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EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

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**In Search of a New Language:
Italian Labour Law Scholarship in the Face of European Integration**

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European Legal Integration: The New Italian Scholarship (ELINIS)

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship*. Even the most cursory examination of the major scientific literature in the field of European Integration, whether in English, French, German and even Spanish points to a dearth of references to Italian scholarship. In part the barrier is linguistic. If Italian scholars do not publish in English or French or German, they simply will not be read. In part, it is because of a certain image of Italian scholarship which ascribes to it a rigidity in the articulation of research questions, methodology employed and the presentation of research, a perception of rigidity which acts as an additional barrier even to those for whom Italian as such is not an obstacle. The ELINIS project, like its predecessor – the New German Scholarship (JMWP 3/2003) – is not simply about recent Italian research, though it is that too. It is also new in the substantive sense and helps explode some of the old stereotypes and demonstrates the freshness, creativity and indispensability of Italian legal scholarship in the field of European integration, an indispensability already familiar to those working in, say, Public International law.

The ELINIS project challenged some of the traditional conventions of academic organization. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions to ELINIS were not limited to scholars in the field of “European Law.” Such a restriction would impose a debilitating limitation. In Italy as elsewhere, the expanding reach of European legal integration has forced scholars from other legal disciplines such as labor law, or administrative law etc. to meet the normative challenge and “reprocess” both precepts of their discipline as well as European law itself. Put differently, the field of “European Law” can no longer be limited to scholars whose primary interest is in the Institutions and legal order of the European Union.

ELINIS was the result of a particularly felicitous cooperation between the Faculty of Law at the University of Trento – already distinguished for its non-parochial approach to legal scholarship and education and the Jean Monnet Center at NYU. Many contributed to the successful completion of ELINIS. The geniality and patience of Professor Roberto Toniatti and Dr Marco Dani were, however, the leaven which made this intellectual dough rise.

The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

--J. H.H. Weiler

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**In Search of a New Language:
Italian Labour Law Scholarship in the Face of European Integration**

by

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Abstract

This paper explores how Italian labour lawyers, on the basis of different analytical perspectives, have approached the European integration process.

Attention to the effectiveness of law, support for schools of legal pluralism, and the anchoring of legal discourse to the premises of constitutionalism are the components of the Italian tradition which embodies the attempt undertaken by labour lawyers in this decade to place their analyses within the more general stream of research on the overall direction of European integration, to rethink and redefine the process and the place occupied within it by social law and social rights.

The impetus to cast off the clothes of a national labour law scholar and don those of a European one has revolved around the two apparently contrasting trends that are currently present on the Community scene: on the one hand, the advancement of a European constitutionalism which has marked a normative turning point in the unification process; on the other hand, the emergence of multi-level governance techniques that are markedly different from the classical Community method.

The paper argues that the most significant contribution that labour lawyers can provide, in view of their cultural background and tradition, to the legal theories on integration is that of proposing pluralism not only in terms of pluralism of norms, but also in terms of pluralism of institutions and powers. European legal integration cannot be understood and described as an autonomous process, divorced from the political sphere and competing social interests. The “anomaly” of labour law with respect to the other branches of legal science, its anti-dogmatic and anti-formalist approach, endows it with a unique ability to keep pace with the time of social change and predisposes it to grasp the highly dynamic and evolutionary character of the integration process.

Summary:

1. *The “nationalist syndrome”*
2. *The “normativist syndrome”*
3. *A new theory of legal comparison*
 - 3.1. *The instrumental position*
 - 3.2. *The defensive position*
 - 3.3. *The possibilist position*
4. *Understanding the new multi-level governance and its instruments*
5. *Labour lawyers and the procedural experimentalism of the New Modes of Governance*
6. *Squaring the circle? New governance and fundamental rights*
7. *The contribution of Italian labour law scholarship to the theories on European integration*

1. The “nationalist syndrome”

A decade ago, when analysing the reactions of Italian labour law scholars to the internationalisation of markets, Tiziano Treu noted that the labour law community was still a victim of a “nationalist syndrome” which was rooted in the belief that the specificity of national experience was the central element of legal analysis¹. This belief could be explained by a more profoundly embedded cultural phenomenon: despite the fact that labour law scholars received considerable exposure to the pluralist method², legal positivism remained widespread and deeply rooted³. It was to re-surface and overshadow the pluralist “categories of thought” (“ordinamento intersindacale”⁴, industrial conflict, social self-regulation, state legislation as legislation empowering trade unions) during the neo-corporatist era of the Eighties when the institutions and law-making of the state and its apparatus re-occupied the centre stage. Under the shadow of the major neo-corporatist agreements, collective bargaining was even ascribed by some leading scholars⁵ the same regulatory function as the law and the large collective interest organisations were described as being rule-makers parallel to the state⁶. Thus, at the beginning of the Nineties, legal culture in Italy too saw the resurgence of the re-nationalisation of labour law which sought to oppose its Europeanisation⁷.

This “nationalist syndrome” was made more acute by another typically Italian phenomenon: the start of the Nineties saw a profound political, economic and institutional crisis that almost led to the “implosion” of the entire system. It was a period in which the best intellectual minds in Italian labour law devoted their energies to planning internal institutional reforms⁸, even taking part in successive “technical” and political governments, following electoral reforms based, for the first time in the post-war era, on the principle of alternate government and bipolarism. The focus of labour law analysis thereby became inevitably drawn

¹ T. Treu 1994, p. 1134.

² For an analysis of how the pluralist theories influenced Italian labour law scholarship see T. Treu 1979 and G. Balandi, S. Sciarra 1982.

³ P. Grossi 2000; Id. 2002, p. 505.

⁴ The theory of *ordinamento intersindacale*, developed by Gino Giugni (G. Giugni 1956, Id. 1960), asserts the inner legal value to be attributed to the autonomous social norms produced within the industrial relations system (on Giugni’s position see A. Lo Faro 2000a, Id. 1999).

⁵ L. Mengoni 1980

⁶ G. Ferraro 1981.

⁷ See S. Simitis 1994 on the same position with reference to the German debate.

⁸ A commitment which resulted in the unexpected and tragic murders, at the hands of the Red Brigades, of Massimo D’Antona and Marco Biagi, two of the most distinguished labour lawyers of that generation.

to domestic issues, particularly the vast, unsolved question of the history of Italy's institutions, i.e. the reform of the State and the problem of its inefficient public administration⁹.

All this occurred in spite of the fact that Italian labour law studies owed a great debt to the comparative method. Back in the Fifties Tullio Ascarelli had already identified comparative law as the means to overcome "positivist nationalism"¹⁰ and, on the basis of this approach, labour law scholars were able, in the wake of the Constitution of 1948, to undertake a profound cultural revolution that freed the discipline of cultural layers of a national-corporatist nature but also of the rigid private law reductionism that the cultural hegemony of civil law scholarship had subjected it to. But the comparative method, and with it the approach of legal relativism, remained an activity that was prevalently cognitive, one which sought to rationalise and reform national labour law on the basis of "knowledge by differentiation". It led to domestic reforms being devised through learning from the mistakes of others. What is more, Otto Kahn Freund's warning about the limits of legal transplant¹¹ was ever present, above all in such areas as trade union relations and the welfare state. Italian scholars, even those more open to the pluralist method, ended up considering this method as being applicable only within national boundaries; beyond them prevailed the monistic view of legal orders, tinged with a certain amount of nationalistic pride¹². The increasingly evident signs of the direct influence of supranational law on domestic law were either underestimated or confined to particular spheres (equal treatment between women and men, where ECJ jurisprudence acted as a corrective to the original economic meaning of the principle; health and safety at work which was intended to promote market integration while avoiding social dumping), but left untouched the core of domestic labour law i.e. the organisation of the welfare state and the industrial relations system.

Likewise, the little attention that Italian scholarship initially paid to an atypical supranational legal order such as the EEC, and the ECSC before it, can probably be read "as the need to give priority to the consolidation of an 'Italian style' in the variegated frame of European labour law"

⁹ Italy's public administration system was not even able to cope with the challenge of European integration that was speeding up at the time (the introduction of the single currency and the ECB), and which requires models of governance of the economy and public administration able to meet the tougher limits set by the Community. This led to a number of reforms of the public administration system, local public agencies and services, and the civil service as a whole.

¹⁰ As S. Sciarra recalls 2003, p. 435.

¹¹ O. Kahn Freund 1974.

