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The Concept of Flexibility in Labour Law. The Italian case in the European context

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§ 1: Foreword: flexibility as a magic formula

Is it possible to observe changes in labour law through the kaleidoscope of the concept of flexibility? One would instinctively be advised to proceed with caution. The concept is by no means settled and is above all used in various guises in a number of different sectors. Careless use of it risks masking its refractive effect.

It is a point of fact that reference to the concept in everyday conversation and in the mass media often takes on a symbolic value, becoming a magic formula which overlooks all reference to real phenomena.

To try to give order to the discourse, we can point out some salient features, among many, which could be associated with the concept of flexibility and can be found in the concrete praxis of the management and organization of work. As an example, we can point to two of them in particular:

- A) The first is an objective, almost descriptive feature: that is to say, the polysemantic nature of the term, one which leaves a particular aftertaste of ambiguity. Reference to flexibility becomes more concrete when its meaning is functionally specified and inserted into a syntagm (see par. II below).
- B) The second is of greater normative and evaluative value: current considerations, at least on the part of some scholars, in terms of redundancy, excess. Flexibility is homeopathic: if used in the right doses, it is an effective remedy, but one must not overdo it! And at times, as in the Italian situation – but this would mean anticipating the end of the story – flexibility handled with lack of legislative caution, tending towards exaggeration, may cause more problems than it solves.

A brief analysis of these two salient features of the concept will help to place the specific evolution of the concept of flexibility in Italian labour law in a general framework, which is the specific aim of this essay.

I. Flexibility: three persons in one....

As we said, the term flexibility is often used to refer to policies inspired by different economic, cultural and ideological premises, and this contributes towards the rather ambiguous connotations it has come to feature¹.

¹ Some authors have also shown the relativity of the concept: flexibility has different effects according to the context and type of work or worker it refers to. Cf. Gallino, L'idea di flessibilità sostenibile. Prospettive e problemi in rapporto a differenti modi di lavorare, Quaderni di sociologia, 2000, p. 111 and ff..

With reference to theoretical studies on labour, in particular labour law, the concept is frequently associated with others, such as atypical work, casual workers, semi-independent workers, and others again such as deregulation, decentralisation, or privatisation². Analysis of these concepts is more or less explicitly conditioned by a sort of general understanding of the concept of flexibility on the part of the author, either stated or to be read between the lines.

In short, the point is that the term flexibility has an extremely broad spectrum of reference and is difficult to place bounds on. With reference to labour law issues, it has been correlated not only with the labour market and standard forms of employment³, but also with care work⁴, and even the very concepts of collective representation⁵, the carrying out and organisation of work in the public sector⁶, and welfare (for example, the ways in which social security schemes are provided)⁷.

However, when used generically in connection with work, the term flexibility refers above all to clusters of issues concerning the regulation of employment relationships. Flexibility, as a concept, has indeed no uniformity or conceptual regularity: it only presupposes a common etymology (coming from the Latin verb *flectere* – to bend or adapt), but the phenomena referring to the concept are several and various. As frequently encountered in sociological literature, there are at least five types of flexibility in the sphere of labour which can be considered syntagms worth analyzing and require different types of analysis:

² Fahlbeck, *Flexibility: Potentials and challenges for Labor Law*, Comparative Labor Law & Policy, 1998, p. 516; see also Fuchs in this volume

³ For a broad survey of the Italian system, see Perulli, *Interessi e tecniche di tutela nella disciplina del lavoro flessibile*, *Giornale di diritto del lavoro e relazioni industriali*, 2002, 3, p. 335. On the relationship between flexibility practices in labour and cultural variations in European countries, see Raghuram, *London, Holt Larsen, Flexible employment practices in Europe: country versus culture*, *International Journal of Human Resource Management* 2001, p. 738 and ff.

⁴ Crompton, *Employment, flexible working and the family*, *British Journal of Sociology*, 2002, p. 537 and ff.; Frey, *Flessibilità del lavoro dal punto di vista dei lavoratori e conciliazione tra lavoro ed esigenze familiari*, *supplemento Quaderni di economia del lavoro* 2002, 73, p. 1 and ff.

⁵ Goslinga Sverke, *Atypical Work and Trade Union Membership: Union Attitudes and Union Turnover among Traditional vs. Atypically Employed Union Members*, *Economic and Industrial Democracy*, 2003, p. 290 and ff.; Leonardi, *Lavoro flessibile e crisi della rappresentanza sociale del sindacato*, *Democrazia e diritto*, 1999, p. 156 and ff.

⁶ The debate in Italy has been very intense since the civil service employment reforms introduced in the '90s and the first years of this century. See D'Orta, *Introduzione ad un ragionamento sulla flessibilità del lavoro nelle pubbliche amministrazioni*, *Il lavoro nelle pubbliche amministrazioni*, 2000, p. 515 and ff.

⁷ Cinelli, *Politiche dell'occupazione e flessibilità previdenziale*, *Rivista italiana di diritto del lavoro*, 2000, I, p. 41.

- a) Functional or organisational flexibility⁸
- b) Working hours flexibility
- c) Wage flexibility

These give rise to what is called internal flexibility in companies.

Then we have:

- a) Numerical flexibility
 - b) Geographical or territorial flexibility
- which give rise to external flexibility⁹.

We then have a kind of flexibility which is not autonomous, but which cuts across the other five rather than being a self-contained type.

This is what sociologists define as normative flexibility, which concerns the capacity of legislation and contractual norms regulating employment and the labour market to adapt quickly to varying situations with acceptable re-adjustment costs.

The problem raised by flexibility is not, however, only its polysemantic nature. It often refers to functions, policies and objectives that evoke, as said previously, a persistent, although not always evident, ambiguity.

In the dimension of economics, production and labour organisation, for example, the concept is entrusted with paradoxically opposing functions¹⁰.

Flexibility is being used to try to:

⁸ Kalleberg, Organizing flexibility: the Flexible Firm in a new century, *British Journal of Industrial Relations*, 2001, p. 479 and ff. Wiltshagen, The Flexibility-Security Nexus: New approaches to regulating employment and labour markets, *Flexicurity research paper FXP 2003*, p. 6 and ff.

⁹ In addition to the essay referred to in the previous note, see Kalleberg, *Coinvolgimento e flessibilità: i cambiamenti delle relazioni di lavoro nelle società industriali*, *Sociologia del lavoro*, 1990, p. 11 and ff. ; Fahlbeck op. cit. note 2; Michie/Sheehan, Labour market deregulation, 'flexibility' and innovation, *Cambridge Journal of Economics* 2003, p. 123 and ff.

¹⁰ See the classical work by Regini, *Between Deregulation and Social Pacts: The Responses of European Economies to Globalization, Politics and Society*, 2000, p. 11 and ff. See also *Modelli di capitalismo*, Bari 2000, p. 17. For an approach which attempts to rationalise the apparent paradox of the coexistence in the same company of different types of flexibility (functional and numerical), see Reyneri, *Flessibilità: molti significati, alcune contraddizioni*, *Sociologia del lavoro*, 2003, p. 24: << European scholars have insisted on this contradiction in the attempt to show how Europe can cope with the new challenge of globalisation without upsetting their traditional economic system, largely based on functional flexibility. Maintaining that reliability and a high level of qualification can only be achieved by guaranteeing worker stability, high road economic growth, centring on sectors with a high added value, is opposed to a low road, confined to forms of production with a low level of technological or symbolic innovation. In reality, companies can respond to this contradiction by segmenting their workforce into a stable part, in which they can pursue a policy of functional flexibility, and a variable part, which allows for numerical flexibility. In this way, the stability of the fixed nucleus of workers considered to be strategic comes to depend on the presence of a "variable geometry" periphery" >>. See also Kalleberg, op. cit. note 7.

- increase competitiveness and productivity in enterprise even at the cost of increasing precarious employment
- increase employment rates
- also guarantee greater adaptability of work organization to the needs of labour supply and, according to some, to guarantee greater security in that greater flexibility would orient companies towards awarding permanent contracts.

These diverging functions are often connected to the dualism and segmentation of labour markets within a company¹¹. The different kinds of flexibility are said to be suitable for different groups of workers employed by the same company; functional flexibility, which implies a multi-skilled and adaptive workforce and loyalty-promoting strategies including training processes, applies to stable workers. Numerical flexibility applies to temporary workers taken on with different kinds of fixed-term contract. As has been pointed out¹², however, these generalising explanations do not solve the objective contradictions and ambiguities of the concept when referred to real phenomena.

It is, in fact, well known to all that squaring the circle of competitiveness, job security, employment standards and the attempt to increase employment rates is an arduous task¹³. The magic formula of flexibility is useful here: it is used to explain and reconcile everything, but it is, after all, only a magic formula which may well not work. It therefore seems worth decoding, destructuring; methodologically, it is of greater significance to investigate the concrete labour policies and far-reaching regulatory strategies that are being applied or intended for application, behind the somewhat mystifying veil of the concept of flexibility. The attempt to do so will be made by following the historical development of the labour law system in Italy.

II. Redundant flexibility

The obsessive use of the concept of flexibility often encountered in public debate is in a sense connected with a phenomenon observed by sociologists in analysing how flexibility operates in concrete labour organisation practice.

In the strategies employed by companies, as we said, the recourse to flexibility and the actions connected with it is, in certain respects, undoubtedly useful; in others, it indicates an exaggeration, an excess of

¹¹ Deakin/Reed, *The Contested Meaning of Labour Market Flexibility*, in J. Shaw (ed), *Social Law and Policy in an Evolving European Union*, Oxford 2000, p. 77.

¹² Above all, Reyneri op. cit. in previous note and Kalleberg op. cit. in note 8.

¹³ With reference to part time work, see essays by Lo Faro and Schmidt in this volume.

both concern and legislative measures, which are not having very positive effects.

This excess of business practice and labour policies inspired by flexibility has been defined as redundant systemic flexibility¹⁴.

The concept can be better explained as follows: in any environment where material or non-material production factors, including human resources, are organised, flexible management techniques appear nowadays to be indispensable in order to achieve objectives such as good performance, efficiency, effectiveness, profitability and success.

This is due to economic, social and cultural factors that cannot be dwelt on here.

It appears, however, to be a general fact that we have passed from an excess of rigidity in organisation and management - which was typical of the Fordist social and production model (in the 60s and 70s) - to an excess of flexibility, which is at times useless and economically expensive, as well as harmful from a social and human viewpoint¹⁵.

When companies, instead of focusing on an adequate capacity to foresee economic events and thus adapt their organisation accordingly, lay everything on a surplus of organisation and flexible labour, and transform this requirement into a claim for changes in legislation in the direction of deregulation, the flexibility introduced is redundant, that is, there is an unnecessary amount of flexibility or it becomes an end in itself.

