The Reform of the Italian Labor Market over the Past Ten Years: A Process of Liberalization?

1. The Recent Labour Market Reforms in Italy: A Brief Historical Overview

Over the past decade, the labour market[1] has undergone a process of profound legislative change, not just in Italy.[2]

The constant evolution of the legal framework governing the labour market and the underlying economic and social structures is clearly not a recent phenomenon. Rather, it may be argued that this has been one of the characteristics of labour law since it first emerged as a discipline domain. It is significant that Hugo Sinzheimer, universally recognised as one of the founders of modern labour law, considered this branch of juridical system as the law of the frontier, but also as a frontier of the law.[3] Little or nothing has changed since then, confirming that the essence of labour law still consists of the intrinsic need to remind constantly the jurist of the difficult task of

[1] The term "labour market" is used in the broad sense here, concerning the area of regulation covered by labour law as a whole.

[2] For a comparative overview see Blanpain, R., and M. Weiss, eds. 2003. *Changing Industrial Relations and Modernisation of Labour Law – Liber Amicorum in Honour of Professor Marco Biagi*. The Hague: Kluwer Law International; and, more recently, Blanpain, R., S. Bisom-Rapp, W. R. Corbett, H. K. Josephs, and M. J. Zimmer, eds. 2007. *The Global Workplace – International and Comparative Employment Law*. Cambridge: Cambridge University Press. See also the Report of the Director General of the International Labour Office. 2006. *Changing Patterns in the World of Work*. Geneva: ILO (also available at bollettinoADAPT.it, index A-Z, under the heading *Statuto dei lavori*.

[3] Sinzheimer, H. 1922. "Über soziologische und dogmatische Methoden in der Arbeitsrechtswissenschaft", Arbeitsrecht, 187 ff.

classification and qualification of new phenomena, or phenomena undergoing continuous change.[4]

The recent far-reaching changes in methods of production and work organisation, introduced by technological innovation and the globalisation of markets, have if anything contributed to the acceleration of the range and depth of legislative intervention, to a greater or lesser extent, so that the process of reform has had a significant impact on all the main areas of this branch of legal studies.[5]

This has undoubtedly affected the internal dynamics of labour law: over the course of just over a century of development, the driving force of normative innovation has been collective bargaining, and the self-regulating balance of power reflected in it. At the same time, legislative provisions have been assigned a role that is subsidiary – at times even secondary[6] – in labour market regulation, with recourse to the traditional techniques of implementation, consolidation and extension of the provisions of collective bargaining.

The progressive loss of centrality of the system of inter-trade union relations, considered in Italy as an autonomous juridical system distinct from that of the State,[7] has led to profound changes in the traditional sources generating labour law[8] and in their degree of effectiveness in regulating the labour market. The gap between the abstract provisions of inderogable legal and/or collective bargaining norms on the one hand, and the economic and productive system on the other, which is another constant feature of the development of Italian labour law,[9] has never been as wide as it is today, as shown unequivocally by the alarming figures on employment in the hidden economy. It has been estimated that more than a quarter of the Italian labour market, over four

[4] Giugni, G. 1977. *Introduzione allo studio dell'autonomia collettiva*, Milano: Giuffrè (first published 1960), p. 20.

[5] For a penetrating analysis of the development of labour law that prefigures the recent reforms, see Giugni, G. 1998. "Il diritto del lavoro: ieri, oggi e domani", *Scritti in onore di Giuseppe Federico Mancini 1*, Milano: Giuffrè, p. 287.

[6] In this connection reference should be made to Kahn-Freund, O. 1977. *Labour and the Law*. London: Stevens & Son, (second edition), esp. pp. 1-17 and p. 2 for the citation, where he speaks of the law "as a secondary force [...] in labour relations".

[7] According to the classical study of Giugni, G. *Introduzione allo studio dell'autonomia collettiva*, cit.

