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The Future of Labour Law: Traditional Models of Social Protection and a New Constitution of Social Rights

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The Future of Labour Law: Traditional Models of Social Protection and a New Constitution of Social Rights*

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1. Foreword: Intell 6 and its Logo

I am particularly happy and honoured to give this keynote address at the opening of the 6th Intell international conference for a number of reasons – some of a personal and others of a general nature – which I will outline very briefly.

The first personal reason is that this international conference, organised here in Catania, would have given great joy to a friend who is no longer with us, Massimo D'Antona. Massimo took part in the 1st conference in Hanover and came back very enthusiastic, transmitting his enthusiasm to all those who collaborated with him. Commemorating tragic deaths has unfortunately become a sad recurrence among the Italian community of labour law scholars, almost a literary genre; and to exorcise this strange curse I do not wish to dwell on the topic at length; I will, however, take the opportunity to devote a thought (interpreting, I believe, the sentiments of all present) to another friend who is no longer with us, Marco Biagi.

The second personal reason that makes me both happy and proud is the fact that this conference, which has brought together labour law scholars from all over the world almost every year since 1994, is being held in Sicily, in the heart of Mediterranean Europe, and more specifically in Catania.

The reason for my pride is in a way represented by the conference logo: Sicily and a small dot (Catania and its Law Faculty) irradiating from Europe all over the world. The intention of the logo is certainly not that of representing a post-modern version of a sort of atavistic Sicilian pride: the insular feeling of being at the very centre of the world which is typical of not fully conscious and rather insecure collective identities, despite our ancient roots.

The aim of the logo is to depict a post-modern existential dimension which binds together in a subtle web the speeches that I imagine will be made in the seminars and workshops to be held in the next few days, and which is one of the great issues of our epoch. It is a dimension which we feel particularly familiar with here in Sicily, a land that has constantly been impoverished by abandonment and emigration, marked by dramatic invasions in the past and more recently by anonymous waves of tourists: how does one form, and above all preserve, an identity in a supranational dimension that transforms regional and national identities, and in a world that globalisation is tending to transform into what has been called a "sandy windy desert where it is becoming increasingly difficult to leave traces and mark out lasting paths" and "where identities can be adopted

and discarded as if one were just changing costumes"? (Lash 1985 quoted by Bauman 1999, 33).

It is a known fact that the problem of identity concerns above all the individual, and as such one of the primary dimensions of individual fulfilment – work – which for this very reason should never be considered as a commodity, the subject of abstract, aseptic mercantilist relationships (Von Prondzynsky 2000, Grandi 1997); but the problem of identity also concerns territories and the communities living in them, and the sense of shared values and objectives which should not be fear and exclusion of others, of those who are different, of foreigners; the issue of identity also affects the apparently rarefied world of ideas, organised into scientific disciplines. The search for a lost identity consequently also concerns labour law which, as a lively, perceptive branch of law, is readily affected by the anxieties and contradictions of our modern world and is today seeing its reference values, its mission, its scientific paradigm, being clouded in a phase of great transformation (Supiot et al 1999; id. 1996); a phase in which it is difficult not only to govern but also to understand the nature of the processes taking place, given their unstable, volatile nature and the multiple levels at which government is applied.

In short, the logo represents a strong aspiration to an identity which concerns not only individuals but also scientific communities, institutions and local communities, in a world in which the complexity of the whole does not, or at least should not, deny the identity of its single, individual components.

2. The key words: uncertainty and identity. The challenge for Labour Law

It is not by chance that my keynote address should start with a reference to identity, because what the most recent and aware lines of thought in labour law bear witness to is a phenomenon typical of the transfiguration of individual and collective identities. We are today facing a great transformation marked by uncertainty and instability, practically the opposite of the labour law and welfare system we were familiar with, at least in Europe, up to a few decades ago.

Although European labour law and welfare systems differ (Ferrera 2000), featuring the characteristic traits of various models of capitalism and national systems of industrial relations (Mendras 1999, 235 ss.; Regini 2000, 13 ss.), they represented a convergent response by governments and states to the bewilderment and anxiety of the post-war period; in the collective imagination, they meant an answer to a widespread need for certainty, protection, and also identity, often

collectively perceived and experienced via participation in trade unions, political parties and other institutions of representative democracy. There was nothing comparable in the USA, where the demand for security after the Second World War only led to a surrogate of the systems we have in Europe; a surrogate represented by systems of company protection and stable employment in those enterprises, steadily decreasing in number and size, in which trade unions were capable of protecting workers on the basis of mere power relationships and supporting legislation (going back to the New Deal) which bore in itself the seeds of its own weakness.

