

## Labour law and social policies: an agenda for transnational research\*

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## 1. The changing world of work: inadequate responses.

The great economic and social transformations driven by two main factors, globalization and technological innovations, have altered the very basis on which the labor law and welfare systems created in the past decades have been built. The national States are losing power in the global markets, the fordist large companies are changing structure, industrial unions and centralized collective agreements are weakened, stable subordinate employment, which was the central object of labour law, has given way to a variety of non- standards work arrangements, often informal and in many cases economically dependent even though formally autonomous. General factors, or mega trends, are altering the context in which we operate and our daily life develops: aging of population, climate changes, scarcity of resources. The turbulence of our times has increased the uncertainty of once stable societies.

The responses of policy makers and also of experts and scholars to the challenges posed by these transformations are by and large inadequate. It is our responsibility not only as professionals but as citizens concerned, to intensify the efforts to understand the new questions and to look for solutions. The seriousness of the economic crisis and its dramatic consequences on the world of work are so evident that they do not leave room for hesitation or inertia.

The 'jobs gap' of about 62 million jobs denounced by the ILO <sup>453</sup> is the dramatic toll that the crisis has taken on employment. In spite of the level of prosperity attained by the world as a whole, too many people are deprived of the fundamental rights as workers and as citizens, recognized by the ILO conventions, and of the opportunities to share the fruit of progress. More than half of the population is not covered by the measures of social protection which have been shaped in the past by many national legislations and which are endorsed by international standards. Even the core ILO principles: freedom of association, non discrimination, prohibition of child and forced labor are far from being respected in some areas of the world.

Moreover inequalities have increased in the last years among people and among regions and the labor share of GDP has declined significantly. These trends are widely commented but less acted upon.

There is evidence that inequality has significant negative effects on growth because it contributes to reduce personal and collective investments in health and education thereby lowering human capital accumulation social mobility. So promoting equality of conditions and of opportunities is not only an act of justice, but also an important condition for inclusive and sustainable development. But, in spite of the concern expressed by many national and international leaders and organizations for the economic and social challenge posed by increasing inequalities, no internationally recognized policy framework has emerged to guide countries wishing to construct a more inclusive economic and social strategy capable of promoting broad-based progress in living standards and wider participation in the benefits of economic growth rather than growth per se.<sup>454</sup>

The range of innovative measures which might contribute to this strategy covers many policy areas. First and foremost promotion of good educational opportunities for all citizens, support to productive and quality employment and diffusion of active universal welfare. But also measures

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<sup>453</sup> Report of the ILO Director general to the 104Th Session of the International Labor Conference, *The future of work*, Geneva, 2015.

<sup>454</sup> See *The inclusive Growth and developement Report 2015*, R. Samans, J. Blake, G. Corsigan, M. Drzeniek, World Econ. Forum, sept. 2015.

broader than traditional labor legislation, directed to creating an economic and social context favorable to sustainable development and to job rich growth, such as public and private investments necessary to guarantee basic quality services and infrastructures; innovative research and dynamic business environment; favorable financial conditions for long term investments etc. Deepening our understanding of these strategies and building consensus for their implementation is a major challenge for the future.<sup>455</sup>

In fact perceptions of these inequalities and of injustice are among the major causes of instability and of social protest in many countries, including some of those traditionally rich and peaceful. Given the dimensions of these challenges, no minor adjustment is sufficient to restore the role of social policies and of labor law as key instruments of social justice and progress. A major revision is needed both of the objectives and of the techniques of our discipline.

## 2. Value of work and sustainable growth: the role of labor law.

The very focus of labor law and of social policies has to be redefined. They may not be concerned exclusively with protection of workers and even distribution of income, assuming, as in the past, that growth was a self-sustaining mechanism, in a linear direction of development. Labor and social policies, and ourselves as socially committed scholars, must share the concern for the conditions and for the sustainability of growth.

This approach to be effective has two major implications. One: the mission of our discipline needs not be confined to reacting to existing economic and social patterns or to reducing their negative effects on labor.

A more committing task is to finalize our specific instruments, technical and political, with an innovative vision, to changing these patterns for a more inclusive growth and progress.<sup>456</sup>

A second and even more fundamental implication is that the economic performance should be evaluated not only according to material parameters, even less to short term financial accumulation, but including social and welfare indicators.

Some of these indicators have been elaborated by various international and research organizations,<sup>457</sup> but still are not taken seriously by policy makers. In fact embracing seriously this objective requires, even before specific social reforms, a change of perspective: a new policy approach able to go beyond the traditional separation of roles and of rationale between economic and social spheres, and to promote an integration between innovative economic policies, active welfare and effective employment policies.

A similar approach has been adopted eg. in the European Lisbon Treaty (art.9), which States that all major economic decisions, at national and international level, should take into account their impact on social and individual welfare. It is an important policy approach whose implementation

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<sup>455</sup> See ILO, *Developing with jobs, World of work*, Report 2014: *An employment oriented investment strategy for Europe*, 2014, Research Department, ILO.

<sup>456</sup> See the general report by S. Deakin, *Labour Law and development*, to the 21th World Congress of ISLSSL, Cape Town, Sept. 18, 2015.

<sup>457</sup> See the "Declaration of Istanbul" adopted in 2007 and subscribed by the European Commission, the OECD, the Islamic Conference, the United Nations, the World Bank, the Program of United Nations for Development (UNDP), <http://www.OECD.org/data-OECD/14/46/38883774>. T. Stiglitz, A. Sen, J.P. Fitoussi, 2009, *Report by the Commission on the measurement of economic performance and Social progress*, Stiglitz, Sen, Fitoussi, FR.

is meeting many obstacles in the actual national and European policymaking. But it is a decisive test for the truth of European social model. And it contains a universal message for our societies; because if they want to give effective value to human work as a fundamental aspect of personal dignity, as an element of social stability and of equitable distribution of wealth, then the impact on the quantity and quality of employment should be an important element of all decisions.

