this thesis, the mistake made by the supporters of change is that of identifying the traditional labour law paradigm and its traditional regulatory and protection mechanisms with a historic form of labour – Fordist labour. The task of labour law scholars today is, on the contrary, to tear down the ideological veil of flexibility⁶³. Even the idea of a third way of regulating labour – a trade-off between flexibility and protection, flexibility and security, mild flexibility – is a vain, albeit noble, illusion. The typical function of labour law – protection of the standard rights of contractually weak subjects – is thus placed in a universal, almost ontological dimension. The reformist DNA of labour law only has to evolve and adapt to the new conditions of labour and exploitation; there is no need for a revolution. In this adjustment labour law scholars, at a national or supranational (European) level, should play a highly political role as counsellors of the "illuminated prince," that is, pro-labour governments or trade union leaders⁶⁴. The bearing structures of national legal systems and the tools traditionally used to carry out this function remain basically unchanged; they should, on the contrary, be strenuously defended against the assault of market globalisation⁶⁵. In short, the

⁶³ The most outstanding representative of this approach in Italy is L. Mariucci 2005. See also C. Vigneau 2003. At an international level many scholars of the INTELL network who are inspired by Critical Legal Studies: see J. Conaghan - R. M. Fischl - K. Klare 2002.

⁶⁴ B. Bercusson 2000

⁶⁵ These tools are :

- State legislation to protect standard social rights, considered as a primary, hierarchically superior source in that it directly implements the principles of social rights enshrined in the various national constitutions. No, or very limited, concessions (regulation of certain aspects of the labour market) are to be made to the social competencies of sources at a sub-state level: federalism is considered to be harmful to social cohesion and territorial solidarity. Supranational regulation at a European level (both legal and jurisprudential in nature) is viewed with suspicion in extreme cases (the Trojan horse of market deregulation); or it is attributed a purely instrumental role, to be invoked only as a possible limit to deregulation policies pursued by national legislators (see, in the European legal system, the non-regression clause affair) or when more favourable to national

broad community of labour law scholars - who hold aloft the banner of tradition - view with favour the trend towards re-nationalisation of labour law systems and the production of regulation by the state or regulatory subjects operating at that level. This is what is happening in Europe today, at a time when the prospect (or, for some traditional Eurosceptics, the illusion) of a federal European social state created in the image and likeness of the traditional national social state, seems to be fading.

4.3. The third approach: dialectic without synthesis. The perception of reality: continuity and innovation in labour law

It must be stated immediately that the two antithetical approaches outlined above are an epistemological trap. Labour law is, in fact, the best place for continuity and innovation⁶⁶ to coexist in a dialectic which does not necessarily require neurotic syntheses. Labour law is the sector of juridical experience that is most suitable for a pluralistic, pragmatic, non-ideological approach.

It is possible, in the current processes of evolution, to identify apparently contradictory phenomena that do not necessarily require the synthesis of a well-defined plan to re-found the paradigm, possibly inspired by a political platform (a sort of third top-down intervention). As far as method is concerned, the most appropriate one would seem to be a series of sequential, adaptive responses that take account of the fact that law today is not only becoming complicated and uncertain but also complex, by which I mean the multiplicity of codes of interaction and

regulation. Soft law regulation is identified, tout court, with deregulation. The individual contract is viewed as belonging to soft law.

- State Court jurisdiction (specialised judges) conserving their special role in protecting traditional rights and even creating new ones; a secondary deflationary role is thus assigned to private jurisdiction and mediation, under the strict control of the trade unions.
- Procedural structures to afford better, differentiated protection to the weaker party – the worker (in relation to costs, burden of proof, swiftness of proceedings, enforceability of rulings in favour of workers) – should be maintained and solicited where inexistent.
- Protective and distributive national welfare mechanisms are to be strenuously defended; at most, any reforms should envisage a minimum guaranteed salary to afford protection against the spreading phenomenon of unemployment and the working poor and new welfare provisions.
- A significant role, but subordinate to state law, is assigned to national collective bargaining. Even more limited is the role of decentralised bargaining, which can only operate within the spaces and limits allowed by the national contract for the worker category involved.