This need for protection led to a conscious sacrifice of a large amount of individual liberty in the whole of Europe, in the sense that nation states and collective representations were delegated with providing an umbrella of legal and contractual rules, the individual power to modify which was intentionally limited.

In exchange for this conscious and consensual relinquishment of individual freedom in labour relations, a series of rules were laid down, contributing towards the construction of work and life projects based on three fundamental securities:

The security of steady employment with a single employer, public or private, possibly handed down from father to son through an intergenerational link which, above all in Latin Europe, represented one of the main factors of economic and social cohesion within the family.

The security of slow but sure career and income prospects within a company or public administration, based on the progressive, linear, uniform accumulation of experience, know-how and professional skills, in a rigidly predetermined scheme of a training and knowledge acquisition period followed by a working career.

The security of a retirement pension, substantially comparable to the salary received at the height of one's working career.

It was, in short, a compromise based on the one hand on acceptance of a reasonable amount of coercion in employment relationships, implicit in the subordinate nature of the contract and the externally imposed rules it involved, in exchange for widespread social protection that would confer immunity to market uncertainties, guaranteed essentially by the state, even outside the work relationship proper.

Against these certainties guaranteed, to different but converging extents, by the labour law and welfare systems of the various European states in the "splendid" thirty years after World War II, there has been a sort of revolution, above all an ideological and cultural one, in the name of the free market, individual autonomy, and rediscovery of the contract. In certain contexts and at a certain stage in history, (the '80s – the America of President Reagan and the England of Margaret Thatcher) this

forced processes of change to take place, but it also triggered off a sort of critical mass in the '90s.

This time it was on the wave of real structural transformations: not only the technological and digital revolution, the dematerialisation of production processes, competitive market globalisation, the crisis of the tax system and the loss of national sovereignty due to new institutions of regional and global governance and the spread of multinational enterprises, but also to new migration and demographic dynamics with their repercussions on traditional welfare systems and, last but not least, the greater presence of women in labour markets and its repercussions on the traditional division of roles in the workplace and at home.

The result of all this is a variegated, differentiated process; its effects are at times considered to be general but they are merely symptomatic of contradictory processes that are probably distorted by a unilateral interpretation in an apocalyptic or apologetic sense.

As many are starting to recognise at the beginning of the third millennium, however, it is a process for which it is possible to plot the costs and benefits, advantages and disadvantages, on an ideal graph, possibly taking as a reference parameter the classical values of labour law: security, solidarity, individual dignity and liberty, and equality.

I think this is one of the many possible ways to identify a common thread linking the specific topics for discussion in the seminars to be held in the next few days, that is, the redistributive effects of federal systems, the separation between work and housework, and immigration policies.

I will confine myself to pointing out a few of the critical factors produced by the phenomenon that has effectively been summed up in the phrase "universal deregulation" (Bauman 1999), one of the most widely debated epiphenomena of which is the digital economy. I use this term in a purposely generic sense without any technical meaning, as I am conscious of complex implications and necessary distinctions which it evokes (process of real de regulation, but also re regulation, flexible regulation, flexibility etc.) (Sciarra 1999, 369 ss., Regini 2000, 52 ss., Collins 2001, 205 ss).

One frequently mentioned advantage is a new strategic collocation of human resources to promote the competitiveness of post-Fordist enterprise; some numerically significant professional groups have proved capable of reviving the glorious individual contract of the 19th century (which was considered to dispense equality and not hierarchy) by virtue of a bargaining power based on the flexibility of acquired knowledge, a capacity for fast adaptation to changes in production, high-quality performance, interrelational skills and initiative. And individual capacity is recognised as being one of the new frontiers of equality in the labour

market, on which a large number of European institutions are basing their employment strategies (Lisbon summit).

This renewed centrality of individual capacity and responsibility, which in a sense recalls the old ideological debate regarding the centrality of the skill or profession (Trentin 2002), has certainly done nothing, at least in Europe, to renew the bases of trade union representation, the incapacity of which to intercept these new professional figures is one of the factors contributing towards the crisis it is going through. But this is not the point I wish to make. The effects of major interest are to be seen by taking a look at the labour market and the forms of transactional exchange. The increase in the utility of labour has not led to a statistically significant increase in traditional autonomous labour either in the USA or in Europe, but it has certainly led to greater complexity and diversity in the legal and contractual ways in which companies hire top-quality employees, not least by means of a progressive hybridisation of the patterns of labour and commercial law, that is, a hybridisation between freedom and dependence, between equality and hierarchy (Brown Deakin Nash Oxenbridge 2000; Barnard Deakin Hobbes 2001, Collins 2000, Davies Freedland 2000), that means a totally new way of considering loyalty and trust in work relationships (so much so that it has been defined as a process of refeudalisation: Supiot 2000, 341).