This abstract line of reasoning can be applied to labour law. The idea of mild, sustainable flexibility, flexisecurity and adaptability, (as flexibility is referred to in the jargon of the European Employment Strategy) refers to a widespread necessity which is being transformed – in various ways and guises according to the national context – into concrete policies and new visible, ordered ways of regulating labour. The commendable attempt is to trigger off a drive towards convergence, although in different ways, on a sort of ideal, still mobile, boundary between social-oriented flexibility on one side, and useful flexibility, in economic and organisational terms, on the other.

¹⁴ Cerruti, *Incertezza, flessibilità e sicurezza sociale del lavoro*, Assistenza sociale, 2000, p. 58.

¹⁵ The reference is to the school of sociological and economic thought that adopts a critical stand towards globalisation and its effects in terms of insecurity and precariousness in the workplace and society in general: in this approach flexibility and precariousness are considered to be almost synonymous. Cf. Gallino, *Il costo umano della flessibilità*, Bari 2001; Beck, *Il lavoro nell'epoca della fine del lavoro: tramonto delle sicurezze e nuovo impegno civile*, Torino 2000; Sennet, *L'uomo flessibile*, Milano 2000; Bauman, *La società dell'incertezza*, Bologna 1999.

How this is to be achieved and which institutions are to act as the driving force (European, national, regional or local) remains a controversial topic of debate¹⁶.

To follow the line of this debate and assess the results of the search for the philosopher's stone (flexibility combined with security), reference will be made to the evolution of the Italian system, evaluating whether recent developments have taken this direction. The analysis will focus in particular on the diachronic evolution of the concept and the way it has been used to justify legislative policies that diverge from traditional ones of a redistributive type. To this end, the paradigm of flexibility will be considered without particular specifications. The differentiation between the various functions of flexibility referred to above (§ 1.1.) will only emerge in relation to concrete examples of the techniques and regulatory measures adopted in the framework of this paradigm.

In the final part of the essay, the Italian situation and its most recent developments will be projected against the European scenario. It is, in fact, at this level that the drive towards a convergence that is capable of avoiding redundant, excessive flexibility finds its theoretical expression in the concept of flexibility combined with security.

§ 2: Stages in the evolution of labour law in Italy in the wake of the flexibility paradigm

Like a virus, the concept of flexibility was inoculated into Italian scientific debate and concrete regulatory strategies from the outside, in the early '80s, and came from other, healthy-carrier disciplines that were much more familiar with it: economics, organisational science and sociology. But as we shall see, once inoculated into the organism of labour law, which is notoriously receptive and at times devoid of antibodies, it took root and began to multiply and spread, ending up by conditioning its identity.

The concept of flexibility is, then, a relatively new one for Italian labour law as a science. The concept has none of the evocative features of its modern identity, as constructed and consolidated above all in Continental Europe in at least two-thirds of the short century: it has nothing to do, for example, with concepts like collective interests,

¹⁶ Cf. Caruso, Decentralised Social Pacts, Trade Unions and Collective Bargaining, WP CSDLE Massimo D'Antona, 2002, 2, http://www.lex.unict.it/eurolabor/ricerca/wp/n2_caruso.pdf, also in Biagi (ed), Towards a European Model of Industrial Relations? Building on the First Report of the European Commission, Kluwer 2001.

solidarity, coalition, the favour principle, etc., which evoke quite the opposite, that is, rigid, uniform regulatory mechanisms.

I. Flexibility as a stigma (the '70s)

In the first phase, flexibility was considered practically as a stigma, not only in theoretical debate but also in regulatory policies, both legal and contractual.

Post-Constitutional labour law in Italy took on its current physiognomy, characterised by the stereotype of excessive support for individual social rights, and thus rigidity, in the 1970s with the Workers' Statute (which was in effect a law implementing the principles laid down by the Constitution in 1948).

This model of legislation aimed at combining support for the most representative trade union organisations and collective bargaining on the one hand and legislative reinforcement of guarantees and individual employment rights on the other. The result was excessive normative rigidity, which went well beyond the intentions of legislators at that time.

This was due to a combination of various factors which were not strategically connected but which ultimately converged, resulting in a highly protective and rigid system (as regards both individual and collective employment relations).

This result was in part due to the legislative technique adopted, based on what are called non-derogatory and mandatory provisions. It was, however, also due to an accumulated flood of further legislation guaranteeing individual rights.

The new guarantees introduced by the Workers' Statute in 1970 neither substituted nor were co-ordinated with the protective norms laid down by the Civil Code in 1942. These, in fact, were still in force, despite the fall of the corporative regime, because they were inspired by an ideology of individual paternalism (the favour principle) that was considered to be compatible with the new values of social solidarity enshrined in the Constitution.

The new guarantees were not even co-ordinated with those deriving from the first wave of protective legislation introduced in the '60s (concerning fixed-term contracts¹⁷ and banning work subcontracting) to counteract the excessive laissez-faire attitude of the '50s. The result was an excess of worker protection and rigidity caused by the uncoordinated sedimentation of various protection strategies¹⁸.

¹⁷ See essay by Zappalà in this volume.

¹⁸ See the seminal essay by Giugni, *Il diritto del lavoro negli anni '80*, *Giornale di diritto del lavoro e relazioni industriali*, 1982, p. 373 and ff.

To this must be added the efforts made by collective bargaining in the '70s to strengthen individual worker protection by means of provisions which often represented an improvement on the minimum terms provided for by law, and the fact that a large cross-section of the labour courts were ideologically inclined to interpret this flood of legislative measures in a pro-labour sense.

This historical phase of Italian labour law can well be defined as one of ideological stigmatisation of flexibility, and corresponded to an extremely rigid regulation of labour law, all in favour of the worker and trade unions.

What is important to point out is that in the Italian debate this stigmatisation of the concept of flexibility corresponded to the strengthening of a conflicting concept which was to find great favour in the vocabulary of European law scholars: the concept of "inderogability"¹⁹.

The concept can be seen as one of the most original products (made in Italy but with strong Germanic reminiscences)²⁰ by the science of labour law and was also recognised as a key concept by law scholars from a different cultural tradition such as Lord Wedderburn, who introduced it into Anglo-Saxon culture where it was as yet unknown²¹. It also influenced labour law theory in Spain, leading to the reforms introduced in the post-Franco Constitutional era.

In the language of labour law experts the concept of inderogability came to mean a regulatory technique both of law and collective contracts that produced uniformity and rigidity in protective treatment which at times contrasted with the wishes of the partners to individual contracts, even those of employees in permanent jobs. But it went even further. Inderogability was not only considered to be a contingent regulatory technique implying protective contents. It was also presented as one of a

¹⁹ "The concept of inderogability means that the legal system prohibits the two parties in an employment relationship from individually negotiating terms of employment that are worse than those laid down by law or a collective contract: a worker is not allowed, for example, to accept a salary lower than the collective one, or less protection against the risk of dismissal. Italian labour law theory – irrespective of its political orientation – has always considered this rule, which goes back to the broader concept of « social public order », to be an essential part of all labour legislation": A. & P. Ichino, *A chi serve il diritto del lavoro. Riflessioni interdisciplinari sulla funzione economica e la giustificazione costituzione dell'inderogabilità delle norme giuslavoriste*, *Rivista italiana di diritto del lavoro*, 1994, I, p. 461. Cf. the seminal book by De Luca Tamajo, *La norma inderogabile nel diritto del lavoro*, Napoli 1976.

²⁰ Of fundamental importance to Italian labour law culture is Vardaro, *Contratti collettivi e rapporto individuale di lavoro*, Milano 1985.

²¹ Wedderburn, *Inderogability, collective agreements and Community Law*, *Industrial Law Journal* 1992, p. 245.

number of reference concepts through which labour law asserted its autonomy, rebelling against the hegemony of contract law and the civil code and the related regulatory techniques and provisions. Inderogability was a privileged, or rather unique, regulatory technique through which collective autonomy asserted its social and existential programme vis à vis individual contractual autonomy (and the related mystifications), to the extent that it colonised, as was to be stated later, the whole sphere of labour²².

In this context, the concept of inderogability took on a symbolic valence (often being connected with the principle of substantial equality) as well as an ideological one. It was for a long time to represent (and in the opinion of some, still represents²³) the autonomy and pre-eminence of labour law and its reference values (protection, solidarity, equality, emancipation) over those of contract and the market (individualism, competitiveness, meritocracy).

II. Flexibility as a necessary evil (the '80s)

The second stage in the evolution of the flexibility debate in Italy, and in negotiated or State-introduced regulation, can be called "flexibility as a necessary evil". The economic crisis and the oil slump in the mid-70s, high inflation rates, the loss of competitiveness by enterprise, compensated for less and less by devaluation of the Italian lira, as well as political reasons (the frighteningly unknown variable of far left-wing terrorism, the defeat of trade unions in the Fiat company) showed that the situation was unsustainable, even for labour law.

In the early '80s even an eminent labour law scholar like Gino Giugni, who was emphatically considered to be the father of the Workers' Statute and thus one of the architects of the protective legislation, caught the cry of pain from the world of enterprise and warned of the dangers of the excessive rigidity of the Italian system²⁴.

²² See essays by La giuridificazione di rapporti di lavoro, *Giornale di diritto del lavoro e relazioni industriali*, 1986, p. 215; id., *Il diritto del lavoro e la riscoperta dell'individuo*, *Giornale di diritto del lavoro e di relazioni industriali*, 1990, p. 87 and ff. In general regarding formation of the cultural identity of labour law, see Supiot *The Dogmatic Foundations of the Market* (Comments illustrated by some examples from labour law and social security law), *Industrial Law Journal*, 2000, p. 321; Romagnoli, *Il lavoro in Italia: un giurista racconta*, Bologna 1995.

²³ See essay by Fontana in this volume, and Delfino, *Il diritto del lavoro comunitario e italiano fra inderogabilità e soft law*, *Diritti lavori mercati*, 2003, p. 653; Novella, *Considerazioni sul regime della norma inderogabile nel diritto del lavoro*, in *Argomenti di diritto del lavoro*, 2003, p. 509 and ff. For a critique of the concept and function of inderogable norms in labour law founded on the postulates of economic legal analysis, see A. & P. Ichino, op. cit. in note 19.

²⁴ See essay referred to in note 18.

Needless to say, the 80s were the years which saw the triumph of a neo-laissez-faire ideology and, in certain countries, policies inspired by this ideology.

In Italy this was not the case: on the contrary, for the first time experiments were carried out with legislative concertation, by means of great trilateral agreements between trade unions, the government and associations of entrepreneurs.

The result was the introduction of a certain dose of flexibility in the regulatory system. It was achieved via legislation, but with the consent of the trade unions.

