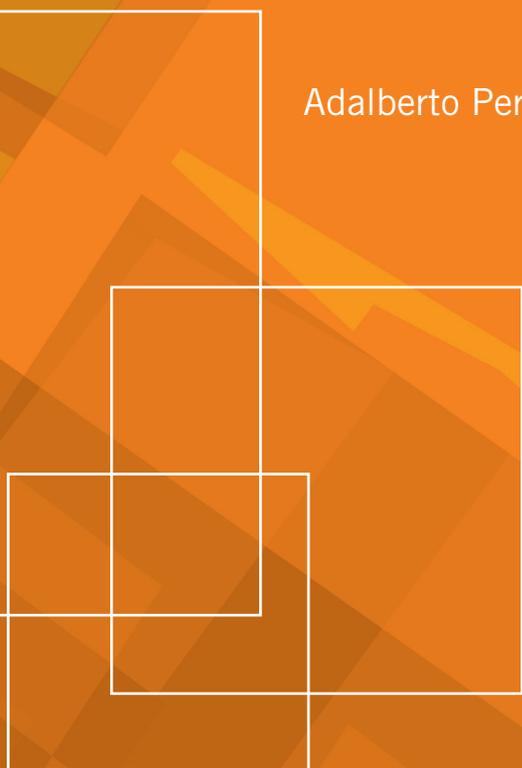




LAB/ADMIN

Social rights and administrative regulations for effectiveness and sustainability: What modernization of labour law?

Adalberto Perulli



**Labour Administration and Inspection Programme
LAB/ADMIN**

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for effectiveness and sustainability:
What modernization of labour law?**

Adalberto Perulli

International Labour Organization – Geneva

2012

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Preface

As part of the research and studies under the Labour Administration and Inspection Programme (LAB/ADMIN), the topic dealing with social rights and administrative regulations for effectiveness and sustainability is one of the most debated. The paper written by Professor Adalberto Perulli of the University of Cà Foscari of Venice (Italy) is a follow-up to the previous paper that Prof. Perulli and I edited on “Compliance with labour legislation: its efficacy and efficiency” of 2010.

In this study the author deals specifically with the adjustment and modernization of labour law in a period of global crisis which, according to the author: “confirmed the unsustainability of economic models that had been thought of as well established”.

The issues articulated in this comparative paper look at the effectiveness of the administrative regulations; the implications of labour law vis-à-vis the economic concerns; the interrelationship between economic regulations and fundamental social rights; the responses from the European Union and more specifically to the debate around the policy of “flexicurity” with all the diversity of its applications. In this regard, the author examines the pros and cons of the “soft labour law” that opens the way to a much deeper debate on a fundamental alternative for the scope of labour law. In a certain sense argues the author, the effectiveness of labour law may decline, but this will depend on the values to be ascribed in the dynamic between economic efficiency and social justice.

The entire paper is part of a wider analysis that is being carried out within the LAB/ADMIN programme and that deals with the compliance of labour law, taken in all its dimensions (national, supranational, international), has to face a new challenge that is the efficacy/efficiency debate of labour law.

The hope is that this paper would inspire further reflections on this subject matter and that more effective responses could be provide to such a dilemma posed by the effectiveness of labour law.

Particular thanks go to Mr Nicholas Bano, an intern with LAB/ADMIN, for his collaboration when revising this study. Special thanks go to Ms Riette Lagarde for her assistance in the editing and formatting this document.

Giuseppe Casale
Director
Labour Administration and
Inspection Programme
(LAB/ADMIN)

1. Introduction

Any study on the adjustment and modernization of labour law must start by noting the symbolic and tragic economic and social crisis that we are currently experiencing. This global crisis, which confirmed the unsustainability of economic models that had been thought of as well-established, has its roots in a process of deregulation, consisting of the gradual dismantling of the system of rules built after the Great Depression. A report in the *Wall Street Watch*, “Sold Out: How Wall Street and Washington Betrayed America” (2009), documents the stages of de-regulation that led to the collapse. These begin with the abrogation of the Banking Act 1933 (1999), which gave the green light to operate investment banks as “creative” financial instruments; continue through the de-regulation of financial derivatives (2000); the change of the regulatory regime imposed by the SEC (Securities and Exchange Commission) with regard to banks in terms of the value of debt-equity that has increased their debt levels (2004); and cumulate in the Credit Rationing Agency reform (2006) that weakened the powers of the SEC in its oversight of credit rating agencies.

The current crisis shows that the myth of the “invisible hand” of the system of regulatory allocations (the idea of development achieved by the market itself) is fallacious, and that the vision of a system of self-regulation, so dear to neoclassical economics, should be abandoned. If globalization without rules appears to have defeated the role of standardization, a serious question of the hetero-regulation of economic processes must now be posed. The rules of conduct for economic activity should be derived from respect for the world’s democratic citizens. This theme, that this should be one of the rules, has recently been described by an Italian jurist (and not merely by chance) as one of “great obsessions” of capitalism¹. It is a theme that is dismissed by the more extreme advocates of the free market. For example, Friedrich von Hayek, in his influential work “*The Road to Serfdom*”, argued that large-scale involvement in the economy leads to collapse of individual freedoms, and that economic analysis cultivated regulation. Consequently the new orthodoxy of financial capitalism is a reductionist approach which is fully committed to a vision with rules of efficiency, the legitimacy (and the same extent the validity) of which is indirectly proportional to the degree of resistance that they held against the free unfolding of economic rationality.

The underlying themes of this crisis are those of rules and regulation, and the relationship between market and law. This is apparent through the signs of the crisis, namely the rampant illegality both of the markets and within the markets, affected with particular arrogance by economic actors. In the United States, Europe and Asia, proceedings against companies accused of corruption, fraud against the state, fraud against other private individuals, or of wrongdoing against consumers and shareholders have multiplied². Irresponsible behaviour by economic actors is a direct consequence of a vision of economic rationality governed by the free play of individual selfish interests moving in a world of “darkness and blindness”. It is a rationality not only surrounded by, but also based upon the unknowable nature of a process; a model whose characteristic of uncontrollability is not a contrasting reaction to, but it is instead based upon the atomistic rationality of the economic actor³.

¹ See G. Rossi, *Il gioco delle regole*, Adelphi, Milano, 2006.

² G. Rossi, *Il mercato dell’azzardo*, Adelphi, Milano, 2008.

³ M. Foucault, *Course at the College de France*.

This vision of the economy and the market was widespread at the supranational level, accentuating the trend towards the de-regulation of markets (and labour markets in particular) in all advanced capitalist countries.

Markets (which are based on legislation within nation-states, but not when they extend globally) have led to a process of de-territorialisation and de-statutization. All sorts of legal constraints that restrict the movement of capital and goods, or the provision of international services, are thereby dismantled. A Total Market that embraces all the people and all the products in the world, as each country removes its trade borders in order to gain the competitive advantage, creates a “duty free zone of export” - real space empty of law - in which political rights are suspended (as are fundamental social rights) in a “state of exception” proclaimed in the name of free trade⁴. It ensures that foreign investors would be compensated if they were to suffer a loss in value of their assets due to the application of law (for example chapter XI of the Treaty of the North American Free Trade Agreement (NAFTA) protects American companies operating in Mexico, where the paradox is that damages caused by the application of a legitimate local law are sanctioned by an international treaty).

By enshrining competitiveness as the only universal principle of organization in the world, the economy has created a new kind of totalitarianism in the twenty-first century: just as the old totalitarianism of the last century saw legal forms of enslavement (through competition between races or between classes), the totalitarianism of the market defines the new paradigm of geo-law, which is subject to the “laws” of economics. It instigates a global economy that is indifferent to geographical and political boundaries, as actors can freely choose the location that best serves their need for competitiveness (according to the principle that “everyone is free to choose their legal status”⁵).

A region that clearly embodies this model of regulated competition, and of forum shopping, is the old Europe, where economic freedoms - of establishment, to provide services, of movement of capital and goods - instigate a new Legal Darwinism in which economic actors, choosing the most profitable jurisdiction, progressively eliminate the regulatory systems that are less suited to meet the financial expectations of investors. The recent Court of Justice case of Viking, Laval, Ruffert and Commission & co. v Luxembourg (to which we shall return) shows this attitude through the adoption of the principle of competition among jurisdictions as a criterion in the interpretation of Community law, which has the effect of “contaminating” those with higher regulatory standards. This is contrary to what should be done (applying the principle of non-recourse) and contrary to what is necessary to safeguard the economic and social cohesion that is undermined by the increasingly frequent practice of social dumping. In brief, it is a process of “European deconstruction”, as defined by Antoine Lyon-Caen in an editorial in the *Revue du droit du travail*.

2. Effectiveness of administrative regulations

From this vision of efficiency, which puts competition at the heart of regulation (as it is fundamental to the international dynamic), the basis for a profound change in systems of

⁴ See A. Lang, Trade Agreements, Business and Human Rights: The case of export processing zones, LES, Working paper No.57, April 2010.

⁵ See A. Supiot, L’inscription territoriale des lois, in *Esprit*, Nantes, 2008, p. 151 ss. By the same author: *L’esprit de Philadelphie. La justice sociale face au marché total*, Seuil, Paris, 2010.

labour law is created – just as we saw in the last century. The reconstruction that will take place – should it happen – in the light of a guiding principle of judgment and evaluation is one that respects core labour standards, with parameters that surpass the laws of effectiveness and economic efficiency. It will rely on a philosophy by which the regulation of labour creates distortions in markets which otherwise – we assume - would be efficient⁶. This so-called “administration of labour law”, which the title of this study would suggest is a result of a considered balance between efficiency and economic sustainability, connotes a shift against efficiency. This demonstrates the permanent preoccupation (and the pride) of labour law with the economic sustainability of labour regulation. It focuses on sustainability that occurs by comparing the regulation of competing legal systems on the basis of statistical indicators related to macroeconomic effects of worker protection (such as the indicators developed under the World Bank’s *Doing Business*), or those defined by the OECD, in order to relate the employment protection regulation to labour market performance (measured by employment or unemployment rates).