¹² As S. Simitis 1994, p. 648 ff. explains, in Germany too, social harmonisation and the "convergence" of national orders were considered to be an extension of the German model to the rest of Europe, never as the creation of an original and autonomous order capable of moulding national orders to its own principles.

¹³. Its contribution to the debate on the convergence or divergence of Community legal systems and on the construction of a supranational or transnational law was therefore to remain for a long time uneven and largely limited. A notable exception was the participation of two of Italy's best legal scholars, Luigi Mengoni¹⁴ and Gino Giugni¹⁵, in the comparative studies of national labour law systems promoted by the High Authority of the ECSC and by Federico Mancini's writings on Community law in the Eighties, supported by his experience, first as Advocate General and later as a judge at the European Court of Justice¹⁶. While in the former case we have an example of a sophisticated attempt to establish a common terrain of legal research through the use of the comparative method, prior to and independent of the political initiative of the European institutions, in the latter case there is a conscious effort to reveal the limits of early Community social law. Federico Mancini was the first to coin the phrase "frigidità sociale" (social frigidity) to describe the approach to the Community institutions and policies¹⁷. Often quoted by Italian labour lawyers in Community law studies, even the most recent ones, we have here a case of a felicitous expression condemned to overuse and, in the end, to distort the truth. Indeed, in later years, to talk of a social Europe often meant being critical of the limits of the Community labour law system and vice versa extolling the "political and national nature" of labour law and the "constitutional" limits of its values. The pluralism of normative sources was to be limited to the territorial dimension of the State - a kind of "social sovereignty" - and attributed in essence to the law vs. collective agreement dialectic.

And yet labour lawyers enjoyed the advantage of having a privileged observation point as regards the opportunity to grasp early on the effects, engendered by globalisation, of the denationalisation and diversification of social regulation and its sources. Labour relations have been one area that has clearly felt the crisis in national law-making and the ensuing regulatory

¹³ S. Sciarra 2003, p. 429.

¹⁴ With regard to Mengoni's writings on the subject, see in particular L. Mengoni 1966, Id. 1965, Id. 1958.

¹⁵ G. Giugni 1967, Id. 1964.

¹⁶ Mancini's essays on Community law are now collected in F. Mancini 2000.

¹⁷ And yet back in 1985 Mancini, after analysing that formidable instrument of integration consisting of the dialogue between national Courts and the ECJ, wrote the prophetic words: "The domestic sources are on the verge of drying up and it is easy to predict that, for those who look only at these, the future is bleak: plaintive ruminations about the past, melancholic rearguard skirmishes and perhaps the birth of a new formalism (signs of it are already evident). Why not, therefore, initiate, or continue a dialogue with Luxembourg? I don't know if this will be enough to avoid the grim prospects that I have described; but I do know that it would breathe new life into Italian labour law and, more importantly, would open new roads for EC labour law" (F. Mancini 1985, p. 493). Mancini's scepticism regarding the characteristics of European social law and his awareness of the difficulties in constructing a supranational political body did not prevent him from maintaining to the end the hope of constructing a federal European state (F. Mancini 1998).

competition which has accompanied the globalisation of the economy. But even in cases in which such awareness existed, there was a basic conviction that the national legal instruments and related protection systems constituted the necessary shields with which to ward off the deregulatory effects of globalisation. There emerged the anxiety to defend the national system of constitutional values, often identified, with a legal positivist ideology, with the state (apparatus) and the law implementing those values (in the peculiar labour law form of the “non-derogable norm”). In this they shared the company of the majority of constitutional scholars of the period and of the Italian Constitutional Court itself, which only at the end of the Eighties would forsake its challenge to the theory of the primacy of Community law, based on the defence of the fundamental rights enshrined in the national constitution, to begin (together with the German Constitutional Court) a dialogue with the ECJ, which can rightfully be considered as one of the milestones on the road to European integration ¹⁸.

2. *The “normativist syndrome”*

The nationalist syndrome” was thus mirrored by a “normativist syndrome”, which was described by Massimo D’Antona in a work published at the same time as the one by Tiziano Treu mentioned at the beginning ¹⁹. The inadequacy of Italian labour law theory on European integration in the Eighties and Nineties became evident in the methodological failing of studying and describing the relationship between EC law and labour law by considering only *the product*, which was always a norm of labour law or at most its judicial interpretation, and applying received interpretative criteria indiscriminately, including, notably, that of assuming that labour law should generally deal only with the protection of one particular category, namely employees, and that EC law should be by definition more favourable than domestic law. It was a kind of transcendental and universal principle of *favor*, taken out of its historical context (post-constitutional labour law), and applied to a system whose specificity was not identified even as regards the theory of sources.

It is for this reason that to talk of a social Europe means, prevalently, dealing with the tendentially upwards *harmonisation* of national labour laws, and not (also) with *mutual*

¹⁸ R. Toniatti 2002, p. 520.

¹⁹ M. D’Antona 1994 now 2000, p. 351 ff.

recognition (as happened in other disciplines), but neglecting the karst (not necessarily negative) integration occurring at the time in the European supranational context. And it is for this reason that the normativist approach fails also to identify a peculiar development of the Community order and of European social law, which cannot be reduced to the experience of the nation state, namely that these are organised around a number of fundamental principles “safeguarded” by a true “federal” Court, with policies of convergence which, in taking national differences for granted, make full use of new softer forms of regulation ²⁰.

According to D’Antona, the normativist approach not only leaves unsolved the various problems of the complex, multi-level interaction between the two systems, but above all “prevents one from seeing that behind the sources there are powers”²¹, as well as a plurality of institutions and actors which are beginning to develop their own action and law-making strategies, ones that cannot be framed within any of the frameworks supplied by national public and civil law or even by international law. In short, for a period of time, labour lawyers nurtured the fallacy that a “stateless law” could be interpreted on the basis of the historical experience of national labour law models and of the yardsticks of legitimacy supplied by state systems. As has been observed, clinging on to these positions means remaining prisoners of a public law tradition that has been on the whole abandoned by public law scholars, and which is unable to dissociate the concepts of “law” from “state” and to recognise that the “legal communicative code” can travel beyond state borders simply by ignoring them ²². It means not grasping the fact that the process of European integration has created an atypical multi-tier governance system, which cannot be considered either as a new supranational structure, or as a simple association of states ²³.

The writings of Tiziano Treu and Massimo D’Antona in the Nineties were among the first to explore, without preconceptions, the original features of the Community legal order and the different genetic code of Community law with respect to labour law. They did so with an intellectual curiosity which allowed one to grasp the gap that has existed between economy, politics and law in the European legal system. This new approach, nevertheless, gradually managed to become a school of thought; and the reason for this is that Italian labour lawyers

²⁰ M. D’Antona 1996 now 2000, p. 377.

²¹ M. D’Antona 1994 now 2000, p. 352.

²² G. Bronzini 2000. p. 95 ff.; M.R. Ferrarese 2006.

²³ C. Joerges 2000, p. 276; F.W. Scharpf 1999. This is the most common negative definition. But see I. Pernice 2002 pp. 511 ff. and 517; I. Pernice, F. Meyer 2003, for an attempt at a positive definition.

were able to count on a theoretical and cultural legacy which provided massive doses of antidote to the nationalist and normativist syndromes. Although its DNA remained obscured for many long years, it would eventually re-surface. Of course this was not a self-referential process involving a few labour law scholars. Globalisation and the increasingly evident phenomena of supranational norms have led to a polished restoration of the pluralist approach, which like a karst river, runs particularly deep in Italian labour law culture.

Alliance to schools of legal pluralism, attention to the effectiveness of law, and the anchoring of legal discourse to the premises of constitutionalism were the components of the tradition of European labour lawyers (investigated with acumen by one of the other representatives of the “lost generation” of eminent labour law scholars - Gaetano Vardaro ²⁴) which embodied the attempt undertaken in this decade to rethink and redefine the process of European integration and the place occupied within it by *social law* and *social rights*. The impetus to cast off the clothes of a national labour law scholar and don those of a European one revolved around the question of how different levels and forms of regulation were to intertwine ²⁵, and around the role that constitutionalism, seen as a set of binding values having normative strength, was to continue to play in this complex relationship among different systems and principles.

3. *A new theory of legal comparison*

It was a period in which there was a growing awareness that the “unforeseen, anomalous and strategic effects” ²⁶ produced by the construction of the Community legal order included the opportunity for a new theory of legal comparison. Reference was made to the theory of continuous cross fertilization among systems. According to this approach the hybridisation between the Community order and the national legal orders led to the Communitisation of the national legal systems, which meant, on the one hand, the elimination of national rules that were not consistent with the Community normative framework and the replacement by Community law of incompatible national laws; and, on the other hand, the Europeanisation of Community law, i.e. the attribution to Community law of a solid foundation based on concepts and principles

²⁴ G. Vardaro 1983, Id. 1982.

