NEW TRAJECTORIES OF LABOUR LAW IN THE EUROPEAN CRISIS. THE ITALIAN CASE.

Bruno Caruso – University of Catania

1. *An "epochal" crisis, labour law and fundamental rights. The Italian specificities*

In a recent essay, Tiziano Treu [Treu 2013] conveniently reminded Italian labour lawyers what Hugo Sinzheimer wrote about the particular impact that an economic crisis has on the labour law paradigm, as compared to what happens in other branches of the legal system. The current global recession, indeed, offers a fertile ground in highlighting the inner limits of twentieth century labour law narrative, by now reported in the international debate by several influential observers [Arthurs 2006; Davidov - Langille 2006; Langille 2006; Hyde 2006; Stone 2006].

It is quite evident, as a matter of fact, that the traditional protective, solidaristic, and equality-driven labour law as imagined by the illuminate reforming approach [Giugni 1989, 2007] in which it was understood to be an instrument in the mediation of social conflicts in a pluralistic society [Coutu - Le Friant, - Murray 2013], nowadays it is suffering from a sort of impotence crisis if not a true heterogenesis of intents; and this could be said even regardless of a direct and immediate connection with the economic crisis.

Almost everywhere and not only in countries most dramatically affected by the crisis, the twentieth century labour law paradigm appears inadequate and insufficient to cope with the complex problems posed by globalization and by technological and organizational changes[1]: rising unemployment rates[2] concentrating on the weakest labour force segments (mainly the

[1] Bringing about new processes of change both in the production organization, and in the legal notion of employer [Prassl 2013, Fudge 2006]

[2] As the Italian case is concerned, see the data contained in [Passerini - Marino 2014]. In more general terms on the determinants of the current occupational trends, with particular regard to the USA case, see the much-debated book by [Moretti 2013].

young and women)[3]; new inequalities and new horizontal conflicts[4]. Twentieth century labour law, as it has been conceived and realized, it is not able to deal with such new dichotomies [Hyde 2006, Davidov 2006] without a deep reassessment of its instruments, its functions and what I'd call its 'jurisdiction'.

Within the neo-liberal rhetoric[5], traditional labour law is even considered to be an obstacle to economic development and social inclusion processes, insofar as it is deemed to generate *per se* – new inequalities: between generations, between insiders and outsiders, between the protected and the unprotected [Ichino 1996]. Two kinds of allegedly factual sets of evidence are usually evoked in order to validate the theoretical inadequacy of the twentieth-century labour law paradigm. On the one hand, the crisis of unionism and of its typical tools of action: i.e. social dialogue [Zan 2104] and its very same prototypical product, the national sector agreement [Le Friant 2013]. On the other hand, the quite palpable financial unsustainability of the traditional welfare state, especially in its Mediterranean model [Palier, 2013, Ferrera, 2013, Saraceno 2013].

The profound economic crisis affecting the Western world[6] is characterized in Europe by a specific systemic dimension, related to its institutional side-effects: namely, calling into question the EU constitutional, economic and social model[7], to some extent exacerbated by the drastic choices made by the EU institutions, and by the conflict between 'virtuous' and 'unstable' national economies. What should be analytically examined is a financial, budgetary and economic crisis with no comparison in post-war Europe;, the particular intensity of the crisis which has affected some specific euro area countries (so-called PIIGS); and finally the Italian case, with its peculiar national specificities.

These different geo-political dimensions of the crisis, which should be kept analytically separate, are often confused, or even related, through an overestimation of a single cause/effect mechanism. With regard to the Italian situation, both the economic and the constitutionalist [Calvano 2104] common narratives tend to impute the reasons of the economic, financial and constitutional crisis to a series of international and EU driven austerity measures and restrictive fiscal policies [Armingeon - Baccaro 2012; Krugman 2009],

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[3] See the dossier *Generation Job Less*, The Economist, April 2013. For a global analysis on employment trends [ILO 2014].

[4] As examples of horizontal conflict in Italy, it would be possible to evoke those between private and public workers; experienced and young professionals; big companies and subcontracting suppliers [Fubini 2014, 10].

[5] See [Deakin 2013 and 2014].

[6] The scientific literature on the crisis is by now extremely vast. For a review on the economic debate, see [Stiglitz 2010] and [Krugman 2009]. A different view is expressed by [Reinhart - Rogoff 2010].

[7] With regard to these issues too, the literature is huge. See [Ruffert 2011; Bini Smaghi 2013; and Pitruzzella 2102].

which can by now, be considered questionable at least. . The representation of the balanced-budget rule is part of this approach and could damage 'national social sovereignty' directly affecting the extent of social rights and policies, which on the contrary, in their quality of constitutional based values, should not be conditional upon rigid fiscal limitations [Bilancia 2012; Ruiz-Rico Ruiz 2013][8]. Such an approach cannot be entirely accepted, to the extent that it is founded on a false representation of the actual state of things. Recent and well-documented analyses demonstrate that the Italian economic crisis is long established and deep-rooted in endogenous factors, among which labour law regulation plays a quite significant role (see *infra* §. 2 and following)[9].

If we turn our attention to the constitutional debate, a series of convincing analyses do tell us that: *a)* until now, the economic crisis and the related EU-driven austerity measures have not produced any real *vulnus* to the constitutional rights and principles (as, for example, it has happened in the seventies with the emergency anti-terrorism legislation). *b)* The measures taken so far have avoided a definite collapse of the whole European integration process, as it is possible to infer from a careful reading of the *Pringle* judgement[10]. *c)* Thanks to the financial aids awarded to some member states, an innovative principle of *interstate responsible solidarity* has emerged as a possible prelude toward a closer economic union and a different constitutional model for the European integration process [Morrone, 2014, 85; and in general von Bogdandy 2011].