⁶⁶ See the intellectual legacy of the essay by O. Kahn Freund 1979

approaches based on different types of logic, not only linear but also recursive, multi-causal and circular⁶⁷.

More than any other lawyer in the era of globalisation, the labour law scholar has to value the logic of what is reasonable or proportional alongside, rather than instead of, what is, linear, inferential, or merely binary, logic. He has to have access to the tools used by hermeneutics and the theory of argumentation⁶⁸. Just as the old and new dichotomies (legal formalism and politicism; *ius naturale* and legal positivism; subjectivism and objectivism; hierarchy and circularity; monism and pluralism; *ius cogens* and *ius dispositivum*, etc.) seem to be unstable in the general theory of law, so is it necessary, in labour law, to rediscover the logical pleasure of the third man excluded by simple binary logic.

The theoretical limit of the approaches mentioned above – the revolutionary "everything must change" and the conservative "plus ça change" approach – is, in fact, a certain unilateralism. As mentioned previously, however, the solution is not an "*ex machina*" third way that rejects the other two only to find a new one, or a blend or hybrid of them. The third way should rather be seen as a dimension that gradually emerges from the very field in which the dialectic of contraries takes place. What Ost and Van de Kerchove have defined as the "dialectic without synthesis" of the paradigm of a critical legal science, also can apply to labour law⁶⁹. It is a third way that is not relativistic or affected by political or methodological opportunism, but which, addressing the paradigm in a Kuhnian fashion, starts to measure itself progressively with the past, with a new ontology, a new method and a new ethic.

To clarify this we can take as an example two directions, or paths of investigation, to which some thought has been devoted in the last few years, although the conclusions reached up to now are still provisional.

The two directions are part of a reconsideration of the theory of labour law sources: the first concerns the relationship between social regulation and the territory, along with the connected issue of federalism; the second concerns the issue of the regulatory consistency of the various sources and their effectiveness as regards the various regulatory techniques they presuppose: the choice between hard and soft sources of regulation.

III

⁶⁷ G. Teubner 1997a; J. Paterson - G. Teubner 1998.

⁶⁸ C. Perelman 1976.

⁶⁹ F. Ost – M. van de Kerchove 2002.

5. The winding dialectic paths of labour regulation

5.1 Regulation and territory: the issue of supra- and sub-national federalism. Vertical subsidiarity

The first direction is that of the relationship between labour law regulation and the territory. The traditional labour law paradigm, especially in Europe, refers to a number of sources which are mainly endogenous to national territory and privilege the State level. In a global dimension, this can be seen as "relative or limited pluralism"⁷⁰. Any alternative among national sources is confined to that between state laws and national collective agreements, which are basically considered as being of equal status, given the various national mechanisms for extension *erga omnes* of such contracts⁷¹. However, with a few exceptions in Northern Europe, the law generally enjoys hierarchical prevalence. It is a relative pluralism because it denies, or is extremely reluctant to accept, sub-national (regional) or supranational (e.g. European) regulation. In other terms, in the traditional structure of labour law sources, above all in the experience of Continental Europe, a written constitution, state law or a functional equivalent (the collective agreement with *erga omnes* effect), were considered the main vehicles of social regulation, the space left to supranational, and even more so infranational, sources being limited.

The same diffidence is shown towards the decentralisation of collective agreements or its opposite – supranational centralisation.

The binary opposition between the central national level of social regulation and the sub-national or supranational level, is hardly sustainable today, given the objective multilayer features of social regulation. In reality, the national, supranational and sub-national levels are not only not mutually exclusive but interact with each other. The multilayer dimension of regulation, in which the local and supranational levels are granted the same status as the national level, was not invented by the supporters of deregulation: it is the result of increasing regulatory interference by several competing actors (states, supranational institutions, regions and local authorities, regulatory agencies at various levels, companies, etc.) who stake their claims to a leading role. "Glocal" is not a tongue twister or a buzz word: it is an objective statement of the multilayer effects of strategically rational allocation decisions.