[8] See Mariucci, L.2003. *Le fonti del diritto del lavoro, quindici anni dopo*. Torino: Giappichelli.

[9] In this connection see Mariucci, L. 1979. *Il lavoro decentrato. Discipline legislative e contrattuali*. Milan: Angeli, esp. p. 20 and p. 25, putting forward the argument, that is still relevant today, that "the history of labour law largely coincides with the historical reconstruction of the reasons for its ineffectiveness".

million jobs amounting to 23-27 per cent of GDP,[10] is in the shadow economy, with a consequent lack of legal regulation.[11]

The explosion of the area of atypical employment and the loss of effectiveness of inderogable legislative and collective bargaining norms are clearly not to be found only in the Italian labour market. However, it must be pointed out that the other OECD countries are not characterised by a degeneration of the kind to be seen in Italy, where employment in the hidden economy is estimated to be two to three times higher in percentage terms than the European mean.[12]

The progressive loss of effectiveness of the regulation of labour relations, with its negative impact on the constitutional right to work for all,[13] together with the constant loss of competitiveness of Italian enterprises in the international market, was undoubtedly one of the main reasons that led the legislator to attempt a profound reform of the labour market, though not without opposition from those intent on maintaining the status quo.

It has been argued[14] that the most recent normative developments will tend to undermine the power of the social partners and industrial relations, thus bringing to an end a phase characterised by the devolution of powers and competences to collective bargaining. However, this view is highly controversial, and less linear than it might appear to be from a superficial assessment. It is even possible to argue the opposite: that the significant

[10] See Scheneider, F., and D. H. Enste. 2002. *The Shadow Economy: an International Survey*. Cambridge: Cambridge University Press. More limited, but still alarming, are the estimates published by ISTAT. 2004. *La misura dell'occupazione non regolare nelle stime di contabilità nazionale: un'analisi a livello nazionale, regionale e retrospettiva a partire dal 1980*. Rome: Istat, available at bollettinoADAPT.it, index A-Z, under the heading *Lavoro irregolare*. An influential study is that of Dell'Olio, M. 2000. "Il lavoro sommerso e la lotta per il diritto", Arg. Dir. Lav., pp. 43-53, but see also Sala Chiri, M. 2003. "Il lavoro sommerso e il diritto del lavoro", Scritti in memoria di Salvatore Hernandez, Dir. Lav.,No. 6, pp. 731-745, and the bibliography therein.

[11] It should be pointed out that this phenomenon is by no means new, and was highlighted in the 1970s and 1980s. See, for example, Giugni, G. 1989. "Giuridificazione e deregolazione nel diritto del lavoro italiano", *Lavoro legge contratti*, ed. Giugni G. (Bologna: Il Mulino), first edition 1986, esp. pp. 350-351.

[12] See Scheneider, F. 2002. "The Value Added of Underground Activities: Size and Measurement of the Shadow Economies and Shadow Economy Labor Force all over the World", World Bank Paper, at www.lex.unict.it, under the heading *Dossier sul lavoro sommerso*. In addition extensive documentation is available at bollettinoADAPT.it, index A-Z, under the heading *Lavoro irregolare*.

[13] Art. 4 Italian Constitution of 1948.

[14] Cf., by way of example, Bellardi, L. 2005. "La struttura della contrattazione collettiva e il d.lgs. n. 276 del 2003", *Diritto del lavoro. I nuovi problemi – L'omaggio dell'Accademia a Mattia Persiani* 1:339-362.

intervention on the part of the legislator in recent years is due to the persistent inertia of the social partners, who are reluctant to come to terms with changes in the world of work,[15] together with the lack of reform of the industrial relations system and collective bargaining structures.

An analysis of the main national collective agreements unequivocally confirms that certain matters relating to organisational innovation and productivity (working hours, contracting out and outsourcing, job descriptions and grading, training issues, etc.) are dealt with only to a marginal extent by collective bargaining as a way of governing the changes taking place in work and production.