Within such a broad and complex context, the Italian debate on labour law and labour market reform (*see* infra, §. 5) keeps being victim of a 'double obsession'. On the one hand, the obsession of those who think that the economic crisis and the lack of competitiveness of the Italian system is only due to the unsustainable complexity and the excessive degree of protection of current labour law rules; it follows that simplification and flexibility are seen as the only and sufficient measures to be taken to solve any problem. On the other hand, the opposite obsession of those who think that any process of change (or loosening) of labour protection rules is to be equated with an unacceptable dismantling of imperishable rights and 'non-negotiable values', which should be kept immune of any conditionality related to the economic crisis.

With regard to such crushing dichotomy, an intersection of data contained in international surveys shows however that a third possibility exists, which should dictate an agenda of reasonable reforms inspired by a thoughtful renewal of labour law paradigms, and not by a palingenetic demolition of the

[8] For a review on the constitutional debate, see [C. Caruso - Morvillo 2014], and [Giupponi 2014].
[9] See [Fubini 2014].
[10] CJEU 27.11.2012, case C-370/12, *Thomas Pringle* v. *The Government of Ireland*, on which see [G. Beck 2014].

entire labour law heritage. The *Global Competitiveness Report 2013-2014*[11] - annually measuring the competitiveness of each national system based on the analysis of twelve indicators - tells us that the Labour market efficiency indicator (pillar) determines the level of competitiveness of a given country only to a minor, if not negligible, extent (1/12 of the total). On the other hand, if we relate national data on labour market efficiency to employment rates, we might recognize that a direct correlation exists between the level of inefficiency (or efficiency) of national systems of labour regulation and higher (or lower) unemployment rates. Hence, the logical conclusion that labour market efficiency - and the reforms aimed at improving it - though not decisive, cannot be underestimated[12].

2. *New trajectories in labour law narratives: a) Extending labour law's 'jurisdiction': for a reassessment of Art. 35 of the Italian Constitution*

The extended scale of the current crisis puts the traditional jurisdiction of protective labour legislation under pressure. Traditional labour law has always been based - not only in Italy, and not only in civil law countries - upon the great dichotomy between employment and self-employment, with a concentration of legal and contractual protections on the former, and an exclusion from the scope of labour law of the latter. This is not the place to dwell upon the historical, economic, legal and sociological determinants of such a crucial macro-distinction, if not to say that it appears nowadays quite out-dated and inadequate to deal with the current reality. Nor is it the place to emphasize the theoretical and conceptual need for a systematic rethinking of the employment contract - and, consequently, of the subjective scope of labour law - towards an extension to all the contracts in which the *legal nexus* is based upon a personal work relationship, irrespective of its modalities and of the subsistence of any imbalance in bargaining power[13].

It is however worth stressing that the theoretical perspective of extending labour protection beyond the traditional employment relationship, and the need for a new labour law paradigm, are definitely boosted by the economic crisis [Davidov 2006; Stone 2013]. On the one hand, several factors of change emerge, affecting both the boundaries of the firm as a legal and conceptual entity, and the ways work is organized. This generates uncertainties and instabilities in the traditional area of employment relationship regulation and brings about new organizational working modalities – project based or ob-

[11] It can be read at www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf

[12] Such correlation can be demonstrated by comparing employment rates in countries characterized by inefficient labour market institutions (such as Spain, Greece, Portugal and Italy), and countries where labour market institutions are well functioning (such as Scandinavia, Poland, Switzerland, Norway).

[13] The most intriguing and ambitious conceptualization, supported by solid historical and comparative perspectives, is offered by [Freedland - Kountouris 2011; and 2008].

jectives based work, results dependent salaries and even within the traditional subordinate employment relationship[14] [Borzaga 2102],

On the other hand, alterations of the firms' internal markets are increasingly detectable, to which a paradox is often connected: massive company investments in human capital, and, at the same time, increasing job instability and insecurity as a result of the end of 'linear and progressive' internal careers which were typical of the Fordist model [Stone 2006]. The economic crisis further exacerbates such a changing reality, with its most violent and transversal social effects occurring precisely in those countries – like Italy – where the production structures have always been traditionally weak. Just as the Grim Reaper, the economic crisis does not have any regard for anyone, and it discharges its worst effects of impoverishment, insecurity and instability precisely upon the weakest: formerly, (only) precarious workers; now, subordinate employees too, until now considered stable and protected, and even upon those who were considered the most privileged: executives and managers. Furthermore, the crisis also impacts upon the multifaceted galaxy of independent and autonomous work (professionals, artisans, small and medium traders, even small and medium-sized employers), be they economically dependent or not[15]. What follows is the need to re-examine the possibility of shifting the focus of labour legislation beyond ideological conflicts, as typically happens in Italy with the longstanding dispute between those who defend the 1970 Workers' Statute, and those who support the adoption of a new *Statute of (all) workers*, the latter being understood, as a means to dismantle the traditional protections of subordinate employees (only).

It is no coincidence that the need to reconsider the traditional categories of non-subordinated work - coming from authors[16] who have conceptualized notions such as the 'employee-like person' and the 'economically dependent worker'[17] - is now acknowledged by legislation and collective agreements too. Such a new status of non-dependent work should be built around the self-entrepreneurship vocation of a broad galaxy of workers[18], and should

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[14] In Italy, for instance, new working organization models conflicts with the rigid legislative regulation of functional mobility contained in the Workers' Statute of 1970. In Germany, a good example of reorganizing work by projects are offered by the *Zielvereinbarungen,* i.e. contractual arrangements between workers and employers implying the reaching of certain production goals within a given time [Borzaga 2012, 260 ff.].