The reform of fixed-term contracts²⁵ (in the sense that companies were allowed greater recourse to them), the first regulations supporting part-time work²⁶, the introduction of solidarity contracts, work and training contracts, the possibility for companies to take on workers by name²⁷, that is, to choose them directly without being forced by an automatic selection procedure to choose them from lists bureaucratically and inefficiently administered by State work placement offices; and also concessions regarding functional flexibility via collective bargaining: these were all the results of this phase. Rigidity is still the rule: flexibility is an exception, but it exists.

Three different legislative techniques were used to introduce some doses of flexibility into the system: a) the rigidity of some provisions was loosened, creating new exceptions (as in the case of fixed-term contracts and training contracts); b) collective bargaining was empowered to modulate the amount of flexibility in some specific topics ; c) in some cases established by law collective bargaining was allowed to derogate in peius from legal provisions previously considered to be inderogable, but only as a temporary, transitory measure (the function being to combat the economic crisis).

Two reasons which made this injection of doses of flexibility into the system politically possible must be stressed: in exchange for concessions regarding flexibility, the trade unions obtained two important political advantages. The first came directly from the government in the form of state resources for welfare policies and passive labour market policies, substantially as income support for workers involved in company crises (unemployment benefits and early retirement).

This, however, was also advantageous for companies: in exchange for limited doses of flexibility (much lower than expected or hoped for), they

²⁵ See essay by Zappalà in this volume.

²⁶ See essay by Lo Faro in this volume

²⁷ Name-based appointments were fully liberalised by Law 223/1991. See essay by Bonura in this volume.

obtained State financial support for processes of restructuring and re-conversion that involved collective dismissals. Secondly, the trade unions were persuaded to accept the new forms of flexibility by the fact that the relevant legislation did not adopt the technique of cut-and-dried deregulation.

The flexibility was, on the contrary, a result of various different strategies of negotiated legislation, most of them converging on the common aim of involving trade unions in the process of conferring greater flexibility on laws previously considered to be mandatory, by means of recourse to collective contracts, but also regulating new types of contract (for example, part-time contracts).

In short, companies could obtain greater flexibility within the limits expressly contemplated by the new regulations, but only if authorised by the administrative authorities, or alternatively by means of formal consent in the form of agreements with the most representative trade unions: that is, on a case-by-case basis.

So in this phase the ideological attitude which generally stigmatised flexibility did not change; but the government and the trade unions recognised that a certain dose of flexibility was inevitable, above all when the industrial system was sending out worrying alarm signals.

The change as compared with the previous "stigma" phase is indicative of the evolution of the concepts involved: the concept of inderogability as an absolutely untouchable technique and value declined. Labour protection could, if necessary, be bent and reconciled with other interests to cope with a turbulent labour market, restructuring, the economic crisis and the new post-Fordist models of production that were beginning to be introduced (flexible specialisation)²⁸.

And this was done in the name of a "lesser God": flexibility. But these processes were to be rigorously governed by the bargaining power of the trade unions; indeed, this power was strengthened to the extent that it played a significant role in canonical policy-making: the process of drawing up laws (negotiated legislation). This tacit institutional pact behind the system of industrial relations (which did not become institutionalised in Italy with the same solidity as in Spain or Austria for example) was honoured by all governments during the '80s towards all trade unions, with very few exceptions (for instance, the wage sliding scale issue in 1984).

As far as regulatory techniques are concerned, the consequences were just as evident: the increasingly frequent reference to flexibility as a necessary evil did not lead to processes of deregulation or the

²⁸ Piore/Sabel, *The second industrial divide : possibilities for prosperity*, New York 1984.

dismantling of legislation supporting the most representative trade unions. Quite the opposite; it led to re-regulation by transferring responsibility previously held directly by the law to collective bargaining by the most representative trade unions even on issues directly involving public assets: not only the labour market, for example, but also the management of social security and unemployment benefits.

At this stage, however, flexibility was not considered intrinsic to the labour law paradigm, but an external functional and contingent response to a critical situation in the labour market (hence the category of "emergency labour law"); its impact on the traditional regulatory basis of labour law was not considered to be very great and, in any case, temporary and transitory.

III. Flexibility as an objective necessity (the 90s)

In the '90s the picture changes considerably. International competition, the transformation of the economy and the technological and digital revolution impressed the need for flexibility as an objective necessity rather than a necessary evil, even in the minds of the most reluctant observers. The reorganisation of companies and the economy required much higher levels of flexibility than in the past, not least because the protective legislation was often bypassed, either in fact (by means of a dramatic spread of the shadow economy in Italy²⁹) or by derogation through pacts and agreements at a company, local or territorial level.

The law itself radically changed its attitude: what had previously been stigmatised was now accepted; despite signs to the contrary from the Constitutional Court³⁰, it was accepted by labour Courts, for example, that standard employment was no longer the great sun that attracted all the planets in the system (as it had done during the Fordist era), but just one of many stars of equal rank (if anything, it was diminishing in size). It was, in fact, in the labour market and in what was called flexibility in first-time employment (the aim being to provide incentives for hiring workers) that the most significant systemic changes were made. Various legislative reforms were introduced.

²⁹ The most recent data supplied by Istat on trends in the shadow economy in Italy are dated December 23, 2003 and are as follows:

Rate of irregular workforce members (Source: Istat)

1995	1996	1997	1998	1999	2000	2001
14,5%	14,5%	14,8%	15,1%	15,0%	15,0%	15,3%

³⁰ Corte Cost. n° 115/1994. See essay by Fontana in this volume. Also D'Antona, Limiti costituzionali alla disponibilità del tipo contrattuale nel diritto del lavoro, *Argomenti di Diritto del Lavoro*, 1995, p. 63 and ff.

Thanks to the slackening of juridical interpretation, as mentioned previously, the legislative reforms in the 90s directly or indirectly promoted the spread of various forms of employment involving greater transversal normative flexibility (which in various ways and to greater or lesser degrees affected working hours, pay, job security and so on).

It is worthwhile giving a few examples to make the meaning clearer.

In the early '90s a concerted agreement (the Ciampi protocol) eliminated the sliding scale, which rigidly and automatically protected wages from the effects of inflation. Since then the income policy in Italy (which has no familiarity with the American model of unilateral wage flexibility) has depended on macro-economic variables which are to a certain extent extraneous to the system of wage agreements: it depends above all on the constraints of the single currency and the concerted income policy; at the medium-higher levels of workers (managers and executives) there is a considerable wage drift steered by individual contracts.

In the '90s working hours were made much more flexible due to the combined effects of legislative reforms complying with EU directives and collective bargaining³¹. Legislators also provided stronger support for part-time work than before, even though the logic behind this policy combined trade union control and the need for flexibility on the part of both workers and companies³².

1. The 90s (continued): the "more flexibility, less unemployment" connection.

The rush to legitimise flexibility as a new labour law paradigm - and not only as a necessary but temporary evil or objective necessity - continued in this period with implicitly pro-union governments like the "technical" governments of the early '90s and the openly pro-union centre-left governments of the second half of the decade. The Italian social model based on development of the productivity of labour featuring a very limited work activity rate (due to atavistic economic and social reasons which cannot be dealt with here) required acceptance of modifications to the labour law system with the aim of promoting employment, seen as an urgent priority.

The change therefore took place for functional reasons: even reformist labour law experts accepted in principle the dominating more-flexibility-less-unemployment connection. The furthest-reaching, if not the most rationally co-ordinated, reforms introduced in the '90s concerned flexibility in first-time employment.

³¹ See essay by Ricci in this volume.

³² See essay by Lo Faro in this volume.

The labour legislation introduced in the '90s contained many new types of flexible work contracts, all aiming at increasing employment; some were already common in other systems (such as temporary work through agencies); others were typically Italian ("stage" contracts, "social utility work", work scholarships, professional retraining schemes, contracts for continuous and co-ordinated but not permanent work).

They are contingent work contracts which are still stereotyped as atypical, but the statistics concerning the growing recourse to them make nonsense of such a definition³³. As official statistics demonstrate³⁴, these types of contract have definitely contributed towards a remarkable increase in the percentage of flexible work in the Italian labour market as compared with steady employment (although not to the same extent as in other European countries); and they have also contributed to the increase in the employment rate in the last few years (although other factors must also have played an important role, given the unexpected recent increase in traditional permanent employment as well, but before the present economic slump).

The social effects of this spread of flexible contracts are, however, as evident as the economic effects:

- a) Greater accent has definitely been placed on the multi-tier internal labour market³⁵ (i.e. workers with standard contracts and those taken on with the new forms of contract, who may or may not have job security, particularly in what is called contingent work)³⁶.

³³ For the similar evolution of the labour market in France cf. Théry, *Nuove forme di lavoro: flessibilità e sicurezza*, Sociologia del lavoro, 1998 p. 103 and ff.

³⁴ For an analysis, albeit not very recent, see *The growth of flexible work*, Italy, *European Industrial Relations Review*, 2000, 315, 31. For more recent data, see Table 1 in Appendix.

³⁵ The multi-tier configuration of the labour market within companies, and not one in merely dualistic terms, is probably more realistic as it takes account of the complexity of outsourcing strategies adopted: alongside permanent employees who make up the organic "core" (insiders) there are various categories of outsiders: steady external workers (e.g. those working on a continuous, coordinated but not permanent contract, others working on a continuous consultative basis, contracted or subcontracted workers who are permanently inserted into the production cycle of the contracting firm, and workers on a permanent contract); but there are also temporary outside workers (doing occasional, accessory, or on-call fixed-term work, to use the terminology used in the recent reform introduced in Italy by the Berlusconi government: Legislative Decree 276/03).

³⁶ For an analysis referring above all to self-employed workers, see Barbieri, *Liberi di rischiare. Vecchi e nuovi lavoratori autonomi*, Stato e mercato, 1999, p. 281 and ff. I cerchi concentrici. Discussion about contingent work is frequent in American literature: see Barker, Christensen, Lautsh, *Income and Social Security and Substandard Working Conditions* Contingent Work: American Employment Relations in Transition, Ithaca, 1998; Stone, *From Widget to Digits: Employment Regulation for the Changing Workplace*, Cambridge, CUP, 2004.

- b) But there has also been a shift in the mobile borderline between flexibility and job instability and precariousness, with a marked prevalence of the latter.

It is as if Italian labour law in the '90s, although it did not declare so openly, had become aware of the social plurality of types of employment; and although no radical reforms were brought in, it is as if it had introduced a diversification in the relative juridical regimes. What are the consequences of this prospect as far as the theory and functions of labour law are concerned?