Recognizing the value of work is not only a condition to promote sustainable growth, but also to exploit the great opportunities of technological innovations and of the knowledge society. The impact of technological change on jobs is a matter of debate, today more uncertain than in the past. In order to avoid disruptive effects by new technologies, new instruments and investment directions should be directed to promote job growth in both developing and industrialized countries: two commonly identified sources of future employment are the green economy and the care economy.<sup>458</sup>

Policy choices of this kind, like most policies, must be projected on a global scale, because the challenges for the future of growth of work and of society are global. But they can hardly proceed if they are not promoted by national governments and by national social actors, particularly in the most powerful States, also because these are important members of the international organizations, beginning with the ILO.

A major role can be played to the same end by those regional institutions and governments such as the European Union and similar common organizations which have been formed in other regions of the world, with the aim of compensing for the decreasing national authority and of the reduced national resources in the areas of labor and welfare policies.

### 3. Revision of labour law: diversification of rules and basic standards.

Not only economic decisions must be revised in order to contribute to social welfare and justice; a parallel recalibration is required in many areas of legal and social policies, so that they can respond to the present scenarios of the economy and society. It is commonly affirmed, also in our meetings, that a new balance must be struck between the imperatives of competitiveness and the welfare needs of people.<sup>459</sup> Some examples of balance can be found in national experiences, but their effectiveness and actual results are a matter of controversy.

One controversial area has to do with the core of traditional labor law, namely protective legislation. If we agree that employment has greatly diversified, the forms and techniques of protection should also diversify according to the different types of work and needs of the employees.

How and to what extent different forms of regulation should be applied, is still a matter of discussion and has been object of various legislative experiments. The prevailing trend in most countries, including those run by conservative governments, is not to adopt policies of sheer deregulation nor to reduce all traditional protective regulations to soft law.

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<sup>458</sup> See for a positive evaluation various contributions in *Sharing in the success of the digital economy*, ITIF, Policy Network, 2015; OECD, Young SME, *Growth and job creation*, 2014. Also for policy implications, ILO, *World of work Report 2014, Developing with job*, Geneva 2014.

<sup>459</sup> *Reconciling labour flexibility with social cohesion. Ideas for political action*, Council of Europe publishing, Strasbourg 2006.

On the other hand the search for new forms of regulation cannot be guided only by traditional legal categories. The standard contract of employment may not always be an appropriate “filter” to adopt the right approach to this search. It might even be an obstacle to a full understanding of these forms of non standard or informal employment. Some countries (Spain, Germany, Italy but also anglosaxon countries), have introduced alternative legal categories to frame these new realities, such as para subordinate works, collaboration contracts, economically dependent employment. But the identification of the boundaries of these categories has proved itself controversial and the regulation of these legal entities have produced uneven results, often below the expectations of the policy makers.

Indeed the forms of non standard (or informal) work are so variable in time and space, that they defy an easy application of fixed legal categories. And the multiplication of the types of contracts, adopted in some countries like Italy, is not a useful remedy.

On the other hand, if we believe as I do, that labor law cannot limit itself to ratifying the variety of works which appear in the labor market, the legislator and the judges are bound to adopt some guiding principle in deciding the appropriate regulation of the various non standard works. Legal and collective decisions are decisive in shaping the future of these works, in deciding how and to what extent their protections will converge or diverge from those provided by traditional labor law to standard employment.

The countries, mostly developed, which have adopted specific interventions to regulate non standard works , or as the ILO says, to “formalize the informal” works, have followed different policy approaches.<sup>460</sup>

In some cases a sort of minimal regulation is held appropriate, but here too with different contents.

A “forced” harmonization of the legal Statute of non standard work to the rule of subordinate employment, has sometime been envisaged; but has proved to be legally and politically unfeasible.

Instead various measures have been adopted for mitigating the dualism of the labor market and the fragmentation of the different types of work: loosening the criteria for identifying subordination, extending some social protections to non standard work (in particular basic standards concerning working conditions and welfare); using a series of regulatory mechanisms to normalize non standard work.<sup>461</sup> These measures have in common the objective to tailor legal protections to the different positions and needs of the employees, not only subordinate workers but also those employees who are not legally subordinate but are not fully autonomous, because they are economically dependent on one or few principals.

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<sup>460</sup> See R. Husmanns, *Defining and measuring informal employment*, Statistic Paper, ILO, Geneva, February 2004; C. Williams, M. Lansky, *Informal employment in developed and developing economics: perspectives and policy responses*, in *Int. Labor Review*, vol. 152, 2013, p. 335-380, and the panel discussion chaired by M. Weiss at the 21th ISLSSL World Congress, Cape Town, Sept. 16, 2015.

<sup>461</sup> D. Adams, S. Deakin, *Institutional solutions to precariousness and inequality in labor markets*, BJIR, 2014, p. 779-809.

This grey intermediate area of employment is itself composed of a great variety of work patterns, often not regulated by formal contracts or even consisting of “personal work relations”, operating outside the labor market and not recognized as basis for economic compensation.<sup>462</sup> They represent the majority of employment in developing countries, and their percentage remains considerable – if not increasing – also in the labor market of most deindustrialized economies.

Not all the norms which compose the traditional core of imperative labor law can be extended to this grey area of employment. Some protections are less necessary; others may apply only partially or with adaptations.

On the other hand, some traditional norms may lose importance for employees who have acquired great operational independence, even if hired under a contract of dependent employment. One guiding principle might be followed in the selection of appropriate regulations; namely matching the functions of the different labor and social security norms with the needs of protection and of promotion of the various forms of works. This may be only a general principle, which should be tested on the ground so as to suit the characters of each type of employment and to avoid both excessive rigidity and lack of protection.

The adoption of such a principle, as proposed in some countries, might favour a regulatory approach not only better finalized but also more flexible and simplified. It would reduce the number of norms of detail which is burdening many modern legal systems, and instead it would increase the importance of minimum standards, national and in perspective supranational.

These standards are to be adaptable to the different economic and social conditions of the various countries, as indicated by the ILO. But the essential core of them should be universally respected. This core would include both basic collective rights, e.g. freedom of association and of collective action (including strike); and fundamental individual rights, e.g. to personal privacy, to free access to education and to professional training, to accessible informations about the opportunities existing in the labour market, adequate protection of health and safety. Some of these standards are explicitly included in many national legislation and in the European Charter of fundamental social rights.