The result of these comparisons is a market that is open to the rules of individual free choice: freedom to opt for more attractive and convenient rules. The establishment of such a market must lead to the progressive elimination of the legal systems that are less suited to meet the expectations of investors. The effects in countries such as France, Italy or Germany are generally invoked as a major “empirical evidence” of the effects of employment law rigidity. Without worrying about the serious conceptual and methodological problems that are raised through such comparisons⁷, economists referring to them believe that the ranking of countries according to these criteria reflects the reality of the situation. But this is not the case. The pursuit of job creation as a purely numerical objective, expressed in terms of the unemployment rate, neglects the qualitative aspects of jobs, which must also be taken into account if the evaluation is to be serious. The same can be said of “flexicurity”; a more complete and ambitious objective would be to aim to reduce market segmentation and to promote quality jobs.

The simplistic assertion that legal regulation hinders growth and economic development, based on the assumption that it creates costs, is contradicted on the one hand by empirical evidence (which shows that regulation will produce benefits for companies) and on the other hand because it discounts the complexity of legal labour market⁸. The objective behind the assertion is also evident: the critic focuses on power relations between workers and on the differences of interests between *insiders* and *outsiders*, but overlooks the politico-legal regulation of relations between *workers and entrepreneurs*. Moreover, the relationships between legal regulation, employment and economic growth are much more complex than the way they are currently being presented. This view is gaining ground even among theorists of deregulation, who admit that regulation should be evaluated as a function of a general framework that takes into account the ways in which certain legal rights and obligations form part of a wider politico-legal system. This attention to the legal effects of conditions of production, and the specific contexts of development and reform policies is, in fact, the essence of the “modernization” of labour law - especially in those systems where the formalization of rights, and not the deregulation of the labour market, should be a policy priority.

⁶ See G. Casale, A. Perulli, Compliance with labour legislation: its efficacy and efficiency, ILO, Working Document No.6, January 2010; A. Lyon-Caen – A. Perulli, Evaluate Labour Law, Cedam, Padua, 2010.

⁷ See S. Lee, D. McCann e N. Torm, L’indicateur “Embauche des travailleurs” de la Banque mondiale: bilan des travaux et critiques, in *Revue int. Travail*, vol. 147 (2008), 4., p. 455 ss.

⁸ See S. Lee, D. McCann, N. Torm, L’indicateur “Embauche des travailleurs” de la Banque mondiale: bilan des travaux critique, in *Rev. int. trav.* Vol 147 (2008), p. 455.

Yet the issue of evaluation is only one of the endless variations on the theme. The issue is long-standing and has never been resolved – despite numerous and contrasting reflections⁹ on the merits of flexibility of work and its (de)regulation. It is worth recalling some of the arguments here. First, the argument about comparisons the discourse on flexibility seems to feed on comparisons: it has been said for years that the low US unemployment rate is determined by the operation of dismissal at will. Is this true? Should this principle of dismissal inspire the European continental systems, where the unemployment rate is too high? It is not a fair comparison. A legal policy such as control over dismissals cannot be isolated from the legal, political and social systems in which it is inserted, and it cannot be evaluated on the basis of purely quantitative indicators. For example, an evaluation that assesses the rate of unemployment conceals significant differences in the protection of US workers against free dismissal, which depends to a great extent on many heterogeneous factors (the existence of a collective arrangement that states the rule of just cause, the state law where the company has its headquarters, the orientation of the courts that have created a legal principle of just cause, etc.). The same can be said for Danish law, which is based on freedom of dismissal, but is then counter-balanced by powerful flexicurity mechanisms that are so specialized and particular for that context that cannot easily be exported to countries like Italy, Spain or France.

3. Labour law and the economic concerns

We must try then to think differently, bearing in mind the observation with which we started: without any solid regulative basis, the global economy, the financial system and the trade system lead to market failures and social, environmental, and cultural catastrophes. We must therefore ask the following question: what rules are needed? For what kind of modernization?

To answer these questions, we must return to the origins of labour law, which were similarly driven by economic concerns and values. The deep ambivalence of labour law regulation - its being a facet of capitalism and, at same time antagonistic to its excesses by protecting fundamental rights – leads to its instigation of regulation with a view to tempering economic and social competition. The future of labour law can only be realized by the neutralization of the excesses of social competition, and by its gaining to control social competition¹⁰. The problem is that this function cannot nowadays be limited to the level of individual national systems, since the corrective mechanisms should be consistent with the needs expressed by social groups, which is increasingly difficult in a global economy. Therefore, at this time of uncertainty, the idea of a virtuous globalization must be encouraged. “Civilized globalization” is possible, starting from its pulsating heart, the international trade system. This new *nomos* of the world is that regulation is based on the market's concerns, but with the political aspect being more meaningful than ownership and the distribution of world resources¹¹.

It seems clear that international organizations (the WTO in particular), in deciding issues relating to trade, deliberate on intellectual property, environmental safety, technical product standards, health, work and the environment. World trade represents a “boundless” and “general” system, a mechanism for trading that is intended to develop an inter-norm

⁹ See L. Mariucci (a cura di), *Dopo la flessibilità, cosa? Il Mulino*, Bologna, 2005.

¹⁰ This is M. Rigaux's thesis, see *Droit du travail ou droit de la concurrence sociale? Essai sur un droit de la dignité de l'Homme au travail (re)mises en cause*, Bruylant, Bruxelles, 2009.

¹¹ This has been said by C. Schmitt, in his work “*Der nomos der Erde*”, Duncker & Humboldt, Greven, 1997.

perspective: that is a perspective which takes into account connections with non-trade issues, other social and institutional spheres, with regard to “global public goods” that liberalization without rules has thus far ignored¹². These inter-norms mechanisms must be implemented in all locations, even in non-state jurisdictions following the principle laid down by the Appellate Body of the WTO that “trade agreements are not to be read in clinical isolation from public International law”¹³. The regulation of economic and financial phenomena, when linked to globalization, merits a dual theoretical justification: one economic (to the extent that respect for the law is functional to the creation of an inter-state level playing field and, in practice, to fair competition between enterprises); the other an axiological justification, as regulation is aimed at promoting and respecting fundamental social rights, within the wider human rights and democracy framework¹⁴.

At the national level, labour administration systems and labour law, although experiencing a strong pressure from economic systems' needs for competition, have so far shown a substantial resistance to change. Yet the slogan of “modernization”, with its ambiguity, forces us to rethink the patterns of labour protection and instead focus on a difficult conjugation of flexibility and security (flexicurity), and on using new generation regulatory instruments (soft law, Corporate Social Responsibility). These come from the traditional paradigms that it will be difficult to derogate from, and they challenge the judicial control and the entrepreneur's power (see the proposals circulating in Italy and France on replacing the devices of judicial control of “economic” redundancies with a tax-based system).

On the supranational level, the trade-off becomes much more critical, both in Europe, and globally. European labour law has long been in recession (in its regulatory content, its regulatory technique, and its aim to harmonize). Now, the European labour laws must deal with an expansion of the economic logic, symbolized by competition law and by the principle of freedom to provide services. The problematic effects of this upon workers' rights are clearly evident (see the most recent jurisprudence of the European Court of Justice). Consequently, the European social model, once known and appreciated for its ability to combine the economic intentions of the Treaties with concerns of a social nature, risks taking a road of no return towards de-regulation and social dumping.

4. Economic regulations and fundamental social rights

At a global level, the need to rethink the model of economic regulation so as to include respect for fundamental social rights represents the clear impact of the economic crisis, which has shown the inability of the economic sphere to achieve targets of sustainable growth. In this regard, the issue of *linkage* between international trade and labour standards must be raised. There is a need to identify - even in the absence of institutions of global social adjustment - new ways of connecting economic rationality with social justice in the light of analysing inter-regulation of socio-economic spheres (trade, finance, environment, labour), which together are able to combine a sustainable

¹² The thesis about the inter-normativity has been developed in the work by “Le pluralisme ordonné, Seuil”, Paris, 2006, et La refondation des Pouvoirs, Seuil, Paris, 2007.

¹³ WTO Appellate Body Report and Panel Report ‘United States – Standards for Reformulated and Conventional Gasoline’, 20 May, 1996.

¹⁴ See A. Perulli, Globalisation and Social Rights, in Benedek, De Feyter, Marrella, Economic Globalisation and Human Rights, Cambridge, Cambridge University Press, 2008, pp. 93-137.

development and protection of fundamental rights¹⁵. This new regulation is permeating through many mechanisms, some of which already exist and must be further used and improved, whilst others must be set up, helping to provide a direction; a sort of guidance towards the normative space which the “global legal space” should occupy.

The fast growth of international trade in goods, services and capital, made possible by the application of the principles of trade liberalization developed under the GATT-WTO, has produced a de-territorialisation of economic activities. This is not a comprehensive political project under which the social ties with bilateral, multilateral and supranational disciplines can be retained. The system of global unilateral governance that has thus far worked, but has now proved to be unsuccessful, should be reformed both in the way in which it operates, and the objectives of its multilateral institutions.¹⁶

International organizations like the IMF and the World Bank, which are also significant players in global governance, should link their monetary policies more closely and more systematically to commercial and social standards, and to the resolution of humanitarian crises, and put onto their agenda (which is all but blank in this regard) policies to promote and protect human rights¹⁷.