At this stage, flexibility is no longer considered to be a stigma, a necessary evil, or an objective necessity: it has become a new theoretical horizon to refer to in adapting labour law and its regulatory techniques to new, broader institutional strategies and functions. The flexibility paradigm is thus legitimised as a new theoretical horizon for labour law; the problem that remains is how to adapt it so that it can coexist with the much more legitimised paradigm of the traditional Italian labour law system, that is, job security and permanence, which is considered to be the ideal, universal model of social protection.

Taken as a whole, the provisions introduced in the '90s were not simply an injection of further doses of flexibility, but a real systemic transformation due to the variability of labour law worker protection regimes.

The phenomenon of an increasing number of different types of employment contract, hitherto viewed as a sort of departure from labour law (in the sense that labour law was identified with standard forms of employment), is credited with a positive, functional broadening of its regulatory confines. The labour law domain extends to work sans phrase, not through the traditional "imperial" expansionistic technique of applying the whole apparatus of worker protection in permanent employment to other types of contract, but rather through acceptance of the theorem of regulatory differentiation between protection regimes. Social pluralism is accepted by labour law, but this acceptance marks a profound transformation, a crisis affecting its original, monolithic identity³⁷.

Work sans phrase still merits protection, but with more flexible, sophisticated techniques than the traditional inderogability. These techniques also presuppose worker protection on the labour market and

³⁷ Caruso, The future of labour law: traditional models of social protection and a new constitution of social rights WP C.S.D.L.E. "Massimo D'Antona" N. 10/2002, <http://www.lex.unict.it/eurolabor/ricerca/wp/default.htm>

not only in the employment relationship³⁸; promotional protection in the job-seeking stage or in passing from one job to another; proactive, at times, soft techniques, the aim of which is also self-promotion by the worker: what in Community jargon is called employability.

On the basis of the EES which began to influence labour policy and debate in Italy above all from the late 90s onwards, there is a widespread conviction that forms and techniques of protection do not necessarily have to be borrowed from standard permanent employment, but can be gradually adapted to specific types of work. The law does not directly regulate this adaptation, nor does it provide indications as to other sources of regulation. It confines itself to legitimising them, renouncing its regulatory predominance. It does so by amplifying the scope of regulation via collective contracts, but recognises a new role for individual agreements and wishes, providing they are within the bounds and under the protective umbrella of collective autonomy, as is the case with the new regulations governing part-time work³⁹. The several concurrent sources refer back to each other in an articulated play of mirrors (one reflecting the other) and the regulatory framework is apparently complicated⁴⁰: but regulatory complexity is probably the price that has to be paid to prevent labour law from falling into the regulatory dilemma discussed by Teubner⁴¹.

³⁸ Of great and undoubted influence in Italy was the work carried out by the group coordinated by Supiot, *Au-delà de l'emploi* (transformations du travail et devenir du droit du travail in Europe), Flammarion, Paris 1999.

³⁹ See essay by Lo Faro in this volume. Legislation in the '90s which legitimised individual contracts to introduce doses of flexibility into the system was based on theoretical indications from Italian experts supporting innovation in a context of continuity and fully aware of criticism about the colonising effects of classical labour law on several spheres of life: cf., D'Antona, *Contrattazione collettiva e autonomia individuale nei rapporti di lavoro atipico*, *Giornale diritto del lavoro e relazioni industriali*, 1990, n. 47, p. 529 ff., now in *Opere*, Caruso/Sciarra (eds.), I, Milano 2000, p. 75 ff. A limited precedent to the part-time reform introduced in 2000 (Legislative Decree 61) can be seen in the civil service reform, which granted public administration executives the power, albeit greatly limited by collective bargaining, to negotiate their salaries individually; see Nicosia, *La dirigenza statale tra fiducia, buona fede ed interessi pubblici*, *Giornale di diritto del lavoro e di relazioni industriali*, 2003, p. 253 and ff. Here, however, the reasoning behind the law was not to provide a safety net for individual autonomy, but to guarantee trade union control against the risk of an excessive wage drift, with probable repercussions on the public expenditure.

⁴⁰ The most frequent criticism of the part-time reform introduced in 2000 (Legislative Decree 61) to implement the EU directive, as expressed in the White Paper issued by the Berlusconi government, was that the regulations were muddled and uselessly complicated, not least due to the intricate, but probably integrating, involvement of several sources of regulation.

⁴¹ This can be summarised as follows: incongruence between law and society as a consequence of which legal regulation remains ineffective because it does not produce any change in practice; that is, hyperlegalisation of the social system, synonymous with

Despite its uncertainties, timidity and not always acceptable technical solution, this legislation represents a new form of experimentalism, with interference from sources and techniques of protection that are different from the traditional ones attributable to labour law. Work relationships can also be regulated by individual contracts, but the worker's wishes are "protected" by a collective source which provides a framework of certainties and limits to individual bargaining: a sort of safety net against voracity and unilaterality on the part of employers.

This short season represented the embryo, in the Italian system, of the new paradigm of flexicurity which had already taken root successfully in other European countries (above all in Holland and, with certain differences, Denmark⁴²). This experience found an institutional reference in the so-called "third way" that Europe was trying to experiment with the pillar of adaptability in employment policies⁴³. In Italy at that time, however, there was a lack of awareness of the need for the coexistence of all the elements necessary to qualify a labour policy as being inspired by the paradigm of flexicurity, as indicated by the most successful experience, that is, in Holland. In particular these involve the synchronisation and coordination of measures aiming to introduce flexibility into the labour market and employment; but they also include social security reform to increase security on the job market, and

Habermasian colonisation; or, hypersocialisation of the legal system, leading to its being instrumentalised by politics or the sectors being regulated. Cf. Teubner, *After Legal Instrumentalism? Strategic Models of Post-Regulatory Law*, in *Dilemmas of Law in the Welfare State*, ed. by Teubner, Berlin 1986.

⁴² As is known, there are basically two models based on the flexicurity paradigm: the Dutch model, which focuses on compensating flexibility and security in employment, with particular reference to atypical forms of work; and the Danish model, where a high degree of flexibility (in all types of employment) is compensated for by great protection and social subsidies on the labour market. For a comparative analysis, see Wilthagen, Tros, van Lieshout, *Towards "flexicurity"? Balancing flexibility and security in EU member states*, Flexicurity research paper FXP 2003 – 3. For further references to the two models, see Wilthagen and Rogowski, 'Legal Regulation of Transitional Labour Markets', Schmid/Gazier, eds., *The Dynamics of Full Employment: Social Integration through Transitional Labour Markets*, Cheltenham, Edward Elgar, 2002, p. 245 and ff. Reference to the two models is also made in the recent Kok report, *Jobs, Jobs, Jobs, Creating more employment in Europe*, Report of the Employment Taskforce, chaired by Wim Kok, p. 28. Available on Labour Web <http://www.lex.unict.it/eurolabor/documentazione/altridoc/jobs.pdf>

⁴³ For a critical stance, see Ashiagbor, "Flexibility" and "adaptability in the EU employment strategy", in Collins, Davies, Rideout, (ed.), *Legal regulation of the employment relation*, London, 2000, p. 373; a more positive judgement is given by Kenner, *The EC Employment title and the "third way": Making soft law at work*, *The International Journal of Comparative Labour Law and Industrial Relations*, 1999, p. 99 and Caruso, *Alla ricerca della flessibilità "mite": il terzo pilastro delle politiche del lavoro comunitarie*, *Diritto delle relazioni industriali*, 2000, p.141.

reasonable coordination between legislative reforms and deregulated bargaining policies based on multilevel governance, as presupposed by the flexicurity policy⁴⁴. In short, the season of reforms did not have the strength to implement much-needed systemic reforms, in the framework of a far-reaching cultural project aiming at “re-institutionalising the employment relationship which would be achieved by setting rules, allocating negotiating forums for these rules and enabling collective actors to intervene effectively”, according to the lines of the Supiot report. A project that would be able not only to reconcile but also systemically integrate freedom, flexibility and the need for security⁴⁵.

A sign of these limits is the so-called Christmas Pact, signed on December 22, 1998 by the social partners and the government, in which the chapter on labour market and employment relationship reforms remained empty. Without clear, unambiguous institutional and normative points of reference, even the season of decentralised territorial pacts, which was perhaps the most significant step in the direction of flexicurity in Italy, remained fruitless and was destined to end⁴⁶.

Little remains of that season beyond a few sporadic, fragmentary norms based on the paradigm: there has been no coordinated, structured policy induced by mutual reliance between the political and social actors on which to build partnership practices that are deep-rooted enough to become vectors of solid structural reforms in the name of flexicurity⁴⁷.

Traces of the paradigm can be seen in the part-time reform introduced in 2000 (Legislative Decree 61/00), where the law tried, as mentioned previously, to give the individual partners responsibility for establishing sustainable degrees of flexibility that were reconcilable with the personal needs of the workers involved. This is achieved by recourse to measures

⁴⁴ Wilthagen and Rogowski, ‘Legal Regulation of Transitional Labour Markets’, cit. in note 42. Note p.250, flexicurity <<represents a policy concept or, more specifically, a policy strategy that can be defined as follows: ‘a policy strategy that attempts, synchronically and in a coordinated way, to enhance the flexibility of labour markets, work organisation and labour relations on the one hand, and to enhance security – employment security and social security – notably for weaker groups in and outside the labour market on the other hand’. For a detailed analysis of the flexicurity paradigm, see Wilthagen *The Flexibility-Security Nexus: New approaches to regulating employment and labour markets*, Flexicurity research paper FXP 2003 – 2, and Wilthagen, *Flexicurity: A New Paradigm for Labour Market Policy Reform?*, 1998, Flexicurity Research Programme FXPaper Nr. 1.

⁴⁵ Supiot, Casas, de Munk, Hanan, Johansson, Meadows, Mingione, Salais van der Heijden, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*, Oxford 2001, p. 45.

⁴⁶ Caruso, essay cit. in note 16.

⁴⁷ The fiduciary element as a salient political factor in governance based on flexicurity is convincingly emphasised by Wilthagen, *The Flexibility-Security Nexus*, cit. note 8, p. 25 and ff.

regulating consensual agreement on the duration and flexibility of working hours, legitimising this possibility but within a network of protection guaranteed by collective bargaining, and entitling the worker to “change his mind” about his terms of employment⁴⁸. There are also some traces in regulations governing temporary agency contracts (Law 196/97), which require temporary workers to be afforded the same treatment as workers permanently employed by the company and establish significant training obligations on the part of the temporary employment agency⁴⁹.