The promotion of basic common standard is the core of the international governance of work, pursued in particular by the ILO through the its international conventions.

Promoting the effectiveness of these standards is a most challenging task. The mechanism of enforcement used by national legislations cannot easily operate across borders, even in countries which have ratified the ILO conventions. Indeed the content and the wording of these conventions are not always framed as prescriptive directives, immediately applicable and enforceable in national labor laws. However they are conceived with the aim of providing a framework of guidance which the member states, and their institutions (executive and judiciary), should use to promote the compliance with the terms of the convention by the various actors concerned, the employers in the first place.

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<sup>462</sup> See the General Report by Judy Fudge to the 21th World Congress of the ISLSSL, Cape Town, Sept. 17, 2015, Equality and citizenship at work as conceptual foundations for Labor Law, which explores this variety of work patterns and in particular the need to extend the focus of our discipline also to personal work relations.

Moreover it has been recognized that the membership to the ILO should imply the acceptance (at least) of the fundamental principles on which the organization is based, and consequently a duty of the member states to promote the compliance with these principles, using the national legal instruments. The effective compliance of international standards may be promoted and enlarged by specific arrangements and procedures included in the social clauses of trade agreements (see below the case of TTIP).

How to further improve the effectiveness of the international social norms is a widely discussed question.

The opening address of A. Supiot to the 21th World Congress of the ILLSSL (*What social justice in the XXI century?*) has submitted for discussion an interesting proposal, according to which the member states which have ratified the ILO conventions are not only expected to enforce the standards in their legal system, but could also pretend the respect of these standard by (other) member states which have not ratified the conventions – even to the point of requesting this compliance as a condition for reciprocal bilateral trade.

#### 4. Static and dynamic security.

Flexibility is another controversial area of policy making in our field.<sup>463</sup> Its pressure cannot simply be resisted. But regulations and limits are necessary to avoid the pitfalls of precariousness. The need of flexibility has to be balanced with the value of security which is highly priced in time of uncertainty. Here again the ways towards security may differ from those of the past.

Innovative proposals have been advanced – and in part implemented - in order to promote and guarantee a continuous career rather than specific job security.<sup>464</sup> The results are uneven also in countries like the Europeans which have experimented for years the so called flexicurity. Much depends on the effective balance between the flexibility required from the employees and the safety net of income support and active labor policies available to the unemployed. Keeping the balance has proved to be difficult even in strong countries, during the recent years of economic crisis. More effective policies have been advocated to support both firms and their employees in the periods of transition, which are becoming a recurrent or normal feature of modern labor markets.<sup>465</sup>

The task of public interventions is particularly important in order to ensure that individual employees are supported in the case of economic downturns and in the job changes which characterize the present turbulent economies. The best national practices indicate that the support should include guarantees of income, personalized assistance in the search for work opportunities and by the opportunity to enrich and update their skills according to their personal capacities

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<sup>463</sup> The debate on this issue has been going on in Europe since 1997 when flexicurity was endorsed by the Commission as the major guideline for labor market policies: see among others, T. Wiltshagen ed., 2007, *Flexicurity Practices. Expert report for European Commission*; Eurofound, *The second phase of flexicurity*, Dublin, 2013; P. Auer, *Security in labour markets: combining flexicurity with security for decent work*, ILO, Geneva, 2007.

<sup>464</sup> The most widely discussed set of proposal is by A. Supiot, 2001, *Beyond employment*, Oxford Univ. Press, Oxford. The forms of implementation of similar proposals differ according to national patterns of flexicurity.

<sup>465</sup> A. Hemerijck, *Changing welfare states*, 2012, Oxford Univ. Press, Oxford, p. 256 ss.; H.P. Blossfeld, S. Bucholz, D. Hofacker, S. Bertoloni, *Selective flexibilization and deregulation of the labor market*, Stato e Mercato, 2012, p. 373 ss.

and the trends of the labour market. Education and services on the labour market are public goods necessary for both economic competitiveness and for personal and social wellbeing.

Certainly replacing static by dynamic security stability is a difficult social goal, whose attainment requires widespread consensus and involvement of the interested parties.<sup>466</sup> Indeed good faith negotiation is necessary in general for building confidence and also stable social innovation.

## 5. Continued: active welfare measures as social investment.

A redefinition of scope and of content is necessary not only for the law of employment, but also for the law of social protection and of welfare. In many European countries, strong financial constraints are reducing the resources to be devoted to welfare measures. In the newly developed countries which are undergoing a period of growth, public policy is called to develop a welfare system capable of meeting the essential needs of the population, health and safety, old age pensions, protection from unemployment. These countries should avoid the pitfalls and the uncontrolled increase of costs which have burdened some traditional welfare systems. Their road to social policy making needs not reproduce the patterns adopted by the historically industrialized countries. In all cases, even taking into account the different level of economic and institutional development of the various countries, the new global context requires a 'recalibration' of the structures and content of the welfare of last century. A more active set of policies is necessary both to reduce the increasing costs of social benefits and to mobilize the capacities of users, in order to promote their personal development and not simply to assist them in case of need.

An opportunity to be caught is to exploit the potentials of individuals, and even of individualism, by supporting personal trajectories in the various life cycles and by investing in the different personal qualities of people as to shape their "capabilities". In this perspective welfare measures come to be seen more than a cost as a social investment,<sup>467</sup> and prove to be not only compatible but functional to sustainable growth and to competitiveness.

This new approach to welfare measures may facilitate their extension beyond the traditional coverage of core employees, to non standard workers and to the growing number of migrant workers which have been so far excluded from protection and mostly ignored. All social regulations and policies at national and international level, have been finalized to counteracting the many factors which make them more vulnerable than other employees: various measures can contribute to this objective: regulations to guide the flow of migrant workers across national borders in a socially sustainable and secure way: protection from the risks of exploitation at work and of unemployment; effective access to major social security benefits in case of mobility of workers among

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<sup>466</sup> M. Hansenne, *Labour flexibility: the quest for competitiveness versus the need for social protection*, in *Reconciling Labour flexibility*, quoted, p. 27 ss.