²⁵ S. Sciarra 2003, p. 450.

²⁶ R. K. Merton, E. Barber 2004.

shared by the legal orders of Member States ²⁷. The consequence of all this was the transformation of comparative law from a purely persuasive and cognitive area of law to one which was to perform a regulatory task of strategic importance. These legal developments, as has been observed, broke with the state nature of legal sources and no longer allowed themselves to be caged within the mere image of ‘hierarchy’ ²⁸. This is obviously also true of labour law sources. The process intensified following the Maastricht Treaty, which also opened the Community order to the pluralism of organised collective interests ²⁹.

The trends taking place in European integration were explored starting from this preliminary acknowledgement, which amounts to a sort of methodological manifesto. Sources, including domestic sources, increasingly had impressed upon them the traits of their genesis in a cross-fertilisation among various orders, under the sign of a new legal, regulatory and institutional pluralism which generated a model of social policy which is also plural and diversified, polycentric and interrelated. The research of this generation of labour lawyers revealed an awareness of the intrinsic unitarity of the two legal orders, of the necessary supranational dimension of regulatory responses to the social challenges brought about by globalisation, combined with a profound rethinking of the comparative method applied to law in general and labour law in particular. Its gestation is also accompanied by a re-positioning of the dialoguing community of labour law scholars in a space “without national borders”³⁰. This compelled a rethinking of the very language and reference categories of labour law as a law existing in a new dimension of space and time. None of the interpretative categories used by labour lawyers can be transferred automatically to the European context. This is true of collective *laissez faire*, which cannot be applied to European collective bargaining or social dialogue ³¹, and of the “non-derogable norm”, whose hard law characteristics are difficult to trace in the new generation of directives (such as the part-time directive). Furthermore, Italian labour law scholars strove to go beyond the confines of labour law in order to describe the new role that law and politics are playing in the current stage of the Community institutional process.

²⁷ W. Van Vergen 2001, p. 465.

²⁸ P. Häberle 2002, Id. 1999; J.H.H. Weiler 2003; J. Scott D., M. Trubek 2002.

²⁹ S. Simitis 1994.

³⁰ B. Caruso 2007b.

³¹ F. Guarriello 1992; A. Lo Faro 2000a, Id. 2000b; Id. 1999. G. Arrigo 2000 suggests that the concepts of trade union representation and representativity are essentially derived from national systems.

The metaphor of searching for a new language, used by Silvana Sciarra³² to describe the new role that law and politics are playing in the current stage of the Community institutional process, is also appropriate to the approaches used by legal scholars in their conceptual reconstructions of the characteristics of this process.

Community law scholars widely acknowledge that the Community legal experience is apparently inexplicable in the light of traditional legal theories, irrespective of whether the rationale behind the integration process is viewed positively or negatively. Italian labour law scholars are also party to this epistemological awareness. However, not unlike in other areas of research, this does not mean that they have not tried to formulate some explanation and that such explanations are not profoundly influenced by their different normative visions of the function of law, and of labour law in particular, ones which precede those of European integration. The debate has therefore been woven into the one which has been going on for more than a decade on the crisis of labour law and its future. This debate has produced various positions and perspectives. Each of these also corresponds to a different way of approaching the integration process.

3.1. The instrumental position

The first position sees the gradual adaptation of labour law to the needs of the enterprise and of the market, with its related corollaries of efficiency and competitiveness, as the only alternative to it becoming extinct as a regulatory system or functionally pointless or gradually ineffective³³. This perspective does not share the neo-liberal ideological simplification of the return to the individual employment contract or to company law. It is argued that labour regulation is undergoing a change in focus and ought to increasingly deal with the dictates of the economic analysis of the law, as well as with company law and competition law, but without losing sight of its functions.

In this case, the approach is politically responsive: the adaptation of labour law to the market would imply radical top-down reforms and the abandonment of old ideological postulates

³² S. Sciarra 1999.

³³ P. Ichino 2000, Id. 1999,; M. Biagi 2000; M. Biagi, R. Salomone 2000; P. Olivelli, M. Tiraboschi 2005.

in favour of new ones. It is argued that to avoid the unconditional political and cultural surrender of labour law to the market, labour lawyers must not only accept, but contribute actively to a radical transformation both of the function and of the regulatory techniques underpinning the discipline. As regards the function, the focus of regulation must be shifted from the protection of rights, to the organisation and promotion of the market and of employment; from distribution to production. The right to work and the fight against the social exclusion of outsiders become the “noble” justification to lower the standards of protection enjoyed by the employed, or rather, to redistribute rights between core and marginal workers. Such redistribution of rights in the market would replace the redistribution of the positions of power within the enterprise, which are accepted as unchallengeable.

According to this perspective labour law must deal less and less with the protection of standard rights, and increasingly with anti-discrimination techniques. While fundamental rights remain the term of reference of the language of legal models, they do so as a posthumous and marginal discourse with respect to the central focus attributed to the efficiency of markets and of the enterprise. A typical example is the right to strike and the right to collective bargaining, which are downgraded from inalienable constitutional rights to relative freedoms, the boundaries of which are determined *ex post*, on a case by case basis, according to how economic freedom manifests itself. Economic freedom, according to the conceptual categories of the *ordo liberalis*, is raised to the status of a fundamental right³⁴.

The approach of these labour lawyers to Community law and their interpretation of European integration are often instrumental in nature. Community law constitutes the means to liberate national law from its paternalistic chains. Hence the strategic use of litigation at the Community level. The most notable example is the *Job Centre* case, in which it is possible to see at work a convergence of academic and economic interests in using litigation as a means of anticipating and pushing national political decisions in the desired direction, i.e. the liberalisation of the labour market through the removal of inefficiencies in public placement agencies³⁵. Hence, once again, the use of Community discourses and techniques that could best enable to adopt the new paradigm of flexibility and differentiation i.e. soft law, management by objectives,

³⁴ The European Court of Justice’s decision on the *Albany* case, which, not unsurprisingly, is criticised by proponents of these positions, constitutes a barrier to this attempt by market values to spill over into the traditional concept of social rights.

³⁵ See S. Sciarra 2001b, p. 241 ff.

best practices, etc.. The belief that Europe is a kind of *à la carte* menu, from which one can take what is desired and transfer it where one wants, can sometimes lead to forms of caricatural mimicking, such as the provision which entrusts political actors with the task of scrutinising the legality of private behaviours that ought to be undertaken by the judiciary³⁶.

3.2. *The defensive position*

In other positions a strong resistance to innovation dominates. While their proponents do not deny that transformations in the labour market and in the post-Fordist enterprise are taking place, these are considered, all told, to be superstructural or quantitatively limited in nature. It is often argued that those in favour of innovation and change overestimate certain real data for purely ideological purposes (a sort of revised form of the bourgeois false consciousness). The positive innovations of post-Fordism (creativity, teamwork, the focus on knowledge, autonomy of new employees), on closer examination, turn out only to be a mystification. As the French would say they are only cases of a *marchandisation de la différence et de la créativité*³⁷. According to this perspective, far from liberating labour, the transformations of the Eighties and Nineties have only heightened old inequalities and created new ones, brought about by worse forms of discrimination based on age, ethnic group and race, as well as by the greater economic dependency of self-employed workers on their clients, and has reproduced forms of alienated, mass labour in which neuroses, insecurity and widespread uncertainty constitute the terms of the new “psychological contract”.

Consistently with these premises, it is argued that there is no reason to modify the cornerstones of labour law put in place by national models after the Second World War, above all in Central and Northern Europe. These systems have been the most efficient answers to the quest for equality and solidarity circulating in Europe in the post-war era. They have provided the right counterweight to the demand for economic freedom sought by enterprises. The prime actor and arbiter of this balancing has been the nation state, which has mainly used to this end

³⁶ In the form of a Ministry of Labour code of best practices and indices of circumstantial evidence on unlawful subcontracting and legal procurement of services: see art. 84 of legislative decree no. 276/03.

³⁷ L. Boltanski, E. Chiapello 1999; P. Veltz 2000.

the instruments of the “norma inderogabile” and supportive legislation for collective bargaining. This model puts the state and law at the centre, and has been in the long term more successful than the Anglo-American voluntarist models. Given these premises, there is no reason to carry out a profound restructuring of the labour law model based on the protection of standard rights³⁸.