Also linked to the paradigm is the slow but progressive consolidation of a minimal set of measures to protect workers on coordinated, continuous, but not permanent contracts which, together with subcontracting, became the main kind of contract in Italy in the 90s and was used by companies for outsourcing purposes, as a replacement for steady employment⁵⁰. Legislation contributed to this by providing for increasingly significant social security cover, with a series of measures starting with the general reform of the pensions system (Art. 29 clause 2° Law 335/95)⁵¹, the introduction of compulsory health and accident insurance (Legislative Decree 38/2000) and maternity benefits. A further

⁴⁸ On the part-time reform in Italy under governments belonging to the Olive Tree alliance, see Lo Faro in this volume, as well as Liso (ed), *Il lavoro a tempo parziale*, Roma 2002, and the essays it includes. However, even in the case of part-time work, changes in the name of flexicurity did not achieve the organic nature of the Dutch regulations: see Wilthagen, Tros, van Lieshout, *Towards “flexicurity”?* cit. note 42, p. 18 and Wilthagen and Rogowski, ‘Legal Regulation of Transitional Labour Markets’, op. cit. note 44. p. 246. Although Italian legislation is in certain respects similar, it does not provide measures like that of the Dutch civil code which expressly prohibits discriminatory financial or legal treatment of workers regarding the amount of time devoted to work, nor is there anything similar to the Dutch Working Act of 2000, which allows a worker to reduce or increase his working hours unilaterally, in relation to his personal needs, a possibility that is only precluded if an employer can demonstrate that “major corporate or organizational interests’ are likely to be adversely affected”, *ivi* p. 245 and note 12. Similar measures only apply to public administration.

⁴⁹ Cf. Liso, Carabelli (eds.) *Il lavoro temporaneo. Commento alla l. n. 196/1997*, Milano, 1999, p. 33 and ff. Carinci M.T., *La fornitura di lavoro altrui. Art. 2127*, in Schlesinger (directed by) *Il codice civile. Commentario*, Milano 2000. From the perspective outlined above, see especially Zappalà, *La “flessibilità nella sicurezza” alla prova. Il caso del lavoro temporaneo fra soft e hard law*, *Giornale di diritto del lavoro e di relazioni industriali*, 2003, p. 69. The Italian reform, however, has nothing to compare with the articulated balance between flexibility and security in agency work achieved by the Dutch legislation, cf. Wilthagen, *Flexicurity: A New Paradigm*, cit. nt. 44, p. 12 and ff, but above all p. 15.

⁵⁰ Reyneri op. cit. note 10, p. 23; for a recent quantitative analysis of continuous, coordinated but not permanent employment, cf. Altieri/Otieri, *I lavori atipici, analisi e prospettive*, *Quaderni di rassegna sindacale*, 2001, p. 13 ; for a similar phenomenon in Germany, see Waas in this volume.

⁵¹ See essay by Fontana in this volume.

contribution was made by collective bargaining⁵² and, less significantly, by the law courts, with important but isolated recognition of remuneration and legal protection.⁵³ Intervention by both collective bargaining and the courts, as a surrogate for organic legislative reform, are not judged sufficient to balance, in terms of security, the flexibility introduced into the system by massive recourse to coordinated, continuous work contracts.

All this did not come about by means of radical systemic reform aimed at extending the protection regime for permanent employment to the new types of work⁵⁴, but through progressive, circumscribed and unsystematic adjustments to the system of labour law⁵⁵: this can by no means be termed a distinctive sign of an organic labour policy inspired by the paradigm of flexicurity.

Even the loosening up of the rigidity of previous legislation regarding working hours is part of this initial, non-organic embryo of legislative reforms based on flexicurity.

In the late 90s there was a mini-reform of the previous rigid discipline regulating working hours (which went back to 1923). This reform only led to a partial adaptation of the Italian legal framework in compliance with the European working hours directive (EEC Directive 93/104, now EEC Directive 2003/88). It was therefore judged insufficient by the Commission and the European Court of Justice, which issued a sentence

⁵² See the first national collective contract for coordinated, continuous work stipulated on April 8 1998, as well as the framework agreement between the Federazione CDO "non-profit" and ALAI-CISL CGIL-NIDIL CPO-UIL, the temporary workers' trade unions. In the state sector see the "Accordo di regolamentazione relativo alle collaborazioni coordinate e continuative presso gli uffici e gli istituti centrali e periferici del Ministero per i beni e le attività culturali", stipulated in 2000.

⁵³ Some relatively dated, such as Cass. civ., 12/04/1985, n.2433 which recognises the right of coordinated, continuous workers to fair pay and the right to strike; others are more recent, for example Pret. Monza, 10/07/1996.

⁵⁴ This was the sense of the proposal made under the previous government by left-wing politicians and trade unions, leading to the so-called Smuraglia project, named after an illustrious senator and jurist, requiring precise legislative definition of a new type of norm to regulate the grey area between subordinate employment and self-employment (a *tertium genus*); the proposal countered that of the moderate Left Wing, the Treu Project, which supported progressive legal extension of certain differentiated forms of protection according to a criterion of progressively concentric circles (a workers' statute), without the need to define typologies, considered useless in a constantly changing context. For an analysis of the proposals and relative theoretical implications, see Perulli, *Il disegno di legge sui lavoratori atipici, Lavoro e Informazione*, 1999, p. 5 and ff. See also Biagi/Tiraboschi, *Le proposte legislative in materia di lavoro parasubordinato: tipizzazione di uno «Statuto dei lavori» o codificazione di un tertium genus?*, *Lavoro e diritto*, 1999 p. 571

⁵⁵ For a global evaluation of this phase of labour policy in Italy, see Treu, *Politiche del lavoro. Insegnamenti di un decennio*, Il Mulino, Bologna 2001.

against the Italian State⁵⁶. This partial adaptation, however, contributed towards the feasibility of a more flexible model of working hours on a weekly and annual basis, in conformity with Art. 6 of the EU directive. This came about thanks to a substantial loosening of constraints on overtime and the acceptance of multi-period working hours schemes. These modules, which had already been tested by collective bargaining, left room for individual negotiation, within the limits of the framework provided by the collective contract (individual flexibility) and allowed working hours to be spread out in time in particular circumstances, even without trade union control (timely flexibility)⁵⁷.

§ 3: Flexibility as an ideology (the present)

However, the undoubted results of this new strategy as far as employment rates are concerned, and the alarm bells being rung by economists and sociologists about the excess of systemic flexibility introduced into the labour market, have not mitigated either criticism of existing labour law or the demand for further amounts of legislative flexibility. This never-ending demand for a further wave of flexibility in the system (without security) from certain sectors of entrepreneurs has been taken up by the centre-right government which came to power at the beginning of this century. On coming to power, the government published a White Paper proposing reforms based on a type of flexibility which was said to comply with the indications given by EU institutions. The proposals were then transformed into a Parliamentary text (Delegatory Act n. 30/03), which came into effect on October 24, 2003 (Legislative Decree 276/2003) directly drawn up by the Government.

In this transition from a statement of policy to concrete legislative implementation, all homage to the flexicurity paradigm of Dutch origin remains merely formal. In the section of the White Paper devoted to flexibility and security (II 3), in fact, indications are given as to reforms (part-time, occasional work, temporary work and intermediation, project work, fixed-term contracts, working hours) which, once implemented, will possess all the features of flexibility tout court, or unilateral flexibility: security appears to have vanished. Traces of security remain where it had already been introduced, for example in regulating agency-brokered employment (compulsory training and equal treatment).

⁵⁶ Case C-439/98 Commission of the European Communities / Italian Republic, decision of 16 March 2000, at <http://www.lex.unict.it/eurolabor/en/documentation/sentenze/causa439-98en.htm>

⁵⁷ For further reference, see the essay by Ricci in this volume.

The operations of the new government and parliament are guided by the idea put forth in the European Commission Green Paper, where stress is above all laid on the concept of the flexible firm⁵⁸, tempered by frequent reference to partnership; all reference to security tends to fade, if not to dissolve into deregulation, as has been pointed out⁵⁹. It is a focalisation, to a certain extent subsequently adjusted by the Lisbon summit⁶⁰, in which unequivocal reference not only to the quantity but also to the quality of work implies greater investment in human resources, the exaltation of capabilities and training, and therefore the consequent, natural instruments of security.

Some modifications, however, follow the lines of previous reforms: they represent a positive rationalisation of the tools used to regulate the labour market⁶¹, not least by allowing private individuals or organisations to carry out intermediary activity via work agencies⁶². Other changes to the overall normative framework inaugurate a new phase in the relationship between labour law and flexibility: the purely ideological and symbolic use of flexibility (which in this case becomes a real metaconcept) to cover up a profound de-structuring of some of the basic institutions of Italian labour law, which up to now had not been affected by previous reforms.

⁵⁸ COM(1997)-128 11.04.1997 Green Paper. Partnership for a new organisation of work. For critical considerations on the idea of flexibility laid out in the document, see Ashiagbor, "Flexibility" and "adaptability in the EU employment strategy, op. cit. nt. 43, p. 390 and ff. In general regarding American cultural hegemony affecting ideas and concepts of flexibility, the labour market and welfare in Europe in the '90s, see the significant book by Hutton, *The World We're In*, 2003 Time Warner books, above all Chapter 5.

⁵⁹ Ashiagbor op. cit. in note 58.

⁶⁰ For broad coverage of the summit, consult the Labour Web site: <http://www.lex.unict.it/eurolabor/en/documentation/altridoc/speciale/lisbona.htm>.

Especially point 24 of the conclusions drawn by the President on 23-24 March 2000, "People are Europe's main asset and should be the focal point of the Union's policies. Investing in people and developing an active and dynamic welfare state will be crucial both to Europe's place in the knowledge economy and for ensuring that the emergence of this new economy does not compound the existing social problems of unemployment, social exclusion and poverty". This strategy also emerges and is confirmed in more recent Commission documents: see Commission Draft Joint Employment Report 2003/2004, Brussels, 21.1.2004 COM(2004) 24 final, p. 23 ff; Scoreboard on implementing the social policy, Brussels, 01.03.2004 COM(2004) 137 final, pp. 6-7. See also *Jobs, Jobs, Jobs* cit. at nt. 42, p. 18 ff. and 27 ff

⁶¹ See the essay by Bonura in this volume.

⁶² On the strategic role of Temporary agency work acting as human capital managers rather than mere manpower suppliers, see the Kok report, cit. notes 42, 29

I. The Berlusconi/Maroni (not Biagi) reform.

a. Main contents

The so-called Biagi reform⁶³ represents a far-reaching change, comparable as regards the import of the regulatory intervention and the number of areas affected with what happened with the Workers' Statute in 1970, but leading in the opposite direction as regards legal policy.

The regulations introduced in 1970 aimed to strengthen the dominant social model of subordinate employment in the Fordist factory, which was taken as the ideal model for the whole of social organisation. It was made more rigid by surrounding it with various forms of protection. The attempt today is not to destructure from the inside a regulatory model founded on the Civil Code definition of the subordinate worker (Art. 2094) and the series of protective regulations that have since been introduced.