As regards the traditional labour contract the phenomenon has therefore made things more complicated, in that this new centrality of the individual introduces a new bargaining power on the supply side, even in formally subordinate labour relations, bringing to light a need for differentiation in individual treatment and well-being that only an individual contract can meet, given that the classical tools of labour market regulation in many European systems (laws that cannot be derogated from and collective contracts with a distributive function) were devised to achieve just the opposite, that is, equalisation and uniform distribution of material assets (both horizontally between the workers themselves and vertically with respect to the power of the enterprise) and not selective, cumulative, fiduciary distribution of non-material assets (capacities and skills). This is not a topic I intend to develop, but all this means that the work contract exalts not only traditional opposing and conflictual elements but also ties of collaboration based on trust between the parties to the contract.

This is therefore a positive element (a new way of considering labour) but it has generated a complication (how can this new way of considering labour be reconciled with the traditional instruments and the traditional identity of labour law?)

Although it may seem strange, a second positive element of innovation in universal deregulation is, in my opinion, represented by the spread of short-term or temporary forms of employment (temp, contingent, or short jobs), which are typical of the post-material economy but are also spreading, according to recent statistics, in the old economy. A close analysis of this phenomenon (Hyde 2001) suggests that it is useless to indulge in unilateral judgements concerning the increase in precariousness and inequality connected with it.

The various types of temporary job, with their varying degrees of regulation, the first among which is the supply of labour by agencies, have led to better employment rates and this, I will recall, is an economic objective that in many systems, including the Italian one, guarantees a right enshrined in the constitution (the right to work).

But a positive aspect of the spread of short-term jobs, above all in highly dynamic economic sectors where there is a strong trend towards the starting up of enterprises (e.g. in Italian industrial districts), is also the circulation of practical experience, a reduction in the lack of symmetry in information and thus contractual costs for enterprises, and a refinement of the mechanisms of mutual selection between enterprises and workers in the genetic phase of the employment relationship which ensures, perhaps just as effectively as legal norms protecting job stability, the psychological relationship of mutual trust that will lead to prospects of stability: "trust beyond the contract", as Deakin puts it.

From the field of human resource strategy, such considerations are also starting to enter the new theoretical models for labour contracts I mentioned previously (Collins 2000, Hyde 2001, Stone 2001).

A third element that cannot but be listed among the advantages of the great deregulation is the trend towards a reduction (one that supporters of the free market still do not consider to be sufficient) in the once dominating role of universal and inderogable regulations laying down rigid, uniform patterns that are often incompatible with the social, cultural and territorial differentiation caused by the new organisational and economic processes. One point must be made, however: flexible adaptation of standard labour protection laws is positive provided that it represents a conscious response, governed by the social actors involved, to the impossibility of handling differentiation in markets and labour with rigid, uniform regulatory apparatus. I will return briefly to the value of the "concertation" method in my concluding remarks.

A last beneficial aspect of deregulation in Europe, with all the differences in national administrative systems and types of response, is the new trend towards taking the monopoly of management of the economy away from state-run public administration, which is now only

entrusted with the task of regulation by means of agencies and via forms of intervention governed by private rather than administrative law. In this case, above all in certain European systems, administrative deregulation has led to a re-regulation, in the form of public private partnerships, of public services which has extended to cover third-sector activities. This type of partnership has provided greater management efficiency by labour law and its canonical tools (e.g. local public service reform and the privatisation of public administration employment in Italy), but it does present new problems of accountability and guarantee against risk (e.g. in the event of bankruptcy) (Dahrendorf 2002) (as well as a gradual re-publicising of the third sector (Diamanti 2002).

On the other hand, picking through the deluge of literature about globalisation, one easily comes across precise, inexorable accountants who point out the costs of universal deregulation (Gallino 2001, Bauman 1999, 61 ff):

On a general level, the radical growth of planet-wide uncertainty (concretely represented today by repeated stock exchange crashes), amplified by phenomena such as world disorder (fundamentalist terrorism, the proliferation of local ethnic or religious wars), which generate old and new fears and jeopardise fundamental individual rights and freedoms for subjects who all basically fall into a new or perhaps old category: the foreigner (Spire 1999, Sassen 2002, 37 ff, Bauman 1999, 55, 81), rights and freedoms that were previously held to be consolidated and universally recognised (Bosniak 2000).