As noted by the World Commission on the social dimension of globalization under the aegis of the ILO “pour une vaste majorité des femmes et des hommes, la mondialisation n’a pas répondu à leurs aspirations, simples et légitimes, à un travail décent et à un avenir meilleur pour leurs enfants”. Trade liberalization was considered, as an aim in itself, a detriment to the objectives of social justice – which should regain its status as a principle of priority on an international scale, as envisaged by the Declaration of Philadelphia of the ILO. Moreover, economic globalization and the associated reduction of the traditional border barriers (tariffs and quotas) have highlighted the increasingly important role in international trade of domestic measures taken for other purposes, posing questions as to the interrelationships between trade and non-trade issues (such as environmental protection, investment, respect for human rights and core labour standards). However, in the current transition between national systems in crisis and supranational sources in gestation, the intertwining of economic and social regulation depends on specific sectoral and bilateral negotiations. It requires a political solution at the multilateral level, if it is to stabilize a steering mechanism for the social dimension of international trade.

The mercantile system that supports globalization leaves fundamental ethical and legal problems unresolved, which now require global responses. They affect both compliance with standards of protection in the poorer countries of the world (where social degradation and violations of basic human rights are increasingly, seemingly every day, more tolerable) and the maintenance of evolved protection systems, the competitive deregulation of which is considered by governments to be the only response to

¹⁵ The link between trade and labour has been widely debated both as a general matter, and as an important part of the debate surrounding the subscription of the NAFTA, see Compa, *The North American Free Trade Agreement (NAFTA) and the North American Agreement on Labor Cooperation (NAALC)*, International Encyclopaedia of Laws, Labour Law and Industrial Relations, Leuven, Kluwer, 2008, p. 110; H. Meils, *A Lesson from NAFTA: Can the FTAA Function as a Tool for Improvement in the Lives of Working Women?*, Indiana Law Journal, 2003, p. 895.

¹⁶ L. Boisson de Chazournes, *The Bretton Wood Institutions and Human Rights: Converging Tendencies*, in Benedek, De Feyter, Marrella, *Economic Globalisation and Human Rights*, Cambridge, Cambridge University Press, 2008, pp. 210-245.

¹⁷ See G. A. Sarfaty, *Why Culture Matters In International Institutions: The Marginality of Human Rights at The World Bank*, in *American Journal of International Law*, 2009, vol. 103, n. 4, p. 647.

international competition. As noted in the UN World Economic and Social Survey 2008, “more flexible labour markets have undermined the security of employment. In many developing countries, the void left by lost jobs, due to a stagnant or declining public sector and cuts in the industry, was filled with precarious or poorly paid occupations in the informal economy or in the expanding services sector. In developed countries, the lifestyles of the middle class have been emptied (...)”¹⁸.

Only through the actions of some larger institutional structures (in addition to state involvement) aimed at regulating the global economic order, respecting social progress and promoting human rights, will it be possible to lead globalization to embody universally shared and accepted political principles. This would imply legitimacy to the actions of the market by addressing the underlying imbalances that are created by a process currently arbitrated solely by economic forces, and based on a confidence in the benefits of free market dogma.

The current problems have surpassed the market's capacity to self-regulate, as well as the regulative capacity of individual countries. They suggest the need for interventions of hetero-regulation to be carried out with standards and measures requiring respect for human rights as well as the rules of competition.

From this perspective it is necessary to introduce social clauses to international multilateral trade agreements, designed to respect the core ILO conventions.

Reform of the WTO that can “internalize the externalities” generated by trade liberalization is now necessary. Non-trade bodies involved in the governance of world trade should be incorporated in order to improve the social and environmental impact of the decisions of the panels and appellate body of the WTO, on the basis of treaties and international rules in force in its member States¹⁹.

Those who see a risk in the social clause of aggressive unilateralism that seeks to impose trade barriers in poor countries are not convincing. Similarly, objections concerning the absence of a tripartite structure in the WTO (which would allow the participation of governments and social partners in setting and implementing social standards), and the arguments for applying capitalist theory and market logic to modernize international economic and social relations, are not feasible. The response to these objections is the affirmation of what the ILO - for the first time in its history - adopted in Geneva, on 10 June 2008: the “Declaration on Social Justice for a fair globalization”, which establishes that “*the violation of principles and fundamental rights of labour cannot be relied upon or used as a legitimate comparative advantage*”. This rejected the “legality” of social dumping. The ILO itself, which recognizes the impact of trade and economic policies upon employment and social rights, hopes for the creation of an “integrated approach” to promoting decent work, and the forging of links with international and regional organizations that have mandates on “related” matters.

In the *Myanmar* case, which involved the systematic violation of ILO Convention No. 29 on the exploitation of forced labour by the military, the ILO promoted the adoption of economic responses such as restrictions on imports, the confiscation of the regime's pension scheme, and a block on economic grants. These measures were taken by member

¹⁸ UN World Economic and Social Survey 2008.

¹⁹ See W. Benedek, *The World Trade Organization and Human Rights*, in Benedek, De Feyter, Marrella, *Economic Globalisation and Human Rights*, Cambridge, Cambridge University Press, 2008, pp. 147-170.

States against the government: this confirms that if moral suasion does not work, the connection of different actors and institutions can be used to achieve social justice.

Likewise, a more effective pursuit of the EU Generalised System of Preferences is necessary – even on the basis of the European Parliament’s resolutions – with particular reference to special schemes for encouraging and rewarding the best measures of law (which rewards the emerging countries).

Another regulatory action is public procurement legislation and procedures for public/private partnerships (required by the Government Procurement Agreement and the UNCITRAL Model Law on Procurement, and the Labour Clauses (Public Contracts) ILO Convention, No. 94 (ratified by 60 countries)). These concerns governmental promotion of the adoption of social clauses into public procurement contracts in order to ensure that social standards are not a source of competition - a “race to the bottom”. The promotion of these devices by international bodies is active in the area of public contracts, including the World Bank, international financial institutions, international financial corporations, the regional development banks, the European Union and other regional organizations (COMESA, WAEMU, APEC, Mercosur, NAFTA), NGOs, and voluntary guidelines (such as “Equator Principles Financial Institutions and the International Federation of Consulting Engineers”)²⁰.

To realise the prospect of connecting different international organizations, there must be a connection on a “judicial” level among the ILO, WTO and other international organizations with specialized expertise. This was foreseen, for example, by Art. 7 of the Havana Charter, by its reference to respect for fair labour standards on a global level.

Another facet in the constructions of social condition mechanisms, and one which is interconnected with the dynamics of economic globalization, is the introduction of “essential” conditionality clauses aimed at respecting human rights in international treaties on investment, development aid, and economic cooperation. Promoting and ensuring a greater role for conditionality clauses in the work of IMF, World Bank and regional development banks allows for, if necessary, the resorting to restrictive measures or the termination of an agreement in the event of a default under the Vienna Convention on the Law of Treaties.

Among the criteria of conditionality should be the eligibility of developing countries to a total or partial reduction of their debt towards rich countries based on respect for rights, and fundamental workers’ rights in particular. There should be access to finance and insurance/reinsurance of export credits, compliance among companies with these rights, and the introduction of the OECD guidelines mechanism on social and environmental matters. Finally, among the at-risk nations, there must be compliance with the standards required by the ILO that prevent public money obtained for financing projects of international companies, but which is used to finance social dumping.

But that is not enough. It is also necessary to promote adjustment from below through a new legitimacy of civil actors with global multilevel citizenship. Without mandatory rules and pressures from civil society, companies do not have any incentive to sufficiently protect economic and social rights. Civil society, therefore, must also be held responsible for the exercise and observance of human rights (see the preamble of the Universal Declaration), in order to bring economic behaviour into line with the observance of human rights, by reporting violations to the competent bodies and giving civil society a voice

²⁰ See K. Zeisel, *The Promotion Of Human Rights by Selective Public Procurement Under International Trade Law*, in O. De Schutter, *Transnational Corporations and Human Rights*, Hart Publishing, 2006, pp. 361-393; ILO, *Labour clauses in public contracts*, Geneva, 2008.

before international bodies where it is permitted (for example, according to the procedures *amicus curiae*).

NGOs should be more transparent, and should meet the requirements of effective representation. In order for these requirements to meet, NGOs must:

- have the capacity to use all existing legal techniques to exercise the right of denunciation, ensure security and communications in the interests of victims and assisting the parties in the process;
- have the capacity to exercise the right of action in the collective interest before domestic courts and international tribunals (including the World Trade Organization and the International Court of Justice). This should follow the model given in the Protocol to the European Social Charter that grants recognized NGOs (registered on a list established by the Governmental Committee of the Charter) the right to claim for collective defence of economic and social rights (but not the right of action), and, pursuant to the provisions of the African Charter on Human Rights, a cause of action on behalf of individual victims.

In terms of remedies, there is a lack of an international law that can impose compliance with international standards. It is necessary to design and create conditions for a transnational justiciable system of economic and social rights.

Globalization, with its consequences of the denationalisation and deterritorialization of economic phenomena, requires the establishment of courts that can guarantee respect for human rights beyond national borders, where domestic law does not grant justice for rights violations. Despite the fact that systems of private international law are by definition local, the seriousness of fundamental rights violations may lead legal systems to question the traditional principles of judicial and legislative powers, see the *Moukarim* case, for instance. In that case, by reference to the concept of international public policy, the Court applied the French labour law to a foreign worker relegated to conditions of slavery by an English employer who was spending his holidays on French territory (Cass. Soc May 10, 2006).