⁷⁰ G. Teubner 1997b

⁷¹ R. Rebhahn 2003; D. Schiek 2005; B. Caruso forthcoming I.

A company's decision to relocate, for example, not only affects the actual place of production, leading to collective dismissals and processes of reorganisation (including that of trade union representation), but also the local or regional labour market, at least in terms of its effects on employment and other social effects such as town planning, the architectural features of a territory, and the organisation of social life. It has repercussions on the institutional and political strategies of local administration; it involves government strategies and those of social actors at a regional and national level; it has regulatory effects at a supranational level (see the Renault and Hoover cases in Europe or Rush Portuguesa and the posted worker directive). Finally, it has economic and social effects in the places to which the company has relocated. Interesting studies have been carried out into the social impact on local communities, workplace rules and the territory of the global managerial style and culture of western companies setting up in China, leading to changes in labour law regulations or, where absent, an objective need for them⁷². A case studied in the USA, the trade dispute in the Cutfish industry⁷³, highlights the multilayer effects of global policies and trade rules, as well as the regulatory dilemma and conflicts of loyalty facing scholars ideologically oriented towards critical legal studies.

The complex effects of global trade strategies and company relocation decisions often lead to social regulation that features an equal degree of complexity and interaction. Social regulation is inevitably multilayer as well.

Faced with this trend, labour law experts in accordance with the two cultural trends they favour, can either oppose it ideologically or take it on board, undergoing the consequences passively or proposing a total upheaval of the traditional paradigm.

There is, however, the odd man out in the binary trap: the attempt to find a social rationale for the various layers of regulation by working on the interspaces, nodes and hinges between the various layers, and if necessary rethinking the theory of regulatory sources, starting to consider a labour law based on procedures and not only rights. A procedural approach to labour law, based on rules and complex procedures rather than subjective rights, is today as important as the substantive traditional one. More: today, rights tend to present themselves more as a procedural machinery aiming at a result, quite often driven by the Courts, than as a subjective status⁷⁴.

⁷² X. Lu and J. Perry (eds) 1998; A. Chan 2004; CH. Lee 2006.

⁷³ D. Danielsen - K. Klare (2003).

⁷⁴ A. Lyon Caen 2002; B Hepple 2002.

Faced with three competing dimensions of regulation, which in Europe means supranational, national and sub-national (although a global transnational dimension also seems to be emerging from the codes of conduct of multinationals and transnational collective agreements), the problem is not that of rejecting one in favour of another or accepting all of them as an inevitable result of globalisation; it is starting to see the interaction between these levels as a rational interactive system for politically aware regulation strategies. In this perspective, it is not even a case of listing the social competencies and marking out the precise, rigid boundaries separating the various levels of regulation.

The issue raised by multilayer regulation, where problems of governance extend beyond the national territory, is how to deal with procedural mechanisms favouring cooperation and collaboration between the various actors (European institutions, national governments, local and regional authorities, public and semi-public agencies, the social partners) in such a way as to identify the level that is socially most appropriate in each circumstance. In the debate on the European legal system this has been defined as the dynamic concept of vertical subsidiarity⁷⁵.

Of course, a system with multiple interactive layers of regulation needs compensation valves: as physics teaches us, any apparatus subject to pressure will explode unless it is equipped with a safety valve. This also applies to social physics. Today labour law and labour law scholars should not only concentrate on the conductors but also on the valves that give fluidity to the nodes, connections and reciprocal interferences between autonomous multilayer regulatory systems. Let us take as an example: the social procedural clauses inserted in the new Italian constitution in order to drive the new federal form of State (Art. 117 letter m, new Italian Constitution). According to this formula the State still has to guarantee essential performance levels concerning civil and social rights throughout the national territory, while the regions are allowed to differentiate both the levels themselves and the ways in which they are guaranteed. The model adopted is thus one of cooperative, non-competitive federalism, entrusting the State and the Constitutional Court with the role of monitoring any possibility of regulatory differentiation turning into inequality; this end is pursued by means of a procedural formula aiming at safeguarding nationwide social cohesion⁷⁶.

The same applies in the European supranational dimension: the need for formal ratification of the Nice Charter does not only respond to

⁷⁵ B. Caruso 2004.