The recrudescence in new strains and with new and more dangerous spreading mechanisms (monopolistic control of the mass media) of old political viruses: populist movements and governments being installed even in regions of what was once Europa Felix (Amato 2002, 99 ff., Mény - Surel, 2000, id. 2002)

Then we have new protectionist and isolationist tensions that not even the most fervent supporters of universal deregulation seem able to resist (see, for example, the Bush administration's industrial policy after September 11th).

There is also an increase in absolute and relative inequality, in segmentation, in poverty and social exclusion, both in national markets and on a world-wide scale, that conjures up the worrying image of an hourglass society (a drastic reduction in the middle class and upward and downward polarisation of social stratification).

Finally, to go back to issues that will be dealt with in our seminars, changes in types of employment and the internal organisation of enterprises, which increasingly depend on the instability of the market with evident phenomena of risk transfer from enterprises to labour;

phenomena that jeopardise not only the primary protection network (welfare systems, employment protection legislation, collective representation and the coverage of collective bargaining), but also the secondary network made up of communities and human relationships, especially the family, leading to processes of upheaval and alienation (the consequences of temporal and geographical flexibility (Sennet 2000, 13 ff), the new imperatives of women being forced to work or be available for work: these are all issues that raise anxieties and worries and lead to a demand for labour policies oriented towards what has been called family-friendly flexibility, as has been successfully experimented in Sweden, Holland and France) (Gonas 2002, Tyrkko 2002, Appelbaun, Bailey, Berg, Kalleberg 2002, Cappelli, Costantine, Chadwick 2000) .

3. The mirror and the pieces. Can we complete the jigsaw?

Faced with these diversified and contradictory effects of universal deregulation, it is perhaps a good idea to give up any thought of a homogeneous, solidly structured identity for labour law like those built up around the New Deal in America and the plurality of labour law and welfare systems in Continental Europe, however different their respective models may have been.

It is perhaps time to realise that the mirror reflecting that homogeneity (the hegemony over state and society of the Fordist model of production) has definitely been shattered and the image reverberated is a necessarily fragmented one, because globalisation generates more differentiation than homogeneity.

I think that the positive disintegration of labour law debate (Collins 1997) is a methodological point of arrival from which the debate to be held in the next few days should start.

This fragmentation of identity has understandably created dismay and pessimism in those who had associated the destiny of a compact labour law and the security it provided with a model of social emancipation, based on the continuous re-invention of legislative, institutional and contractual planning in a scenario featuring the primacy of politics and law over the economy (which is the postulate behind all reformist strategies), under the aegis of classical and unflinching values that the bourgeois revolution and the welfare state based on the rule of law made up of civil liberties, equality and solidarity subsumed, as in the Nice charter, in the value of individual dignity.

Are we then to agree with those who, from different standpoints, with the certainty of the apologist or the pessimism of the labour law scholar

in crisis (Arthurs 1996, 2001, 1998, Simitis 1997), speak of the end of labour law, or law *tout court*, in its current guise, as one speaks of the end of modern history faced with the disruptive, relentless vitality of the market economy and globalisation?

I think that the terms of the question are rather more complex than these alternative but converging diagnoses make out, at least in the European perspective.

In a fine recent essay Alain Supiot (2000) attempted to invert the dominating dogmatic premise that appears to inform all remedies in the legal and social field – the unvarying objective dominion of the economy over the law, whereby law is to be judged by its capacity to promote or contrast the free play of market forces, historically or geographically.

Hence the market is seen as a sort of universal equivalent against which national and regional labour law systems are negatively or positively assessed, in terms of adaptation or obstruction.

Inverting the terms of the problem, Alain Supiot asks whether the market has a juridical foundation, and if so what it is, and he attempts to provide plausible answers, starting from recognition of the fact that labour cannot be considered as a “thing” separate from the “individual”, a mere object of mercantilistic considerations, along with recognition of the primacy of worker status over the work contract, with all the ensuing implications (not least in terms of rediscovery of the propositive, rationalising function of the law).

I do not wish to go so far: it is an ongoing theoretical debate in Italy, and concerns not only labour law (Irti 1998).

