



Common places, new places The labour law rhetoric of the crisis

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**Common places, new places
The labour law rhetoric of the crisis^α**

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^α This paper was delivered at Hasselt University, on the occasion of a Master class, held on May 31 2012, following the conferral of a doctorate HC in law. The paper is dedicated to the law students at the University of Hasselt, as a sign of gratitude and as an encouragement to look constantly for 'new places' in legal discourses

1. A short rhetorical preamble

I feel honoured to share my thoughts with such a distinguished audience, among which I recognize familiar faces. The dream of an academic comes through when the joy for a magnificent event – such as the one that I am part of here at the University of Hasselt – can be combined with an intellectual discussion among friends and colleagues.

The expression 'common place' frequently assumes a negative connotation. It implies a repetitive exercise, not innovative, neither path breaking. In rhetorical terms common places play a role in persuading the audience and in attracting attention, so that there will be memory of what has been said.

What I intend to do is to use common places which are recurrent in the specific EU jargon dealing with measures to be adopted in employment and social law, in the aftermath of an unprecedented economic and financial crisis. My point of departure is the following: a shared understanding of recent historical events makes labour lawyers aware of potential positive outcomes in discussing common places and discerning their deepest meaning. However, the role of academics is to demystify and intervene critically, in order to avoid what has been described as the 'tragic' use of common places. The latter produces the effect of perpetuating cultural divisions and letting language use its power in accentuating social inequalities¹.

I shall argue that beyond common places there are new places in which labour law is performing untraditional functions. New places are not, in this case, a rhetorical device. They have a geographical connotation, which transcends the nation state or descends to subnational levels of decision-making. I am referring to the expansion of transnational collective agreements, on the one hand, and to the re-discovery of local partnership agreements, on the other hand. The latter may disclose new potentialities to the social partners and to other relevant stakeholders, in the attempt to fight the crisis and its perverse effects on employment.

New places, I shall argue, have an indirect link to the crisis. They are discovered because 'old' places – such as trilateral social pacts or sector collective agreements, all so meaningful in the European tradition – do not seem to respond promptly to the impulses coming from the institutions, shaken by the negative impact of the crisis.

The underlying criticism that I develop in commenting on common places follows the observation of a gradual and yet constant de-

¹ R. Barthes J-L. Bouttes, *Luogo comune*, in Enciclopedia Einaudi, vol. 8, Torino 1979, p. 571 ff. and p. 582 in particular

politicization of the process that should enhance European integration. The crisis often provokes contingent answers, leaving aside broader projects. The re-coupling of law and politics is not so imminent and yet it represents a priority, if one looks ahead, towards a more coherent supranational system of norms. Common places, imposed through repetitive announcements of policy-makers, slowly de-couple law from politics, with the result of watering down legal discourses and lowering the level of legitimacy of the system as a whole.

The current situation in the EU is fragmented. The monetary union is still unfinished and a fiscal union is to be completed, whereas the instruments put in place – such as EFSF and ESM – are intergovernmental and depart substantially from a European method². Intergovernmentalism – it has been argued – further marginalizes the European Parliament and may weaken even more the legitimacy of institutions³.

Social and employment policies, intuitively distant from the scope of intervention of financial institutions, are nevertheless central to all macro economic manoeuvres. However, European citizens perceive the distance that separates institutional actors from their own immediate priorities⁴. Thus, we need to look into the interstices of political agendas, to retrieve a mixture of measures that may provide new impetus to social justice.

Labour law scholarship throughout the EU is active and inspired by pluralist perspectives. The sign of attention shown by the University of Hasselt and the Faculty of law towards this legal discipline makes me very proud in such an extraordinary occasion.

2. New synergies in cohesion and employment policies

A preamble on language and rhetorical strategies allows me to look with a certain degree of disenchantment at some recent proposals aimed at combining cohesion and employment policies, fostering growth in most disadvantaged European regions. They may sound as common places and in fact they are not entirely new.