Rather, a prevalent tendency is for trade unions to exercise the power of veto, as shown by the numerous agreements (both at national and company level) aimed at "sterilising", to use the term used by some trade unions,[16] the most recent legislative provisions relating to flexibility and labour organisation.

Arguably, the main aim of reform in Italy is to overcome this logic of conservation and opposition, also trough the resurgence of domestic terrorism, to change. "Of all the mistakes that the unions may be said to have made", wrote in 1980 one of the first victims of the terrorism in the area of employment and social reforms named Walter Tobagi,[17] "the reluctance to come to terms with social transformation is the one requiring the closest attention. It is indicative of the fact that the unions have managed to exercise the power of veto in relation to leading companies and political power, but have not managed to redesign the Italian economic model. And the market powers have found a new point of equilibrium which indeed takes account of the rigidity of the trade unions, but only in order to find a way round it" (our translation). These words appear to be particularly relevant today, and it is significant that this concept underlies the White Paper of Marco Biagi (the last victim of the domestic terrorism in Italy)[18] published in October 2001[19] and its

[15] This is the view taken ever since his inaugural speech by the CISL general secretary, Raffaele Bonanni. See his remarks at the General Council of the CISL, 27 April 2006, *Bollettino ADAPT*, 2006, No. 25.

[16] The renewal of the metalworkers' national collective agreement, that is influential in terms of pattern setting in Italy, is emblematic: see Tiraboschi, M. 2006. "Metalmeccanici: siglata l'intesa", Guida Lav. 5:11. Ample documentation for the arguments put forward is available at bollettinoADAPT.it, index A-Z, under the heading *Contrattazione collettiva*.

[17] Tobagi, W. 1980. *Che cosa contano i sindacati*. Milano: Rizzoli, reprinted in Baiocchi, G., and M. Volpato, eds. 2005. Walter Tobagi giornalista, Associazione Lombarda dei Giornalisti, Milan, esp. p. 226.

[18] See Tiraboschi, M. 2002. "Marco Biagi: The Man and the Master", The International Journal of Comparative Labour Law and Industrial Relations 3.

attempt – culminating in the reform of the labour market that bears his name[20] – to challenge this equilibrium based on the safety valve of employment in the hidden economy and employment contracts of dubious value affecting vast numbers of individuals who are denied protection and rights.

The need to deal with the extensive area of the informal economy, while governing and shaping the major transformations that are taking place, gave rise to the need to rethink the labour market, in order to provide a systematic reform of legislative provisions that had become increasingly incoherent at the end of the 1970s and the beginning of the 1980s, with the result that they were of little practical value and failed to work together as part of an overall plan. This fragmentary legislation, as has been rightly pointed out,[21] was not based on a coherent and far-reaching vision, and although attempts were made to deal with a range of matters such as the promotion of employment among young people and safety-net measures for the extensive processes of restructuring and reconversion, it was mainly characterised by the resistance to any intervention aimed at introducing systematic change. However, this resistance to innovation, though based on a passive approach providing derogations and exceptions, was accompanied by some initial concessions to market values and the requirements of the enterprise.

It is significant that some analysts have seen Italian labour law as mainly responding to economic crisis or transformation.[22] This approach may be said to be conservative, attempting to deal with emergencies[23] in a purely defensive manner, and limiting the social consequences of economic crisis[24] by means of

[19] See also the EU documents on the modernisation of labour law which the White Paper explicitly mentions: in particular the Communication of the European Commission on Modernising the Organisation of Work – A Positive Approach to Change, COM(98)592, esp. p. 8, available at bollettinoADAPT.it, index A-Z, under the heading *Lavoro (organizzazione del)*, and the documentation therein.

[20] On the so called "Biagi reform", reference can be made to the documentation and the bibliography in bollettinoADAPT.it, index A-Z, under *Riforma Biagi*.