The cornerstones of national legal systems and the instruments traditionally used for the abovementioned functions should remain largely untouched; indeed they should be strenuously defended against the assault made on them by the globalisation of markets. State legislation protecting standard social rights is considered a primary source and hierarchically superior in so far as it directly enacts the principles of the welfare state as formally envisaged by the various national constitutions. Supranational regulation at the European level (produced both by the legislature and by the judiciary), in this perspective, is in the worse cases seen with suspicion.

As in the preceding position this regulation is considered, this time in negative terms, a sort of “post-modern Trojan horse” designed to breach the wall of national protections, by introducing the deregulation sought and triggered by the markets³⁹. Or such regulation is once again attributed a prevalently instrumental role, here too in terms opposed to those described when referring to the first position: it is to be invoked, if and where possible, as a barrier against the deregulation policies implemented by national legislatures (e.g. through the non-regulation clauses) or only when they are more favourable than the national ones. In this second form, European social law is considered a sort of “shield” to defend national systems, a form of subsidiary defence that can be activated when the first barrier (national law) is in danger of being demolished⁴⁰. Soft law, instead, is mainly identified as a form of deregulation. For all of the above reasons this group of labour lawyers looks positively at the tendency to re-appraise the national constitutional dimension, all the more so at a time when the possibility (for some traditional eurosceptics, the illusion) of constructing a federal European welfare state shaped in the image and likeness of the traditional national welfare state seems to be fading in the horizon.

³⁸ M.V. Ballesterero 2007; U. Carabelli, V. Leccese 2005, Id. 2004; M. Pallini 2007, Id. 2006.

³⁹ G. Orlandini 2006, Id. 2000.

⁴⁰ M. Roccella 2006, Id. 2001, Id. 1999; M.V. Ballestrero 2007; S. Giubboni, G. Orlandini 2004. The metaphor of Europe as a shield and as a Trojan horse can be found in A. Alaimo forthcoming.

3.3. *The possibilist position*

Finally there are other positions which, following Häberle's suggestion, seek to apply the "pensiero possibilista", i.e. "*thinking of alternatives and in alternative terms*"⁴¹. This mode of thought avoids thinking solely in terms of oppositions and binary alternatives, and opens up to third and fourth possibilities and even to compromises.⁴² According to this perspective, just as the old and new dichotomies appear less stable at the level of general theory of law, so there is a need not to fall into the logic of oppositions at the level of labour law. Indeed, labour law is considered one of the areas of legal experience that is most suited to this pluralist approach because it is the crossroads where continuity and innovation confront each other and can co-exist.

These authors see European integration as a system of governance and a legal order in which differentiation is the trademark of a legal and institutional pluralism that is not just quantitatively but also qualitatively different from that of the state, which labour lawyers, but also constitutional lawyers had been accustomed to⁴³. They also believe that social regulations and competition regulations, and the different values that they embody, need not necessarily stand in opposition and compete with each other, but can mutually shape and favour each other⁴⁴.

A position that is so open to the logic of the reasonable, the probable, and the proportional, also leaves itself open to criticisms of making labour law lose its profoundly normative and prescriptive inspiration, its reference to values, principles and rights can be defined as "fundamental". It is feared that a non-hierarchical vision of the legal order and the multiplicity of viewpoints might generate an exchangeability of normative solutions, decided as needs arise. This criticism is rejected together with the invitation to go beyond conceptual certainties to "free the mind" in order to work on a "programme of interconnections", not relying solely on the

⁴¹ P. Häberle 2001 now 2005.

⁴² As F. Ost and M. van De Kerchove 1997 recall: "While there is no doubt that legal scholars have not forgotten formal logic, they must now learn the logic of the probable, of the reasonable, of the proportional. A gradualist and relativistic logic that is no longer content with binary oppositions, but explores the boundaries of the law to redress the scales of justice as quickly as possible".

⁴³ T. Treu 2001; M. D'Antona 2002; S. Sciarra 2005; Ead 2004, Ead. 2003; M. Barbera 2000, Ead. 2006b; B. Caruso 2007a, Id. 2006, Id. 2004, Id. 2003; F. Guarriello 2004; E. Ales 2004; C. Alessi 2004. For a general discussion on the relationship between differentiation and unity among legal orders in European integration see F. Tuytschaever 1999.

⁴⁴ B. Caruso, G. Ricci forthcoming; S. Sciarra 2000.

discourse of rights and its conventional and less conventional techniques – anti-discrimination protection – in order to perform the function of setting limits to policies and correcting the market⁴⁵.

It is precisely in order to perform the tasks traditionally entrusted to it that labour law should include within its jurisdiction and its language new regulatory techniques, including soft law and even the supple forms that border on politics; without, however, excluding traditional hard law, in an approach that is truly integrated and complementary, not one of mere juxtaposition. In this vein, the language of rights is to be integrated with that of politics; but not by continuing to conceive the language of rights in a passive manner i.e. merely as a barrier, as a defence against deregulation policies, one which mainly entrusts to the Courts the function of protecting individual rights and individual negative freedom, and to public policy and collective regulation the tasks of guaranteeing a fair distribution of income and/or opportunities to the socially disadvantaged groups (in the employment relation but also in the market).

In this way, it is argued, the legal scholar's traditional field of observation would certainly widen, as it would also have to deal with other techniques and other rationales, and the language of rights would undoubtedly have to accept a loss in instrumental density, which traditional labour law had accustomed us to, and blur its dichotomies. But it compensates for this apparently greater opacity by regaining a strong and clear final objective, precisely because it restores shine to principles, which are none other than the axiological content of fundamental rights.

It is probably as a result of this willingness to endow the language of rights with a more pragmatic and experimental dimension, while not losing sight of its prescriptive function, that it has been above all this group of labour law scholars who have analysed in parallel the two apparently contrasting trends that are currently present on the Community scene: on the one hand, the advancement of a European constitutionalism which has marked a “normative turning point” in the unification process, due to its treatment of the tensions existing between various principles and different demands – uniformity of rules and maintenance of the characteristics of national regulations, democracy and efficiency, market and social justice – as constitutional

⁴⁵ B. Caruso 2007a.

problems⁴⁶, on the other hand, the emergence of multi-level governance techniques that are markedly different from the classical Community method, one which is based on an experimentalist approach and whose general features are multi-level integration and deliberation, diversity and decentralization, flexibility and revisability of norms, knowledge-creation and mutual learning. The Open Method of Coordination (OMC) is the most evident example of the latter trend, as well as the most studied.

The question raised by these developments is whether constitutionalism and new governance are truly like two ships passing alongside each other in the night without even sighting each other⁴⁷ or, in less evocative, but more precise terms, whether the constituent characteristics of contemporary constitutionalism, starting with the rule of law, can be freely reinterpreted or are to continue, instead, to constitute the limit of public regulation (as well as its ultimate justification)⁴⁸. In other words the question is whether, at the level of theory, it is possible to cast a bridge linking the constitutional foundation of the legal order and the new rules of governance. More specifically, the question that has been asked is, what should the consequences of such a perspective be on the fundamental rights that are cherished most by labour lawyers i.e. social rights. Besides problems of formal legitimation, these sorts of questions raise problems of substantive legitimation regarding the constraints that the recognition of fundamental rights imposes on public action.

Before analysing these questions some clarification is needed about certain basic characteristics of the new governance models and techniques and their impact on the reflections by Italian labour lawyers regarding European integration.

4. Understanding the new multi-level governance and its instruments.

The concept of *governance*, and of multi-level governance in particular, appears to offer a solution to the present problems of legal regulation of complex systems, providing a response that is not only empirical but also epistemological. It deals simultaneously with the problem of

⁴⁶ R. Bellamy, V. Buffacchi, D. Castiglione 1995.

⁴⁷ N. Walker 2005, p. 10.

⁴⁸ M. Barbera 2005.

power and its legitimacy, as well as with the problem of law and its effectiveness. It proposes a shared and multicentric idea of power diffused in multiple, decentralised places - not just in the traditional institutions and actors representing collective interests, but in the wide variety of group interests present in civil society today. It prescriptively attributes power characteristics of transparency and dialogic participation and, therefore, endows it with a strong procedural character, without embracing *a priori* the virtues of participation⁴⁹.

This method of policy decision-making differs from the traditional legislative method, as it leaves room for *non-binding*, but morally persuasive rules on social self-regulation, consultation and social dialogue, as well as for the action of specialised agencies capable of deciding complex issues of risk allocation and implementation of rights.