I only want to stress that strong affirmation of the humanistic foundation of labour law may perhaps be a way to put the fragments of the mirror together again, even though it may be impossible to reconstruct a unified whole. I think this may be an indispensable common platform to give new life to the best part of labour law, the spirit of rationalistic, pragmatic and intelligent reformism that inspired some to lay down their lives in defence of their beliefs.

If this is true, it seems evident that the future prospects for labour law scholars are not represented by a sinister notice saying “closed due to completion of work”; indeed, our order book would seem to be almost too full.

4. From labour law to European social law. The (blurred) outlines of a micro and macro identity; from “policies”....

I will confine myself to outlining a few issues that confirm my position and concern labour policies and their contents on the one hand and the

tools (procedures) to achieve them on the other. I state at once that my view, if not Eurocentric, is a specifically European one.

In speaking of European specificity, I refer above all to the attempt to construct a supranational institutional dimension (with a completely original constitutional system unlike any of the federate models known to history: Rossi 2002, Weiler 1999, Jeorges Meny Weiler 2000, Grewal 2001) that does not deny the cultural, social and institutional pluralism that has marked the history of the Continent. I also refer, however, to the fact that in this task of delicate institutional engineering the DNA of the social issue (the future constitution of which the Nice charter is only a foretaste) has already been inoculated, as it is part of the core business of its policies.

This event is of great significance not only now but also in the light of future enlargement of the European Union: a recent report compiled by a group of experts on the state of industrial relations in Europe shows what this enlargement will mean in terms of simple economic statistics (Experts' Report 2002, Biagi 2002). The expected enlargement of Europe from 15 to 27 members will mean a 28% increase in the population of the Union, but only a 5% growth in the overall GDP, or in other terms an 18% reduction in the GDP pro capita. The result will obviously be an enormous increase in inequality and the rich/poor divide between the nations and regions of the Union, with the imaginable risk of social dumping.

By this I only wish to stress the reach of the challenge that Europe seems to have accepted at a time when, unlike other supranational institutions such as Nafta, social policies are institutionally and constitutionally becoming the objective of the new entity.

Is there, then, a common denominator on which to hinge the challenges Europe is preparing to take up along with many other post-Fordist economies (changes in the labour market, demographic trends, technological changes in the knowledge-based economy, the effects of globalisation)?

As far as policies are concerned, I think that there are two guiding lights that have given visibility and identity to EU social strategy, above all in the 90s, and have to a great extent dictated the concrete actualisation of the policies, especially those regarding employment:

First of all the decision to balance requests for flexibility and competitiveness on the part of enterprises and markets with incentives for the co-ordinated spread of new tools and dynamic rather than static security networks, not only in labour relations but also in the labour market itself. The attempt is also to utilize well-know experiences, deeply entrenched in the old economy: I am speaking of bilateral bodies which

exercise semi-public functions concerning income and other types of uncertainties in sectors as building industry where employment insecurity is a cyclical and structural factor (Hyde 2001, Experts' Report 2002). Hence the proposal of means for safeguarding not jobs as such but individual capacities and professional assets rooted in a career (social capital), with all that this implies in terms of a new way of considering the individual's right to self-determination; as well as protection of the new forms of atypical, para-subordinate or semi-independent workers, with differentiated means (not just an enlargement of old forms of protection); and finally by the provision of new rights that will guarantee a balanced alternation between the workplace and family life, via family-friendly policies. But please take note: the aims I have just listed are those the EU has outlined in policy statements, guidelines and social directives of a general nature; but the outlines are so broad that they may lead to the implementation of policies by nation states (whose role in this sense is still far from being marginal) that may contain vastly different accents and nuances. In Italy, to recall current developments, both the centre-right government which proposes amendment of the law against unfair dismissal and neo-liberal reform of the labour market as contained in the White Paper, and the presenters of the document shortly to be discussed during the round table debate, outlining a proposal for future opposition legislation aiming among other things at the distribution of protection between the various types of jobs, state that they are guided by the same principle of flexibility in security advocated by Europe. This shows that policies and strategies at a European level are one thing, whereas the problem of co-ordinating the various entities and the instruments they use is another. But I will return to this topic later when I speak on methods and procedures.

The second guiding light in European social strategy is the new era of equality launched with directives issued in 2000 (and others yet to come) in which the decision to contrast old and new forms of discrimination (by sex, age, handicap or ethnic origin) has become increasingly clear and firm. In its apparently conventional form (social directives) it contains highly innovative elements (the possibility of stating a general principle of non-discrimination, the concept of discrimination as violation of individual dignity and therefore an absolute right to protection against disadvantage or humiliation due to subjective individual characteristics; the explicit attribution in certain situations of positive rights: Barbera 2002, Skidmore 2002, Barnard Deakin Hobbs 2001, 471 ff) which with all probability will lead to renewed activism on the part of national constitutional courts and law courts regarding equality and redistribution policies.