One mechanism of extraterritoriality (in prototype) is the US Alien Tort Claims Act, which allows foreign citizens to sue the United States for any offence committed in violation of the (public international) law of nations, or of a treaty of the United States. In recent years there have been various attempts, some successful, to take legal action in American courts against multinational companies that have violated the fundamental social rights; this has allowed the development of a contentious labour law, based on the model of civil action for liability for breaches of human rights²¹.

Of course, large companies are opposed to such proceedings, but as Nobel laureate Joseph Stiglitz wrote – “*if we want globalization to work, this possibility must be extended to the rest of the world.*” We could continue in this direction until we envision mechanisms of universal civil jurisdiction – these already exist in criminal matters. Other possible actions are:

- to use the tools of the *lex mercatoria* in arbitration;
- to set up an international tribunal specializing in human rights protection.

²¹ See Andrew J. Wilson, Beyond Unocal: Conceptual problems in Using International Norms to Hold transnational Corporations Liable under the Alien Tort Claims Act, in O. De Schutter, Transnational Corporations and Human Rights, Oxford, Hart Publishing, 2006, pp.43-73.

5. What about Europe?

Let's consider Europe. The balance between economic freedoms and social rights has characterized the European Community intervention. In the most recent developments, there is an obvious stance against the social sphere, with a consequent corrosive effect on national systems of labour law. This trend constitutes an important part of the "market-oriented approach" that has characterised the economic model adopted by the EU. It allows justifications for restrictions on fundamental workers' rights, in the name of a "cult of the market". This is manifested by the decisions concerning the right of ownership.

Despite the growing, albeit discontinuous, calls for a different "justice-oriented approach", the most recent jurisprudence of the European Court of Justice has in fact set out on several occasions the prevalence of the market in the EU integration process to the detriment of fundamental social rights (the latter being the remedy sought for the markedly liberal and mercantilist drifts that we are witnessing²²).

In the Viking and Laval cases, the European Court held that collective actions organized by trade unions are unjustifiable restrictions on economic freedoms; paradoxically, the Court declared the right to strike among "fundamental rights that are part of the general principles of Community law" and then to counterbalance that, subordinated it to the principles of free movement, with the effect of its marginalization.

The right to strike is only justified for overriding reasons of general interest, but the reasons espoused by the Court in this case are reductive. There need not be mandatory rules of any kind within member States: in this case, protection of workers was not recognized (par. 110 of *Laval*) and they could not strike to conclude a collective agreement. In this sense, the principle of proportionality was used to the advantage of economic freedoms.

In the case of *Rüffert* and the European Commission vs. Luxembourg, the judges considered domestic posted worker regulations less favourable than the minimum requirements of Community law. The judgement excluded the possibility of applying better employment conditions for posted workers, which doubtlessly encourages the practice of social dumping by companies established in other member States, as they are now relieved of the most stringent labour protection laws of the host state.

In terms of individual employment relationships, these judgements, by legitimizing unequal treatment, have opened a wide rift and created a dangerous source of conflict. At the same time, on the basis of the collective action, the limits on strike action and the exercise of collective bargaining, risk adverse consequences to the process of harmonization, including the mobility of workers within the European Union²³.

Concerns about the idea of a neo-liberal European Union that supports and requires these decisions are to be found in significant parts of the European Union labour law culture²⁴, and the (now compromised) balance between the economic and social spheres is a subject of intense debate: "le conflit récurrent et aux vastes implications politiques qui

²² See A. Lyon-Caen, *Le travail dans le cadre de la prestation internationale de services*, in *Droit Social*, Paris, Dalloz, 2005, p. 503 ss.

²³ See S. Robin-Olivier, E. Pataut, *Europe sociale ou Europe économique*, *Revue du droit du travail*, Février 2008.

²⁴ See e.g. T. Blanke, *Europa sociale: un modello comune per evitare una corsa al ribasso?*, cit., p. 270; E. Dockes, *L'Europe anti-sociale*, in *Rev. Droit Travail*.

opposent les libertés communitaires de circulation et le droit du travail éclat à nouveau en pleine lumière”²⁵. The clamour from the judgments is more than justified. The Court has created a serious imbalance in favour of economic freedoms, establishing in Community law the priority of the guarantees of freedom to provide services and freedom of establishment over fundamental social rights, such as the right to collective bargaining and the right to strike.

The main pitfalls of the approach of the case law (which aimed at establishing that any measure that challenges the supply of undertakings or prevents access to the markets of another state is contrary to the internal market rules) can be summarized as follows: it encourages social dumping; it establishes the legitimacy of downward competition between member States’ workers’ conditions, with a risk of downward harmonization of labour standards; it fails to adequately recognise the principle of freedom of association, with negative effects upon collective bargaining at European Union level (preventing transnational mobilization to raise working conditions that exceed the law of a member State (art.3, par. 1 and 3, par. 10 of the Directive on the posting workers)); it undermines the Scandinavian model of industrial relations within the northern European states of Sweden (Laval) and Finland (Viking); it damages the process of legislative harmonisation (as the practices of forum shopping and competition between systems are gaining ground). There is little respect for the primary functions of labour law, which should be to prevent and potentially eliminate social dumping, and to ensure the equalization of competitive conditions between companies operating in the same economic sector through equalizing the costs of “buying” the workforce.

We need to rethink the role of European Union labour law in its protection (or conversely, in its erosion) of the borders of national employment and welfare law. The Laval, Viking and Rüffert cases seem to show the incompatibility of the right of the transnational market with the guarantee of national social spaces, including rules that ensure the free provision of services and commitment of states to ensure universal social rights. They run the risk of starting competitive regulation: a race to the bottom in labour standards.

What are the answers given in that regard by the New European Governance? The open method of coordination (OMC)? Obviously, the OMC does not solve conflicts between rights, including social rights protected by national constitutions and economic rights protected by the Treaty. It therefore does not solve this “social dilemma”. Nevertheless, even if it is not a vehicle for raising the level of social rights, the method is a tool to encourage a reflective attitude among the different social actors of EU social law, to complement and to encourage an attitude of examining other national contexts, as it coordinates social and economic discourse.

A different response would be to call for a resumption of regulation. But this would contradict the underlying reasons that originally prompted the EU to choose a different path from the convergence of national welfare systems. Another possibility would be the principle of solidarity, operated by the Court (as demonstrated by several ECJ cases) and reported into the Preamble of the Treaty of Nice to solve the worst transgressions of the national case law. This would use the Charter of Fundamental Rights to protect social rights from economic freedoms, and resurrect the best elements of an autonomous model of European social law.

A different notion of integration is suggested by the concept of “reflexive governance” which does not presume the reduction of differences, but instead relies on the

²⁵ See S. Robin-Olivier, E. Pataut, *Europe sociale ou Europe économique (à propos des affaires Viking e Laval)*, in *Rev. Droit Travail*, Février 2008.

EU's ability “to listen” to the needs of individual member States. The promotion of a reflexive attitude among EU actors would aid the integration of economic and social discourse, and a better understanding of differences. Positive elements of this governance have been highlighted in the literature on “Experimentalist Governance”. It is a model that interprets new institutional Western trends to take advantage of the possibility of using the differences between states as laboratories to develop different approaches to solving problems²⁶.

Although EU social law has not been based on those experiences, experimentalist governance could provide a forum to disseminate and to learn, taking advantage of what appears to be a flaw (the inability to build a common European social model). But there are some negative aspects of the model, particularly the development of patchy regulation, as domestic actors remain the main decision-makers. In this sense, it is not a common policy, rather a “common concern among local member states”, as mentioned by the Treaty of Amsterdam Art. 126 (2). In this context, it is worth conducting further investigation.

6. Some European experiences

The European theme of the open method of coordination of social policies leads us to think more generally about new forms of regulation²⁷. This theme is inherently connected to globalization; it induces actors to seek new methods of social regulation that are more attentive to the need for effectiveness. It is a progressive process that is changing the traditional regulatory landscape: diversification of regulation models and the sophistication of regulatory techniques, the extent of the space concerned and the adjustment of the process itself.

The “hard law”, which by definition follows the principles of legal positivism and falls within the traditional model of government (command and control in the Anglo-Saxon term), is joined by “soft”, heteronomous and autonomous forms of regulation, which enrich the scope of a new polycentric and distributed governance. It is based on the idea of deliberative²⁸ democracy, on a plurality of private self-regulated worlds²⁹, on a “network” as a new paradigm of state law, and on international supra-national law³⁰. Even labour law is seeing growing forms of lightweight regulation: soft law is not mandatory, as it is sometimes without legally enforceable rights (and penalties), but could nevertheless provide effective regulation, if developed and adopted by economic actors (especially multinational enterprises) through voluntary self-regulation, and by international organizations (ILO, OECD - we will return to this point later).

In terms of international labour law, soft law is widespread (there are over 200 recommendations). This does not mean that it is a product to disdain, rather, in the absence of international enforceable obligations, it is an appreciable method to influence the

²⁶ See Sabel, J. Zeitlin, Learning from Difference: The New Architecture of Experimentalist Governance in the EU, in *European Law Journal*, 2008, vol. 14, n. 3.

²⁷ See M. Barbera, a cura di, *Nuove forme di regolazione: il metodo aperto di coordinamento delle politiche sociali*, Milano, Giuffrè, 2006.

²⁸ See J. Habermas, *Theorie des kommunikativen Handelns*, I, Frankfurt-am-Main, 1981.

²⁹ See G. Teubner, *Diritto policontesturale*, Napoli, La città del sole, 1999

³⁰ See F. Ost, M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Bruxelles, Publications des Fac, 2002.

behaviour of States insofar as an internationally competent and representative body elucidates rules in a certain disciplinary context³¹.