The model also conceives the law and its sources differently. It contests the unitary vision of law and its identification with legislation and the state monopoly of its production; the rigidity of its provisions; the mechanical sequence of norm, precept and sanction. It tends to replace the principle of the hierarchy of sources with a system in which co-ordination plays a fundamental role (the metaphors used are those of a star or of a network, rather than of a pyramid); finally it tends to overcome the distinction between the creation and application of law by allowing room for a dynamic process of adaptation of rules as unexpected problems and situations arise.

The meaning of the new multi-level governance can be understood better when we go on to analyse the concrete experience of regulation in which this universe of discourses has been translated. We refer, in particular, to the introduction of the Open Method of Coordination (OMC) as a decision-making instrument through which to exercise the new powers conferred to the Community in the employment field by the Treaty of Amsterdam. Typically this method of integration makes use of soft law, a technique which in the field of employment policy seemed not only to be the most consistent with the principle of subsidiarity⁵⁰, but also the most suitable, from a functional point of view, to coordinate relations among States and to balance the unity and diversity of national systems.

⁴⁹ A. Lo Faro, A. Andronico 2005.

⁵⁰ There are those who dispute that we can speak of subsidiarity in this case, due to the fact that the OMC involves various levels of regulation on non-hierarchical levels, while subsidiarity implies a final choice from one of the levels and presupposes a hierarchy (D. Hodson, I. Maher 2001, p. 728). It is true, however, that subsidiarity itself can also be interpreted in a dynamic way i.e. as a fluid and mobile distribution of powers. The more recent developments in Community integration refer to this last form of subsidiarity. And this is the way that the term will be used in this paper. See B. Caruso 2004 for a narrowly cast analysis of the vertical subsidiarity principle and the relationship between national and non-national sources.

The fact that the OMC was identified by the Lisbon European Council in the spring of 2000 as the key instrument to implement the European Social Agenda (to be extended to areas such as social inclusion, immigration, pensions, innovation, the information society, healthcare, education, environment and taxation), appeared to vindicate those who had considered the method «*a post-regulatory approach to governance*»⁵¹, the expression of a more general shift from «*hard law*» to «*soft law*», which promotes solutions based on procedural norms and on general guidelines, rather than on substantive, detailed and inflexible norms with a binding value. Labour law scholars have in this way ended up institutionalising the “*new modes of governance*” (NMG), defining them, in general terms, like any other instrument that is different from the classical Community method, including social dialogue, above all in its consultative and participatory forms⁵². These regulatory instruments should become the cornerstone in the construction of a new institutional architecture that would support the weight of a European Union of 27 in which the pendulum between unity and diversity has swung inexorably towards the latter of the poles. It is mainly under these conditions, according to the scholars who have most dealt with the NMG⁵³, that models of «*deliberative democracy*» such as the OMC - which are based not on the «*strength of numbers*» and on pre-constituted and uniform rules, but on a process of discussion and experimental discovery of «*best*» solutions in which each conserves its own diversity but coordinates this diversity with that of others – seem to be able to assure a legitimate basis for political decision-making in the absence of the traditional rules and mechanisms of representative democracy.

The concept of new governance is also given ample space in the White Paper on European Governance issued by the European Commission in 2001. However, while identifying the principles “of openness, participation, accountability, effectiveness and coherence” as key features, the White Paper also provides a narrower definition, focusing much more on the role of the State rather than on the aspects which make it a form of self-regulation of society (or rather of organised sections of society)⁵⁴.

There are optimistic and pessimistic views of the OMC and of the NMG in general. According to its supporters, widespread application of these techniques could lead to a bottom-

⁵¹ J.Mosher 2000, p. 2.

⁵² K.Armstrong, C.Kilpatrick 2007; on the NMG see also J. Scott, D. M. Trubek 2002.

⁵³ O. Gestenberg, C.F. Sabel 2002, p. 279; J. Mosher, D.M.Trubek 2003, p. 64.

⁵⁴ F.W. Scharpf 2001.

up rather than top-down convergence of national social policies, through voluntary mechanisms of coordination (which nevertheless produce legal effects), mutual learning and policy transfer⁵⁵. Others argue that the history of European integration teaches us that the use of instruments which initially had a low binding value did not hold back the process of convergence of national policies and regulations⁵⁶. Within the Community setting soft law was functional in origin, fitting in with the typical characteristics of an order in which law is primarily an instrument to implement policies to achieve specific objectives.

This procedural vision of the NMG thus appears to have brought together authors, in Italy and elsewhere, who while starting from different visions and conceptions of the European social model and, more generally, the function of labour law and its relationship with the market, nevertheless agree that the deepening of European integration, albeit with different methods from the classical Community model, is a positive element for the different labour law policies being devised in this new constitutional space.

According to this perspective, the new regulatory techniques could help circumvent political constraints, decision-making traps and competence gaps in social policy, and could become the *medium* through which to renew the European social model, without destroying it. It is also pointed out that even in the case of the classical Community method, not only have there been a number of examples of integration through co-ordination rather than harmonisation, but harmonisation too nowadays expresses itself through commands of vague coercive force also on subjects such as collective dismissals or health protection, which were previously regulated through harmonisation by means of the classical Community method⁵⁷. Finally, the NMG were attributed the capacity to stimulate social self-regulation, providing civil society and the social partners with a decision-making role that has until now been mainly attributed to Community and state institutions⁵⁸.

The more pessimistic analyses of the virtues of the new regulatory methods paint a more contradictory picture, both at theoretical and application levels. The principal fear is that the abandonment or low recourse to traditional normative instruments, such as directives, and the renunciation of the search for minimum social standards could lead to a gradual erosion of the

⁵⁵ M. Biagi 2000, Id. 1998; T.Treu 2001a, Id. 2001b.

⁵⁶ S. Sciarra 1999; M.Barbera 2000; S.Giubboni 2003, p. 280 ff.

⁵⁷ M.Barbera 2006b.

⁵⁸ F. Guarriello 2004.

European social model. According to this view, soft law is seen as a normative technique that is unable to achieve a real form of convergence towards common social objectives within the Union, and indeed likely to undermine the *acquis communautaire*, through a «normative contamination» between hard law and soft law whose ultimate outcome is difficult to direct, and likely to trigger strategies of regulatory competition to the bottom ⁵⁹. At a more political level, according to the critics of the NMG and to their concept of governance, there is in this approach an implicit intention to “depoliticise” and “denormalise” the issues, in favour of a pragmatic production of knowledge and of *learning*, as if the concept itself of *learning* does not imply different things with reference to different policies and normative values ⁶⁰, and as if the issue underlying the experimenting of multi-level social governance i.e. towards which social model to converge, was not today *the* problem of European politics and of national policies.

Scepticism can be noted not only among scholars but also among policy makers. In its White Paper on European Governance the European Commission expresses a marked preference for the classical Community method (and for the legislative instrument, even in softer forms). The concern is to maintain a certain degree of uniformity in European regulation and to ensure that the Commission can continue to play a central role. The strongest opposition surfaced, however, during the drafting of the new European Constitution. Despite the fact that the OMC clearly re-evaluates the inter-governmental dynamics, Member States did not approve the proposal to specifically include it in the Treaty that was put forward by some scholars ⁶¹, and also reiterated by some members of the working groups during the Constitutional Convention. The planned re-writing of the European Treaties and the abandonment of the prospect of their unification and of any reference to the very term Constitution and its symbols (a side effect of the failure to ratify the new Constitutional Treaty), do not change, and indeed are very likely to reinforce, this prospect of a *de facto*, but not formally constitutionalised, presence of the OMC and of the other new methods of governance.

How much this was due to the fact that the OMC appeared to be, already at the time, which can in hindsight be defined as “heroic”, when the Constitutional Convention was being held, a «constitutionally anomalous» process because it connects what constitutions normally

⁵⁹ M. Roccella 2007, p. 205 ff.

⁶⁰ With reference to the OMC Radaelli notes: “learning in a political context is eminently (albeit not exclusively) about power. Indicators, peer reviews and reformulation of guidelines produce hierarchies of models and differential adaptational pressures on Member States” (C.M. Radaelli 2003).

⁶¹ G. De Burca, J. Zeitlin 2003.

separate, that is the competences of different public actors and different levels of political decision-making, and to what extent, instead, it was due to the doubt that any, albeit cautious, constitutional reform ran the risk of compromising the effectiveness of the traditional Community methods of decision-making, is something that remains open to discussion ⁶² .