<sup>467</sup> A. Hemerjick, *Changing welfare state*, quoted, p.133 ss.; M. Ferrera, *The boundaries of welfare: European integration and the spatial policies of social protection*, Oxford Univ. Press; E.B. Cantillon, *The paradox of social investment: growth, employment and poverty in the Lisbon era*, Journal of European Social Policy (JESP), 2011, p. 432 ss.



different countries, in particular by way of mechanisms of totalization, either legal or negotiated in transnational agreements.<sup>468</sup>

New forms of welfare may also be necessary to facilitate the inclusion of weak groups and areas so far not covered. Some experiences of emerging countries indicate the importance of group solidarity and of mutual support, for shaping forms of micro finance and insurance capable of reaching these sectors of the working population.

An immense task for the future of welfare is to reach the great number, almost half of the world population, who is working in the informal economy. A few attempts are being made in some countries to allow these irregular workers to emerge gradually, by way of a combined use of incentives and disincentives; but with uneven success.<sup>469</sup>

## 6. Revitalisation of collective actions.

The changes in the economic context and the diversification of work require a reappraisal not only of public employment policies but also of collective bargaining and industrial relations. How to do it is a controversial issue which has received different solutions also by those, governments and social parties who consider collective bargaining and industrial relations an important form of social participation and of employees protection and not an obstacle to the better functioning of the economy.

Collective agreements have been shaped, like statutory law, according to the dominant patterns of standard employment and mostly based on the experience of the social parties of industrialized countries. If they are to remain a major source of regulation and promotion of employment, they too must revise their objectives and practices so as to respond to the diversification of employment patterns, and, on the other hand to the globalization of the markets.

Indeed these challenges are affecting the system of Industrial relations even more directly than the legal status of the contract of employment, insofar as industrial relations are exposed in many cases, without protection to the pressures of the markets and because the diversification of work affects the very basis of collective action and solidarity of the workers, more than the initiatives of the employers.

The main responsibility for the revision of Industrial Relations rests with the social partners, in particularly with the labour unions. In fact the Unions have to reframe the relations with their social constituencies, which have drastically changed from the homogeneous and national work-class of the fordist industry to the tertiary diversified and mobile workforce of today.

But the national States and their legislator have been always important in framing the institutional context in which Industrial Relations have developed in the past decades, although with many variations which have contributed to shape the “variety of capitalisms”. We can assume that the

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<sup>468</sup> See the general report by prof. M. Asher to the 21th World Congress of ISLSSL, Cape Town, Sept. 17, 2015, *Social Security: which way forward?*; and *Setting an ILO agenda for fair migration*, 2014. Report of the director general to the 104<sup>th</sup> session of the International Labor Conference, Geneva.

<sup>469</sup> See the *Report of the Committee on Social Security*, Inter. Labour Conference 2001, Point 2, *Extension of social security coverage*, and the general report of prof. M. Asher to the 21th World Congress of ISLSSL, Cape Town, Sept. 17, 2015, *Social Security: which way forward?*

interplay between the (internal) dynamic of the labor movement and the initiative of national institutions will continue to influence the future of collective labor relations.

But the recent experience of most countries shows that this interplay may be less virtuous than in the past, i.e. less capable of sustaining collective action in the promotion and regulation of work.

In fact even the scholars most sympathetic with the role of collective agreement and Industrial Relations seem to oscillate between a moderate optimism and a moderate pessimism about the future.<sup>470</sup>

I cannot elaborate further on this. But we know enough to promote common research of innovative thinking about the possible alternatives, and of measures capable of influencing the evolution of industrial relations system.

I am convinced -that- the adverse factors, which are weakening collective bargaining where it is well established and are hindering its development where it is at an early stage can be opposed only by concurrent action and interplay by public institutions and social actors.<sup>471</sup>

A major challenge for public policy is to redress the balance of power which globalization and the crisis have made unfavorable for the labor side and the unions. Public support for collective action at present has some specific testing grounds: a) recognition of basic individual and collective rights, beginning with freedom of association and of collective action; b) at company level support of workers participation in the organization of work and in enterprise life; c) support of the right of employee representatives to participate in the public institutions which provide employment and welfare services; d) provision of a universal safety net to support the collective participation of employees and citizens in local institutions which are still decisive even in time of globalization.

The experience of countries where this participation is widely adopted has shown positive results not only in facilitating employment relations, but also in improving both the welfare of workers and the productivity of firms. This approach however requires a major change of attitude in the culture and practice of the social parties, particularly of the unions most dedicated to conflict and often alien to participation.

Moreover, unions are required to be more sensitive to the needs of the different types of employee, not only to the traditional core of insiders and to become not only wage negotiators but welfare and service organizations, acting as intermediaries between public institutions and employees for full access to the opportunities of the current society.

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<sup>470</sup> A rather pessimistic analysis is presented in the paper by L. Baccaro and C. Howell, *A common Neoliberal trajectory: the transformation of Industrial Relations in advanced capitalism*, in *Politics and society*, n 4, 2011., p. 521-563; a more nuanced vision can be found in M. Keune, *Decentralized wage setting in time of crisis*, *European Labour Law Journal*, n.2, 2011; J. Visser, *Recent trends and persistent variations in Europe's Industrial Relations*, Dutch Social and economic council, 2004, [www.ser.nl](http://www.ser.nl).

<sup>471</sup> S. Sciarra, 2009, *Transnational and European ways forward for collective bargaining*, WP C.S.D.L.E. "Massimo D'Antona", INT-73/2009, in <http://csdle.lex.unict.it/workingpapers.aspx>; J. Visser, *The rise and fall of industrial unionism*, Transfer 2012, I. For a critical view L. Baccaro, C. Howell, *A common neoliberal trajectory: the transformation of industrial relations in advanced capitalism*, quoted, p. 521-563; a more nuanced vision is presented by M. Keune, *Decentralized wage setting in time of crisis*, *European Labor Law Journal*, n.2, 2011; J. Visser, *Recent trends and persistent variations in Europe's industrial relations*, Dutch Social and Economic Council, 2004, [www.ser.nl](http://www.ser.nl).