⁷⁶ The function of the formula has been likened to the German *konkurrierende Gesetzgebung* or the *Supremacy Clause* in the US federal system.

an abstract rationale of institutional engineering or a purely formal need to balance the values of competition and the free market which for some time now have been constitutionalised in treaties along with social values. It is the premise to prevent the procedural mechanisms of multilayer regulation (peer review, benchmarking, the OMC) which allow European institutions to set social objectives, leaving Member states free to adopt differentiated social policies and regulations, from following the drift of competitive federalism and producing phenomena of social dumping.

Hence the awareness, unfortunately still confined to a political and intellectual elite and not as yet the domain of the vaster European public opinion – as the French and Dutch referendums have shown – of the need for strong reference values, enshrined in substantial universal norms (a European Constitution) that govern and give sense to the mesh, or labyrinth, of interconnected procedures.

5.1.2 The regulation of bargaining and the workplace: centralisation/decentralisation as a false alternative

The same applies to collective bargaining, a source of regulation that traditionally has an almost physical, carnal, relationship with the workplace and the territory. Here again, the drastic alternative between national centralisation and territorial or company-level decentralisation is no longer the case, just as the cut-and-dried divide between national decentralisation and supranational centralisation is no longer applicable to Europe.

As regards decentralisation in national bargaining systems in Europe, a widespread trend is the assignment of new functions to decentralised collective bargaining, as opposed to its traditional role in redistributing income and the control of work. For example, responsibility for handling company crises, the reorganisation of enterprise by means of company branch transfer, or granting derogations from the standard treatment provided for by national contracts in order to save jobs, or partnership governance of local labour and development markets (territorial social pacts), or rationalisation of the treatment of all those who are involved in a network of enterprises – standard workers, suppliers and the self-employed⁷⁷.

This broadening of the role of decentralised bargaining can be seen, in the binary alternative, as either detrimental to the uniform, standard regulatory function of the national contract, or as a necessary adjustment by collective bargaining to the needs of competitiveness, by virtue of the inevitable shift of power in favour of enterprise. Empirical

⁷⁷ B. Caruso 2002; M. L. Morin 2005; A. Supiot 2001;

experience of the evolution of national bargaining structures shows that this alternative is a trap. Once again the third man rule holds.

Recent research into the evolution of bargaining system structures in Europe⁷⁸ reveals reciprocal interaction between much more complex levels than was the case in the past; the social partners are identifying new territorial and company levels of regulation (territorial districts, regions, company groups and networks). It also demonstrates the insufficiency of the criteria traditionally used to regulate competition and conflict between different bargaining levels (the hierarchical, favour, or chronological principles) and the need to introduce new, more complex ones.

For example, the territorial or company-level "opening clauses works agreements" in Germany or the non-standard salary clauses in Spain, are none other than procedural mechanisms to legitimise differences in pay with respect to national standards.

In the two cultural alternatives mentioned previously, this type of clause can be seen:

- a) as heralding the demise of the equalising function of the national agreement, its values and usefulness (not only solidarity between workers in the same country, but also regulated competition between companies in the same national territory).
- b) or as the only way for collective bargaining, along with the trade unions, or even better directly with workers' representatives, to adjust functionally to the new models of corporate governance in enterprise and local markets facing the challenge of global competition.

These mechanisms, not to mention others such as procedures for the national coordination of decentralised bargaining (e.g. the 1993 protocol in Italy), could be seen as the "third element" excluded by binary logic. In activating procedural control mechanisms, assigned for example to unions or national commissions set up to weigh long- and medium-term costs and benefits, they introduce a procedural logic in which the balancing of interests is not a once and for all given, but is measured in relation to the social acceptability of achieving any specific objective being pursued.

To go back to the previous example, derogation clauses are only legitimate if they introduce pay differences that are tolerable and compatible with other measurable social objectives: the defence of

⁷⁸ See the general report on research into European contractual systems by S. Sciarra 2005 and the national reports: http://www.unifi.it/polo-universitario-europeo/ricerche/collective_bargaining.html

existing jobs or, as with company training contracts in Italy, the creation of new ones. In other terms, it is the law itself or collective bargaining that assigns the unions the task of establishing and governing by means of procedural norms the historically adequate point of balance between conflicting interests and rights, the legitimacy of which is measured *ex post* depending on the achievement of a compensatory social objective.