[15] [Passerini - Marino 2014, 87] explicitly refers to a 'extermination' of managers and employers.

[16] [Freedland - Kountouris 2011, 276 ff.].

[17] "For much of the twentieth-century period of development of labour law in European legal systems the domain of other personal work contracts existed as the largely unregulated epiphenomenon of the domain of the contract of employment" [Freedland Kountouris 2011, 288].

[18] According to [Freedland and Kountouris 2012], such a broad galaxy of workers can be ascribed to the general category of *Other Personal Work Contracts as a family of Con-*

avoid any automatic reproduction of the classical protection of subordinate employment. Obviously, some degree of protection in the contractual bilateral relationship should be provided. In addition tax incentives, services to entrepreneurship, anti-discrimination measures in public procurement, simplification of administrative burdens, also have a role to play, as an increasing part of the recent Italian debate seems to suggest [Treu 2010; Perulli 2010 and 2011; Magnani 2010; Razzolini 2012; Pallini 2013. In more general terms, see also Davidov 2006; Supiot et al 2001; Freedland - Kountouris 2011].

What is ultimately at stake is the need to recognize a sort of polymorphic legal figure of worker, which requires a new less strict and more purpose oriented regulatory approach to cope with the new reality of non-dependent work. A single conceptual macro-distinction should possibly just be kept, between self-entrepreneurship on the one hand [Razzolini 2012, but *contra* Freedland - Kountouris 2011], and economically dependent work on the other [Pallini 2013]. Such regulatory adjustment should obviously take into account the complex functional interrelations between the proposed new self-employment law and other branches of law, such as civil law, company law, tax and administrative law. However, the basic *ratio* of protection should always be preserved, according to a 'constitutional approach of private law' requiring that wherever a personal nexus exists, even if it is not a subordinate employment one ‚fundamental rights[19] and other macro-categories such as non-discrimination and abuse of power should always be taken into account [Collins 2007; B. Caruso, 2013, Nogler 2013].

The perspective which has just been evoked can be conceptually nourished and supported by person-centred ideas of justice [Sen 2009 and 2013; Deakin - Supiot 2009]. Within such a theoretical approach, the economic crisis, could be said to contribute to two items to the agenda; the opportunity to go beyond an out-dated employment-centred reading of the Italian Constitution, and to surpassing a series of authentic conceptual taboos connected to that idea. As a result, companies can no longer be considered only as places where the redistribution of conflicts occur, as a utilitarian idea of distributive justice would suggest. On the contrary, they are the places where a fundamental creative experience of the worker as a person takes place; where the tasks he performs increase his professional and personal growth; where production objectives are pursued according to criteria of efficiency, merit, productivity and competitiveness.

All the above mentioned issues can be aggregated around the idea of a *personal* – not institutional, or corporatist – conception of work relationships. In a humanistic, communitarian and participatory perception of the firm – as was the case in Adriano Olivetti's pioneering vision – the firm is represent-

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tracts, which is internally differentiated according to the different content and the different modalities of the job performed.

[19] For a unitary reconstruction of human rights based on the idea of indivisibility, see [Fredman 2009].

ed as 'the' place where human capital of working people is improved, and where working people contribute with their personal technical, manual, and intellectual skills and creativity to the development of general welfare [Sennet 2008].

In this perspective, the time has come to recognize that, in addition to the historical mission of reducing inequality, fighting discrimination and supporting social solidarity, labour law should also take on the task of strengthening social and human capital, which is also made of those individual capacities, skills and talents that Europe needs [Deakin 2013].

It is in this context that a proviso such as Article 35 of the Italian Constitution should be re-evaluated. This rule ("The Republic protects work in all its forms and practices") has been traditionally focused on the social protection of subordinate employees only, disregarding the very same "identity-building" Art. 1 of the Constitution, stating: "Italy is a democratic Republic founded on work", without any further specifications and/or limitations.

Such an updated reading of Art. 35[20] , which is more adequate and adheres to the above mentioned social changes, could also be suggested by the concept of human dignity, which several national and supranational sources refer to; just to mention some of them: Articles 3, 32, 36 41 of the Italian Constitution, Article 1 of the German *Grundgesetz*[21]; Article 1 of the EU Charter of Fundamental Rights[22]. Within such a perspective, the right to human dignity cannot refer to an abstract and atomized individual, but to a concrete person who must be contextualized in the increasingly differentiated inter-relational dimensions in which he/she is involved both in the labour market and in the workplace [Nussbaum 2002; Piepoli 2003; Hennette-Vauchez 2011; Veneziani 2010].

In this constitutionally renewed perspective, the obligation to protect the dignity of workers can no longer only be related to subordinate employees, but should also be consistently extended to the work of those who, through their own intelligence, ability and creativity, organize and coordinate the work of others. Nowadays, labour law cannot avoid taking care of such a new perspective: i.e. protecting human work in all its possible forms and modalities, by following the thread of human dignity as a limit to abuses (as it has always been the case), but also as a source of inspiration for legislative regulation promoting individual freedom and *capacitas* [Deakin 2009; Langille 2006; Del Punta 2013].

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[20] Which can be based on of the EU Charter of Fundamental rights, intended as a text build around the idea of the individual person [Caruso B. 2007]. For a critical reading of the EU Charter, see however [Azzariti 2012].

[21] «Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority» (Art. 1*Grundgesetz*).