5. Labour lawyers and the procedural experimentalism of the New Modes of Governance.

Labour lawyers, in Italy and elsewhere in Europe, studying the legal transformations spawned by supranational integration are acutely aware of the risks of the NMG: both of those more directly linked to the policy content of the methods (the OMC, above all in its more recent applications to employment policies ⁶³, appears particularly suited to promoting deregulation policies) and of those linked to the regulation techniques, which favour soft and procedural law.

Certain interpretations of the OMC do not contest the method per se but in relation to the role now played by fundamental rights in the European legal order. It is reasoned that, since the effectiveness of fundamental rights in the new European Constitution are compromised by procedural devices (the horizontal clauses on EU competences) as well as by a more restrictive interpretation in terms of justiciability that the legislature has sought to give them, (the artificial distinction between principles that cannot be immediately enforced and rights, enshrined in the opting out clause negotiated by the United Kingdom), this would lead to the automatic consequence of the rights enshrined in the Charter being unsuitable either to act as a “barrier” or as a “corrective” to the possible deregulatory misuses of the method ⁶⁴. These very authors are, however, willing to admit that in their reading of the OMC as a regulatory competition regime there are clear signs of an excess of “negative determinism”, which does not take into account

⁶² J. Cohen, C. F. Sabel, 2003, p. 351.

⁶³ The key concepts on which they focus, and which reflect their basic philosophy, are *modernisation of labour law* and *flexicurity*. These are ambiguous concepts which are open to many interpretations, but in the interpretation given in the Green Paper recently issued by the Commission (*Modernising labour law to meet the challenges of the 21st century*), with the aim of opening up a process of consultation addressed to the social partners, the national and European institutions and all stakeholders, they mainly entail a generalised weakening of constraints in the regulation of standard work relationships (above all as regards dismissals), together with labour market intervention favouring greater individual worker mobility. For a critical analysis of the Green Paper, see the document written by a large group of Italian academics, judges and practitioners, and signed by several other labour lawyers from other countries (*The labour lawyers and the Green Paper on ‘Modernising labour law to meet the challenges of the 21st century’. A critical and constructive evaluation*).

Available at http://www.lex.unict.it/eurolabor/news/en/doc_libroverde.pdf.

⁶⁴ A. Lo Faro, A. Andronico 2005.

the absence of some of the pre-requisites necessary for this model to function.

Others say that that the method should not be assessed *a priori*, but from a critically constructive perspective, which implies, first and foremost, an attitude of cognitive openness⁶⁵. This would suggest accepting the experimental character of the method, pragmatically following and evaluating its development, and waiting until the envisaged mechanisms of self-correction are implemented, before passing judgement on its actual success.

And yet it is fairly clear that in the orthodox construction of their proponents the OMC and the other forms of new governance aspire to be not just *one* of the possible roads to European integration, to be used in various fields, but a holistic decision-making method that would be capable of solving European social policy dilemmas by involving all policies and all actors at Community, national and sub-national levels. Thus a purely consequentialist approach does not appear to be feasible, because it fails to tackle the risks that such a choice of «denormalising» European social policy as a whole entails, and to circumvent the deontic dimension of rights.

The cognitive aspect of the OMC and of the other instruments of soft law (i.e. their capacity to provide flexible instruments of knowledge of situations to be regulated and the possibility they offer of reviewing the decisions taken in the light of the results achieved) is one of the most appreciated aspects about these forms of regulation. However, the normative aspect is certainly not absent since the objectives to which the regulation pertains imply a substantive vision of social policy⁶⁶. And yet there is a risk of the cognitive aspect overshadowing the normative one, despite all good intentions.

It is the experimental nature of the method which enables political decision-makers to deal with complex problems in conditions of uncertainty, not by providing pre-conceived solutions but ones which prove to be the best depending on the conditions. The volatility of present-day capitalism is, so to speak, repaid in equal currency through regulation that synchronises itself with social change, which is read, interpreted and transposed into regulatory action in real time, unlike in the case of traditional regulatory instruments (law, the machinery of bureaucracy, the judicial decision), whose predominant trait is frequently obsolescence.

⁶⁵ B. Caruso 2006.

⁶⁶ F. Vandenbroucke 2002, p. 10.

The “discontinuous leaps” towards new cognitive models is seen by some scholars as positive. Destabilising the usual way of understanding things is considered to be the first, necessary step for developing new ideas and promoting learning. In reality, much has been said, not only by legal scholars but also by sociologists and economists⁶⁷, about the OMC’s ability to actually measure social dynamics, apart from the choice of indicators that are supposed to enable the comparison and evaluation of Member States’ performances, and about the exportability of instruments used in business economics (such as benchmarking and management by objectives) to fields where the objects to be measured are of a social nature and involve fundamental individual rights⁶⁸. More generally, the OMC raises, once again, the problem of the conditions and limits of the ability to learn, something which social scientists and philosophers of science have debated for some time.

But there is also a problem upstream. There is no such thing as universally shared cognitive legacies, or descriptive neutrality. The cognitive horizon of the OMC, or rather the cognitive horizon of the theorists of the OMC, has been shaped by a set of initial normative premises, and in particular the idea that the institutions must «learn» from economics the basic principles of a pragmatism that would allow us to decide in rapidly-changing conditions. In itself it is a premise that is questionable even in the case of policy-making, but which becomes truly problematic when we move to the level of law. This is something which undoubtedly happens when we arrive at the final, concrete stage of the OMC, «which is the least post-regulatory possible and the most old-governance that one can imagine: a state norm, normally a law»⁶⁹ but it also occurs in the case of the mildest forms of soft regulation. The desire to synchronise legal mechanisms with those of the market not only completely blurs the function that the difference between «cognitive expectations» and «normative expectations» plays in terms of differentiation of social⁷⁰ subsystems, and in particular in terms of certainty and stability of rules (and hence

⁶⁷ R. Salais 2005, Id. 2004.

⁶⁸ B. Caruso 2007a, p. 20 ff.; F. Ravelli 2006; S.Sciarra 2004.

⁶⁹ A. Lo Faro 2006, p. 365.

⁷⁰ See N. Luhmann 1990, p. 104 ff. on the distinction between cognitive behavioural expectations, which are open to learning and therefore variable (specific to the economy) and normative expectations, resistant to disappointments and hence invariable (which are specific to positivised law). He also discusses the conditions in which positivised law has lasting validity and the conditions in which it is variable. For a critical discussion of this distinction, see M.R. Ferraresi 2002, p. 62, who suggests that at present normative expectations are less and less able to escape the cognition of the world «as it is». However, Ferraresi tends to overlap problems of the relationship between what law is and what it ought to be (which relate to questions of justifications outside the norms) with those of the relationship between being and having to be *within* the law (which relate to questions of the legal validity of norms), on the

also in terms of justice), but also implies adopting a certain position in favour of the law playing a particular role. In the case of labour law, taking on board this perspective means forgetting that this field of law did not originate as a market instrument, but as a way of regulating and correcting the market, and it means forgetting that fundamental individual rights, along with constitutional guarantees, are typically at stake in employment relations.

This brings to the fore the problem that Massimo D'Antona, with his usual acumen, pointed out years ago i.e. the problem of the “*loss of authority of the juridical point of view*”: “in labour law, legal discourse is always more a tributary of other ‘discourses’ and other ‘knowledges’, and this means that the labour lawyer, *as such*, has fewer and fewer things to say about law”⁷¹.

6. Squaring the circle? New governance and fundamental rights.

When, in the years after Maastricht, the labour law community debated what antidotes there were to the spilling over of competition law into the fields occupied by social law, the strongest proposal, the thing “to say”, appeared to be to include a Charter of rights in the Treaty⁷². The same thing is happening today at a time when the more “constructivist” forms of integration are transforming themselves into the post-regulatory forms of multi-level governance. With the approval of the Nice Charter and its incorporation into the constitutional Treaty, it has become clear to many legal scholars how to square the circle. Constitutionalising fundamental rights could become the ideal counterweight to the dangers of regulatory misuse implicit in a system of regulation that is excessively open in its outcomes, and could bring the “language of rights” within the pragmatic universe of procedural experimentalism⁷³. It is for this reason that the background to the discussion has therefore become that of the possibility of allowing the two trends that are contending the European scene i.e. constitutionalism and new governance to live together in their multi-level dimension.

presupposition clearly that these problems can no longer be kept distinct from each other (on this distinction see Ferrajoli 1990, p. 894 ff.).

⁷¹ M. D'Antona 1990, p. 117 now 2000.

⁷² On the meanings and aims of the proposal put forth by a group of European labour lawyers, see B. Veneziani 2000, p. 795; S. Sciarra 2003b p. 449.