This scheme of legitimisation of regulatory differentiation via bargaining is obviously much more sophisticated and complex than the one proposed by the two dialectical alternatives.

As regards the relationship between national and supranational contract regulation, once again they are not mutually exclusive: the European contract has to replace or flank the national contract to strengthen its equalising function at a European level, or it will end up by just duplicating the national contract, the inevitable consequence being inefficient allocation.

Here again the facts show the possibility of a third element. The spread in the last few years of European sector-level bargaining, as well as the experience of bargaining by European Works Councils, shows that there is a supranational area allowing for functional coordination and mutual interaction between different levels that leads to neither an artificial overlapping nor a mutual rejection of levels, but rather to an improvement in the efficiency of national bargaining systems and the regulation of issues that are better solved by higher-level framework regulation.

5.2. The forms and techniques of regulation: old governance vs. new governance; the classical Community method vs. the OMC; hard vs. soft law

The same apparently antithetical dualism applies to the second direction of the argument: the structure and consistency of the various sources. It is a highly topical issue in Europe today and again concerns the relationship between the sources (and thus the theory of sources) but not in connection with the traditional reference to the territorial space in which each of them operates, as was the case previously, but rather their "anatomical consistency." The reference is to the alternative between hard and soft law in the regulation of a series of significant social issues; an alternative that, in the current debate, goes beyond the question of legal sources to embrace more general issues of governance.

Issues such as training, antidiscrimination policies, working time, flexibility and health and safety have been regulated at a European level both by recourse to classical regulatory techniques (hard law, the classical Community method) and by means of techniques that present

features of hybridisation between classical methods and more recently coined methods or techniques (various types of soft law, social dialogue, the OMC)⁷⁹.

In their formal structure, the so-called "social" directives (e.g. concerning flexible part-time work and fixed-term contracts) thus named because they are the result of union agreements belong to the classical Community method and so should have hard regulatory effects (legislative harmonisation); but they possess a lower regulatory content than classical ones. Some contain norms that instead of obliging states to align themselves with principles or precepts regulating behaviour, confine themselves to suggesting and advocating state regulation policies that are uniform in purpose (moral suasion).

Other models of directives, (such as the working time and EWC directives)_granting broad powers of derogation not only from state laws but also from national collective_bargaining and individual contracts end up by tolerating great national differentiation with respect to European standards. They constitute awareness that uniform regulation of an issue such as working time for example, is not possible in a reality of profound change and differentiation (by sector, geographical area, type of job, organisation of work) that will not tolerate uniform regulation but only uniform principles⁸⁰.

As regards non-discrimination policies, the ultimate aim is indistinctly pursued by means of classical directives and the European Employment Strategy which makes wide use of the OMC.

Recourse in social regulation to tools other than classical ones introduces a series of general dualisms that, as mentioned previously, do not only concern the sources but also the models of governance; dualisms that are starting to be given conceptual clarification: the dualism between old and new governance; between the OMC and the classical Community method, and between hard and soft law.

Faced with this emerging reality, scholars tend to split into two opposing factions, especially with reference to the impact of these new models of regulation on the protection of social rights⁸¹.

Some scholars are of the opinion that not only can the new governance and the new regulatory techniques be used to achieve convergence between systems and overcome the restrictions of social competencies in the EU, but that they can also be considered as an alternative to the jurisdiction of the European Court of Justice to make

⁷⁹ J. Scott - D. M. Trubek 2003.

⁸⁰ G.C. Ricci 2005; see above § 3.1.

⁸¹ M. Barbera – B. Caruso , forthcoming.

the social rights of the Nice Charter effective⁸². In the opinion of others, these new forms of governance are a Trojan horse concealing an attempt at re-nationalisation of European social policies, a destructuring and neo-liberal re-interpretation of social rights, subordinate to the requirements of politics and the market⁸³.