[22] «Human dignity is inviolable. It must be respected and protected».

3. *… b) beyond conditionality. Rethinking relationships between labour law and the principle of responsibility*

According to the opinion of several authoritative constitutional and labour lawyers, a spectre, which is likely to put at risk the preservation of social rights even in their minimum content, is haunting Europe:: the principle of conditionality.

This principle, originally emanates from particular areas (activation strategies in labour market and active welfare policies) [Corazza 2013], is said to be likely to extend its shadow up to the point of affecting the fundamental principles of the social state and of putting at risk its constitutional architecture[23].

Its critics believe that such a new principle would for the first time, after the Glorious Thirties, ultimately legitimize , reasons of public economic policy to act as a "principle of exception" capable of affecting constitutionally founded rights (*Salus rei publicae suprema lex esto*).

Recent analyses on the effects of austerity measures on national social rights [Fabbrini 2013; Gambino 2013; Lo Faro 2014a; Romagnoli 2013], and more generally on national states' social sovereignty, show that the principle of conditionality applied to EU financial aids to bailout states, has severely affected a wide range of social rights. In first place pension rights which are now intended as should on the contrary, have been guaranteed according to the principles of legal certainty and protection of legitimate expectations [Carnevale – Pistorio 2014]. But also public wages and the very same right to collective bargaining in public employment, have been sacrificed beyond the limits of 'constitutional reasonability' [Ricci 2014]. And the same has been said of social spending prerogatives of sub-national entities[24], and of protective dismissal legislation[25].

According to such alarmist interpretations, the conditionality principle has somehow replicated the same principle of 'due deference' whic, for example in UK law,has been used to legitimize judicial inertia against legislative action and employers' prerogatives exercised to the detriment of fundamental rights [Davies 2009, 284 ff].

The above-mentioned criticisms are not entirely justified. Indeed, it would be improper to maintain that the principle of conditionality has radically changed the founding principles of the welfare state, or that it has even endangered the basis of classic constitutionalism. In-depth analyses of national and supranational higher courts' jurisprudence, on the contrary, seem to confute such a radical reading [Morrone 2014; Contiades 2013; but see also in

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[23] See the analyses of national cases and of the various 'paths' they have followed to react to the crisis (*adjustment, submission, breakdown, stamina)* in [Contiades 2013].

[24] For the Italian case [Messineo 2012, 201 ff.].

[25] The constitutional and labour law literature is vast: beyond the already quoted volume edited by [Contiades [2013], see [Abbiate 2014]; [Fabbrini 2013b]; [Cisotta - Gallo 2013]; Barnard [2013]; [Yannakourou 2014]; [Lo Faro 2014b].

more critical terms the analyses of national cases contained in Kilpatrick - De Witte 2014]. National constitutional systems, especially the most socially sensible ones, have shown a certain capacity to adapt to the crisis by balancing social rights and economic exigencies; whereas on the contrary the cases of real constitutional breaches justified by a state of exception have been quite rare[26].

If it is true that, when called to assess austerity measures adopted in compliance with supranational constraints, higher national courts have tended to adopt an abstentionist (and pragmatic) stance[27]; it is also true, on the other hand,that the legislative measures adopted so far to cope with the crisis have not taken the radical shift feared by a certain reading of conditionality.

It is quite manifest, however, that when faced with austerity-driven legislative measures, the courts have relied upon the general principles associated with the social state of law, such as proportionality, equality, legal certainty, and reasonableness, rather than upon the affirmation of single social rights as such.

Such general principles are evoked and used in several countries according to modalities which are more similar in different national contexts. Due to the somehow 'soft' judicial review of the anti-crisis measures they lead to, they could perhaps disappoint the expectations of those who would demand stronger judicial answers, affirming an absolute respect of social rights as an adequate reaction to the economic crisis. And yet, the operational strategy adopted by many higher courts seems to constitute quite a realistic and pragmatic form of judicial resistance against legislative excesses allegedly justified by external constraints[28].

What can be affirmed with certainty, observing the responses of national courts and of other 'new' actors (the ECHR) enriching the judicial discourse on social rights' effectiveness [Fontana, 2014, 42 ff], is that never before in European legal history has there been a more evident convergence of the language of higher Courts and their answers to common problems, as there is today when observing 'economic crisis and social rights' jurisprudence.

If this is not a validation of the well-known imaginative apologue of globalization, where the beating of a butterfly's wings might cause earthquakes in another hemisphere of the world, it is certainly the proof that judicial cross-fertilization, intended as an implicit and indirect dialogue between courts producing an integration effect of national legal systems and cultures [Caruso - Militello, 2012], is nowadays accelerated as a result of the economic crisis.

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[26] On the Hungarian case, see [Szente 2013]: on Iceland [Thorarensen 2013].

[27] With the exception of the Latvian Constitutional court [Contiades 2013]; [Balodis, Pleps 2013].

[28] See for example the Portuguese and the Greek case. In more critical terms [Lo Faro 2014b], regarding the Italian constitutional court jurisprudence.

That said, it is however undeniable that, due to the structural, and not merely contingent character it has progressively gained, the principle of conditionality is likely to produce a certain adjustment of the labour law paradigm. This is why labour lawyers should take care of it, possibly by reinterpreting it through different conceptual bases, and by 'relocating' it at a point of intersection between a constitutional law and a labour law perspective.

What Hans Jonas has called, on an ethical plane, the 'duty to the future'[29], can be translated, on the constitutional plane, as a revaluation of the duty to solidarity, understood as a sort of higher principle able to orient the interpretation of constitutional systems inspired by an ethic of duties and responsibilities, and not only by rights' protection goals [Morelli, 2013, 28].