5. to “procedures”

As I was saying, the European social plan features two procedural strategies that are closely linked to the contents (I would even go so far as to say that they are an integral part of them) and contribute towards restoring the plural, fragmented identity of European labour law at the beginning of this new century.

Firstly, social concertation, which is strongly supported at different levels in Europe, supranational, national and local. This method should ensure transparency, democracy of choice and consensus regarding institutional labour policies. I do not agree with the view that involvement of the social parties at the various complex levels at which social strategies and policies are worked out and applied represents a surrogate for a lack of democracy in EU political institutions (Lo Faro 2000); I see it rather as the embryo of a new, specifically European model of governance with a view to a balancing of interests, adopting formulas that have been widely experimented at a territorial and enterprise level, as shown by the season of social pacts.

Here again we need to state things clearly: concertation is a means, not an end in itself; it is not a universal remedy to our problems of uncertainty and identity, nor does it guarantee that the contents of the legislative and institutional policies and strategies will adequately meet the values and principles I mentioned previously. It may indeed represent a new, more sophisticated means of coercion and hierarchical selection of interests through a contract that does not generate but probably strengthens new inequalities. It may therefore be one of those cases in which a contract is transformed from a means to achieve equality into a way to exercise power (Supiot 2000)

As Italy has shown recently, concertation may in fact boil down to an aseptic institutional method that transforms trade unions into para-public organisations, guarantors of a social consensus on externally imposed choices that has been neither verified nor demonstrated. In this case concertation becomes a replacement for regulatory activity that is still applied in a top-down direction. This idea of concertation, or social dialogue if you prefer, is a far cry from that of concertation seen as a tool whereby the necessary mediation between different, possibly conflicting, demands and interests (currently competitiveness and efficiency on the part of enterprises vs. worker security) goes through a laborious and pragmatic process of conciliation in which those ultimately affected (the actual employers and workers in flesh and blood) are not passive receivers of the decisions made but active subjects whose will has in

some way been channelled at various levels by collective representation. There cannot, therefore, be real concertation without prior definition of the channels of representation and the criteria of true representativeness: this is a lasting principle that 20th-century labour law, as Massimo D'Antona clearly recognised, has bequeathed to our new century.

The second method, again one that characterises social policy and the relative institutional strategies in Europe, is newer and has been experimented more recently; it has been imported from international relations and seems to be being positively applied in European employment strategy starting from 1997 Luxembourg job summit: I refer to the open method of co-ordinating policies that is fundamentally based on soft law (guidelines, recommendations as means of sanctioning) and the priming of virtuous processes of imitation and adaptive reproduction of best practices, or benchmarking. In the opinion of some experts (Expert's Report 2002, Biagi 2002, De la Porte, Pochet, Room 2001; Verma Slinn 1999, Treu 2001, Syrpis 2001) the open method of co-ordination (OMC) is the best way to integrate the various systems, in a process in which common strategies and objectives are not set above the diversity of tools and national identities; a method which should guarantee the co-ordination of intervention and governance at the various complex levels at which the demand for governance presents itself. The effectiveness of the method has yet to be demonstrated: but we must recognise that it is a pragmatic response in Europe to the problems created by the new level of pluralism and the co-existence of plural identities, of different levels of governance, of different territories, a response that avoids the pursuit of artificially harmonious unified structures. In short it is one of the possible methodological responses to the serious problem of reconciling difference and equality in the construction of new federal-based institutional arrangements, against the constantly latent risk of competitive Balkanisation.

6. Humanism and labour law. Do traditional values still count?

My address is obviously open and necessarily circular, so to conclude I will go back to where I started: the problem of identity. This is a problem that is particularly felt either in phases of growth and change or in periods of great bewilderment and the crisis of consolidated values and the usual reference points.

I cannot say which of the two components is prevalent in the identity crisis currently affecting labour law.