Let me first mention that, in the attempt to smooth procedures and to clarify the final aims to be pursued, in November 2011 the Commission launched the 'European semester'. A broad planning of activities, put forward each January, is followed by the organization of

² B. Marzinotto, A. Sapir, G. B. Wolff, *What kind of fiscal union?* Bruegel Policy Brief, November 2011

³ V. Schmidt, *Democratizing the Eurozone*, Social Europe Journal 15.May 2012

⁴ M Monti, *A New Strategy for the Single Market*, Report to the President of the European Commission J M Barroso, 9 May 2010

the Spring Council meeting and the delivery of National Reform Programs (NRP) by Member States, each April. This modified version of OMC encompasses employment policies, which should be included in NRP. However, measures to regulate the concurrent presentation each year of national budgets and to introduce economic and fiscal surveillance have attracted most of the attention in the public debate. In December 2011 the 'Fiscal compact' saw the light and a new road was opened to allow further monitoring of excessive national deficits. The new Treaty on Stability Coordination and Governance in the Economic and Monetary Union (TSCG) was agreed in the Council meeting held on 1-3 March 2012⁵.

It is debated whether turning to a Treaty can represent the right response to the crisis. It is also stigmatized that decisions were, in the end, left to an *ad hoc* working group, departing from 'a constitutional spirit that sees process, substance and legitimacy as interlinked'⁶. It is also acknowledged that there is now more complexity than before in decision-making. This can potentially lead to criticism and frustration among citizens, as well as make them question on excessive delegation of powers to intergovernmental formations⁷.

In the overall reconstruction of Europe occurred during the crisis, employment policies and proactive measures to fight unemployment are marginalised. This undisputable fact reveals the paradox of inconsistencies in the mechanism of coordination, which, in the original institutional framework, should have brought together the economic and the social spheres. The paradox is exacerbated by the constant reference in national debates to employment measures as one of the privileged roads to growth and recovery.

The European economic recovery plan, issued in 2008⁸, had a short-term impact, mainly aimed at advancing payments and amending regulations on structural funds, so to simplify and facilitate the completion of programs. The Commission also issued a temporary scheme, in derogation from state aid regulations, to facilitate access to finance, especially for SME⁹.

⁵ <http://european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=it>

⁶ K. Armstrong, *Stability, coordination and governance: was a treaty such a good idea?*, <http://eutopialaw.com>, posted on 8 March 2012

⁷ J. Pisani-Ferry, A. Sapir, G.B. Wolff, *The messy rebuildibg of Europe*, Bruegel Policy Brief, March 2012 www.bruegel.org

⁸ COM(2008) 800, 26.11.2008

⁹ Commission communication '*Temporary framework for State aid measures to support access to finance in the current financial and economic crisis*' (OJ C 83, 7.4.2009, p.1). See also the European Commission's Communication *Single Market Act. Twelve levers to boost*

As a reaction to the crisis, SME frequently tend to connect to each other, so to share services and appear more competitive in the global market¹⁰. Measures aimed at favouring such processes are relevant and could in perspective be linked to labour law measures, for example introducing standards to be enforced at a territorial level, across clusters of companies, and value-chains of production, once SME have access to economic and financial benefits¹¹.

A search for synergies to be created among different European policies opens up a new scenario, associated with the reform of the European budget for the years 2014-2020. Common places are mixed with new places in the search for a better-targeted financial support to social measures. Instead of perpetuating the criticism – which is, nevertheless, historically justified – according to which social policies are ancillary to economic and monetary policies, a less conformist approach moves from the inextricable links which tie together the many spheres of European integration. Financial support, granted on the basis of selective criteria and accompanied by severe monitoring, is a concrete sign of attention towards mature social policies in times of crisis. Theories on integration through law, aiming at a full enforceability of fundamental social rights, should also consider such a pragmatic approach.