On the labour law plane, such a reading of the conditionality principle implies a reinterpretation of the principles of labour protection, representing them not as absolute, unconditioned, and a-historical values, but rather as relative values, which, through the principle of proportionality (but also of equality and legal certainty) are susceptible to being balanced with other goals, –such asthe economic integration of markets, the sustainability of the transient anti-crisis measures and their end goal, the protection of future generations. The implementation of such constitutional balancing is primarily entrusted to judges, but also to other international agencies involved in monitoring compliance with international and European fundamental social rights [Lo Faro 2014b].

In such a perspective, the conditional, or on the contrary, the unconditional nature of labour-related rights cannot be considered on the basis of axiological, or even worse, ideological*a priori*[30]. Quite on the contrary, the conditional and/or unconditional nature of single rights should be realistically assessed in the overall context of the measures taken in different national and supranational regulatory systems and subsystems. When evaluating austerity measures affecting social rights, the limits of conditionality should therefore be assessed not in abstract and absolute terms, but in relation to the concrete balancing operations made by decision makers and placed under the control of the courts.

In this sense, labour law narratives should come out of the doldrums in which the binary conditional/unconditional rights' debate risks condemning it, and move towards a new, more complex and articulated perspective: i.e.

[29] A plane where duties might ethically prevail over rights, as it happens when intergenerational solidarity is at stake [Jonas 2009, 49 ff.]. The 'Fiscal compact' too – and particularly, the balanced-budget rule - might be read as an expression of a principle of intergenerational solidarity.

[30] It is different when supreme constitutional values are put into question, as it has happened in the Hungarian case with the complete submission of judicial power to the government.

constitutional balancing and its technical corollaries, with the principle of proportionality in first place.

4. *... c) New strategies of dynamic social protection: constitutional balancing and proportionality*

It is clearly not disputable that in times of economic crisis, de-regulative labour policies end up having a very negative impact on social cohesion. But it is equally accurate to say that such risks cannot be remedied by tweaking old recipes, maybe reworking them in terms of constitutional patriotism[31]. In a recent essay, Simon Deakin wrote «*in the context of proportionality-type arguments, economic policy-related justifications for qualifying social rights should be very carefully scrutinised. The economic goals they are serving may be legitimate, but it is far from clear that they are effective means of meeting those goals. Arguments of this kind may get a hearing if, in due course, the Court of Justice agrees to hear challenges to the terms of the various structural adjustment package*» [Deakin 2013, 561].

What Deakin alludes to is quite a cautious and prudent view of the principle of proportionality, which nevertheless opens up new ways of looking at the classical category of the inderogability of labour legislation as an identity-building conceptual tool of labour law. This is a consequence which flows from a supranational regulation that inevitably ends up contaminating the discourse on rights with the discourse on economic freedoms. The principle of proportionality becomes, from this point of view, a key factor in mediating and dynamically balancing different constitutionally relevant interests in the context of the economic crisis.

It is clear from observing the jurisprudence of the highest courts that the economic crisis has strengthened constitutional balancing and its corollary, the principle of proportionality (through the triple and sequential tests of adequacy, necessity and proportionality in strict sense[32]), making them hinges of communication between the urgency of anti-crisis measures and the reasonableness of their impact on rights.

As it is widely discussed in national and international debates[33], balancing and proportionality might doubly affect rights. Either 'negatively', as defensive tools against legislative limitations adopted for the sake of economic sustainability or competitiveness. Or 'positively', as techniques used to iden-

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31 [Azzariti 2012]. The opportunity of a cooperative coexistence between supranational and national legal cultures and traditions, is auspicated by [von Bogdandy - Schill 2011].

32 For an application to national labour law systems, see [Davidov 2013]; [Davies 2009]; [Caruso 2008].

33 [Contiades - Fotiadou 2012]; [Tsakyrakis 2008]; [Koutnatzis 2005]; [Stone Sweet - Mathews 2008]; [Young 2008]; [Khosla 2010]; [Rivers 2006]; [Morrone 2008] and the bibliographical references therein contained with regard to the Italian debate.

tify the minimum core of given rights through balancing with other rights[34]. The latter method, balancing and proportionality help thus to strengthen the core content of social rights, insofar as they submit their possible reduction to a public process of communicative rationality which ends up defining their minimum and inalienable content[35]. In this sense, proportionality is closely connected with a Habermasian view of law.

Besides legitimizing judicial control of legislative action, the principle of proportionality, due to its intrinsic argumentative nature, also contributes to making constitutional balancing operations transparent and intelligible by public opinion. This way, it also helps 'to save' judges from the accusation of deciding in a discretionary or arbitrary way when affirming/denying the compatibility of a given social right with the current economic framework. At least, to the extent that their decisions are taken with effective and persuasive argumentative techniques[36].

This is what has happened, for instance, in Greece but also in Italy with the use of temporary parameters with regards to wage freezing measures in the public sector parameters which are ascribable to the principle of proportionality. [Ricci, 2014; Yannakourou 2014][37] These tools have been deemed necessary in order to improve national financial systems, andin the end, to stabilize the whole EU political project.

Even if it is true that in some cases, Greece and Portugal for example, the utter urgency of the anti-crisis measures have somehow altered the judicial scrutiny of necessity (the urgency of the measures having being identified *tout court* with their necessity), thus giving rise to a certain improper judicial *bricolage* [Contiades 2013], it is clear that recourse to the three-phases proportionality test as a controlling tool of anti-crisis measures should always presuppose recognition of the prescriptive nature of the essential content of social rights [Contadies - Fotiadou 2012]. Indeed, the application of the pro-

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[34] For an analysis of the use of balancing by the Italian constitutional 'crisis' jurisprudence, see [Morrone 2014]; [Tecla 2014]; [Groppi, Spigno, Vizioli 2013]; [Messineo 2012].