Here again it is possible to identify a way of escape from the trap of binary alternatives or unsolvable dualisms.

Once again, if we view reality without ideological infrastructures or preconceptions, it proves to be much more complex than these drastic alternatives make out, and the third element emerges in a mutual, circular interaction between the different techniques and models of governance.

It is, in fact, legitimate to ask whether the techniques and regulatory methods of the old and new governance are so very antithetical.

Current reconsideration of the relationship between them tends, in fact, to highlight their interconnections, their points of juncture, their mutual completion and transformation, rather than a relationship of mutual exclusion, of alternatives.

The examples given above show that these are phenomena of juxtaposition and hybridisation between different regulatory techniques and methods; in this case the end product is a "third" result that loses the features of the original components.

In recent analyses the hybridisation between old and new governance, that is, a relationship of connection and interaction, is further clarified and referred to concrete experience in Europe and the USA as regards not only social but also welfare and environmental policies and relationships once regulated only by contract law and the principles of civil responsibility⁸⁴.

According to these analyses, the connections between hard and soft law, between classical regulatory strategies and new methods, have given rise to a relationship of complementarity (e.g. in issues of non-discrimination and training⁸⁵) and reciprocal transformation, that is, hybridisation in the strict sense. A new and original regulatory technique, therefore, which also provides a particular blend of juridical

⁸² N. Bernard 2003; see also S. Regent 2003; more problematic is the approach of G. de Burca 2003.

⁸³ A. Andronico - A. Lo Faro 2005.

⁸⁴ The authors cited in note 20.

⁸⁵ C. Kilpatrick 2003.

modules typical of private law (the contract, self-regulation by private individuals) and public law (the law, administrative regulation).

The theory of hybridization in the strict sense also allows consideration of the functional types of relationship between hard and soft law that recall analytical models used by labor law scholars, above all in Italy, who as early as the last decades of the 20th century addressed the issue of the pluralism of sources in the state legal system, in particular the relationships between the law and the collective agreement.

The wealth of analysis of the various modules of interaction between the law and collective agreements⁸⁶ in the state legal system – which is the cultural heritage of Continental European labor lawyers – can be transferred to study of the relationship between hard and soft law in a European context⁸⁷.

In this process of osmosis and interaction, the two types of tool, hard and soft, are brought into contact and in a way change their original features, giving rise to a third regulatory result, a hybrid. This is perhaps the element of originality in this approach.

While this is nothing new as regards the already investigated modules of interaction between the law and the collective contract, except for the fact that they are enriched and become more complicated, what changes as compared with the traditional approach of Continental European labor law scholars is the regulations interacting with the law are no longer confined to the collective agreement but become more numerous and sophisticated.

That is to say that the range of regulatory tools interacting with the law is widened and considerably differentiated: some are of relatively slight juridical significance; others operate within a "law-like" regulatory structure, even though they are distinct from the law in the classical sense.

The labor law scholar traditionally addressing the crucial and mutable issue of the relationship between sources, between models of

⁸⁶ The binary opposition between the view that the collective contract only has the limited task of improving legal standards, or adapting the law more flexibly, possibly by exploiting the greater social consensus it enjoys, and the equal and contrary hypothesis (the collective contract at all levels and with no limits on contents is allowed to derogate from legal standards) has been overcome by the complex reality of differentiated modules of reciprocal integration.

⁸⁷ In the perspective of hybridization, hard law can be integrated with soft tools for purposes of legitimate differentiation, adaptation or specification of forms of treatment, binding the latter to respect certain parameters according to the typically reflexive approach; the tools of soft law can deal with solving problems or improving standards, whereas hard law deals with guaranteeing minimum thresholds for fundamental rights and other issues.

regulation and the protection of rights and interests in employment relationships, and nowadays in the labor market, thus faces a stimulating analytical horizon.

6. From values to techniques and levels of regulation, then back to values: the need for a new theory of social justice at a transnational level.

On the plane of regulatory techniques it is thus possible to abandon the mechanically binary approach between old and new governance, between traditional and new regulatory techniques. The conceptual approach based on complementarity, or better, reciprocal transformation (hybridization) provides an escape route. It is evidence of the positive application of the third way dialectic to the sources, tools and techniques of regulation.