There is one thing, however, that I can say: I think it is impossible to give reassuring answers to this question by creating artificial identities ranging from the nostalgic, if not ideological, vindication of a lost identity based on the egalitarian and redistributive acquisitions of the "short century", to the opposite extreme represented by the discovery of the philosophy of the free market, competitiveness and individual autonomy as the only reference paradigm for labour law. Together with many others, I am convinced that individual liberty is not only the result of individual responsibility and effort to assert merit and achieve efficiency and competitiveness. It is also this, but it will only be achieved if the fundamental premises of individual liberty are guaranteed, that is, conditions of equality (of wealth, resources and also capacities and opportunities) and solidarity, and for this to continue to happen there is still a need for political community and the certainties this provides. And labour law contributes to these.

I will therefore conclude by recalling that whatever identities our discipline assumes in the future, however polyhedral and fragmented they are, its foundation will remain the same, that is, its essence as a discipline forged round the human being and his primary needs: hence a humanistic foundation that is reflected in a balanced mixture (albeit a historically changing one) of the three components that mould human dignity: liberty, equality and solidarity; it is no coincidence that these are the timeless, boundless reference values of the new European constitution that is being constructed.

7. References

- Amato G. (2002), *Tornare al futuro*, Laterza, Bari.
- Appelbaum E., Bailey T., Berg P., Kalleberg A. (2002), *Shared Work – Valued Care: New Norms for Organizing Market Work and Unpaid Care Work*, *Economic and Ind. Dem.*, 23, 125 ff.
- Arthurs H. (2001), *Reinventing Labour Law*, *Berkeley Journ. of Empl. & Lab. Law*, 22, 271 ff.
- Arthurs H. (1998), *Landscape and Memory: Labour Law, Legal Pluralism and Globalization*, in Wilthagen (editor), *Advancing Theory in Labour Law and Industrial Relations in a Global Context*, North Holland, Amsterdam, Oxford.
- Arthurs H. (1996), *Labour Law without the State*, *Un. Toronto Law Journ.*, 46:1, 2 ff.
- Barbera M. (2002), *Not the Same? The Judicial Role in the New Community Anti-discrimination Law Context*, *ILJ*, 31:1, 82 ff.,

- Barnard C., Deakin S., Hobbs R. (2001), *Capabilities and rights: An emerging agenda for social policy?*, *Ind. Rel. Jour.*, 32:5, 464 ff.
- Bauman Z. (1999), *La società dell'incertezza*, Il Mulino, Bologna.
- Biagi M. (2002), *Cambiare le Relazioni Industriali: Considerazioni sul rapporto del gruppo di alto livello sulle relazioni industriali e il cambiamento nella U.E.*, *Riv. It. Dir. Lav.*, 21:2, I, 147 ff.
- Bosniak L. (2000), *Universal Citizenship and the Problem of Alienage*, *Northwestern U. L. R.*, 94:3, 963 ff.
- Brown W, Deakin S, Nash D, Oxenbridge S. (2000), *The Employment Contract: From Collective Procedure to Individual Rights*, *BJIR*, 38:4, p. 611 ff.
- Cappelli P., Constantine J., Chadwick C. (2000), *It pays to value Family: work and Family tradeoffs Reconsidered*, *Ind. Rel.*, 39:2, 175 ff.
- Collins H. (2001), *Justifying European Employment Law*, in Grundmann S., Kerber W. and Weatherill S. (a cura di) *Party Autonomy and the Role of Information in the Internal Market*, Walter de Gruyter, p. 205 ff.
- Collins H. (2000), *Justifications and techniques of legal regulation of the employment relations*, in Collins H., Davies P., Rideout R., *Legal Regulation of the Employment Relation*, Hart Publishing, London.
- Collins H. (1997), *The Productive Disintegration of Labour Law*, *ILJ*, 26:4, 295 ff.
- Dahrendorf R. (2002). *Nè pubblico nè privato, ma semplicemente una via di mezzo*, in *Il Corriere del Ticino on line*.
- Davies P.- Freedland (2000), *Employees, Workers, and the Autonomy of Labour Law*, in Collins H., Davies P., Rideout R., *Legal Regulation of the Employment Relation*, Hart Publishing, London.
- De La Porte C., Pochet P., Room G., (2001), *Social Benchmarking, policy making and new governance in the EU*, *Jour. Eur. Soc. Pol.*, 11:4, 291 ss.
- Diamanti I. (2002), *E in Italia crescono i volontari*, in *La Repubblica del 06.30.2002*
- Experts' Report (2002), *Report of the High Level Group on Industrial Relations and Change in the European Union, Employment & Social Affairs, European Commission*.
- Ferrera M. (2000), *Integrazione Europea e Sovranità Sociale dello Stato-Nazione: Dilemmi e Prospettive*, *Riv. It. Sc. Pol.*, 3, p. 393 ff.
- Gallino L. (2001), *Il costo umano della flessibilità*, Laterza, Bari.
- Grewal S. S. (2001), *The Paradox of Integration: Habermas and the Unfinished Project of European Union*, *Politics*, 21:2, 114 ff.
- Gonas L. (2002), *Balancing family at Work – to Create a New Social Order, Economic and Ind. Dem.*, 53, 59 ff.