[35] «Proportionality facilitates this 'translation' while it may also facilitate the task of judges dealing with the kind of political and budgetary considerations that underlie the implementation of social rights. Subjecting social rights in a rationale shared with civil and political rights through the use of proportionality, that is subjecting them to the narrative of proportionality which is becoming a constitutional Esperanto, solidifies the content of social rights more than a unending struggle to settle for a minimum core. Proportionality thus does not result in the proceduralization of social rights, but is substance-generating concretizing their content» [Contiades - Fotiadou 2012, 670].

[36] Something that - according to the opinion of [Lo Faro 2014 b] - did not happen on the occasion of the decisions recently taken by the Italian constitutional court.

[37] National austerity measures are often questionable especially because of their *trenchant* and emergency character. It is true, however, that this is due to the original national states resistances, due to the fear of losing political consensus [Bini Smaghi 2013 and 2014].

portionality principle has given rise to rigorous reviews of national anti-crisis measures, particularly when the proportionality test has been intersected with the principle of legal certainty. This is what has happened, for instance, in Latvia where a punctual consideration of the principles of proportionality and legal certainty has induced the Constitutional Court to declare the unconstitutionality of the measures affecting pension rights[38].

In the final analysis, in the current acute phase of the crisis the principle of proportionality appears to be the most realistic strategy for checking the correctness of the political choices made by the lawmakers, to the extent that it presupposes social rights as counter-limits of economically driven anti-crisis measures, thus contributing to the definition of their essential and inalienable minimum content.

On the diachronic plane, recourse to constitutional balancing, *via* the principle of proportionality, as a constitutional meta-rule [Stone Sweet, Mathews 2008, 95], emphasizes the compromising nature of post-war constitutions against the absolutism of rights [Koutnatzis 2005], but also against a tyranny of markets, thus allowing strategies of contamination and mutual interference between the respective values [Deakin 2013].

Even more so, the emergency measures adopted up to now to face the crisis are the result of inaccurate choices made by supranational institutions incapable of handling the economic crisis with politically and socially acceptable measures [Bini Smaghi, 2013; Sciarra 2013]. The agenda of the new institutions which emerged from the European Parliament elections, imposes the need to adopt policies and measures, no longer dictated by a state of exception, raising the risk of an anti-European populism, inspired by a reasonable process of gradual economic and political integration, which allows more balanced and reasonable strategies, capable of avoiding draconian decisions which have the effect of delegitimizing and eventually disintegrating the European project [Habermas, 2012; Beck, 2012 and 2013].

5. *Putting constitutional balancing to proof: law and collective bargaining in Italian labour market reforms*

Some of the labour market reforms recently implemented in Italy might be evoked as paradigmatic examples of the new discursive context as described above.

Faced with the persistent and alarming state of the economy and of the rising unemployment/inactivity rates, the new government strengthened by

[38] The judgement in question (pronounced on 21.12.2009) might be read in English at www.satv.tiesa.gov.lv/upload/Judgment%202009-43.htm. For a comment, see [Contiades - Fotiadou [2012, 676 ss.] and [Balodis - Pleps 2013]. General comments on the economic welfare and economic developments in Latvia in [Dahn 2012]. With regard to the Portuguese case, [Contiades 2013, 36] highlights the 'trap-effect' deriving from a judicial review which, because of a distorted use of the equality principle, had the effect of producing an equalization to the bottom.

the outcome of the European elections, decided to move along a double-tracked path of labour reforms. Shock measures aimed to produce an immediate stimulus to the economy and occupation on the one hand (law 78/2014)[39]. On the other, changes aimed at producing a more far-reaching reform of social security nets and labour market institutions, a general simplification of labour law rules, and the introduction of the so-called 'protection-growing' employment contract[40].

The legislative intervention aimed at introducing 'shock' measures, focuses on a substantial liberalization of fixed-term contracts by removing the need for any objective justification for contracts having a maximum duration of 36 months. Such contracts, whose initial duration may be extended up to five times within the 36 months-limit, cannot exceed 20% of the total workforce[41].

Critical opinions based on traditional labour law narrative affirm (to make it brief) that such a vehement liberalization of fixed-term contracts, with the elimination of the requisite for objective reasons and a corresponding reduction of remedies[42], ends up violating the EU fixed-term Directive, which states that "contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers"[43]. Moreover, the new Italian legislation would favour abusive recourse to fixed-term contracts, since they are already the main channel of access to employment; their pro-cyclical liberalization would therefore produce the effect of a 'cannibalization' of the standard employment contract by fixed-term contracts. In the absence of labour market security measures and of incentives for permanent contracts, consequently, a clear shift of labour market policies on the side of flexibility at the expense of security would occur, raising the prospect of insecurity and precarious work without any positive effects on the recovery of employment.

These kinds of criticisms condense the traditional labour law narrative, founded as they are on an absolutization of values; in this case, the value of traditional full-time and open-ended employment contract. In this way, such opinions end up, wrongly, identifying the right to work granted by art. 4 of the Constitution, with the right to work on permanent basis only. If, on the

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[39] Converting decree-law 20.3.2014 n. 34.

[40] Bill n. 1428, currently under parliamentary examination. The text can be read at www.pietroichino.it.