[21] With reference to emergency labour law reforms adopted in the absence of an overall plan, see Romagnoli, U. 1983. "Il diritto del lavoro tra disincanto e riforme senza progetto", Riv. Trim. Dir. Proc. Civ.,esp. p. 20.

[22] See Giugni, G. 1989. "Il diritto del lavoro negli anni '80", G. Giugni, *Lavoro legge contratti*. Bologna: Il Mulino, p. 319.

[23] The dubious results of the period of emergency labour law are examined in De Luca Tamajo, R., and L. Ventura, eds. 1979. *Il diritto del lavoro nell'emergenza*. Napoli: Jovene.

[24] On this topic see the papers in D'Antona, M., R. De Luca Tamajo, G. Ferraro, and L. Ventura, eds. 1988. *Il diritto del lavoro negli anni 80*. Naples: ESI, vols. 1-2.

a policy of passive measures with ever-increasing subsidies by the State to enterprises.[25]

Such a traditional conception of labour law gives priority to rigid regulation and extremely high levels of protection, which has become increasingly inadequate for governing a marketplace undergoing drastic and far-reaching changes.

Particularly emblematic, in this connection, is the failure on the part of labour law to provide a strong response to the hidden economy,[26] in which the main intention is to avoid normative provisions and evade social contributions, while paying due regard to the development of modern forms of work organisation. As a result of the traditional approach, certain management techniques and employment models have been considered illegal, solely due to the inadequacy of the Italian legal framework, and its failure to modernise, when compared to provisions adopted in other countries.[27]

Consequently, there is a need to analyse the most recent normative developments in the labour market against the background of a complex historical process, aimed at the rationalisation of a system of labour law which at the end of the 1980s was characterised by successive layers of normative provisions, rigid practices of a corporative nature, and ad hoc legislative measures that were not part of an overall plan.[28]

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[25] On this point see Giugni, G. "Il diritto del lavoro negli anni '80", cit., p. 309, and for a more incisive analysis, Mancini, G. F. 2006. *Democrazia e costituzionalismo nell'Unione Europea*. Bologna: Il Mulino, esp. p. 18. For an analysis of economic policies adopted solely with a view to neutralising or offsetting, in the short term but also in the long term, normative constraints, in the form of the protection laid down by the traditional system of labour law, reference may be made to the study by the present author, 2002. *Incentivi alla occupazione, aiuti di Stato, diritto comunitario della concorrenza*. Turin: Giappichelli, esp. Chap. I.

[26] See the authoritative comments by Giugni, G. "Il diritto del lavoro negli anni '80", cit., esp. p. 329.

[27] Emblematic, in this connection, is the legitimisation of agency work, introduced in France and Germany as long ago as 1972, but introduced in the Italian system only by the Treu measures of 1997. See Biagi, M., and T. Treu. 1998. "Temporary work in Italy", Comparative Labor Law and Policies Journal. For an historical and comparative survey, reference may be made to the work of the present author, 1999. *Lavoro temporaneo e somministrazione di manodopera*. Torino: Giappichelli.

[28] See Giugni, G. "Il diritto del lavoro negli anni '80", cit., esp. p. 304, p. 322 and p. 331. Reference should also be made to Romagnoli, U. "Il diritto del lavoro tra disincanto e riforme senza progetto", cit., pp. 11-23 and Mariucci, L. *Le fonti del diritto del lavoro etc.*, cit., esp. pp. 135-168.

At the same time, an interpretation in a perspective of pure and simple deregulation – although put forward by many Italian labour law scholars[29] – may be said to be completely inappropriate, and incapable of explaining the overall development of the transformations taking place in recent years in the Italian system of labour law.[30]

It should also be noted that, in normative terms, legislative intervention has not resulted in a significant amount of deregulation or the promotion of free market policies, but has become more intense in recent years, to the point that some scholars have made ironic comments on the amount of space dedicated to labour market reform in the Gazzetta Ufficiale.[31]

Rather, it would appear to be more appropriate to speak of legislative innovations inspired by the need for a properly governed labour market, with a view to making legal norms more effective by adopting positive measures and normative incentives, to achieve greater cohesion between abstract normative provisions and the economic and social system they are intended to regulate.