- Grandi M. (1997), *Il lavoro non è una merce*, *Lav. Dir.*, 4, p. 557 ff.
- Hyde A. (2001), *Employee Organization and Employment Law in the Changing US Labor Market: America Moves Toward Shorter-Time Jobs*, forthcoming in *WP Centro Studi di Diritto del Lavoro Europeo "Massimo D'Antona"*.
- Irti N. (1998), *L'ordine giuridico del mercato*, Laterza, Bari.
- Georges C., Mény Y., Weiler J.H.H. (editors), *What Kind of Constitution for what Polity? Responses to Joschka Fisher*, EUI Harvard Law School.
- Lasch C. (1985), *The minimal self. Psychic Survival in Troubled Times*, Pan books, London.
- Lo Faro A. (2000) *Regulating Social Europe. Reality and Myth of Collective Bargaining in the EC Legal Order*, Hart Publishing, Oxford.
- Mendras H. (1999), *L'Europa degli Europei*, Il Mulino, Bologna.
- Mény Y. – Surel Y. (2002), *La costitutiva ambiguità del populismo, Trasgressioni*, 34, 3 ff.
- Mény Y. – Surel Y. (2000), *Populismo e democrazia*, Il Mulino, Bologna.
- Regini M. (2000), *Modelli di capitalismo*, Laterza, Bari.
- Rossi L.S. (2002), *"Constitutionnalisation" de l'Union européenne et des droits fondamentaux*, *Rev. Trim. Dr. Eur.* 38:1, 27 ff.
- Sassen S. (2002), *Globalizzati e scontenti*, Feltrinelli, Milano.
- Sciarra S. (1999), *Parole vecchie e nuove: diritto del lavoro e occupazione*, in *ADL*, p. 369 ss.
- Sennet R. (2000), *L'uomo flessibile*, Feltrinelli, Milano.
- Skidmore P. (2002), *EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-discrimination Policy?*, *Ind. Law Journ.*, 30:1, 126 ff.
- Simitis S. (1997), *Il diritto del lavoro ha ancora un futuro*, *Dir. Lav. Rel. Ind.*, 76:4, 609 ff.
- Spire A. (1999), *De l'étranger à l'immigré. La magie sociale d'une catégorie statistique*, in *Actes de la recherche en sciences sociales*, 129, 50 ff.
- Stone K. (2001), *The New Psychological Contract: Implications of the Changing Workplace for Labour and Employment Law*, *UCLA Law Review*, 48:3, p. 519 ff.
- Supiot A. (2000), *The Dogmatic Foundation of the Market*, *ILJ*, 29:4, 321 ff.
- Supiot A. (1996), *Perspective on work: Introduction*, *Int. Lab. Rev.*, v. 135, 6, p. 663 ff.

- Supiot A. et al. (1999), *A European perspectives on the Transformation of Work and the Future of Labor Law*, *Comp. Labor Law & Policy Journal*, v. 20, 623
- Syrpis P. (2001), *Smoke Without Fire: The Social Policy Agenda and the Internal Market*, *ILJ*, 3, 271 ff.
- Trentin B. (2002), *Lavoro e conoscenza*, Prolusione per la Laurea Honoris Causa, Università Ca' Foscari, Venezia, dattiloscritto.
- Treu T. (2001), *L'Europa Sociale: problemi e prospettive*, *Dir. Rel. Ind.*, 3, 307 ff.
- Tyrkko A. (2002), *The Intersection between working Life and Parenthood: a Literature Review*, *Economic and Ind. Dem.*, 43, 107 ff.
- Verma A. – Slinn S. (1999), *Labor Policy in the Internet Age: Europe's Answer to the Market Challenge*, *Comp. Lab. Law & Pol. Jour.*, 20, 703 ff.
- Von Prondzynsky F. (2000), *Labour law as business facilitator*, in Collins H. , Davies P., Rideout R., *Legal Regulation of the Employment Relation*, Hart Publishing, London.
- Weiler J.H.H. (1999), *The Constitution of Europe*, Cambridge, University, Press, Cambridge.