The attempt is rather to neutralise it and transform it into just one of a number of models, regulating an ever-decreasing proportion of the overall workforce. Subordinate employment as the main beneficiary of a whole series of juridical effects has not, that is, disappeared but its paradigmatic regulatory status has been diluted.

This has been done by certain fundamental lines of action evident in three groups of regulations that can be summed up as follows:

1. One group of regulations should facilitate the spreading out and outsourcing of phases of the production cycle (staff leasing, subcontracting, undertaking transfer). With these measures the decree confines itself to accepting and facilitating outsourcing operations that respond to the real requirements of companies and are already a strong reality in the Italian labour market, with substantial backing from both national courts and the European Court of Justice. This is achieved, however, by introducing great

⁶³ As explained by Carinci in *Una svolta tra ideologia e tecnica: continuità e discontinuità nel diritto del lavoro di inizio secolo*, Italian Labour Law e-Journal, <http://www.dirittodellavoro.it/public/current/ejournal/>, there are valid reasons why the labour market reform introduced by Legislative Decree 276/03 should not be referred to as the "Biagi reform": "Of form, because a law can be labelled with the name of the first person to propose it, that is, the person who claims both paternity and ultimate responsibility for it; but not with the name of a consultant, however authoritative, who remains detached from the institutional process, without the possibility of identifying and distinguishing his actual contribution, which is destined to count only if and to what extent it is taken into account by political legislation. Of substance, because what can certainly be attributed to Marco Biagi is the project set forth in the White Paper, whereas Legislative Decree 276/2003 was issued several months after his death, which makes *sic et simpliciter* attribution to him problematic, not only in spirit but also in practice".

uncertainty as to the borderline separating legal break-up operations and illegal brokering⁶⁴.

2. With a second group of measures, the decree produces even further fragmentation. It does so by legally enlarging the grey area separating self-employed and subordinate work. Far from rationalising concrete social phenomena, the law creates an artificial legal fragmentation of types of work (coordinated work, project work, occasional work, occasional accessory work, with a series of internal distinctions; and then administered work, intermittent work and job sharing; and also various types of apprenticeship, starter contracts, and so on down to even more subtle distinctions, the declared aim being to increase revenue from contributions, eliminate the hidden economy and prevent fraudulent employment practices. The result is confusion, both conceptual and as regards practical application of the regulations⁶⁵. Besides, whereas the picture is considerably complicated from a juridical viewpoint, no new objectives are pursued with a view to extending and strengthening protection for contingent workers and the decree fails to achieve all the requirements suggested by the Community "better job" policy. It totally neglects the fact that the correlation between quality and the type of work contract (temporary vs. permanent), working time (full time vs. part-time) and its nature (voluntary vs. involuntary), has been established at a European level. In other words, the nature of the work contract is considered a fundamental element of job quality⁶⁶. The result is that the so-

⁶⁴ Zappalà, Verso un nuovo assetto dei rapporti interpositori. Prime riflessioni sulla "tipizzazione" del contratto di somministrazione di lavoro, in *Diritto delle relazioni industriali*, n. 2, 2004.

⁶⁵ Experts, even those not aprioristically hostile to policies laying greater stress on the need for flexibility in the system, are radically critical of the technical solutions proposed in the reform, especially the regulation of new forms of non-subordinate work, cf. Pedrazzoli, *Tipologie contrattuali a progetto e occasionali. Commento al Titolo VII del D. Lgs. 276/03*, WP C.S.D.L.E. "Massimo D'Antona" N. 29/2004; De Luca Tamajo, *Dal lavoro parasubordinato al lavoro "a progetto"* WP C.S.D.L.E. "Massimo D'Antona" N. 25/2003, <http://www.lex.unict.it/eurolabor/ricerca/wp/default.htm>

⁶⁶ This clashes quite clearly with labour policy suggestions from the ESS and Social Policy Agenda: see the Commission's documents COM(2000)-379 and COM(2001)-313. See, also, the Joint Employment Report 2003/4 cit. in note 60: "Whereas greater flexibility may be needed in some Member States as regards standard contracts, a review of the contractual framework may also require strengthening security in non-standard contracts". (Emphasis added) From that, converging indications: "Review the role of other forms of contracts with a view to providing more options for employers and employees depending on their needs" but also "Ensure there is adequate security for workers under all forms of contracts and prevent the emergence of two-tier labour markets", p. 23. Along the same lines, see also

called border zone between self-employed and subordinate work is becoming less and less clear⁶⁷; observed through the new regulations, it is so artificially broken up into types and subtypes as to create a juridical labyrinth that might well lead to an increase in contentious procedures. This does not find favour either with employers, who are caught up in a mesh of unforeseen and unpredictable legal technicalities (above all because they come from a "friendly" government, whose stated aim was to simplify the labour market and render it more flexible), or with the trade unions, who stress the failure to increase overall protection for contingent workers.

3. The explicit aim of a third group of regulations is to reduce space for judicial intervention (some explicitly limit control by judges based on "merits"⁶⁸) in favour of certification procedures. These procedures are assigned to a wide range of authorised bodies (not only bilateral institutions of various kinds, but also provincial employment bureaux and even state and private universities via forms of collaboration and agreements with individual labour law academics), and can be used in cases of uncertainty to provide legal qualification of types of work relationship. The decree appears, that is, to propose a preventive remedy for the probable counterintuitive effects of the uncertainty of the regulations, introducing alternative procedural mechanisms for certification. The procedures obviously amount to a Freudian admission of the chaos that has been created. But what clearly emerges is a legal policy that had already been explicitly stated in the government's

the Kok Report quoted in note 62, p. 27 "while promoting flexibility on the labour market, it is also important to foster new forms of security. Security in today's labour markets is not a matter of preserving a job for life. In a more dynamic perspective, security is about building and preserving people's ability to remain and progress in the labour market. It is related to decent pay, access to lifelong learning, working conditions, protection against discrimination or unfair dismissal, support in the case of job loss and the right to transfer acquired social rights when moving jobs". For an evaluation of the EES see Kenner, *EU Employment Law, From Rome to Amsterdam and beyond*, Hart, 2000, pp. 491-505. In general, on the European strategy on quality of work see Goetshy, *A transition year for employment in Europe: EU governance and national diversity under scrutiny*, *Industrial Relations, Journal*, 2002, 414 ff

⁶⁷ Davies, *Lavoro subordinato e lavoro autonomo*, *Diritto delle relazioni industriali*, 2000, p. 207; Supiot, *Le nouveaux visages de la subordination*, *Droit Social*, 2000, p. 131 and ff; see also Fontana and Waas in this volume.

⁶⁸ Cf. Clause 3, Art. 27, Legislative Decree 276/03, which expressly excludes the possibility of judicial control being extended to "evaluations and technical decisions, [...] which are the responsibility of the user".

White Paper⁶⁹: the measures were not devised on the basis of a legitimate need to deflate labour claims in the law courts, providing incentives for alternative forms of arbitration⁷⁰, but betray a clear lack of confidence and negative attitude towards labour court judges and judicial intervention in general. These provisions are hard to classify among the traditional tools used to prevent legal action from being brought (conciliation, mediation), nor do they belong to the class of classical adjudication tools such as arbitration. The attempt is to get round proceedings in labour courts by disproportionately multiplying the number of subjects entrusted with non-consensual prevention litigation powers. These, in fact, are not only the traditional social partners, in a classical scheme in which this function is devolved to collective autonomy, but also subjects and institutions in civil society (for example, universities), in a scheme disputably referring to horizontal subsidiarity. Without going into noble principles like subsidiarity, it is more probably a stratagem to limit judicial control; a mechanism that has been defined as “technically cunning” rather than well-constructed, the practical effectiveness of which remains to be seen. The certification procedures are also entrusted with a new regulatory technique inspired by flexisecurity: assisted derogation. By this procedural mechanism workers can renounce or negotiate acquired rights before bilateral institutions (in this case, not universities) and not only before the traditional trade union and administrative commissions. This is not particularly innovative, as it is already provided for in the Italian system (final clause, Art. 2113 Italian Civil Code). The only innovation lies in the fact that the conciliation and transaction functions are entrusted to new institutional subjects – bilateral entities – which can “assist” workers in an activity that is already possible in other institutional contexts. According to a much more destructured interpretation of the current situation, the new system offers the individual worker the possibility, with the assistance of those entrusted with certification, of forgoing treatment that is by law inderogable; that is, he can forgo standard legal and contractual terms *ex ante*, when he is hired, or during the employment relationship itself. This radically modifies the protection mechanism based on the inderogable regulation

⁶⁹ Government White Paper on the Labour Market Reform, § I.3.7., Rome 2001.

⁷⁰ Caruso, *Sindacato, arbitrato e conflitto collettivo*, Diritto delle relazioni industriali, 1992, pp. 47-49.

whereby acquired rights can be forgone for transaction purposes, but preventive renunciation of standard treatment is impossible⁷¹.

Of significance are also certain modifications introduced by legislation other than the "great" reform contained in Legislative Decree 276/03, in particular as regards fixed-term contracts and working hours.

- a) Fixed-term contracts are regulated by Legislative Decree 368/2001, which implements the EU directive. The new regulations signal a departure from a model which details a limited number of legal and contractual types considered to be exceptions to the general rule. The new model introduced provides general grounds legitimising the stipulation of fixed-term contracts for "reasons of a technical, production, organisational or substitutive nature". In this way fixed-term contracts become a "normal" tool to determine the makeup of company workforces, juxtaposed to but not countering permanent contracts. This contradicts both indications from the European social partners (the agreement incorporated in the directive)⁷² and recent trends in other European countries (Portugal, Spain) to support permanent employment and discourage excessive recourse to fixed-term contracts⁷³. The new regulations also greatly re-dimension the monitoring role of collective bargaining, signalling a significant break with the model of negotiated flexibility applied up to now. Although the government's aim was to introduce a "more simple and controllable system" of fixed-term contracts, the new regulations, above all on account of the extremely generic nature of their general grounds, would appear to have led to a framework of rules which employers themselves find hard to apply, thus increasing the margins for discretionary rulings by judges assessing their legitimacy⁷⁴.

⁷¹ There is already a large amount of debate on these provisions (Title VIII of the Legislative Decree) and the problem of interpreting them. For two opposing opinions, see Ghera, *La certificazione dei contratti di lavoro*, in *Mercato del lavoro. Riforma e vincoli di sistema*, ed. by De Luca Tamajo, Rusciano, Zoppoli, Napoli 2004, p. 277 and ff. for the destructured interpretation; and Bellavista, *La derogabilità assistita nel d.lgs. n. 276/2003*, WP C.S.D.L.E. "Massimo D'Antona" N. 35/2004, for the more reductive interpretation.