The aim of safeguarding the effectiveness of legal norms would appear to be the main focus for an analysis, albeit problematic, of recent developments in Italian labour law. The system of labour law needs to embrace the values of industrial (and post-industrial) society,[32] pursuing modernisation as an

[29] For this view see, among others, Garofalo, M.G. 2006. "Il diritto del lavoro e la sua funzione economico-sociale", *Percorsi di diritto del lavoro*, eds. Garofalo, D., and M. Ricci, eds. Bari: Cacucci, pp. 127-144.

[30] On this point, with reference to the Italian debate on deregulation and the search for alternatives to a legalistic approach to employment relations based on inderogable norms, reference may be made to the study of the present author, *Incentivi alla occupazione, aiuti di Stato, diritto comunitario della concorrenza*, cit., Chap. I, § 2. In the international literature, comparable arguments are put forward by Gaudu, F. 2005. "Libéralisation des marchés et droit du travail", Droit Social No. 5, pp. 505-513 esp. 506, where the process of reform of French labour law is placed at the beginning of the 1980s.

[31] This comment about the Biagi reform of the labour law was made by Vallebona, A. 2004. *La riforma del lavoro*. Padova: Cedam.

[32] As advocated in the early 1980s by Giugni, G. "Il diritto del lavoro negli anni '80", cit., esp. pp. 334-335. This position, for many years neglected or at least supported only by a minority of Italian labour law scholars, (cf. Mariucci, L. "Il diritto del lavoro e il suo ambiente", *Scritti in onore di Giuseppe Federico Mancini*, cit., esp. pp. 346-348), was advocated again, in a perspective of constitutional recognition of the freedom of private economic initiative, by Persiani, M. "Radici storiche e nuovi scenari del diritto del lavoro", *Diritto del lavoro*, ed. Persiani, M. Padua: Cedam, Padua, esp. p. 91. For a highly critical comment see Garofalo, M. G. "Il diritto del lavoro e la sua funzione economico-sociale", cit., esp. p. 140, who speaks of the "hegemony of the so-called business culture" (our translation).

alternative to pure and simple deregulation,[33] while conciliating the traditional objectives of social justice with efficiency and productivity imposed by the transformations taking place in the economy and society, as in the early days of labour law.[34]

2. The Innovations Introduced by the Treu Measures and the Biagi Reform of the Labour Market

The reforms in the 1990s, with the "privatisation" of public-sector employment, the restructuring of employment services and the Treu measures for promoting employment[35] were carried forward with a considerable degree of continuity from one government to the next, though at times there were elements of incongruence[36] and even of discontinuity. In particular, reference should be made in this connection to Constitutional Law No. 3, 18 October 2001, reforming Title V of the Constitution. In spite of the ambiguous formulation regarding the division of competences relating to the "protection and security of employment" between the State and the Regions, this measure had a significant impact on the regulation of the labour market during the fourteenth legislature (2001-2006). But also in this case the paradigm shift was more apparent than real,[37] as recently confirmed by sentence No. 50/2005 of the Constitutional Court.[38]

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[33] A strategy for the "modernisation of labour law" as an alternative to a neoliberal approach was proposed in the international literature by Hepple, B. 1997. "Economic Efficiency and Social Rights", *Law in Motion*, ed. Blanpain, R. (The Hague: Kluwer Law International), pp. 867-878 esp. p. 857, and advocated in Italy by Biagi, M. 2003. "Competitività e risorse umane: modernizzare la regolazione dei rapporto di lavoro", *Marco Biagi: un giurista progettuale*, eds. Montuschi, L., M. Tiraboschi, and T. Treu, Milano: Giuffrè, pp. 149-182.