Financial support was also exceptionally granted through the European Globalization Adjustment Fund (EGAF), addressed to workers hit by the impact of globalization on local labour markets and, later on, to large groups of workers made redundant, as a consequence of the crisis¹². The EGAF is a temporary measure, meant to provide support, on grounds of objective needs that must be proven by the national authorities entitled to file the application. Hence, the suggestion I made elsewhere that solidarity should, in certain situations, be declined in the plural¹³.

growth and strengthen confidence. "Working together to create new growth", COM (2011) 206 final, sec 2.1 with references to the Small Business Act

¹⁰ So called 'network agreements', to be signed, following specific legal requirements, by a certain number of enterprises, have been introduced by the Italian legislator, as one of the measures to respond to the crisis

¹¹ A protocol signed in 2009 by social partners and the Tuscan region in Italy links access to credit to full enforcement of collective agreements at plant level, with regard to wages and working conditions. This agreement proved beneficial for small and medium enterprises, in counterbalancing the effects of the crisis

¹² Regulation 1927/2006/EC, 20.12.2006, based on art. 175.3 TFEU, dealing with specific actions to enhance social and economic cohesion. The EGAF, which was extended in 2009 (Regulation 546/2009/EC) to cover the effects of the economic and financial crisis, will operate until 2013

¹³ S. Sciarra, *Notions of solidarity in times of economic uncertainty*, ILJ 2010, 223

In 2009 a Report on cohesion policies outlined in great detail measures to improve recourse to structural funds, through the adoption of new partnership agreements, involving national and subnational levels of decision-making¹⁴. Closer controls *ex ante*, followed by strict monitoring *ex post* of the programmes financed, should lead to a more virtuous use of European funds and to a more targeted one. The adoption of sanctions towards Members States, in case of non-compliance with the new rules, is also foreseen.

Far away from proposing common places, this policy document is accurate and inventive in some passages, despite the limited space of manoeuvre left to policy-makers in times of economic restrictions. Following the recommendations of the Barca report, the Commission has slowly moved ahead, pursuing the idea that financial help must be selective and supportive of the priorities included in 'Europe 2020', the latest manifesto for a 'smart, sustainable and inclusive growth', to which I shall return later¹⁵. A plea to make use in 2013 – therefore before the entering into force of the new European budget regulations – of European funds which have not yet been spent, was made by Mario Draghi, President of the ECB, arguing in favour of financial help to fight unemployment among young people¹⁶.

In this line of thinking, the Commission proposes to deliver Europe 2020 through new partnership on funds, with recourse to a EU code of conduct supplementing the common provisions regulations¹⁷. What we see here is an interesting hybridization of new governance techniques, with hard law measures. The Code of conduct sets specific phases and responsibilities, in view of concluding binding agreements.

Social partners and other umbrella organizations are asked to return to the scene of shared decision making. In this better structured context, they should not limit themselves to echo the voice of civil society, but learn to deal with concrete stakeholders, in well-defined

¹⁴ F. Barca, *An Agenda for a Reformed Cohesion Policy*, April 2009, an independent report written for the Commissioner in charge of regional policies

¹⁵ European Commission, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth* (2010)

¹⁶ Lecture 'Federico Caffè' delivered at the University of Rome La Sapienza, <http://www.ilsole24ore.com/art/finanza-e-mercati/2012-05-24/draghi-crisi-internazionale-colpito-160009>

This proposal is echoed by the European Parliament, in a Resolution on *Youth opportunities initiative*, 24 May 2012
<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-224>

¹⁷ Commission Staff Working Document, *The partnership principle in the implementation of the Common Strategic Framework Funds - elements for a European Code of Conduct on Partnership*, SWD (2012) 106 final, Bruxelles 24.4.2012

areas and in specific local agreements. Interlocutors of partnership agreements should not be companies as single entities, but wider communities of economic actors involved with local authorities and labour representatives.

In a nostalgic mood, one could recall that this language is evocative of the vast literature on neo-corporatism, which infiltrated so intensively labour law discourses in Europe in the Nineteen Eighties and Nineties. Things have changed and are still changing, so much so that such a stream of thinking is now remote. Issues of representativity and legitimacy around bargaining tables have become more stringent, especially when recourse to European funds is at stake.

To pay homage to a legal theory tradition, which has been successfully cultivated in Belgian scholarship¹⁸, one can argue that a renewed proceduralization of legal discourses is now taking shape. A scattered notion of civil society should leave space to a highly responsible set of bargaining agents, kept together by precise obligations in the access to funds, in using them efficiently and in responding back for lack of transparency or misuse.