The same construction of Community law, traditionally conceived around the pillars of hard law (regulations and directives) has become an example of the emergence of new techniques and methods of social regulation, defined as second generation “soft law”, as opposed to the political-programmatic acts (recommendations, opinions, resolutions) that were adopted in the past.

The European Employment Strategy (EES) and the Open Method of Coordination (OMC) form part of a more complex multilevel governance that characterizes EU regulation. In response to reforms introduced by the Treaties of Maastricht, Amsterdam and Nice, they mobilize a variety of regulatory flexible, not strictly binding devices in order to achieve the objectives identified. They rely on guidelines and focus on economic-technical branch techniques such as peer review, benchmarking, management by objectives and good practices.

In this complex scenario, where the language of politics and that of rights tend to merge and overlap, combinations emerge that are hybrid forms of legality attesting to the overcoming of the established boundaries and dichotomies (public/private; hard/soft law; national/international; local/global). These benefit experimentalism, adaptability and reversibility instead of generality and abstraction.

Rationalism and legal constructivism converge - in the literature on international relations theory and international law - in emphasizing both the limits and the merits of this perspective. It is in many ways better suited to answer the challenge of “second modernity”, characterized by uncertainty, flexibility and instability, through its aims of regulatory effectiveness.

From a rational point of view, regulation is functional to the stabilization of individual expectations (to lower transaction costs and to increase the benefits of compliance). The mechanism needed is a soft multifunctional instrument: able to reduce costs in highly complex transactions, in negotiations or in litigation; to bind parties without prejudice to the respective spheres of sovereignty; to model the norm in adaptive and flexible terms; to respect differences; to enable a wider participation in the construction of rules; and finally to mark, incrementally, the first step towards more binding commitments³².

The constructivist, for his part, sees in the soft law an approach that values within the regulative sphere elements such as persuasion, argumentation, socialization, learning, all geared to a vision of regulation as an open and dynamic process. It is a process that involves community and transnational networks in the construction of a social identity and of shared institutional values³³. From this perspective, soft law seems better equipped to promote transformative processes for the effective dissemination of standards, as well as

³¹ See Valticos.

³² See D. Snidal, *Rational Choice and International Relation Theory*, in *Handbook of International Relations*, London, 2002.

³³ See E. Adler, *Constructivism and International Relations Theory*, in *Handbook of International Relations*, London, 2002; J. Ruggie, *Whot Makes The World Hang Together*, in *International Organization*, 1998; T. Risse, *Social Constructivism and European Integration Theory*, Oxford, 2004.

being capable of producing knowledge - including by creating deliberative arenas - providing a positive impact on policy formation and implementation.

The tension between a vision of the effectiveness of regulation as a constraining tool, capable of leading the behaviour of players in pre-set preferences, or as a transformative tool, capable of adapting to identities and actors' interests, is designated to be composed from a perspective of coexistence of regulatory data for stability and flexibility, uniformity and differentiation, dynamism and binding rules.

Very probably, within the legal systems of work some osmotic devices move in the direction of hybridization rather than embodying the conflict between hard and soft regulatory instruments. This happens with the European experience, where we can formally classify regulatory devices as *hard* devices, with *soft* effects (the second generation directives), *soft* devices, which produce binding rules for the parties, framework agreements, social dialogue, the coordination of employment policies, (particularly in the first phase), and devices definable as semi-hard or semi-soft, like the Charter of Fundamental Rights (or Charter of Nice), considering its recent use by the Court of Justice³⁴.

For labour law, the soft regulation opens a vast horizon for reflection, starting with a fundamental alternative: it is a trend that will update labour law with unprecedented technical regulation in the name of efficiency, whilst awaiting a new social democracy. We are faced with a modernization of the social model of regulation, immersed in the neo-liberal economy and societal vision, which leads to a de-structuring of labour regulation internally and on a supranational level to a progressive dilution of social rights. Social policies are continually less capable of ensuring coordination.

The debate boils. According to the doctrine, there is a real danger that the OMC and other forms of cooperation and new governance are part of (and are functional to) a trend of minimal-deregulation oriented "government"³⁵. In this view, applying the political science term "soft" to the law does not conceal the inability of Europe to act with a renewed incisiveness in social rights, but instead how much more deeply (and insidiously) the manipulation of social policies for structural benefits targets the reduction of public spending, austerity wages, and labour market flexibility³⁶.

According to some less critical visions, and indeed some very optimistic, the potential of the OMC as a means of strengthening integration in the era of globalization cannot be

³⁴ See Judgement of the Court December 11, 2007 Case International Transport Workers' Federation, Finish Seamen's Union v Viking Line ABP, OU Viking Line Esti, when recognizing the right to strike as a fundamental part of the general principles of Community law Court expressly referred to the Charter of Nice; Judgement 27 June 2006, C-540/03, concerning family reunification; Judgement 13 May 2007, C-432/05, which see G. Bronzini, V. Picone, "The Luxembourg Court "discovered" the Charter of Nice: towards a new era in protecting "multilevel" fundamental rights? In RCDL, 2006.

³⁵ See J. Kenner, EU Employment Law, Hart Publishing, Oxford, 2003, p. 505; A. Lyon-Caen, J. Affichard, Des normes juridiques aux normes statistiques: les politiques de l'emploi à l'épreuve de la coordination, in Studies in memory of Giorgio Ghezzi, Cedam, Padova, 2005.

³⁶ See F. Eymard-Duvernay, O. Faverau, A. Orléan, R. Salais, L. Thévenot, Des contrats incitatifs aux conventions légitimes. Une alternative aux politiques néolibérales, in F. Eymard-Duvernay, L'économie des conventions, méthodes et résultats, Tome 2, La Découverte, Paris, 2006, p. 40.

under-estimated³⁷. However, other authors highlight the difficult relationship between the procedural perspective of the OMC and the substantial grammar of fundamental rights of individuals, the visibility and certainty of which are guaranteed.

Probably, the effectiveness of labour law may decline, depending on the values to be ascribed in the dynamic between economic efficiency and social justice. The strategy of dismantling the welfare state and the (de)regulation drift could be overlooked, which creates a risk for the same social laws at the “community acquis” level. For those who promote the primacy of the social economy, or believe that legal rules are an obstacle to productivity and development, that imperative will be a tool to overcome the inefficiency and lack of legitimacy of European social policies.

What is certain is that the regulative “hybridization theory” on coordination of employment and tax policies, developed in international law and applied to the context of European regulation, highlights the simultaneous presence of hard and soft law in the process of legal regulation. This creates a complex model of legality in which soft law, sensitive to the imperative of efficiency, is operating to increase the effects of hard measures, as has happened in the past with regard to soft first-generation instruments (such as the recommendation on the promotion of positive action for women, designed to give effect to the requirements of Directive 76/207/EEC, or the recommendation on a code of good practice on sexual harassment in the workplaces). These can be described as hybrid tools between law and litigation aimed at influencing both national courts and the Court of Justice in their interpretation of legal provisions, influencing States to adopt new rules in that *subiecta material*, or encouraging good practices³⁸.

In this way, the idea of a virtuous relationship between coordination and harmonization between hard and soft law is introduced, in a context where regulatory devices of different nature coexist and participate to the same purpose of job creation while combating social exclusion.

Weak signs of a possible resumption of a Community initiative can be perceived in the European Commission’s Green Paper, dedicated to labour law’s adjustments to ensure “flexibility and security for all”. This document seeks to identify the role that labour law has to play in flexibility, combining flexibility and security, regardless of contractual forms. It also seeks to promote a debate about the forms that regulation should take: supporting non-standard workers and temporary workers and drawing the attention of governments to the need for cooperation in the European labour market in order to strengthen the effectiveness of rights and combating undeclared work and the improper use of flexible forms of contract. They are claims which will have to be supported by policies and rules to limit the various forms of flexible working to establish a common welfare in these jobs.

However, we have to take into consideration in this hypothesis the possible scenario of a definitive and final change in the regulatory approaches to European governance, in which the OMC is the symbol of the impotence of Community activities in the social field, and of the “dilution” of European social policies. In this situation, labour law would only be guaranteed by opening up markets to greater competition and flexibility. This strategy would not be pursued with binding regulatory actions, which are invasive upon national prerogatives, but through the coordination of member States’ policies.

³⁷ See S. Sciarra, Global or Re-nationalised? Past and Future of European Labour Law, in F. Snider (ed), *The Europeanisation of Law: The Legal Effects of European Integration*, Hart Publishing, Oxford, 2000, p. 280 ff.

³⁸ These are examples from J. Kenner, *EU Employment Law*, Oxford, Hart Publishing, 2003.

It has been said that this path leads to the realization of the principles of “procedural law”³⁹ in which the discursive exchange between institutional and social actors at different stages of multilevel governance is interpreted as an example of democratic experimentalism, in which the EU operates in a form of deliberative supranationalism capable of bridging the democratic deficit featuring in national systems⁴⁰. According to others, however, providing that the EU knows how to resume the path of harmonization and convergence beyond the method of coordination - re-thinking patterns of action towards the establishment of rules of law – Europe should provide useful tools to correct the worrying trends that characterize its labour market.

The balance between these opposite views will probably be found in arbitrating between the need for a more “procedural” labour law, aimed at compensating flexibility with more efficient protection in the market, and the protection of standards strengthening in the European social model. For the simple reason that, as the traditional procedural rights (prohibition of discrimination, training, etc.) can only be exercised by those who enjoy the guaranteed stability of employment, the new generation’s procedural rights must be based on universal mechanisms of a guarantee of stability “outside” the relationship. That is to say, guarantees of effective security provisions that remove workers from the risk of a social exclusion. At present, however, it is undoubtedly the first dilemma to prevail.