It is, however, legitimate to wonder whether, having reached this point, the labor law scholars who adopts the comparative method not merely for its cognitive function but also to query the validity of traditional values in a transnational rather than national context, can feel a sense of satisfaction.

It is, in fact, probable that the concept of hybridization only takes us halfway, providing an escape route from false alternatives as regards regulatory techniques, but requiring a further distance to be covered to complete the circuit.

One should ask whether it is culturally legitimate to renew the language of the global labour law community merely by addressing the renewal of regulatory techniques, without a parallel renewal of the language of values and rights.

Would neglecting this connection not lead to a new, albeit more evolved and modern, type of formalism and juridical positivism?

It is therefore probable that labour law scholars need to equip themselves with a solid theory of social justice in order to complete the other half of the circuit, the one which leads to the legitimization and affirmation of rights as well as of regulatory techniques.

If we exclude the procedural issue of enlarged participation and the plurality of the subjects involved (deliberative democracy), the regulatory models proposed by the theorists of the new governance, are basically confined to proposing new tools, excluding from their epistemic sphere the purposes of regulation; they look for the best techniques to achieve their aims (mainly effectiveness/efficiency), but do not address the actual contents, thus running the risk of neutralizing the new tools (policies and legal techniques) from the purposes (rights), the end result

being an artificial separation between techniques and the policies they intend to implement on the one hand, and the social rights to be safeguarded on the other. A clear example of this effect is given by the European Employment Strategy, where the employment policies adopted by the states and the method used to pursue them (the OMC) has been artificially separated from social policies and thus from rights. This risk of separation between techniques and rights emerges, for example, from the grounds of judgments passed by the European Court of Justice (e.g. the Mangold and Wippel cases).

The risk is also to be found in the structure of the European Constitution still awaiting ratification: thanks to horizontal clauses, Part II of the European Charter of Fundamental Rights is subordinate to Part III which concerns policies and competencies. By means of the technical mechanism of competencies, European legislators have thus neutralized state policies concerning universally declared social rights. According to this scheme it would in theory be possible in Europe for the various Member States to implement labour policies that derogate from any constraint to subordinate them to the social rights enshrined in the Constitution.

This undermines a basic assumption of classical constitutionalism: the supremacy of rights over policies.

There is also a second risk that may derive from neglecting the connection between the new techniques and a new theory of social justice.

Insofar as the regulatory techniques of the new governance remain disconnected from an equally new attitude to the structure and function of social rights, their role is confined in the best hypothesis to that of complementing traditional techniques, aiming at safeguarding traditional rights.

If the new techniques are merely to contribute towards the pursuance of traditional social rights, the acquisition and distribution of income, means and opportunities, why should they be added or even preferred to the more consolidated techniques of hard law? Who is prepared to bet that the new techniques are more stable and efficient in their effectiveness than, for example, the declaration of legal rights by the Courts?

At this point the many who still cling to the traditional labor law paradigm and shrug off the OMC would appear to be right.

These risks can be avoided if the transformation in regulatory methods is addressed together with a similar, thorough reconsideration of social rights, with reference to their nature, structure and function. They

can be avoided if the material and formal rationality of law is in some way recomposed.

This can be achieved by adopting a theory of social justice that is capable of metabolizing into its paradigm and articulation the changes occurring not only in regulatory techniques but also, and above all, in the contents of regulation.

The classical techniques of labour law – in Continental Europe inderogable legal norms and acquisitive collective bargaining provisions implementing a particular principle of public social order – had in their DNA a certain vision of social justice: a merely distributive and welfare-oriented vision of equality as a package of benefits, opportunities, means and utilities to be constantly enhanced through economic development and equally distributed between classes and individuals.

In this view the central role in both regulation and identification of its contents was taken by the great national political actors: the state, governments and intermediate articulations, basically the major political parties and the trade unions.