Innovative initiatives in industrial relations might require not only change of the contexts and of the structure of collective bargaining, but the search for new forms of collective action based on the new motivations and identities of the variable workforce of today. This might require a multidimensional approach - bilateral and trilateral - to the regulation of individual and collective relations of the various groups, possibly involving not only working condition but also other aspects of working life.

This approach can hardly be promoted from above, instead it need to be experimented, as confirmed by some cases, in the different territorial contexts at the initiative of local actors, both private and public.<sup>472</sup>

### 7. International projection of social policies: multiple levels of action and different legal techniques.

The new directions of policy sketched here have a major testing ground within the national states even in a globalized world. The outcomes of national reforms and the major indicators of national labor markets have been different, depending on the economic and social conditions of the countries, but also on the quality of the institutions in charge of public policy making.<sup>473</sup>

But given the global dimensions of the present economy, national testing of these policies is insufficient. It and cannot be successful unless national social and economic policies can meet the challenge of international markets; a challenge which can hardly be met in isolation by individual countries, even by the strongest ones.

That is why some kind of international projection of social policies must be promoted. This can be done only at the concerted initiative of national and supranational actors, directed to promote the social dimension and the democratic development of globalization. To this end the present status of supranational actions must be reinforced and finalized to promote a common approach (at least) in the major aspects of social policies.

In order to pursue this objective, public institutions and social actors have to interact, differently from the past, with various levels of governance, at least three, namely national, regional and global.

This multiple fields of action is a further factor which requires innovation of both the merit of policies and of the instruments for their implementation. The quest for transnational responses to these problems is proceeding slowly, in spite of the efforts of (some) actors. That is why innovative research directed to frame these responses is needed also by national labor experts and comparatist lawyers.

The interdependence between different national economic and social spaces has become so tight that the traditional terms of comparison are often blurred and need to be redefined. The national legal and social systems, confronted with this interdependence, are exposed to unprecedented form of regulatory competition which is not (yet) subject to a defined set of supranational rules.

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<sup>472</sup> See the report by Jude Fudge to the 21th ISLSSSL World Congress, quoted.

<sup>473</sup> See on the importance of institutions and of institutional change, C. Howell and R. Kolins Givan, *Rethinking institutions and institutional change in European Industrial Relations*, BJIR 49, 2011, p. 231 ss.; K. Thelen, *Institutional change in advanced political economies*, in BJIR, n. 3, 2009; and the first results of the ambitious research project presented by S. Deakin at the 21th ISLSSSL World Congress, quoted.

No simple replication of national patterns abroad is feasible. The diversity of national economic, social and public institutions, combined with the different stages of development of the various countries, requires a patient exercise of reciprocal understanding and of mutual learning. Exchange of good practices, possibly guided by some form of institutional mediation, may lead to virtuous forms of hybridation of different national models.

The transnational dimension of problems has contributed to diversify and to adapt also the forms of regulation. The European Union, which is a relatively homogeneous area regulated by a common, although partial, legal system, has experimented the limits of the traditional rules of hard law and has adopted various forms of soft law, in particular the open method of coordination (OMC). In spite of the scarce effectiveness and coherence of these forms, they have appeared to be a necessary “second best” with respect to legally binding measures, which have proved difficult to introduce, both technically and politically.

The experience suggests that in order to promote gradual experiments in transnationalism, different instruments may be combined, according to the specific objective to be pursued. Some social matters are hardly suitable to be regulated by rigid norms of law, and are better handled by a complex mix of flexible rules, organizational changes, consistent behaviors of social parties and of public institutions. This is the case eg. of active labor policies, of welfare to work practices and of the measures directed to promote employability.

On the other hand the various forms of soft regulation can be made more effective by improving the procedures of their implementation, the instruments of control and monitoring and the review mechanisms. This possibility is only in part confirmed by the experience of the ILO labor standards and by the European open method of coordination (OMC):<sup>474</sup> in both cases improvements are required.

## 8. Sustainable development.

Transnational actions can not be promoted simply through legal procedures and not even by distributional measures. More comprehensive economic and social policies are needed to create the structural conditions of a sustainable development for all the areas of the world, and to redress the historical obstacles which have hindered the growth of disadvantaged countries.

The pursuance of such an ambitious goal goes beyond the capacity of individual actors and even of individual states. It requires a long term commitment by national governments and by the international organizations. A coordinated action of the governments of the major world economies have been repeatedly advocated by the major international organizations (ILO, OECD, WORD BANK) and by the international summits of these governments. Detailed agendas of measures have been agreed upon and finalized to promote sustainable development, or, as it is usual to say, to guarantee “stability and growth”. But the implementation of these agendas has been at best partial and uneven, in front of the uncertain and turbulent state of the world economy.

Beyond the general commitments of these institutions, useful contributions in this direction can

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<sup>474</sup> M. Heidenrich, J. Zeitlin (eds), *Changing European employment and welfare regimes. The influence of the open method of coordination on National Reforms*, London NY, Routledge, 2009.

come from programs and initiatives implemented in specific sectors and areas by national and regional actors, public and private. Similar initiatives are being taken in great number by way of bilateral and multilateral treaties, which combine mutual regulation of trade with development programs and social clauses.

In fact the possibility to proceed along the path of transnational action and regulation depends on many variables and on a myriad of decisions in the private and public domains, nationally and internationally, with regards to all aspect of policy. A multiplicity of actors are involved and different vectors may be appropriate according to the issues and to the spacial dimensions of the specific actions.

Our discipline has a role in the task of promoting sustainable development; provided it does not limit itself to reacting to external economic pressures. An active role can be exerted by using in a innovative way the specific instruments of the law and of collective action.

Our common discussions have given significant, although tentative, indications on how legal and collective instruments can contribute to this goal: to sustain employment and the quality of work, which are the basis of sustainable development; to foster workplace flexibility and productivity while guaranteeing security in the labor markets; to facilitate a positive use of organizational and technological innovations; to promote the welfare of people; and, equally important, to give voice, motivation and confidence to the employees in the working place and in the public scene.

## 9. Multinational enterprises and transnational company agreements.

The enterprise, is a key vector of development, which is undergoing itself a process of change. The global dimensions which many companies are acquiring make them a decisive player not only of national labor relations, but also of transnationalism. In their cross borders operations they can promote both global trade and transnational regulations of employment.