The procedural guarantees in the market, which follow a kind of “social protection outsourcing” (or social costs of social protection), seem to be the only viable way to integrate economic competitiveness and social rights; but the practicability of the Danish model on a European scale is unrealistic as there is the risk that in the combination of “flexicurity” it would be the flexibility to prevail over security, and this constitutes a perspective not very different from that commonly described as “neo-liberal”. Indeed, the discourse on flexibility seems to be winning unstoppably.

The discourse on flexibility has acted to ensure the genetic mutation of traditional labour law into a “right to equal opportunities in labour”. In a close correlation with the constraints posed by economic policies that call for social protection systems’ “modernization”, we have seen a strengthening of employment services, transparency in the labour market to facilitate workers’ mobility, flexibility and wage moderation, increased investment in human capital (through actions on collective bargaining), and the adaption of training and education systems to the labour market and the needs of the economy.

The recipe at the basis of the European Guidelines demonstrates a special relationship between market and social rights, which aims to re-design the welfare state without adopting redistributive policies. This was demonstrated by the Integrated Guidelines for Growth and Employment 2008-2010. The proposed decision of the Council contains important references to the “quality of jobs” in terms of pay, benefits, working conditions and promotion of employment.

But the emphasis is certainly directed at adaptability and tools to deal with complex working lives, and with an increasing number of job changes. Workers need to adapt

³⁹ See Choen, Sabel, *Sovereignty and Solidarity: EU and US*, in Zeitlin, Trubeck (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments*, Oxford, 2003, p. 362 ff.

⁴⁰ See also, for others literature's references on this theme, Orlandini, *Riflessioni a margine del dibattito sui diritti fondamentali nell'unione europea*, in *Diritti Lavoro Mercati*, Milano, Giuffrè, 2009., p. 85.

themselves to changes in their employment status, and to the risk of facing temporary income losses, which requires the provision of appropriately updated social protection. We have entered into the era of flexicurity, which provides, inter alia, for the adaptation of laws, the improvement of anticipation, a positive management of changes, the promotion of innovative and adaptable forms of work organization in order to improve quality and productivity at work, and support in transitions from one job to another job (inter alia by promoting education, self-employment, business creation and geographic mobility⁴¹).

7. Flexicurity debate

The idea of flexicurity is best analysed in light of a discussion of the risks currently facing society.

Family and work have been the bases of peoples' security in modern times. Through work, individuals have access to the contexts of employment guarantees and fundamental social experiences, and "the holder of an employment can pass through the eye of the needle of his work and become 'co-creator of the world' on a small scale"⁴². These concepts of work seem long gone in an era of *Risikogesellschaft*, the 'risk society' where employment has lost its certainties and its protective functions of the past. The boundaries between working and not working are so fluid now, and the labour market of Fordism is now also flexible and pluralized, as part of a new and great "power imbalance" between contracting parties in the labour market and between organizations that seek to protect their interests⁴³.

In this framework employment is becoming less capable of assuring people of "primary goods", which for Rawls are "things that every rational man allegedly wants" and include "income and wealth", basic freedoms, "freedom of movement and choice of occupation", "award and prerogatives of offices and positions of responsibility" and "social bases of self-respect"⁴⁴. Even fewer employment opportunities guarantee people the pursuit of the model of justice based on "capacity", which, according to Sen, designs and evaluates individual situations not on the basis of one's resources or commodities, but on the basis of the actual enjoyment of the freedom to choose the life one has reason to appreciate, in which the emphasis is on "individual's ability to acquire various alternative combinations of operations"⁴⁵.

Maybe that is the reason why labour law literature notes that whilst the past marked the transition from contract to status, the near future will be characterized by a counter-movement from status to contract "status, however, that no longer coincides with the employment status or profession, nor depends on it: the status of citizenship is protected by a constitutional democracy"⁴⁶.

⁴¹ See the EU Integrated Guidelines for growth and jobs (2008-2010).

⁴² U. Beck, p.200.

⁴³ U. Beck, op. cit., p. 211.

⁴⁴ J. Rawls, *A theory of Justice*, trans. it *Una teoria della giustizia*, Milano, Feltrinelli Editore, 2008.

⁴⁵ Cfr. A. Sen, *Inequality Reexamined*, trans. it *La diseguaglianza*, Bologna, 1992.

⁴⁶ U. Romagnoli, *Tornare allo statuto*, in LD, 2010.

In a society which is dominated by uncertainty and risk, the rebalancing of legal principles is not always concerned with rules, instead with the elasticity of soft law instruments, and with sources that are “outside” and “moral”, which mark “the decline of Olympian images full of organic law and are concluded by the rational model of the great European codifications⁴⁷”. Similarly, labour law gives the way to labour markets in which an equilibrium is maintained through a promise of social justice which is no longer oriented on (or based upon) the security of employment, instead on the “acquisition of specific capabilities to be spent along the unknown paths of labour’s “transitions”⁴⁸. These include transitions between jobs, transitions between unemployment and employment, transition between initial education and continuing paid employment, transition from household activities or community service to employment, transition from inactivity (or inactivity due to disability) to employment. In this scenario of transitional and economic uncertainty, the watchword of the labour law has become “protect the employee, not the workplace”.

From the work contract, as theorized by Jean Boissonat, to the “*droits de tirage sociaux*” proposed by Supiot’s report, and the promotion of public and private investment in “social capital” (referring to trust networks to which individuals can draw on to social support⁴⁹) the response of flexicurity now prevails. It is led by its social and professional mobility, based on new “social transactional rights”, and multi local-partner negotiation.

This model is represented by Denmark, a small country that seems to benefit from an enhanced competitiveness of transitionality, as it is able to combine flexibility and (new) security as a tool to reconcile social protection and adaptability to changes. In this perspective, the examples from northern Europe can be helpful to the European legislator, not for a transposition but as a suggestion on the possible paths to follow.

The Scandinavian model, which can make mobility and security compatible, is reflected in the EU guidelines on flexicurity. These show that in the current phase of social relations, characterized by individualization and adaptability, security and protection do not necessarily consist of a defence of the traditional status of employment for an indefinite period, as the acceptance of instability and flexibility may be offset by two things. Firstly, by strong unemployment compensation during periods of alternation between work and lack of work. Secondly, efficient and effective vocational training capable of “arming” the individual in the face of changes to his employment status without degrading his citizenship status. These ideas can vary, although the goals remain the same: to provide the worker with a flexible protective transitional status, to ensure safety in flexible labour markets, and to promote a social security system that is compatible with the discontinuity of professional journeys.

The term “flexicurity” makes reference to the model of the Danish and the Dutch labour markets, in which considerable flexibility in hiring and firing is accompanied by an equally extensive security for those who live in conditions of unemployment. This is due to

⁴⁷ Cfr. G. Palombella, *Dopo la certezza. Il diritto in equilibrio tra giustizia e democrazia*, Bari, Edizioni Dedalo, 2006.

⁴⁸ Cfr. B. Gazier, *Vers un nouveau modèle social*, Paris, Flammarion, 2005.

⁴⁹ See A. Giddens, “The Third Way and Its Critics”, trans. Lt Seizing the opportunity, Rome, 2000, p. ; Id *Europe in the Global Age*, trans. com. Europe in the global age, Roma-Bari 2007, which, on pg. 30 recognizes the importance of flexicurity, but also its limit, which consists in entering into play only when a person loses his job, while “politics” that are also policies to follow that helped people even before they get out of work.”

various safety valves and an effective training system that facilitates transitions from one job to another.

This concept has its origin in the European Commission's Green Paper of 1997, "Partnership for a new organization of work". Since then it has accompanied the European Employment Strategy (EES) and the so-called review of the EES (which was implemented by the European Council of 2005). By now the theme of flexicurity has acquired a high position on the European social agenda.

Flexicurity, as an official term, was created on 25 October 2005 during the tripartite summit in London. This term was originally defined as:

- The need to promote both flexibility and security;
- A reduction of the segmentation of the labour market;
- Recognizing the importance of the role of social partnership.

A few days before that summit, the European Commission had pointed out that in order to achieve the objectives of the Lisbon Strategy at national level, it was necessary to "raise the employment rate and reduce unemployment, especially through active labour market policies and measures promoting flexibility and adaptability designed to protect people rather than jobs, so we have to think of the worker and also of the employment⁵⁰".

The original concern was therefore to protect the worker. But the concept of flexicurity was defined through informal discussions rather than through institutional meetings; its introduction was based on a comparison of the various proposals, and its negotiation was characterised by a soft convergence of different tools.

At the tripartite social summit in Lahti (Finland), 20 October 2006, the transition from a purely semantic and conceptual use of the term flexicurity to a political use was formally marked. It was defined as a rule, and marked the beginning of that process. On that occasion, however, the flexicurity debate was enriched by the participation of social platform NGOs.

After Lathy, the term flexicurity became a subject of note due to the adoption of the European Commission Green Paper on the modernization of the labour law⁵¹, which sought an open and public consultation on the possibility of achieving sustainable growth conducive to the creation of more and better jobs through the merger of greater flexibility with the need to maximize security for all.

8. Some key issues

The term flexicurity was developed by Ton Wilthagen, who with Frank Trost, defined it as: "a policy strategy that attempts, synchronically and in deliberate way, to enhance the flexibility of labour markets, the work organization and labour relations on the one hand,

⁵⁰ European Commission, "European values in a globalized world. Commission's contribution to the October Meeting of Heads of State and Government", COM (2005) 525 final, Brussels, 20 October 2005.

⁵¹ European Commission Green Paper. Modernising Labour Law to meet the challenges of the twenty-first century dl, COM (2006) 708 final, Brussels, November 22, 2006.

and to enhance security – job security and social security – notably for weaker groups in and outside the labour market, on the other hand⁵².