⁷³ M.V. Vittoria Ballestrero 2007; B. Veneziani 2006; S. Sciarra 2004; S. Giubboni 2003.

In the Italian labour law tradition fundamental rights have always formed the backdrop to legal discourse, the normative premise of a regulatory method that was, however, considered as working mainly at the level of *effectiveness*. This has meant that for a long time the school of normative-legalist constitutionalism, with its vocation of guaranteeing individual rights, which considered the law and judges as the main instruments in fulfilling the constitutional pact⁷⁴, remained a minority stream of thought with respect to the pluralist-institutionalist one, which entrusted the protection of fundamental rights to social practices (in particular collective bargaining). This same manner of viewing the Constitution, on the other hand, looked consistently at its historical-political dimension rather than at the formal-legal dimension, and considered collective self-regulation and the social institutions representing the interests of labour as the highest, history-dependent interpretation of constitutional values. It was but a short leap from this to viewing the “ordinamento intersindacale” as a self-contained and self-sufficient order, endowed with its own *Grundnorm* which shielded it from the problems of legitimacy posed by present-day constitutionalism. One of the most radical versions of the collective *laissez faire* theories was to maintain that collective autonomy in the Italian constitutional system enjoyed immunity not only from the employer’s private powers, but also from fundamental individual rights, which ceded in the face of the superior, and in a certain sense exceptional, character, of collective union freedom and autonomy. The idea that individual rights were valid per se, irrespective of the construction of a collective counterpower and of social self-government, was one that was difficult to accept⁷⁵.

Thus there is a curious historical paradox in the revival that the tradition of constitutionalism has seen among Italian labour lawyers with a pluralist culture. Today this area, not unlike the Anglo-Saxon one which has long inspired it⁷⁶, is engaged in a debate that clearly focuses on the constitutional foundation of the Community legal order. This discussion is influenced by a typical characteristic of pluralist approaches, namely the tendency to provide an anormative concept of legal order, which conceives that order as a set of social practices producing norms that are effective because these are generally obeyed. On closer observation, this tradition is better disposed towards a fruitful dialogue with the *new age* versions of contemporary constitutionalism, that is to say it is open to the continual social discovery of new

⁷⁴ The leading proponent of this stream of thought is Ugo Natoli (U. Natoli 1955).

⁷⁵ For an attempt to analyse the historical and cultural roots of this approach see M.Barbera 2002.

⁷⁶ See H.Collins 1997.

meanings of the constitutional text. Some of the most significant contributions that have long formed the mainstream of research on European integration can be placed within these institutionalist theories. It is this theoretical line of research that is responsible for analysing that special “dialogue” between the Courts which, through preliminary reference, has acted as a formidable *de facto* mechanism of integration⁷⁷ and it has been able to identify with great subtlety, perhaps more than research in other branches of law, the development of a Community order at the level of praxis, consisting in the action of private and public institutions, and in the conflict of interests of the various social and political actors. The metaphor of conversation, used on more than one occasion by these authors, perfectly reflects the sense of this process.

But at the same time, this very tradition has perhaps made it more difficult to grasp the destructuring effect that the European integration process has had on the concept of the rule of law and the system of sources; or, better still, it has led to this phenomenon being thematised as a natural phenomenon, implicit in the very character of the Community order and in its focusing on the objective fact of effectiveness⁷⁸. From this point of view, labour lawyers who instead refer to the tradition of analysis and legal positivism, are more ready to identify how, given that each order is governed by its own *Grundnorm* and by endogenous transformation processes, the integration of several legal orders generates a situation of “legal disorder”, a continuous disruption of the parameters of internal lawfulness of the orders being integrated and thus a continuous questioning of the parameters of formal legitimacy⁷⁹. But, on the other hand, this very idea of conflict, of competition among legal orders and the search for a rule to resolve the conflict once and for all, which also underlies a clear demarcation among the territories of the orders (with the possibility of raising the drawbridge constituted by the “*teoria dei controlimiti*” when defending the national order), is unable to sustain the dynamic character of European integration and the overlapping of sources, competences and regulatory techniques that this generates, which make even the distinction between what is legal and what is not uncertain.

If many principles, many rules, many competences are defined *in itinere*, if the demarcation between hard law and soft law becomes uncertain to such an extent as to envisage a normative universe in which even the “hard core” of legal order tends to become flexible and

⁷⁷ S. Sciarra 2001a; A. Lo Faro 1998. On the effects of the ECJ’s rulings on national law see also Roccella 1997.

⁷⁸ D. D’Alessandro 2002, p. 383.

⁷⁹ M.V. Ballestrero 2000. For more on the different ways of interpreting European integration see G. Itzcovich 2005.

variable, the challenge becomes that of understanding at what level the orders can converge and whether, according to this neo-constitutionalist point of view, it is possible to assign fundamental rights the function of setting this level of convergence and establishing a hierarchy of values.

If the point of view of labour law is that of “not renouncing on the language of rights” even in the case of procedures involving solely soft law mechanisms (viz. employment and social inclusion policies) or of the weak harmonisation characterising current European social law (as is the case of the new directives on atypical work, whose core is now made up of techniques of flexible law consisting of open clauses and anti-discrimination prohibitions), then it is necessary to understand what are the legal and constitutional constraints acting on the multi-level order which can open up a perspective of legal integration rather than of separation between national legal systems and the European one.

A sceptic’s view is that fundamental rights and soft law belong to two radically different levels of legal discourse, to such a degree that in the theories vying to conceptually embrace *new governance* there is no space for fundamental rights. Therefore putting the “substantive grammar” of the former together with the “procedural grammar” of the latter is a pointless exercise ⁸⁰.

But the debate has also seen other positions being expressed, ones which have transposed the idea of legal integration from the integration of legal orders to one of integration of legal regulation techniques. The concept of integration, in this case, is used both when examining the issue of the regulatory coherence of various sources, and the effectiveness of the various regulatory techniques which each source presupposes, and when considering the content of social regulation as regards the employment relationship and, finally, when dealing with the question of the regulating actors ⁸¹.

According to this perspective, the two grammars do not necessarily have to be thought of as being in conflict. Indeed, the former deals with the question of the constitutional “principles” of the order being constructed and with the ability of their normative sources to protect fundamental, primary goods, such as those concerning rights. Principles, in other words, have to do with the “ultimate founding value” of the legal order. The latter looks more at the “rules” of the construction and functioning of a complex supranational order, which is certainly different

⁸⁰ A. Lo Faro, A. Andronico 2005.

⁸¹ S.Sciarra 2005, Id. 2004; B. Caruso 2006, Id. 2004, Id. 2003; S. Giubboni 2003.

from all state systems considered individually, be they confederal, federal or monistic. These rules must reconcile the convergence of political orientations and objectives, with the differentiation of regulatory solutions of the individual national components of the order itself which, rather than disappearing, become accentuated.

At this level, some authors point out that “the question is not necessarily one of hard versus soft law”⁸². It is more likely to be a case of hybridisation of forms and interaction between different regulatory instruments. The example that is given is anti-discrimination policy, which is governed by hard law but also makes use of soft regulation proposed in the European Employment Strategy (EES). What matters is that they converge towards a clear and pre-defined goal, namely enhancing social equality. Training policy is another of the examples indicated, where hard law enacted at national level (but also, as in the case of Italy and Spain, at regional level) interacts at EU level with hard forms of regulation, through the European Social Fund, as well as with soft, behaviour-changing rules, both within and outside the EES framework⁸³. In this case, too, what counts is the final objective not the instrument, which may, instead, be adapted to circumstances and as a result, calibrated. And the objective is to make knowledge a value in itself, not only functional to market needs; to think of knowledge as “a public good”. By the same token, co-ordination of active labour market initiatives using soft techniques such as benchmarking and mutual learning are proposed at regional level not as substituting but working in tandem with hard law issued by the same competent regions.

The relationship between the various sources of hard and soft law in the various fields of social law is not, therefore, assigned to a rigid, pre-defined order but is seen as mobile and interchangeable; the dynamics are often not set *a priori*. Often the task of setting limits and standards lies with the hard source, and the soft source has the task of improving or specifying them. The circular nature of the various sources and the variability of the modules of mutual interaction have a significant prototype in the relationship between law and collective agreement, even at the supranational level. Often therefore, it is claimed, the problem will be above all a practical one. As has been pointed with reference to other national experiences, “the trick will be

⁸² C. Kilpatrick 2006, p. 134. See also D.M. Trubek, P.Cottrel , M.Nance 2005.