Hard regulatory policies and techniques seemed to be fully complementary: politics, in the form of both parliamentary activity and economic policy, and trade union bargaining were entrusted with the task of enhancing the package of benefits; to the law, in the form of binding juridical rules, the task of attributing and distributing them; to fundamental rights and the courts the task of preventing a political drift towards deregulation.

Today the attributes of the new governance of widespread participation, decentralization, differentiation, pluralism of actors, experimentalism, soft regulation etc. can only be justified by a new vision of the paradigm of fundamental social rights.

A vision that is not confined to a distributive, welfare-oriented outlook but that adds something else: it entertains a new vision of equality and freedom. An outlook that places at the core of the construction of second-generation rights and reconsideration of traditional rights, the language of individual capabilities and tailors regulation, obviously more articulated and sophisticated than before, to requirements of personal freedom and effective choice.

Far from being an abstract theory, this may have practical effects, for example considering social rights such as the right to training opportunities⁸⁸, which addresses the issue of the social accountability of enterprise, which leads to reconsideration of the contents of collective

⁸⁸ I tried to express this position in my address to the national conference of the Italian Labor Law Association, Cagliari June 2006, B. Caruso, forthcoming II

bargaining regarding working hours and reconciling them with family and social commitments as well as policies concerning placement and the enhancement of professional skills, which provides a stronger foundation for the link between flexibility and security, and finally which gives a more explicit and less evanescent character to discourse regarding the quality, rather than merely increasing the quantity, of work⁸⁹. It is a paradigm that proposes with great strength the universality of the individual's right to a decent, well-paid, satisfying job, in a global juridical dimension that embraces local territorial areas and the varied normative materials of regulation.

By virtue of the attention it pays to the various interconnected factors of conversion of functions into capabilities, including the law and social regulation, in which the law reaches far beyond the limited task of controlling political rationality or adjusting market asymmetries; its active, effective concept of freedom; its finalistic person-oriented vision; by virtue of all this and other aspects still to be studied and further investigated, the language of capabilities allows the traditional task of the law to be enlarged, to "include" within its jurisdiction and language new regulatory techniques, even the soft ones which share borders with politics, without the need to exclude the traditional hard techniques, in a vision of real integration and not mere juxtaposition.

Insofar as the language of rights metabolizes (but does not identify with) the language of capabilities, therefore, its techniques and tools assume a pragmatic, non-ideological, even experimental, dimension.

This new interpretation makes it possible to consider rights not only in the formal dimension of the constitution but also as concretely and pragmatically situated in the various territories and pursued with (old and new) tools and techniques alongside politics.

It may make it possible to provide a basis for renewal of the language of both politics and rights, the language of means and ends, to create a single language that has at its core the individual, the person.

It is only a start: a promising one, but still only at an early stage.

7. Conclusions

This essay is clearly open and states no foregone conclusions. The aim was merely to point out that in an era of great change the global community of labour law scholars is faced with far-reaching intellectual choices regarding the basic ontology, method and ethics of the discipline.

⁸⁹ M. Freedland – N. Countouris 2005.

The great generation of labor law scholars who preceded us, that of B. Aaron, G. Giugni and Lord Wedderburn to name but a few, opened up the way towards rethinking and renewing the discipline, providing a secure, solid basis of cultural, scientific and political values. Their privileged point of observation, despite their masterly use of the comparative method, remained that of national labour law. Whole generations of labour law scholars were brought up on these certainties.

Today we need to have the same courage and broadmindedness as that great generation in facing up to change the complexity of which is proportional to the uncertainties it generates in the global juridical and political dimension. This increases the burden of responsibility for those who intend to tackle this complexity and pursue realistic projects for change on a scale that transcends national boundaries. It is a challenge that must be accepted; the remaining doubt is whether we have enough strength and capacity to cope with it, both in absolute terms and in comparison with the greatness of that generation.

This is, however, a contribution that European labour law scholars are forced to make with a view to constructing a supranational system capable of reconnecting in a systematic order oddly savoring of past times, a European *ius commune* and the *iura propria* of the nation states; an order founded upon a new concept and a broader dimension of social citizenship, that can serve as a point of reference for global governance bases on respect for personal dignity and freedom.

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