This concept – as defined – does not fully coincide with the institutional notion implemented by the European institutions⁵³.

The original definition is characterized by three basic concepts, derived from terms used in the description:

- Synchronically: an element aimed at synchronizing the policies, which may have objectives of increased market flexibility and of increased employment, with the objective of a greater security;
- In a deliberate way: spreading the idea, opening comparisons, dialogue and negotiations between actors at different levels;
- Employment security and social security: the integral vision of security that must be reported to the employment relationship and to the labour market.

As stated above, however, that definition has been transposed by the European institutions, giving rise to differences. DG Employment, Social Affairs and Equal Opportunities of the European Commission launched the European Expert Group on Flexicurity in 2006⁵⁴, which outlined the following concept of Flexicurity: “a policy strategy to enhance, at the same time and in a deliberate way, the flexibility of labour markets, work organizations and employment relations on the one hand, and security – employment security and social security – on the other hand”.

Certainly this definition coincides with the scientific definition with regard to the synchronization of the policies of flexibility and security, which must be pursued with each other using a “deliberative approach”, in a concerted manner at the EU level between the Commission and the European social partners; and in the Member States according to their forms of consultation but also through their involvement in European civil society.

The novelty introduced by the institutional definition is that flexicurity becomes a general recipe for a modernization of labour law that applies not only to the “social inclusion of the weakest” objective, but must also be seen as a reform of the labour market. For this reason, it is not only reform for the imitation of best practice (i.e. the Dutch and Danish cases), but also as inspiration for domestic reforms.

Regarding the process methods that are put into place, they are not *hard* processes, such as the transplantation of Community institutions and regulation, but *soft* processes of movement and fertilization of regulatory solutions from one system to another. Flexicurity, therefore, becomes not “a” recipe for some important goals, but ‘the’ recipe for a holistic

⁵² Wilthagen, Tros, The concept of “flexicurity”: a new approach to regulating employment and labour markets, in *Transfer*, 2004, 2, p. 169.

⁵³ See P. Auer, *Security and labour markets: Combining flexibility with security for decent work*, ILO, Geneva, 2007.

⁵⁴ This committee consists of 5 members chosen on the basis of science curricula (Tito Boeri, Pierre Cahuc, Sanja Crnkovic, Csilla Lehoczky Kollonay-, Ton Wilthagen) and two advisors selected by virtue of their contacts with the social partners (Renate Hornung-Draus, Passchier Catalene). The task of this group was to identify practical solutions and applicable taking into account the diversity of legal systems, labour market and industrial relations of individual states.

reform of the markets and of the national labour law systems that take account of their specificities.

However, it must be noted that, whilst there has been a widening of the scope of the concept of flexicurity, we are gradually losing sight of the consideration of original concern: the protection of the most vulnerable workers. Quantitative objectives are being pursued to a greater extent, rather than qualitative objectives as discussed in Lisbon. The needs of the individual are interpreted as being more directed to “employment security” rather than “job security”⁵⁵.

According to the European Commission, a central role is played by the worker, whose task it is to actively adapt himself. According to that approach, the worker is considered to be the only person innovative enough and able to plan and implement change and modernization.

The need to reduce the distance existing between forms of open-ended contracts and atypical contracts is also problematic and ambiguous. If indeed there was, in the name of the equality principle, a progressive adaptation of atypical contracts to the safety and security of typical work, there would be a mitigation of the general and special principles of guidance of the Community Court in the process of consolidation, and there would be a harmonization with the sixth recital of the Directive on fixed-term contracts, under which the stable employment relationship should be the general form of labour relations.

If, however, the reduction of such a distance would bring an adaptation of the Danish experience to legal effect with a different “culture of real stability” as a remedy for dismissal, such a solution would certainly be too traumatic, and could even theoretically counter the provisions of the Charter of Fundamental Rights, with regard to the right to stability as a fundamental right (by art. 30 of the EU Treaty).

In the case of several European countries, it is considered that any relaxation of current legislation for protection against dismissal (without a prior reform of the labour market that can guarantee a specific and verified job stability) can only be justified following an evaluation of three requirements: 1. That the passage from one place to another has to guarantee an actual working professional improvement; 2. that this transfer takes place with a reasonably broad timescale; and 3. that there is a guarantee of sustainable income during the transition.

The response to Commission communications and the following Council Directives has been an agreement between the European social partners, which has resulted in a true act of pre-institutional coordination at European level leading to the definition of common principles of flexicurity through the instrument of the recommendations to the Commission, the Council and the Member States⁵⁶.

In this way, flexicurity is transformed from a scientific concept into a series of principles that should guide the European Union's rules and the policies of the Member States. However, they do so in the knowledge that through this approach will not be

⁵⁵ With reference to the dichotomy between “employment security” and “job security”, see European Commission, COM (2007) 359 final, p. 3.

⁵⁶ These recommendations were all already taken into account by the ratio Christensen of the European Parliament of 15 November 2007.

possible to apply a “unique” solution to the problem, instead solutions should be based on the respect of the mutual diversity⁵⁷.

9. The European commission’s objectives

As mentioned above, an important intervention by the European Commission on flexicurity was the Green Paper on the modernization of labour law⁵⁸, which was issued during a period of reduced activity in the EU’s social and employment law policies. Low European economic growth and low labour productivity had in fact impeded the implementation of the objectives set out in the so-called Lisbon Agenda (European Council 23-24 March 2000) and forced a downsizing of expectations generated by the favourable performance of the 1997-2000, which aimed to create the conditions for full employment and to achieve the goal of a quality oriented labour market, capable of offering quality jobs and ensuring stronger social cohesion.

The Commission's objective with that document was to launch a public debate in the European Union to consider how to develop labour law in support of the Lisbon strategy - of achieving sustainable growth with more jobs of better quality in order to reconcile the flexibility of labour contracts, and jobs with workers' security.

For the first time the Commission had extended its action not only to some technical-sectoral profiles, but also to the discipline of labour law as a whole, calling on Member States and social partners to “design” a new labour law through rethinking the traditional categories - the only path to meet the challenges of markets' globalization.

The Green Paper is clearly inspired by the neo-liberal philosophy that characterizes the modus operandi of major international organizations, such as the OECD and the IMF, on the issue of regulating the labour market and employment relationships: areas where “the general interest shall provide a utilitarian conception of flexibility, which is required to promote more employment and increase the productivity of economic systems⁵⁹”.

The starting point for the European Commission was the question of the consequences of economic globalization that require flexibility and adaptability in workforces. The strategy and the main objective of the Green Paper is, therefore, flexicurity aimed at reconciling the flexibility of supply and the adaptability of workers to productive and organizational changes with security. This was considered not only as a protection from the economic risk of unemployment, but also as a promotion of the employability of the worker.

For this purpose the Commission document does follow a catalogue of critical situations and concrete actions to be taken using different instruments of law and social dialogue.

The fundamental purpose of the Green Paper was to remove those features of traditional labour law that enforce the separation of *standard* employment contracts (full time and open-ended contracts) and *non-standard* (or so-called atypical contracts such as

⁵⁷ Flexicurity Pathways. Turning hurdles into stepping tones, Report by the European Expert Group on Flexicurity, 2007, p. 42.

⁵⁸ COMM(2007) 627 def.

⁵⁹ A. Perulli, Il Libro Verde sul diritto del lavoro: un’occasione mancata?, in Aran Newsletter, 2007, I, 22.

fixed-term employment, part-time contract, intermittent work, agency work). This separation serves to generate a deep gap between *insiders* and *outsiders* (that is between integrated workers with a stable job and the unemployed or those separated from the labour market, and those who are in a precarious or informal work situation).

To overcome the dichotomy between the core of stable employment contract and the peripheral area which is not stable, legislation aimed no longer at protecting jobs, but at employment and even employability, as established in the Green Paper.

The Commission, therefore, recommends that Member States review “the rules on redundancies with regard to notice periods, the costs or the procedures for individual or collective dismissal, or the definition of unfair dismissal.” It sought the replacement of the discipline of protection and judicial control over the validity of the withdrawal, with forms of monetization which can be quantified in advance.

The main objective that must be pursued is the development of a legislative and contractual regulation for employment transitions, which may consist of a state of voluntary unemployment (training periods, leaves of various kinds) or a state of involuntary unemployment (when the interruption is due to a dismissal for economic or personal reasons) and also a state of inactivity without transitions (e.g. from non-standard employment contract to another temporary contract or to an open-ended or full-time contract).

There is a lack of modernization in the areas mentioned above. The current systems tend to become chaotic, with a proliferation of various atypical contracts aimed at saving costs and resulting from compliance with the rules relating to standard reports.

We have seen the introduction of the concept of worker as a “life cycle”, and of social statuses in which workers no longer match the self-employed, but the employee matches the unemployed, as well as the job seeker and those who place themselves in situations of activity akin to work, but not as a means of subsistence.

The Green Paper is inspired by a philosophy that emphasizes mobility rather than job stability. In an ambiguous and perhaps simplistic way, the positive dimensions of non-standard types of work are celebrated. It is said, in fact, that they can strengthen the capacity of enterprises and develop the staff's creativity, and it is therefore possible to gain competitive advantages.

From another point of view, we can certainly see some advantages for workers who can choose their working hours more freely, those with the prospect of careers, a better balance between family life and professional training, and finally, a greater professional responsibility. The Commission itself, however, after this excitement, admits that the diversity in type of contracts may have negative effects in their precariousness.