I have suggested elsewhere that the current crisis of welfare states, running parallel to the crisis of fiscal states, demands new theoretical approaches, which can be described as 'post-governance' regulatory techniques¹⁹. In the post-governance scenario the communicative side of procedures is attenuated, to make space for binding rules and for monitoring exercises. Responsibilities are envisaged and sanctions are provided, now that representatives of collective interests are more formally invested with powers.

Partnership agreements should be asked to occupy a public space. They should delimit and, at the same time, support the role of private autonomy, so that a public goal can be pursued with active role of social partners.

I shall now move on to test the post-governance theory against the spectrum of proposals enshrined in Europe 2020.

¹⁸ It is difficult to select in a vast literature. See for example J. Lenoble and A. Berten, *L'espace public comme procedure*, in A. Cottureau and P. Ladrière (eds), *Pouvoir et légitimité*, Paris 1992; O. De Schutter, N. Lebessis, J. Paterson (eds), *Governance in the European Union*, Forward Studies Series, Office for Official Publications of the European Communities, Luxembourg 2001

¹⁹ S. Sciarra, *The 'autonomy' of private governments. Building on Italian labour law scholarship in a transnational perspective*, in A. Numhauser-Henning and M. Rönmar (eds), forthcoming

3. Europe 2020 and beyond

The mixture of measures that is required to enhance growth, to support employment and to build up a sustainable economy is not new. The most relevant precedent is the Report produced by a taskforce led by Wim Kok ²⁰.

In that Report we read that a bad outcome of employment policies is segmentation of the labour market among insiders and outsiders, whereas options to work should be made available to all. We learn that training is the crucial resource to rely on. Thus, the vicious circle of low investment in training should be broken, anticipating employers' demands for new skills and sharing the costs with local and regional authorities. Training is the winning bet, since the reduction in working hours, experienced in the Nineteen Nineties mainly through recourse to part-time work, produced a decline in productivity. The Kok Report also emphasized that concrete outcomes should be evaluated by European institutions, instead of relying on mere promises made by governments.

Hence, efforts were put forward by the Commission, under the first Barroso presidency in 2005, to modify procedures in the OMC, stressing the role of national parliaments in the assessment of National reform programs (NRP). Intergovernmentalism came under attack in the evaluation of the rather opaque achievements made in previous employment strategies. That failure was also due to the inability of national bureaucratic elites to learn from each other and to act jointly, within a scheme of mixed administration.

Flexicurity measures became the core of new employment policies and the emblem of efficient labour market reforms to be approved by national parliaments. Crucial recommendations in the Kok report – for example the urgency to invest in education – gradually evaporated and principles of flexicurity started fluctuating in a rather vague area of decision-making, often leaving commentators not fully satisfied ²¹.

Europe 2020 tries to redesign a virtuous circle, favouring synergy among policies. Common places are easily discernible in this agenda. They are useful in cultivating the hope that persuasion will be accomplished, at a time when closer coordination of national choices is most needed as a matter of common interest within the EU (art. 121 and 148 TFEU). However, employment policies remain intrinsically weak even

²⁰ *Jobs, jobs, jobs. Creating more employment in Europe*, November 2003

²¹ W. Njoya, *Job security in a flexible labor market: challenges and possibilities for worker voice*, CLLPJ 2012, 459 ff.; L. Burroni and M. Keune, *Flexicurity: A conceptual critique*, European Journal of Industrial Relations 2011, 75; F. Berton, M. Richiardi, S. Sacchi, *Flex-insecurity*, Bologna 2009

in the Lisbon Treaty. The Council's guidelines, issued under art. 148.2 TFEU and addressed to Member States, are not justiciable in the Court of Justice, as for art. 263 TFEU²². This is a good reason to find other ways for consolidating good practices and place them on quasi-normative grounds.

In a fragile institutional set up, such as the one provided by the Treaty, strength can be generated through other mechanisms, for example through partnership agreements to be supported by targeted funding and through Territorial Pacts promoted by the Committee of the Regions, meant to implement Europe 2020 at a local level.

Let us look at the 'flagship initiative' entitled 'new skills for new jobs', which specifies the Commission's interest in anticipating changes and responding back to the needs of companies searching for qualified workers to employ²³. Research carried on by Cedefop²⁴, and in coordination with the ILO²⁵, shows very clearly that the opening up of new jobs in the green economy should be the object of consideration by policy-makers, in times of high unemployment rates.