[41] According to other opinions, the 20% limit must be referred to the total number of fixed-term contracts concluded within a given enterprise. In general, due to its emergency character, the legislative text is not entirely clear.

[42] Contrary to what usually happens in the Italian legal system in case of unlawful fixed-term contracts, contracts exceeding the 20% limit shall not be converted into open-ended contracts; the employer will just be fined with a pecuniary sanction.

[43] In 2013, out of 2.266.604 hirings, 1.539.435 have been fixed term contracts; 364.972 open ended contracts; 54.073 apprenticeship contracts; 67.438 parasubordinate contracts.

contrary, the different balancing and proportionality perspective is assumed, the judgement on fixed-term reform might turn out to be different.

Well-informed comparative research has shown [McKay 2012] that precariousness is not an abstract, static, and legally definable category. On the contrary, it must be conceptualized from time to time according to the specific non- standard contract proposed to a specific precarious worker. Precariousness is therefore a multifaceted phenomenon, to be ascertained by considering the position, the income, the status of the single worker concerned [Kountouris 2012].

Should we place all the non-standard contracts within a "precariousness pyramid", fixed-term would be the more 'stable' of all, especially when it is used as a sort of long probationary period before an open-ended hiring (permanent contract)[44]. All the more so, because of the principles of equal treatment with permanent workers dictated by the EU Directive. Obviously, what has been just said does not include the subjective perception of insecurity, which might be quite intense for those entering into a contractual relationship which could be extended in time through a series of continuous (short) fixed-term contracts renewals, as occurs in some cases [45].

If we now try to read the recent Italian reforms by using the conceptual lenses of balancing and proportionality, we could probably conclude that the legislator's choice to promote 'long' fixed term contracts (up to 36 months), and to discourage other more insecure contractual types (project work, bogus-autonomous work), produces quite an acceptable balancing.

Additionally, the Italian legislator has explicitly declared in the very same law liberalizing fixed-term contracts, that fixed-term new regulation is only 'the first part of the job'. Other measures will follow very soon, regarding a radical reform of the 'classic' subordinate open-ended employment contract[46]. This way, future steps to be taken in the next stage of the labour market reform, will aim at stimulating employers to invest in human capital and in the consolidation of the psychological contract, through the 'window' of a permanent contract which will be inspired by the logic of 'growing protections': the longer the contract lasts, the more protections apply (dismissal protection, in particular, will be supposed to apply after three years of seniority) [Caruso 2014a].

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[44] In the Italian legal system, fixed term contracts are quite 'stable', insofar as a just cause is required for them to be terminated before their expected expiry date.

[45] This is the case of teaching school staff, whose contracts are renovated year by year according to a national legislation whose conformity with the Directive has been recently questioned by some national judges rising a preliminary question to the ECJ. Among them, the Constitutional court, who has raised a preliminary question on 13.7.2013. On the EU compatibility of fixed-term national legislation (not specifically related to school staff), see CJEU, 12.12.2013, case C-361/12, *Carratù* v. *Poste Italiane Spa*.

[46] The introduction of a new 'protection-growing' employment contract has been 'anticipated' by the legislator in the text of the fixed-term contract reform.

Thirdly, the impact of the balancing and proportionality operation should be evaluated ex-post. In particular, it should be ascertained whether the liberalization of fixed-term contracts is a suitable tool in achieving the occupational goals (adequacy test); whether the possible negative impact of the new fixed-term regulation on open-ended hiring is to be considered as tolerable because of its necessity (necessity test); and finally, whether the removal of the requisite of an objective reason is proportionate to the expected occupational results (proportionality test in strict sense).

In this regard, the first available data seem to show a certain success of fixed-term contracts as occupational 'therapy'[47], thus confirming a statistical trend which is already visible in the Italian labour market. Here the broad recourse to fixed-term hiring could be read as a symptom of business' scepticism on the perspectives of economic recovery, and of distrust towards traditional open-ended contracts which are not yet adequately reformed (with the introduction of the 'protection-growing' contract).

Furthermore, the data also show that the new liberalized fixed-term contract produce a positive substitution effect with regard to less protected contractual types.

If one adds to this picture both the forthcoming introduction of the 'protection-growing' open-ended contract, and the announced reform of social safety net measures in labour market transactions, it is possible to infer that the radical liberalization of fixed-term contracts is only an intrinsically temporary 'shock' measure. Consequently, opinions about it should avoid being formulated in drastically negative terms, as on the contrary happens when the traditional labour law narrative qualifies fixed-term contract new rules as a sheer tribute to de-regulative inputs coming from the EU Troika.

A quite similar line of reasoning could be forwarded with regard to the other 'big' labour law reform adopted by the national legislator in the wake of the crisis: i.e. the possibility for plant level agreements to derogate *in pejus* higher level agreements and the very same labour legislation (Art. 8 of Law n. 148/2011). Something that in Italy has been qualified by many in terms of a national 'submission' to a letter sent to the Italian government by the European Central Bank in the summer of 2011.

In the traditional labour law narrative, any modification of the classical equalizing function of national industry agreements should be considered as nothing other than a submissive yielding to the dominating de-regulative mood of the current times.

Such critical positions, which caustically label the legislative support to plant level bargaining as a form of 'neo-feudalism', tend to disregard that collective bargaining, even when it has derogatory contents, is always a resource

[47] According to some recent data, the new regulation would have produced an increasing of fixed-term (+ 7,3%) and apprenticeship (+ 6%) contracts.

for boosting a company's competitiveness; and that plant level negotiated flexibility is a source of legitimisation for the negotiating unions.