An integral part of the scenario proposed by the European Commission is the economically dependent self-employed worker. On the one hand, operating in that kind of scenario is a free choice in pursuing independent activity; the lower levels of social protection are offset by greater autonomy or a higher salary. On the other hand, it may be a forced condition, or it may conceal the true legal position of subordination⁶⁰. The Commission, recognizing that this problem can easily occur, recommends more control in the application of national legislation and suggests the introduction of minimum protection standards for economically dependent workers.

⁶⁰ A. Perulli, See last work cited.

There were many critics of the European Commission's statements. Insider-outsider theory provides a simplified framework that cannot explain the asymmetries between an institutionalized job market and a system of industrial relations that is governed simultaneously by the trade unions and by social groups and professional employee organizations.

In addition, the existence of an inverse relationship between levels of jobs and employment protection is still not proven as a theory (attacking the idea that workers' rights to stable employment is the backbone of the legal systems of work is not wholly true)⁶¹.

The Green Paper recognizes the role of trade unions and the role of social dialogue: flexicurity is in fact proposed as a possible facet of a bilateral approach to labour market governance, together with joint management of the social risks of unemployment and job discontinuity.

Therefore it would not be an accurate reading of the Green Paper to see only a suggestion of restructuring or weakening the dismissals bond, as it is also a useful stimulus for reflection on the desirability of adjusting system with the technical assistance of lawyers, the social partners, and society at large.

The Green Paper's major failing is therefore its oversimplification, as it is not sufficient to liberalize the regulation of dismissal and open-ended contracts. The modernization of labour law is in fact far more complex; it covers issues untouched or only hinted by the Green Paper.

The primary omissions are:

- The discipline of collective dismissal of surplus workers, and activities related to supporting the income and the retraining of workers;
- Illegal or undeclared work and the practical need for minimum wage legislation;
- Economic democracy and the worker's participation in company decisions, which has to be implemented through information and consultation procedures;
- Cooperative industrial relations, not just antagonistic ones.

Another critical factor lies in the fact that non-standard work gives rise to serious concerns, especially because it involves greater probability and frequency of discontinuous pathways that prevent the accumulation of experiences. This can lead to uncertain, winding careers and almost impossible life projects. In fact, it gives rise to a number of problems of adjustment and requires a more appropriate and advanced floor of rights aimed at providing workers with decent working conditions, routes to stabilization and preservation of volunteerism to establish a non-standard employment relationship, which should be a choice and not a condition imposed upon or suffered by the worker.

Globalization should not be used as an issue that leads to greater flexibility, but in the opposite direction, as a way to make us realize the impossibility of accepting assumptions of flexibility, in comparison with more flexible systems in other regions of the world.

⁶¹ A. Perulli, See last work cited.

With the perspective of competition between systems, even if the cost of the work is lower and employment is more flexible, we could never reach levels of cost and flexibility of work that are comparable to those of emerging and developing countries.

What is needed, therefore, is not higher doses of flexibility, but the exploitation of other factors based on innovation and quality⁶².

Flexibility cannot be exaggerated, and cannot consist of the reduction of the dismissal process to a financial commodity, capable of being calculated in advance. By that method the power to examine the nature of justified or unjustified termination of employment would fall to judges, and the significant proportion of labour law that consists of balancing interests and making decisions based on values such as respect for the person and their fundamental rights would be eroded⁶³.

The most convincing part of the Green Paper is, however, the part which concerns economically dependent self-employment, where, distinguishing between truly and disguised economically dependent self-employment, it urges Member States to promote a framework of safeguards against this problem.

In European legal doctrine, in order to address those needs, the prospect of a series of safeguards, starting from a universal core based on overcoming opposition to the coupling of employment with self-employment, is becoming an increasingly important consideration.

In a report prepared for the European Commission by a group of scientists coordinated by Alain Supiot, employment protection is thought of as concentric circles: the first circle is related to universal social rights; the second is based on rights relating to non-professional work; the third one includes the common law of professional activity (some of the foundations of which are already part of the European law); the fourth circle of rights is applicable to employment in the strict sense of subordination⁶⁴.

10. Some European Courts' cases

The Courts have taken some interesting approaches. A worldwide process is happening, little analysed but extraordinarily fertile, with exploitation by national and supranational courts of international and supranational rules that suggest a slow but inexorable treatment of social rights – a process of universal significance. It is a neo-Kantian approach of “cosmopolitan social law” that find its vectors in the activity of the meritorious and pioneering activity of some national and supranational courts.

The European Court of Human Rights is one of the main protagonists in this process. With the *Demir and Baykara* case of 12 November, 2008, the Grand Chamber officially consecrated the right of collective bargaining as a right protected by art. 11 of the

⁶² A. Perulli, See last cited work.

⁶³ A. Perulli, See last cited work.

⁶⁴ In Italy in a similar methodological approach was adopted by the drafters of the “Charter of rights of workers and employees”, where we start from a minimum of general principles, universally applicable to every contract of employment (e.g. right to freedom, dignity, confidentiality, equal treatment, non-discrimination, safety and health in the workplace, protection against sexual harassment in the workplace, for fair compensation and protection in the event of unjustified job termination).

European Convention on Human Rights (ECHR). In this case, a Turkish trade union was concluding a collective agreement with a municipality on working conditions and remuneration. The municipality was not respecting the contract and, whereas the Court of First Instance upheld the union's claim that contract was valid, the Court of Cassation decided that, as the Turkish Constitution protected the right of freedom of association only in the private sector at the time, the collective agreement should be null and void with a retroactive effect.

The case, when it reached the European Court of Human Rights, became a catalyst for a series of international and European precedents in the field of labour law: the Grand Chamber turns with, its "interpretative rock", external and non-binding materials into obligations for States which are parties of the Convention. In this perspective, it is significant the recall to non-conventional sources in interpreting the Convention; "elements of international law that are different from those of the Convention; the interpretations of evidence from relevant organizations and the practices of Member States that reflect their common values" where it is not necessary "that the respondent State has ratified all the instruments applicable in the field of the case". It considered sufficient that "the international instruments have a continuous evolution of standards and principles applied in international law or domestic law in most Member States of the Council of Europe and certify, on a specific aspect, a commonality of views in modern societies".

With the case of *Enerji Yapi Yol Sen v. Turkey*, 21 April 2009, the Strasbourg Court consecrated for the right to strike as a right protected by the human rights European law the first time, drawing again on Art. 11.

Extending what had already been held in the *Demir and Baykara* cases, the Strasbourg Court allowed the appeal by the Turkish trade unions in a case of particular importance to the public service sector, noting the violation of art. 11 of the ECHR (right to freedom of association) by a ministerial circular which pointed out the prohibition in Turkish law on public sector officials (who had been affected by disciplinary sanctions) from taking part in strikes that threaten the continuity of public service.

The Strasbourg Court could not increase the contrast with the ultra-liberal jurisprudence of the ECJ; ruling that the right to strike, like all rights contained in the Convention, must be "practical and effective" and not theoretical or illusory. The Court uses the principle of proportionality not with the aim of relativizing social rights (as the ECJ did in *Laval* case), but in order to ensure their full utility. We could see a "double level" of strike protection, European (weaker) and international (stronger). It is not unreasonable to ask whether the *Viking* and *Laval* cases do not constitute a "manifest failure" in protecting one of the rights now guaranteed by the Convention, due to the ECJ's presumption of equal protection of Fundamental Rights in Community law, established by the European Court of Human Rights in the famous *Bosphorus c. Ireland* of June 30, 2005.

The context of the globalization of social norms can also be perceived in the work of national courts, with a proliferation of references to international labour standards. In a ruling of 16 December 2008, the office of the social Chamber of the French Court of Cassation held that Article. 6.1 of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 is directly applicable to domestic law, and it ensures the right of everybody to have the opportunity of earning by a freely chosen or accepted work. This is contrary to a provision requiring an employee to comply with a rule of non-competition, which would not deprive him of any economic consideration on the grounds that he had been dismissed for serious misconduct.

In this way, the Court rejected the provision of Art. 75, introductory part 3 of a local Code du Commerce, which was applicable in the departments of Haut-Rhin, Bas-Rhin and Moselle, that for historical reasons, is also present in the German Commercial Code (HGB § 75).

A few months earlier, the same social Chamber of the Supreme Court, by a decision of 1 July 2008, made a direct application of certain provisions of another text of international labour law, ILO Convention No.158 on termination of employment in order to clear the legal provisions of the “Contrat nouvelle embauche” (CNE). The philosophy behind it, inspired by the Italian proposals for a "single contract", was to deprive a worker from the protections provided in the event of unjustified withdrawal for a period of two years: a sort of French translation of dismissal at-will of the American experience.

French judges, after referring to Art. 4 of ILO Convention No. 158 (ratified by France) which provides that where “un motif valable de licenciement lié à l’aptitude ou à la conduite du travailleur ou fondé sur les nécessités du fonctionnement de l’entreprise, de l’établissement ou du service” must exist, believed that the period of two years prescribed by the CNE is over the “reasonable time” stated under Article. 2 of the Convention in relation to cases of exclusion from the scope of certain categories of workers.

According to Canadian constitutional law, an international treaty does not have direct effect in domestic law. The Canadian Charter of Rights and Freedoms does not include the right of collective bargaining, nor has Canada ratified ILO Convention No 98 on the right to organize and bargain collectively. However, by a decision of 8 June 2007, the judges of the Supreme Court, in interpreting art. 2 d) of the Canadian Charter on Freedom of Association, referred to Convention No. 87 on Freedom of Association (ratified) and to the International Covenant on economic and social rights, arguing that “la liberté de constituer et d’organiser des syndicats doit, même dans le secteur public, comprendre la liberté d’exercer les activités essentielles des syndicats, telles la négociation collective et la grève, sous réserve de limites raisonnables”.