⁷² Cf. Foreword to EEC Directive 99/70, which states in point 6 that permanent work contracts represent the most common form of work relationships. For the effects of the directive on the German system, see essay by Preis and Gotthardt in this volume.

⁷³ Cf. the recent Kok report, *Jobs, Jobs, Jobs*, op. cit. in note 42, which makes explicit reference to action of this kind.

⁷⁴ See Zappalà in this volume.

- b) In connection with working hours, the EU directive is implemented via Legislative Decree 66/2003. The reform increase the system's overall degree of flexibility, above all as regards suppression of the maximum limit on daily working hours, the system of breaks and rest periods, and the mechanism of derogation. Although it does not introduce individual opting out (provided for by UK legislation) and despite the significant permanence of a system of collective bargaining, post-reform regulation of working hours in the Italian system possesses a degree of flexibility comparable to that of the UK and certainly greater than that of other Member States (like Holland, Spain and Germany)⁷⁵. It can, however, be stated that in this case the constraints imposed by the EU directive have placed limits on reforms which would have entailed more profound destructuring of the previous system of worker protection.

b. Legal policy and regulatory techniques

What is interesting to note in the legal policy and regulatory technique used in the new legislation is that the objectives outlined above are not pursued via deregulation of the labour market, in line with the neo-liberal thought dominant in the 80s, that is, an attack on the power of the trade unions and abrogation or reduction of protection for permanent subordinate work. Trade unions do not come under direct attack. The tactics are more subtle the legislation provides incentive for division and conflict between the major trade union confederations, isolating the CGIL⁷⁶.

As regards reducing existing protection for subordinate workers, the only proposal made by the government⁷⁷ – strongly supported by Confindustria, the largest association of entrepreneurs (but not by all entrepreneurs) – has drowned under a wave of social and trade union opposition and has not got past the bill stage in Parliament.

⁷⁵ See Ricci, Fuchs in this volume.

⁷⁶ This strategy is institutionally reflected (besides the social pact agreed on with the CISL and UIL alone, the so-called Pact for Italy, and the support given by these two confederations alone for fixed-term contracts: see essay by Zappalà in this volume) is the constant use in the Decree provisions referring to collective bargaining of the preposition "by" instead of "of" with reference to the comparatively most representative unions. This implies that negotiated integrations of the flexibility introduced by law can also be specified by means of separate trade union agreements.

⁷⁷ Modification of Art. 18 of the Workers' Statute, rightly or wrongly considered to be a sort of symbol of the cultural heritage of post-Constitutional labour law, which establishes that a worker unfairly dismissed must be taken back on and reinstated rather than being offered the alternative of financial compensation.

The decree relies on an articulated regulatory technique in which the only really clear element among a series of ambiguities is the desire to introduce pretentious re-regulation of the labour law system in the light of the legislative policies outlined above (§ 3.1.).

If we consider the position taken by sociologists and economists – that is, that the ideal of flexibility for enterprise is the possibility to adapt labour with no limits or obstacles to the increasingly variable requirements of production and the economic cycle – it becomes apparent that the decree does not head in this direction. There is no reduction to legal regulations in favour of individual contracts – still legally regulated by on a different institutional basis from the law and collective contracts⁷⁸ - which is the classical deregulation formula⁷⁹.

Other experiments with deregulation via legal hyper-regulation – the oxymoron of deregulation via juridification – for example the Australian Work Relations Act of 1996, but they do not appear to have produced particularly positive results even as far as the interests of employers are concerned. They have certainly resulted in an increase in uncertainty of interpretation, lawsuits and arbitration, and conflicts in the workplace itself⁸⁰.

To make work more flexible, therefore, Italian legislators do not rely on the market and individual contracts, which are typical of market-oriented policies, but on sophisticated, closely-interwoven, concurrent regulatory tools: the law, collective bargaining at various levels, and also soft law (reference is frequently made to good practice and codes of behaviour, but with serious systematic anomalies⁸¹) and administrative regulation supplementing collective bargaining where the latter does not

⁷⁸ Supiot, *The Dogmatic Foundations of the Market*, op. cit. nt. 22.

⁷⁹ Epstein, *Simple Rules for a Complex World*, Harvard University Press, 1995. For an analysis of the concepts of deregulation and re-regulation, see Ashiagbor, "Flexibility" and "adaptability" in the EU employment strategy, op. cit. nt. 43, p. 393 and ff., and references contained therein.

⁸⁰ Mitchell, *Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia*, *International Journal of Comparative Labour Law and Industrial Relations*, 1998 p. 115 and 134-135. On the insecurity effect of Australian reforms, see de Ruyter and Burgess, *Growing Labour Insecurity in Australia and the UK in the Midst of Job Growth: Beware the Anglo- Saxon Model*, *European Journal of Industrial Relations*, 2003, pp 223–243. For an comparative analysis of individualization policies in Australia, United Kindom, New Zeland and Japan see the essays in Deery-Mitchell (editors) *Employment relations individualisation and union exclusion : an international study*, The Federation Press, 2000

⁸¹ I have pointed out these anomalies in the use of soft law in Legislative Decree 276/03 in Caruso, *Il diritto del lavoro tra hard law e soft law : nuove funzioni e nuove tecniche normative*, a paper presented at the Brescia Seminar titled "Nuove forme di decisione e nuove forme di regolazione: il metodo del coordinamento aperto nel processo di integrazione europea", 9 - 10 February, 2004.

apply. The result is a Russian doll of regulation, symptomatic of a regulatory bulimia that has few precedents in the history of Italian labour legislation.

The consequence is an intricate entanglement of sources that answers no systemic or systematic logic: it is based on no perception of the complexity of the phenomena to be regulated, or of consequent need to coordinate, calibrate and integrate the various regulatory techniques in order to achieve an optimal balance in a virtuous circle like that of the reflexive regulation model⁸². Nor is it possible to perceive an intention to mediate between different policies and objectives (flexibility and security) via balanced doses of different regulatory techniques. Nor, finally, is there any attempt to coordinate the system of legal regulations with the system of bargaining, even at a decentralised territorial level, to generate a form of reflexive regulation that presupposes consent and confidence but which in the end has the effect of generating such consent and confidence. Collective bargaining is at times opportunistically instrumentalised for purposes of flexibility that are already fully predetermined by the law; at others it is forced into "unfair competition" with individual contracts.

For example, regulation via collective bargaining no longer acts, as it did in the past, as a shield against and limit to individual bargaining for supplementary work and flexible, elastic clauses in part-time work. Collective bargaining is offered as an alternative to individual bargaining, thus encouraging employers to elude collective regulation. If, as the new regulations allow, they can choose freely between flexibility in part-time work, regulated individually but within the limits established by collective contracts, and flexibility negotiated (i.e. unilaterally imposed) exclusively via individual contracts, they will obviously choose the latter, more convenient alternative⁸³.

Part-time work is not the only case in which workers are left on their own in front of flexibility imposed by law, with the pseudo-freedom and

⁸² For a reconstruction of the process of European social harmonisation using this technique, cf. Barnard, Deakin, Hobb, Capabilities and Rights: an Emerging Agenda for Social Rights?, *Industrial Law Journal*, 2001, p. 478; Deakin, Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonization. A Law and Economics perspective on Centros, *The Cambridge Yearbook of European Legal Studies*, 1999, p. 244-245. See also, with regard to the OMC, Barnard and Deakin, In Search of Coherence: Social Policy, the Single Market and Fundamental Rights, *Industrial Relations Journal*, 2000, pp. 340-343.

⁸³ I have dealt with this aspect of the regulation of part-time work in Caruso, *Riforma del part time e diritto sociale europeo: verso una teoria dei limiti ordinamentali*, in De Luca Tamajo Rusciano Zoppoli (ed.), *Mercato del lavoro. Riforma e vincoli di sistema*, Napoli 2003.

individual self-protection that could derive from work contract tools; it also applies to intermittent work, which is the Italian version of on-call work, where workers even have specific contractual responsibilities and are liable to pay compensation in the event of breach of contract. These are just two of a number of examples.

In short, the logic is rather narrow-minded, of a flexibility often sought but not declared as such, of an ambiguous way of getting round obstacles and guarantees instead of removing them, the end result of which is only confusion and a wide range of muddled interpretations.

§ 4: Flexibility as a challenge for European Labour Law

The contamination of labour law by the mutating virus of flexibility may have a dual outcome: it can either dissolve or strengthen the organism.

It cannot be denied that the recent reforms in Italy - oriented towards a de-structuring form of flexibility which is claimed to be the result of decisions made by EU institutions and their neo-laissez-faire policies – would seem to make the fatality hypothesis the more plausible one.

This hypothesis, however, is not supported by a significant number of labour law scholars, who see the co-ordination of national labour law systems on the basis of EU constitutional principles and values as a new horizon for the construction of a social model that will tackle the problem of finding a common response to the challenge of flexibility.

This will be achieved via renewal that does not totally upset national traditions if one believes in the inheritance left by a great pioneer of cultural integration between European labour law scholars, Otto Kahn Freund, who saw a balance between tradition and renewal as the only way to develop labour law in conditions that were profoundly different from those surrounding its origins⁸⁴.

Within this framework there is also room for the concept of flexibility, provided that emphasis is laid on the etymological meaning of re-adaptation of an entity to external changes in the systemic context.

And it is for this reason, a philological one, that the concept cannot be accepted in an unqualified fashion or excessively elasticised so as to justify any attempt at de-structuring the national Constitutional traditions, which are the values by which the current-treaty-based

⁸⁴ Khan Freund, *Labour Relations: Heritage and Adjustment*, Oxford 1979 (tr. it. Kahn Freund, *Le relazioni sindacali: tradizione e rinnovamento DLRI*, 1980, 7 p. 413 ff.).

constitutional setup of the EU are based⁸⁵ and which will become explicit in the new European Constitution, hopefully in the very near future⁸⁶.

On the contrary, the concept of flexibility needs explaining and decanting: it has to be filtered, that is, by a mesh of values that are becoming an increasingly important part of the common constitutional heritage of European populations⁸⁷.

In this general perspective it is easy to understand why many feel that to remedy the destructive dynamics of the meta concept it is necessary to "normalise" and control it by introducing attributes and predicates (in the guise of antibodies) representing policies that contrast with those of neo- laissez-faire but still support reformism rather than social democratic conservatism: flexibility and security, sustainable flexibility and soft flexibility are but a few examples.

It is therefore also important to look at the contexts in which the best policies and bargaining practices, and the most interesting legislative reforms have been implemented: in particular the above-mentioned cases of Holland and Denmark.