In the balancing/proportionality perspective which this essay aims to advocate, the legislative promotion of plant level bargaining should not be read in a de-regulative perspective only; but rather as a strategy to improve employees' involvement in increasing business competitiveness, also with a view of a redistribution of the relative surplus. Not to mention the positive outcomes that decentralised bargaining is able to produce as far as 'company welfare' benefits are concerned, as Adriano Olivetti realised with great foresightmany years ago, and as some recent experiences further confirm[48].

There could therefore, be a positive trade-off between the above described encouraging outcomes of decentralised bargaining, and the parallel narrowing of the traditional national agreement. For certain, its classical functions, standardization of working conditions and income redistribution might be negatively affected by shifting the focus of industrial relations to the plant level. However, it might be suggested that the former function could be surrogated by minimum wage legislation; and the latter by strategies inspired by a new awareness of the value of the working person: his knowledge, his freedom and his creativity, which go beyond the sphere of mere income satisfaction. Obviously, all these processes should be developed according to a progressive vision of the common interests of the company's community, which finally begins to be accepted by Italian business associations in some recent ground-breaking documents [Mascini 2014][49].

Within the broad perspective described above, the much debated legislative provision contained in Art. 8 of Law n. 148/2011 might be read from a different angle. As I have already argued elsewhere [Caruso - Alaimo 2012, 208 ff.], what is at stake is not an abstract question of constitutionality, i.e. whether or not a collective agreement may derogate the law *in pejus*. Allowing derogatory effects on certain enumerated issues, respecting certain procedural requirements, safeguarding majority rule and the principle of democracy, as Art. 8 does, does not seem to collide in principle with constitutional provisions. If anything, the problem of Art. 8 is of a different nature: its imperfect framing, in terms of lack of clarity and of approximate definition of its material scope and of its procedural requirements, has made it difficult for social partners to foster its positive potential: Art. 8 must just be corrected to make it more functional; not suppressed because of its unconstitutionality, as many Italian observers would argue [Caruso 2014b]. For the time being, it is for the judge, called to evaluate the lawfulness of single derogatory agreements, to establish whether such agreements are sufficiently

[48] For a paradigmatic example, see the *Luxottica* plant level agreement of 11.2.2009, on which see [Tursi 2012].

[49] See the Manifesto approved by the Italian Employers Association of Metal Industries (Federmeccanica) and the interview of its President published in *Il diario del lavoro*, 13.6.2014.

'balanced': i.e. whether there is a proportionality between the derogation they introduce, and the occupational and competitiveness goals they may achieve.

6. *Conclusions*

The conceptual path developed in this paper originates from the observation of the structural nature of the current economic crisis, and of its profound impact on twentieth-century labour law narrative, especially within those national systems affected by weak production structures and high public debt, as is the case for Italy. In such a context, a careful reconsideration of traditional constitutionalism is imposed by the crisis, due to its effect both on the preservation of the national social model, and on the perspective of EU political integration. The economic crisis might seriously jeopardize the realization of such a project; but at the same time, it might also paradoxically reinforce it.

Such preliminary findings suggest avoiding any 'absolute' standpoint: either the one firmly faithful to the traditional absolutism of (national) social rights; or, on the other hand, the one a-critically accepting de-regulative strategies implemented through EU-dictated austerity measures.

On the contrary, the new economic context should lead observers to acknowledge the inadequacy of traditional labour law paradigms at the time of global crisis, and to assume reasonable attitudes leading to an adjustment of rules, values and principles. It is not being disputed that, alone, labour law reforms are unable to determine – any positive occupational development; it is undeniable, however, that in those countries where labour markets and labour relations are governed by more efficient rules, the occupational effects of the crisis have certainly been less dramatic than what has happened in Italy.

Within such a perspective, new possible trajectories of traditional labour law narrative may be indicated firsly with regard to labour law classical 'jurisdiction', through a conceptual and regulative reconsideration of the *personal work contract*. Such a new trajectory might be supported, in Italy, through a reassessment of Art. 35 of the Constitution, which is intended to protect human work in every form, beyond the subordinate employment contract. What follows from this rule then, is that rather than opposition there is the possibility of collaboration between the values and principles of classical labour law narrative (distributive equality, solidarity) and the values which emanate from a liberal prospective (competitiveness, efficiency, merit). Something that should be done following the conceptual *fil-rouge* of the right to human dignity, interpreted according to the theory of *capacitas* and to its regulatory pragmatism.

A potential second path of a much needed paradigm regeneration of labour law relates to the positive revaluation of the principle of conditionality, considered by many as a sort of spectre haunting Europe, capable of un-

dermining the maintenance of social rights and of disrupting the European social model. A closer comparative analysis shows however, that the alleged dreadful effects of the principle of conditionality have been in fact amply mitigated through the use of the principles of constitutional balancing and proportionality. When read from such a different perspective, the principles of conditionality may be an opportunity to correct the traditional narrative of labour law, especially in Italy, by associating a new grammar of duties and responsibilities to the traditional grammar of rights.

Finally, a third possible trajectory of a renewed labour law narrative could be constituted by an attentive and mature consideration of the meta-principle of constitutional balancing and of its functional corollary, the principle of proportionality. This should be applied both in the evaluation of decision makers' choices, and in the assessment of the judicial decisions regarding social rights' reduction at the time of the crisis. Such a perspective, even irrespective of the current crisis, would provide the chance to surmount a theoretical paradigm which is rigidly anchored to the tradition of the inderogability of labour law. Two examples taken from the recent Italian legislation, regarding fixed-term contracts and derogatory plant level agreements, have been used to validate the described theoretical perspective.