If synergy is the magic word, we should rely on the role of employment services in activating the necessary tools²⁶. We should also be aware of the fact that the crisis accentuates regional economic differences, making it more difficult for weaker systems to offer efficient employment services. Cohesion policies, closely intertwined with employment policies, can create a new ground for solidarity across different regions of the EU. Social partners too can propose solutions through antidumping agreements, meant to fight the practice of wage competition.

In Norway a government action plan to avoid social dumping was first set up in 2006, and renewed in 2009. The Labour Inspection Authority and the Petroleum Safety Authority Norway are important players in the efforts to combat social dumping, namely in making sure that health and safety provisions and all basic regulations, including

²² C. Barnard, *The Shaky Legal Foundations for Institutional Action under the Employment, Lisbon and EU2020 Strategies*, in *Cambridge Year Book of European Legal Studies 2009-2010*, vol. 12, C. Barnard and O. Odudu (eds), Hart Publishing, Oxford 2010, p. 16

²³ See Council conclusions of 9.3.2009 and 7.6.2010. 'New Skills for New Jobs: Action Now' Expert Group Report, February 2010 and the European Commission's Communication *An Agenda for new skills and jobs: A European contribution towards full employment*, Com (2010) 682 final, 23.11.2010

²⁴ European Centre for the Development of Vocational Training (Cedefop), *Identification of future skill needs for the green economy*, n. 2368, 2009

²⁵ Ilo/Cedefop, *Skills for green jobs 2011. A global view*, Ilo, Ginevra 2011

²⁶ Opinion from the Public Employment Services Network to the Employment Committee, Stockholm, 3 – 4 December 2009

collectively agreed wages, are enforced for foreign workers.²⁷ Part of the action plan was the creation of a registry for TWA operating in the country. Field research shows that, despite a sound level of regulations in the construction industry, social dumping still affects workers, mainly those coming from enlargement countries.²⁸

In Denmark, since March 2011, an antidumping agreement has been enforced in the building sector, providing for a special fund in which a percentage of hourly wages is paid, in view of fighting social dumping. Furthermore contracting out can only take place to companies enforcing collective agreements and minimum wages²⁹.

The spectrum of social inequalities and the practice of social dumping must be on the agenda of urgent reforms, in order not to infringe dramatically the original pact signed by the European founding fathers and imperil further integration. The 'reconceptualization' of structural funds, in response to the impact of global trade³⁰, is very pragmatically driven by the need of a new equilibrium inside the EU, as a countermeasure to the dramatic impact of the crisis³¹.

In this scenario, bargaining collectively in the framework of partnership agreements can help to focus on needs of companies and labour and to promote growth of local economies. Out of common places, new places for labour law continue to be inhabited by social partners, in a broad interpretation of art. 152 TFEU. Local authorities are the ones that can further empower social partners within productive clusters and chains of production, so to adjust workers' entitlements and to adapt protective standards to changing needs. Out of common places, flexicurity should be tailored around local needs and react to the crisis within well defined geographical areas.

It is of utmost importance that training becomes less of a common place and more of an individualised resource, through counselling, job-

²⁷ <http://www.regjeringen.no/en/dep/aid/topics/The-working-environment-and-safety/social-dumping.html?id=9381>

²⁸ A M Ødegård, Ø Berge, K Alsos, *New regulations for temporary work agencies: can a growing informal market be subdued? A case study of the Norwegian construction sector*, paper presented at the IIRA congress Copenhagen 2010

²⁹ Eironline 2011, n. 3, <http://www.eurofound.europa.eu/eiro/2011/03/articles/dk1103019i.htm>

³⁰ As argued by D. Ashiagbor, *Embedding trade liberalization in social policy: lessons from the European Union?* CLLPJ 2011, 384. More broadly on these issues, see C. Panara and A. De Becker (eds), *The role of the regions in EU governance*, Springer 2011

³¹ In 2009 Baltic states experienced a sharp decrease in GDP, whereas Nordic states were among the most competitive countries in 2010-2011. See the data presented by sixteen European think tanks, coordinated by Notre Europe, *Think global- Act European*, Paris, p. 20

matching, guidance and mentoring to workers most in need of protection³².