The influence of multinationals in these fields may have different impacts. An exhaustive and accountable evaluation of their quality and results is needed to draw conclusions in the merit, even more so because the role of these companies in this respect is a matter of controversy, often more ideological than factual. However the international role of multinationals is already significant and takes different forms:<sup>475</sup> unilateral ad hoc initiatives, stable programs in various economic and social domains, guidelines of corporate social responsibility of variable content and impact, and more recently collective agreements with representative organizations of their employees (works councils and/or national and international unions).

Transnational company -wide agreements can be an important vector of regulation across the borders in many labor and social issues.<sup>476</sup> This type of agreements may have a impact on employment conditions more direct than transnational agreements of wider coverage, concluded

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<sup>475</sup> ILO, *Tripartite declaration of principles concerning multinational enterprises and social policy*, 4<sup>th</sup> ed., Geneva, 2006. P. Tergeist, *Multinational enterprises and codes of conduct: the OEDC guidelines for MNEs in perspective*, in R. Blanpain (ed), *Comparative labor law and industrial relations in industrial market economies*, 2014, W. Kluwer, p. 213 ss.

<sup>476</sup> I. da Costa, U. Rehfeld, *Transnational collective bargaining at company level. Historical developments*, in K. Papadakis (ed), *Cross borders social dialogue and agreements. An emergency global Industrial Relations. framework?*, Geneva, ILO, ILLS, 2008.

between the national or territorial organizations of employees and of employers in specific productive sectors. These latter agreements, according to the present legal regimes, have no legally binding effects on the individual companies and on their employees. The attempts made within the European Union to give an even light legal framework to transnational collective agreements have met with a diffused resistance by the collective organizations of both parties.<sup>477</sup> So the regulatory impact of these agreements depends essentially on the factual influence that the signing organizations can exert on their national and international constituencies.

The experience shows that the influence of the collective organizations in this domain is reduced with respect to that which they can exert within the national borders. Here they may be helped by friendly governments and the links with their constituencies has been tested by many years of common practice. Collective links across the borders are weak because both labor unions and employers associations have never adopted an effective transnational organization, nor delegated powers to the international bargainers sufficient to provide them with some kind of legitimation and binding authority on their national constituencies and even less on the individual companies and their workers representatives.

Transnational company agreements, like national company agreements, have a “comparative advantage” in this respect, because their regulatory impact on employment conditions depends on the power of the employer to determine these conditions; power which the employer may exercise at his discretion or according to the terms of the agreement that he has signed with the legitimate representatives of his employees.

The fact that the enforcement of company agreements depends on the power of the employers is not irrelevant for the contents of these agreements. They tend to reflect in the first place the priority agenda of the company, which may be more or less influenced by the bargaining power of the employees representatives. The practice of company- wide agreements is likely to acquire growing importance, in line with the general trend towards the decentralization of industrial relations. But it remains to be seen what the impact of this practice will be on the general evolutions of industrial relations and of collective agreements. It is uncertain whether they will promote bilateral regulations of employment at the level of the enterprise thereby enriching the contents of traditional national bargaining, or instead they will favour management led practices and (further) reduce the scope of sectorial and territorial collective agreements.

The agreements signed by some transnational companies with the European works council (EWC) have provided different evidence of their impact and contents. But they have proved to be an effective vehicles of transnational regulation in many issues of employment and of welfare. In some cases they have promoted good innovative practices of work organization and of workers participation. Often they have managed to regulate matters which have proved intractable at sectorial or territorial levels, in spite of the support given by the European Union to collective bargaining and to social dialogue.

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<sup>477</sup> E. Ales et al., *Transnational collective bargaining. Past, present and future*, Final Report, European Commission, feb. 2006; A. Lo Faro, *Bargaining in the “shadow of” optional framework? The rise of transnational collective agreements and EU Law*, *European Journal of Ind. Rel.*, 2012, 2, p. 153-165.

This is the case e.g. of issues concerning the restructuring and reorganization of firms or groups of enterprises, the consequent redundancies, and in general the various processes of outsourcing of work, subcontracting and organizations of supply chains.<sup>478</sup>

#### 10. International treaties as vectors of transnationalism. The case of TTIP.

The diffusion of International treaties in different forms and with different actors has made them a major vehicle of transnationalism.<sup>479</sup> Their relevance to the regulation of employment and social issues is a matter of open discussion. The recent negotiations going on across the Atlantic with to aim to conclude the so called TTIP and for the Pacific area to sign a similar mega-treaty (TPP) are a major testing ground. The outcome of these negotiations, given the importance of the areas and of the actors involved, will set an important benchmark for similar treaties in the future. The scope announced for the agreements, I refer specifically to the TTIP which I know better, is so wide ranging that it will influence not only trade regulations, but the most important aspects of the future development of the world and of the lives of its inhabitants.

The presence of social clauses and of social chapters is frequent in international treaties.<sup>480</sup> But they have different contents, variable degree of details and of commitments by the signatory parties. The language itself reflects the difficulty of reaching a compromise in defining these commitments, which are often phrased in vague or ambiguous terms.

The application of the various treaties has been uneven, confirming the importance of the clarity of the compromise, but also of the procedures of monitoring and of implementation agreed upon by the parties. The experience accumulated in the years is a sign of vitality of this form of transnational regulations and of the learning capacity of the protagonists, which have been able to expand often these regulations from trade issues to social and employment issues.

The negotiators of the TTIP, in defining a possible social chapter, have to confront, differently from other previous negotiators, two continents which are both economically and socially developed, but whose social regimes are different in many respects. Indeed they are considered to represent two opposite models, the European social market economy and the Atlantic free market capitalism. Both areas maintain Important institutional and socio economical differences which deeply influence their social policies. Moreover these latter have been only in part harmonized within the two regional areas, by internal regulations (of the European treaties and of NAFTA) and are exposed to divergent trends in the recent periods of economic crisis.