⁸³ B. Caruso 2007b.

choosing the appropriate policy mix to deliver an employment objective, particularly when it is unclear whether one or all of the governance tools is not, or is perceived not to be, working”⁸⁴.

The fact that fundamental rights and new governance can coexist, and indeed constitutes one of the many paradoxes to which the evolving order has accustomed the labour lawyer, is demonstrated also by the current status of the Nice Charter and the institutional limbo in which it lies: its nature as a *soft law* instrument (solemnly proclaimed but not yet formally binding in the Community order) does not prevent it from producing *hard* regulatory effects through the support of legal interpretation and of the decisions of the national and supranational courts (ECHR and ECJ) which refer to it⁸⁵. All this, moreover, at a particularly dramatic moment, perhaps more so than others, in the history of the political and constitutional construction of the European Union.

7. The contribution of Italian labour law scholarship to the theories on European integration

Our analysis so far confirms that, in speaking of European integration, Italian labour lawyers have continued to discuss the age-old issues.

The impression is that, in doing so, following the openings of the Eighties and Nineties, they probably concentrated too much on this internal dialogue, losing sight of the fact that Europe concerns them since they belong to a wider community than the national one⁸⁶.

This retreat into a national, if not “parochial” dimension, has been grasped by those who have observed how Europe “represented, in more recent years, a continuation by other means of the same cultural battle that has been waged (in Italy and elsewhere) at a domestic level”⁸⁷.

⁸⁴ C. Kilpatrick 2006, p. 134.

⁸⁵ G. Bronzini, V. Piccone 2007, Id. 2006a, Id. 2006b. See also the *Osservatorio sul rispetto dei diritti fondamentali in Europa*, available at <http://www.europeanrights.eu/>

⁸⁶ Wolfgang Däubler 2006 criticises, somewhat ungenerously, Bob Hepple, a scholar capable of projecting topical domestic issues in labour law onto the global dimension (B. Hepple 2005), for doing just this. Däubler suggests that Hepple does not consider how the global dimension has affected the national one, which labour lawyers must always pay more attention to. Däubler thereby appears to propose, once again, an artificial theoretical dichotomy between local and global, between internal and external.

⁸⁷ R. Del Punta forthcoming.

The issue of European integration in Italy has, therefore, been to some extent instrumentalised and “reduced” to the conflict (often steeped in ideology) between the two political currents of the Left: the orthodox social democratic one and the more liberal one⁸⁸; a conflict which, on the other hand, reflects other similar “national” debates. They have therefore neglected to reflect on the prospects of a crisis of one of the fundamental pillars of modern labour law (the nation state) and to reflect on the scenarios, in terms of new rules, interests and values, that the process of de-nationalisation has created for the discipline. They have failed to reflect on the fact that today labour law is now an important chapter, but only one of many, in a wider narrative, a fragment of global legal experience.

And yet the fading of the traditional borders of the subject (the workplace, the factory and the nation state) has compelled Italian labour lawyers, perhaps for the first time in the relatively recent history of the discipline, to enter into open and intense dialogue with the global scientific community.

In taking up this dialogue, the qualitative and quantitative change in the subject matter they have to engage with, has implied a profound re-consideration of the legal method, but also the very way labour lawyers perceive themselves as legal scholars and social scientists.

As we have recalled above, they are today trying to earnestly take up Massimo D’Antona’s challenge to measure themselves not only with the normative sources but also with the *powers* that lie behind them, i.e. they are trying to place their reflections within the more general framework of analyses examining the key characteristics of European integration.

The most significant contribution that they can provide, in view of their cultural background and tradition, to the legal theories on integration appear to be that of proposing pluralism not only in terms of pluralism of *norms*, but also in terms of pluralism of *institutions and powers*. European legal integration cannot be understood and described as an autonomous process, divorced from the political sphere and competing social interests. The “anomaly” of labour law with respect to the other branches of legal science, in other words its anti-dogmatic and anti-formalist approach, endows it with a unique ability to keep pace with the time of social

⁸⁸ Id.

change ⁸⁹ and predisposes it to grasp the highly dynamic and evolutionary character of the integration process.

This does not mean embracing those institutionalist conceptions which reduce European legal integration to a series of social and political facts producing rules. The *normative* dimension of integration remains at the core of the analysis of Italian labour law scholars not only because they are fully aware of the fact that the law has been a decisive element *in itself* of European integration, but also because they consider that the construction of a new legal order requires a legitimacy that is not only formal, dictated by the authority of the public powers that ratify treaties and by the legal order's validation criteria, but also substantive, i.e. able to draw on a degree of social acceptance and acknowledgement of its underlying values. Such legitimacy also depends on the extent to which Europe recognises and protects fundamental rights and its social model. While this strong emphasis on the normative character of integration links Italian labour law scholarship with the neo-constitutionalist tendencies widely found in European legal literature, what makes its position distinctive (obviously) is its attention to social rights. Equally distinctive is its search for new techniques to enact and protect rights, this being a reflection of the decisive importance that the labour lawyer community has always attributed to the dimension of effectiveness of rights.

This search for new regulatory instruments has become all the more important, the more difficult the road to the constitutionalisation of the Community order gets, and the more the old and new dualisms (rights/politics, hard/soft law, *new governance*/ classical Community method, flexibility/security, protection in the employment relation/protection in the labour market etc.) appear to lose meaning.

Labour law, more than other branches of legal science, perhaps because it is more exposed to the contamination of social and economic concerns, has had, over the years, to tackle the question of redefining the very confines of the legal dimension. Scholars, in recent years, have argued, even bitterly, about whether to preserve the “anomaly” of labour law, its openness to the outside world, to the “world as it is”, or to recoup the autonomy of the legal sphere, which requires legal scholars to remain anchored to the “law as it is”, without exposing themselves to

⁸⁹ U. Romagnoli 2003, M. D'Antona 1990 now 2000.

political contingency, especially if this is too skewed in favour of one of the parties involved ⁹⁰. This debate can help, once again, to raise an important “question of method” within the community of European scholars that deals with the integration process.

The majority of the labour lawyers whose positions we have examined seem to not want to renounce the very possibility of imagining how to reconcile means and ends, policy and law, but feel they are moving in a space “without banisters”. The challenge that they face is to perceive this sensation not as a danger but as an opportunity. “Thinking without banisters”, without ready-made truths, is the metaphor that Hannah Arendt kept to herself, without ever publishing it, and which no longer only describes a particular form of philosophical thought, but of all other scientific or political thought: “As you go up and down the stairs the banister always prevents you from falling. But we have lost the banister. This is what I said to myself. And this is what I try to do”.

⁹⁰ See the controversy between Umberto Romagnoli and Mattia Persiani (U. Romagnoli 2003, M. Persiani 2000).

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List of Abbreviations

ADL	Argomenti di Diritto del Lavoro
CI/Europa	Contratto e impresa – Europa
BCLR	Bulletin of Comparative Relations
Csdle Massimo D’Antona WP	Working Papers Centro studi di Diritto del Lavoro Europeo Massimo D’Antona
CJE	Columbia Journal of European Law
CLL&PJ L	Comparative Labor Law & Policy Journal
DD	Democrazia e diritto
DLM	Diritti Lavori Mercati
DLRI	Giornale di Diritto del Lavoro e Relazioni Industriali
DP	Diritto pubblico
DPCE	Diritto pubblico comparato ed europeo
DRI	Diritto delle relazioni industriali
DU	Diritti dell’uomo
ELJ	European Law Journal
ELRev.	European Law Review
Enc. giur. Treccani	Enciclopedia Giuridica Treccani
EurDP	Eurpa e Diritto Privato
JCMS	Journal of Common Market Studies
ILJ	Industrial Law Journal
IJCLL&IR	International Journal of Comparative Labour Law and Industrial Relations
LD	Lavoro e Diritto
MGL	Massimario della Giurisprudenza del lavoro
MLR	The Modern Law Review
MPIfG WP	Max-Planck-Institut für Gesellschaftsforschung Working Papers
Qcost	Quaderni Costituzionali
QDLRI	Quaderni di diritto del lavoro e delle relazioni industriali
QF	Quaderni fiorentini
Qgiustizia	Questione giustizia
RassFor	Rassegna Forense
RCDL	Rivista Critica di Diritto del Lavoro
RCDP	Rivista Critica di Diritto privato
RGL	Rivista Giuridica del Lavoro
RTDPC	Rivista trimestrale di diritto e procedura civile
SD	Sociologia del diritto