The crisis is forcing labour law to revisit some of its principles and to revise some of its perspectives. Anticipation of changes is recurrently practiced in transnational collective agreements, a fascinating subject matter which cannot be treated extensively here. It may suffice to say that large multinational companies seem to react promptly to the slow move of national and supranational law-makers, by setting their own rules, within bilateral agreements signed by international unions and European Works Councils³³.

Some transnational collective agreements provide a system of workers' mobility inside groups of companies, as a response to the loss of jobs. They also provide training, in order to facilitate changes to other jobs and alternatives, such as requalification of skills. Support to enter self-employment is also offered³⁴ and indicators are set, to measure in concrete terms the achievement of all these goals.

Once again, social spheres, even in a transnational context, are ready to provide their own means of enforcement and to adapt sanctions to changing needs of the bargaining agents. This is, needless to say, an alternative to industrial action in its most traditional features. It represents a sign of the difficult time we live, in which we witness a progressive marginalization of conflict, due to the expansion of transnational tools, aimed at building consensus and fostering participation.

4. Le plaisir du texte

I started my presentation humbly borrowing some concepts by Roland Barthes, to express the idea that common places can be used persuasively in rhetoric and even facilitate communication. In fostering critical interpretations policy-makers are placed within an institutional context. They use technical language to convince stakeholders and law-

³² This conclusion is drawn in a study prepared for the European Commission, Metis GmbH, *Evaluation of the reaction of the ESF to the economic and financial crisis*, Vienna 2012, p. 77

³³ I. Schömann, *European social dialogue and transnational framework agreements as a response to the crisis?*, ETUI Policy Brief European Social Policy Issue 4/2011. The Commission's website gathers information on transnational framework agreements <http://ec.europa.eu/social/main.jsp?catId=978&langId=en>. On EWC see F. Dorssemont, T. Blanke (eds), *The Recast of the European Works Council Directive*, Intersentia, Antwerp, 2010

³⁴ See, for example, the *Alstom* agreement, signed in Paris by the EMF in February 2011, dealing with anticipation of changes. The *Gdf* agreement signed in 2010 deals with mobility of workers across companies of the group

makers, they seek compromises and build up solutions which are likely to be accepted. In doing so, written texts become more and more generic, they may even lack the texture that should keep all threads together.

Let me once more borrow an interpretation by Roland Barthes, glancing at his book *'Le plaisir du texte'*³⁵. There are times in which the production of texts ceases to be connected to places. The texture is destroyed up to the point of excluding readers from the understanding of texts and depriving them of all pleasures which are closely linked to cultural references. Hence, the need is felt to reconstruct meanings and to allow for new pleasures stemming from the text.

I have argued in my presentation that the political texture underneath the threads of decision-making could be broken by disproportionate recourse to soft law techniques. In the European tradition of subsidiarity among legal and voluntary sources, laws empower collective actors and make them responsible for parallel processes of standard setting. This tradition is relevant and must be strengthened in times of crisis.

In global law, we observe the hybridization of sources, and we deal with the results of dialogues among national and supranational courts. As labour lawyers, we search for the social spheres in which law is produced and we envisage modern approaches to juridification, shortening distances between centre and peripheries of legal systems. Legal theory helps us reconcile with the idea of openness of legal systems, so that we can capture the multiple functions of communication among different actors, in a pluralistic perspective³⁶. Communication is even richer when the voice of organized groups can be listened to. The pleasure of the text results from a mixture of languages, spoken in constitutional traditions and in customary law.

We – I want to specify – is a plural used as an auspice and is referred to labour lawyers across Europe, although I am aware that there are no unitary visions on what ought to be done. This is the reason why I am relying on common places and on their persuasive function in perilous times like the present ones, wishing that a specific place for labour law will be preserved in forward looking plans to overcome the crisis.

³⁵ R. Barthes, *Le plaisir du texte*, Paris 1973

³⁶ M. Van Hoecke, *Law as communication*, Oxford 2002