Given these conditions, the public opinion, particularly in Europe, has expressed strong worries that a compromise in the TTIP might contribute to reduce the labor and social standards prevailing in Europe: indeed not only these standards but also those relating to safety and quality of

<sup>478</sup> M. Carley, M. Hall, *European works councils and transnational restructuring*, Dublin, Eurofound, 2006.

<sup>479</sup> L. Compa, *Labor rights and labor standards in transnational trade*, 25 *law and Pol.*, *Y. Int. Bus.*, 165/1993; ID, *Labor rights and labor standards in transnational trade and investment negotiation. An American perspective*, Transatlantic stakeholders forum, W. Papers series, John Hopkins Univ., 2014; J. Bellace, *Human rights at work: the need for definitional coherence in the global governance system*, *Int. Journal of Comparative Labour Law and Ind. Rel.*, 2014, p. 175 ss.; J.M. Sirohen, *Labour provisions in preferential trade agreements: current practice and outlook*, *Inter. Labor review*, 152 (2013), 1, p. 85 ss. ; *Social dimensions of free trade agreements*, International Institute for Labour Studies, Geneva, 2013.

food, to protection of the environment etc. In order to avoid this risk the European institutions (Council and Parliament) have mandated their negotiators on one hand to safeguard these standards, both European and national, and on the other to insert in the treaty guidelines committing both parties to improve these standards, by full acceptance, application and enforcement of the eight major ILO social conventions and of the decent work agenda.<sup>481</sup>

It is also recommended to include guidelines for the Corporate Social Responsibility (CSR) of transatlantic companies. The companies registered according to the European rules are requested to apply to their employees the right to information and consultation granted by the European directives. Further recommendations are directed to promote best policies and practices in various areas. Important for the future of work (active labor policies, quality of work programs, continuous training measures, promotion of social dialogue, etc.).

These instructions confirm the difficult task of the negotiators in both directions. The Europeans negotiators have to defend their social standards vis a vis atlantic companies and actors which are used to apply different (often lower) standards, concerning both the individual employment contract (e.g. the law of dismissals) and collective labor relations (e.g. the law of conflict and of collective bargaining). A different but equally demanding task for both negotiators is to agree on how to improve their social policies according to the best international standards.

Promotional clauses in this direction can hardly be enforced by traditional instruments of hard law. They will have to be sustained by joint systems of monitoring, by periodical reviews of practices, and by appropriate procedures of dispute resolution like those experienced in similar treaties. The mandate to the European negotiators recommends that the social and economic impact of the treaty be subject to systematic evaluations according to the criteria of the European 'sustainability impact' (SIA). A collaborative and efficient use of similar procedures has proved to be the best way to promote an effective application of many international treaties. It has contributed to foster a positive dialogue between the various actors involved: companies, workers representatives, public institutions, labor courts and also organizations of civil society.

Similar indications come from other experiences of international labor market regulations and from the guidelines of international organisms. The commitment of the various actors, national and international, which participate to the process of formation and implementation of these rules, combined with appropriate review mechanisms, has contributed to the fact that labor standards are increasingly recognized across the borders. The continuation of this process may be important in promoting a sort of 'incremental transnationalism' useful to sustain regional and subregional integration processes.

#### **11. Direct forms of transnational action: the use of European Funds.**

Different and more direct forms of transnational regulation and action have developed within those regional areas which have set up common institutions and legal regimes. In the European Union these institutions have been entrusted, more or less formally, with the task to regulate

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<sup>481</sup> Resolution of the European Parliament, 8 July 2015, Prov. (2015) 0252; European Parliament, Commission for International Commerce, *Lange Report*, 2014/2228.



not only economic and financial matters, but also a whole range of social issues, which have acquired in many decades a series of common traits.

The history of 'social Europe' confirms the variety of techniques adopted for the promotion of common rules and policies in the social sphere. It shows positive results but also setbacks due to various obstacles: weak recognition and legitimation of the European initiatives in these matters, specially vis a vis the commitments to financial integration, increasing pressures of centrifugal forces and forms of resurgent nationalism.

The instruments of hard law such as the directives have given way to the OMC and to loose guidelines, which, as indicated above, share the value and the limits of other forms of soft law.

Other types of transnational action have been developed in the Union not by way of legislation nor of formal guidelines but through common European funds and resources to be used by member states and by social actors for agreed upon social and economic objectives.<sup>482</sup>

Among the most important are the social fund for education, training and promotion of employment; the fund for regional development, more recently the fund for the 'adjustment to globalization', which is a first transnational measure to counteract the negative effects of globalization on national enterprises and on their employees.

A major investment program directly financed by Union resources have been recently announced by the president of the European Union with the aim of improving the weak performance of the European economies.

Proposals have also been advanced to establish a common system of unemployment benefits for European workers financed with European funds. Such a fund would be an important sign of cross border solidarity and would function as an automatic economic stabilizer for the recurrent periods of crisis: a much needed forms of transnational action.<sup>483</sup>

Similar funds which could be experimented in other regional areas, by way of bilateral or multi-lateral agreements with the aim of extending across the borders selected forms of welfare, and of sustaining national welfare systems. Welfare system need transnational solidarity, particularly where they are in an early phase of development and in fields where they mostly suffer the consequences of economic crisis and underdevelopment: fight against poverty, guarantee of minimum levels of income, promotion of young employment, but also special programs to support basic and professional education.

## 12. Proposals for international research.

The scenario sketched here confirms my belief that innovative and common research is necessary to deepen our understanding of the future of work, so as to make contributions to innovative policy-making in employment and social security matters.

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<sup>482</sup> On the use of European Fund, see the *Social investment package*, Communication of the Commission (COM 2913), 83, M. Heidenreich, 2009, quoted, p. 22.

<sup>483</sup> S. Dullien, *A euro-area wide unemployment insurance as an automatic stabilizer: Who benefits and who pays?*, European Commission, Social Europe, Office of Publications of the European Union, Luxembourg.

The members of the International society for labor law and social security have the intellectual and professional resources to support comprehensive research in these directions. They combine direct experience and knowledge of different national systems with the capacity to evaluate the national traits in a international and comparative perspective.