What is important to point out is that these formulae, which may appear abstract, ambiguous or even manipulative, hide a fervent purposefulness, a striving towards renewal that involves the broad spectrum of labour law: its regulatory techniques and labour policies, the redefinition of rights and forms of protection, and the rules governing the functioning of the labour market.

This would take us far from the scope of the present paper; what we can do here and now is to present a synthesis or synopsis of a sort of agenda (highly concrete legislative and bargaining practices) on which

⁸⁵ The reference is to Art. 6 § 2 of the consolidated version of the Treaty on the European Union.

⁸⁶ For a detached examination of the draft launched by the Convention in July 2003, see Ziller, *La nuova Costituzione Europea*, Il Mulino, Bologna 2003. From a more critical viewpoint, see Weiler, *A Constitution for Europe? Some Hard Choices*, *Journal of Common Market Studies*, 2002, 563.

⁸⁷ The European Charter of fundamental rights incorporated in the new Constitution makes explicit reference to social rights; also of significance is the reference in the general provisions of Title I to concepts such as "equality", "non discrimination", and solidarity" (Art. I-2 of the Constitution Project - Values of the Union); as well as "market-based social economy", "full employment", "social progress", "the fight against social exclusion", "justice and social protection", "equality between men and women", "solidarity between the generations (Art. I-3: Objectives of the Union). Debate on the hopes and limits of the new provisions is already under way. On the limits to rights through the so-called horizontal provisions of the Charter, see De Burca, *Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU*, paper, par. 4. In general, see the essays in the volumes edited by Hepple, *Labour rights in a global context. International and Comparative Perspectives*, CUB, 2003 and Hervey/Kenner, *Economic and Social Rights under the EU Charter of Fundamental Rights - A Legal Perspective*, London 2003.

the scientific community of European labour law experts, as well as legislators and the social partners can act, at both a national and supranational level.

- The re-qualification of forms of protection not only in employment relationships but also in the labour market (the experience of the employment pool and the concept of a transitional market)⁸⁸, through redefinition of the structure and function of social security and unemployment benefits⁸⁹.
- Full recognition of the professional capabilities of the individual combined with protection of his dignity, as a compass for new rights (ongoing training, re-qualification, etc.)⁹⁰.
- The possibility of reconciling family and work commitments, private life and working life.
- The principle of non-discrimination, besides that of inderogability, as the mainstream norm of all social and other policies.
- The possibility of reconciling and weighting the interests of labour demand and supply as a criterion in assessing the sustainability and juridical legitimacy of all new flexibility measures.
- Entrusting the task of protecting the social values enshrined in the European Constitution to a custodian of the common constitutional heritage: the Court of Justice as guarantor against any risk of a deterioration and retrogression in national standards on grounds of European policy implementation.

This is the possible agenda that can realistically be attributed to labour law in its new supranational dimension faced with the contamination deriving from flexibility. The lines of action it provides address above all policies, but do not neglect the broader issue of the regulatory techniques needed to act as vectors for these policies. Here again, the issue is open to debate in national systems and the European dimension. The transformations on the horizon, the possible use of new techniques such

⁸⁸ For a model that presupposes a negotiative strategy for a soft, progressive reversal of de-standardisation, see Regalia, *Decentralizing Employment Protection in Europe: Territorial Pacts and Beyond*, in Zeitlin/Trubek (ed), *Governing Work and Welfare in a New Economy*, OUP, 2003, p. 158 ff.

⁸⁹ See the Amato Treu document presented on behalf of the Olive Tree alliance in 2002, the "Carta dei diritti delle lavoratrici e dei lavoratori", which may be the future policy statement of post-Berlusconi parliaments.

⁹⁰ Barnard, Deakin, Hobbs, *Capabilities and Rights: An emerging agenda for Social Rights?*, *Industrial Law Journal*, p. 464 and ff; Brown, Deakin, Wilkinson, *Capabilities, Social Rights and European Market Integration*, ESRC Centre for Business Research, University of Cambridge Working Paper 253; Salais, *Work and Welfare: Toward a Capability Approach*, in Zeitlin, op. cit. in note 88. Freedland, *Employment Policy*, in Davis, Lyon Caen, Sciarra, Simitis (ed), *European Labour Community Law, Principles and perspective*, Liber amicorum Lord Wedderburn of Charlton, Oxford 1996, p. 300 ff.

as soft law and the open method of coordination, can be considered innovative procedural elements if the objectives to be reached and values to be pursued are pre-established and clear. The tools can thus be assessed in terms of their relative functionality and adequacy for these objectives and cannot therefore be either turned into fetishes or delegitimised as mere Horses of Troy for deregulation policies⁹¹.

§ 5: A Final remark. Flexibility and trade union representation

As Khan Freund taught, however, law can do much to regulate labour, but not everything. There is no doubt that flexibility cannot be reduced to a concept, nor to a meta concept, and not even to a mere policy. Flexibility also implies a social and individual dimension in work relationships and other spheres that cannot be simply entrusted to normative regulation and its colonising tendencies.

It is a dimension in which an important role is still played by modes of organisation, action and bargaining on the part of social and collective actors (above all trade unions but also other organisations such as NGOs and environment protection organisations); and great responsibility is given to their capacity to represent these new interests, which have very little in common with those on which the classical models of representation and organisational modules of European trade unions were forged.

These models are under great pressure in all national systems. Even in Italy, where the model of horizontal organisation and general representation of labour has hardly ever been questioned, in its current forms it seems incapable of intercepting the demands and interests of the new generation of flexible workers.

It is not only a cultural and organisational delay but also a more or less conscious decision to adjust representational strategies to the point indicated by the compass representing the desire to preserve the hard core of union members, unions and their apparatus.

It is, for example, not quite clear what model of representation Italian trade unions are oriented towards for flexible workers: whether towards integrating within the horizontal and vertical categories specific structures that can develop specific policies for the representation of flexible and

⁹¹ The debate on soft law, the OMC and labour law is too broad and complex to summarise in a simple footnote. I have tried to outline some trends in the paper referenced in note 81. It is, however, quite clear that the new strategic regulatory choice, from Lisbon on, in order to achieve employment and social goals formulated in the EES, is a combination of traditional and new means, such as legislation, social dialogue, structural fund, OMC, mainstreaming; see Kenner, EU Employment law, op. cit. in note 66, p. 498.

precarious workers (as in the French model, which would seem much more effective); or whether to separate the organisational structures for these workers completely, accepting the hypothesis of their special nature and thus the need for separate representation policies. Again, it does not seem clear whether the model of territorial and confederate representation that has always characterised Italian trade unions has provided an opportunity to reformulate strategies aimed at territorial unification of interests that appear to be segmented in the workplace and labour markets within enterprises.⁹²

The season of territorial and local pacts in Italy has given good results as regards regulatory strategies and policies affecting local labour markets, but relatively little has been achieved as regards the planning of new models of aggregation and organisation of interests and the re-establishment of union representation⁹³.

This failure to respond by the models and forms of union representation cannot be compensated for by a surplus of mobilisation regarding directly political objectives, as has happened in Italy in the last few years.

Political mobilisation by trade unions against government decisions that are most openly in contrast with the social values and interests they represent may be a useful tonic but it is not capable of protecting the organism against the fatal disease threatening it, thus determining, in the middle to long term, the decline of the historic form of labour representation, not only in Italy but also in the rest of Europe.

It is also true that the widespread practice of political and bargaining-based concertation at a supranational, national and local level, with all due functional distinctions, cannot represent a political and institutional surrogate for the crisis of social representation. At most it may be a useful complement.

Even in the case of union representation, then, the impact with flexibility is located on the crest of the same alternative previously analysed for labour law: it may have a fatal outcome, but it may have the effect of triggering off a regenerating reaction.

It is not in the style of Italian labour law scholars to provide trade union organisations and leadership with solutions or advice as to how to renew their representational practice and policies. Those who have tried

⁹² Cf. the literature referenced in note 5, and also Regalia, cit. supra in note 88, p. 174 and ff. For an American perspective cf. Stone, *From Globalism to Regionalism: Protecting Labor Rights in a Post-National Era*, paper presented at the Intell 7 Conference, Kyoto, March 2004.

⁹³ Caruso cit. in note 16; also Albi, *La contrattazione sindacale nella programmazione per lo sviluppo*, *Giornale di diritto del lavoro e relazioni industriali*, 2001, p.428 and ff.

to do so have not had much luck. It may be hoped that flexibility viewed as a positive adaptation to a changing reality may be a useful spur to those who hold responsibility for understanding the new interests and demands for representation that are coming to the fore in the workplace, and that they act accordingly. This will also have to take place, in all probability, in a broader territorial space than the individual nation state. A space in which not only customs barriers, but also political and cultural boundaries will finally become increasingly evanescent.

Table 1 – Workers in standard and non-standard employment (thousands of units)

	Apr. 1995	Apr. 1996	Apr. 1997	Apr. 1998	Apr. 1999	Apr. 2000	Apr. 2001	Apr. 2002
EMPLOYED WORKERS	19.978	20.095	20.184	20.357	20.618	20.930	21.373	21.757
STANDARD	17.949	18.037	17.985	18.035	17.998	18.073	18.432	18.781
- Full-time self-employed	5.377	5.440	5.399	5.443	5.411	5.435	5.497	5.550
- Full-time permanent employees	12.572	12.597	12.587	12.592	12.588	12.638	12.935	13.231
NON-STANDARD	2.029	2.058	2.198	2.323	2.619	2.857	2.941	2.976
- Part-time permanent employees	571	609	641	690	748	873	1.005	996
- Full-time fixed-term employees	720	730	776	817	988	1.006	1.003	1.106
- Part-time fixed-term employees	303	319	361	416	459	517	468	452
- Part-time self-employed	435	400	420	399	425	461	465	422

Table 2 – Workers in standard and non-standard employment (%)

	Apr. 1995	Apr. 1996	Apr. 1997	Apr. 1998	Apr. 1999	Apr. 2000	Apr. 2001	Apr. 2002
EMPLOYED WORKERS	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0
STANDARD	89,8	89,8	89,1	88,6	87,3	86,3	86,2	86,3
- Full-time self-employed	26,9	27,1	26,7	26,7	26,2	26,0	25,7	25,5
- Full-time permanent employees	62,9	62,7	62,4	61,9	61,1	60,4	60,5	60,8
NON-STANDARD	10,2	10,2	10,9	11,4	12,7	13,7	13,8	13,7
- Part-time permanent employees	2,9	3,0	3,2	3,4	3,6	4,2	4,7	4,6
- Full-time fixed-term employees	3,6	3,6	3,8	4,0	4,8	4,8	4,7	5,1

- Part-time fixed-term employees	1,5	1,6	1,8	2,0	2,2	2,5	2,2	2,1
- Part-time self-employed	2,2	2,0	2,1	2,0	2,1	2,2	2,2	1,9