Here is a tentative list of research areas which seem particularly important in the light of the above presentation and of recent meetings held within the international society of labour and social security law,

### **I. Informal and irregular work**

Most of the world's workers are in the informal sector. In many emerging economies, over 75 percent of the labor force is composed of informal businesses and workers (ILO data). As a consequence labor law studies should focus more specifically on the informal sector.

Major objectives of this research group should be

- to deepen our understanding of the multifaceted aspects of informal and irregular work as they exist in different national and territorial contexts.
- to evaluate the different policy approaches and best practices in labor law and social security adopted by public institutions and by social actors, having regard to the various aspects of informal work and taking into account the regulations most frequently disregarded in the various situations.
- to investigate the possible techniques and policy measures (incentives, disincentives, private and public controls, development programs etc.) useful for promoting the chances of informal work to emerge and to be stably accepted in the formal economy.
- to discuss whether and to what extent labor unions and employers, by ensuring collective agreements application, also within SME, may help to fight irregular work, and promote the access of informal workers to the essential protections and benefits of professional training, of labour law and of social security.

### **II. Migrant workers**

Many factors have given new and dramatic dimensions to people migrations: economic globalization, divergent conditions of work and life among different areas of the world, political and civil conflicts in many regions which force entire groups to expatriate. The pressure of various forms of migrations is hitting in different degrees many national states and communities.

Some progress have been made in the definition of the legal status of migrants, setting forth the general obligations to respect basic human rights. Nevertheless more intense attention has to be paid, also considering the expansion of this trend, to factors as the high rate of unemployment, the risk of exploitation, trafficking and social segregation, the lack of adequate social protection which make migrant workers more vulnerable than others employees.

Such vulnerability and distortion determine, among other effects, human labor trafficking. This particularly serious phenomenon deserves a renewed interest due to changing trends in migration flows and the globalization of labor.

- The research group should give priority to some aspects of migratory trends, in particular of migrant workers.
- How to find new measures, national and international, to regulate the flow of migrants workers across national and continental borders in a socially sustainable way.
- How to combine controls and security checks necessary to guarantee social acceptance of migrants with measures to promote their integration in the civil communities and in the labor markets.
- Which specific provisions are effective to protect migrant workers against labor exploitation and to favor their employability in the formal economy.

### **III. Global trade and labor**

International trade has been promoted and regulated in recent years through various regional and international agreements.

The analysis of the agreements of various dimensions (bilateral, regional or continental) should consider their impact not only on economic growth but also on employment, on working conditions and workers' rights. In this respect the group should investigate:

- Possible contents of social clauses, and the technologies which they adopt in order to guarantee international labor standards to the individuals and groups affected by trade agreements.
- The role of the law and of social actors in implementing and enforcing social clauses.
- The increasing legal relations between foreign direct investments, multilateral trade agreements, and domestic labor law regimes.
- The effects of international trade agreements on national measures addressing inequality such as minimum wages, prevailing wage requirements, unemployment benefits, affirmative action for historically excluded groups and other social protections.
- The compliance of recent international trade agreements with the ILO standards.
- A special focus will be placed on ISDS clauses.

### **IV. Organization, productivity and well being at work**

In the last years the role played by Trade Unions and collective bargaining at national and international level has decreased in importance, while, as a consequence of decentralization processes, a central role is played by collective bargaining at enterprise and at plant level.

Enterprise collective bargaining is regarded as a possible way of fostering workplace flexibility/productivity, efficiency and workers' well-being. Also individual negotiation appears to be a possible tool to regulate working conditions, to increase the individual worker's productivity and, at the same time, his/her satisfaction about wages and other benefits.

For this group research project will focus on

- The role of collective and individual negotiation in the regulation of wages and working conditions.

- The role of enterprise level collective bargaining in fostering workplace flexibility/productivity and workers' well-being.
- The role of enterprise collective bargaining in the regulatory competition.
- The role of corporate social responsibility.
- National reforms concerning enterprise collective bargaining in a comparative perspective.
- Best practices of high involvement and team work systems, and of innovative use of technology in work organization (e.g. remote and smart working) in respect to their impact on firms performance and on employees wellbeing.
- Role of management initiatives and of collective agreements in promoting new forms of welfare, such as supplementary pension funds, supplementary health insurance, flexible benefits of various contents.

#### **V. Transnational collective agreements**

With the internationalization of the economy and due to increasing competitive pressures, collective bargaining is developing in new directions. The growing number of transnational companies has introduced new actors and different strategies for collective action, on both the employees and the employers side: Transnational collective bargaining is a response to this challenge.

The transnational dimension acquired by collective bargaining addresses new questions to be investigated by labor law research:

- New and old social actors involved. Is unionism suited for a transnational action?
- New and old issues negotiated at transnational levels: distinguish firm level and sectoral collective agreements.
- The link between the agreements signed by transnational firms and the governance of these firms.
- The role of national governments.
- The role of international organizations.
- The legal and practical effects of collective agreements on national and local labor relations: need to distinguish firm level and sectoral collective agreements.
- Relations between firm- level agreements and corporate social responsibility.

#### **VI. New forms of social security**

The social security systems of most countries, developed and developing, are facing new and pressing problems.

Suitable social security models need to address the challenge of widespread informality and precariousness in work as well as the low wages often provided for precarious workers. While often benefits are conferred according to the length and the status of employment relationship, new types of employment based on a low and fragmented income are spreading and are increasing

the number of working poors for which the States must provide means of support. A wider scenario of social exclusion is present in less developed countries, but also in some areas of the industrialized world, beginning with Europe.

The research project of this group should analyse:

- The challenges to sustainability of the national social security system.
- The possible response to these challenges by public institutions and social actors, at national and international level;
- The role and domains of private and collective forms of supplementary social security and welfare benefits.
- The possibility to extend social security schemes to informal and non standard employees.
- The ways to strengthen social security systems through minimum income or other inclusion measures and how to activate the beneficiaries.

The list of issues and the research items indicated above have been approved by the executive committee of the ISLSSL held in Cape Town, in Sept. 15, 2015. They are open to discussion and to possible amendments.

Each area of research should be promoted by a study group formed on a voluntary basis, composed of a limited number of international experts selected for their specific field of interest.

Each group should be coordinated by one or two members and will decide the method of work, the duration of research programs and the possible publication of results.