[34] For an attempt to demonstrate that labour law is not solely a unilateral system for the protection of the weaker party, but that since its origins it has also performed other functions, such as the protection of competition among undertakings, the resolution of social conflict, etc., reference may be made once again to the work of the present author, *Lavoro temporaneo e somministrazione di manodopera*, cit., esp. Chap. 3.

[35] Cf., in particular, Act No. 196/1997 and, for a detailed analysis, Biagi, M., ed. *Mercati e rapporti di lavoro etc.*, cit., and in the same volume, in particular, the introduction by Tiziano Treu and Marco Biagi.

[36] The most significant of which is, without a shadow of doubt, the exclusion of the public administration and public-sector workers from the field of application of the Biagi law, except for a generic reference to subsequent harmonisation, that has not led to further measures of any substance.

[37] Reference may be made, also for the bibliographical references, to the paper by the present author. 2005. "Riforma del mercato del lavoro e modello organizzativo tra vincoli

Above all the most recent measures[39] were intended to favour the modernisation of the system of labour law as a whole, in an attempt to balance the system of safeguards with the pressure exerted by international competition, in a dimension that transcends national sovereignty.

However, the turning point, in the form of the Treu measures in 1997, was only a partial step, as shown by the significant changes to the initial government proposals introduced by the agreement with the unions and the Act approved by Parliament.[40] Also the ambitious reform proposals announced by the Berlusconi government, with the publication of the White Paper on the Labour Market in October 2001,[41] were only partially embodied in legislation with the approval of Act No. 30, 14 February 2003, and the relative implementation decrees.[42]

In line with reforms taking place in other sectors, the substantial changes in the legal framework were adopted with the objective, in line with the European Employment Strategy to which the reforms make express reference,[43] to increase the level of regular employment, to overcome inefficiencies in the labour market, to promote employment of good quality

costituzionali ed esigenze di unitarietà del sistema". *Il diritto del mercato del lavoro dopo la riforma Biagi*, eds. Olivelli, P., and M. Tiraboschi, Milano: Giuffrè, pp. 40-96.

[38] See the comment by Scagliarini, S. 2006. "Competenze dello Stato e competenze delle Regioni in tema di regolazione del mercato del lavoro", note on the Constitutional Court 13-28 January 2005, sentence No. 50, Dir. Rel. Ind., No. 1:182-194.

[39] For an overall assessment, which is beyond the scope of the present study, see Veneziani, B. 2003. "Le trasformazioni del diritto del lavoro in Italia", *Scritti in memoria di Salvatore Hernandez*, Dir. Lav., No. 6, pp.901-922.

[40] See T. Treu, *Politiche del lavoro – Insegnamenti di un decennio*, Il Mulino, Bologna, 2001, esp. p. 26.

[41] See bollettinoADAPT.it, index A-Z, under the heading *Riforma Biagi*.

[42] In addition to the legislation to be cited below, for an analysis of the reform set in motion by Act No. 30/2003, known as the Biagi law, reference may be made to the extensive documentation available at bollettinoADAPT.it, index A-Z, under the heading *Riforma Biagi*. See also Tiraboschi, M. 2005. "The Italian Labour Market after the Biagi Reform", The International Journal of Comparative labour Law and Industrial Relations, No. 2.

[43] For the fundamental influence of EU employment and competition policy on the reform of the labour market in recent years, reference may be made to the paper by the present author "Riforma Biagi e Strategia Europea per la occupazione", Tiraboschi, M., ed. 2004. *La riforma Biagi del mercato del lavoro – Prime interpretazioni e proposte di lettura del d.lgs. 10 settembre 2003, n. 276*. Milano: Giuffrè, pp. 40-52. With reference to Act No. 196/1997, see Treu, T. "Politiche del lavoro e strumenti di promozione dell'occupazione: il caso italiano in una prospettiva europea", Mercati e rapporto di lavoro etc., cit., pp. 3-20. On the connection between the regulation of national labour markets and the Lisbon strategy, see Ashiagbor, D. 2005. *The European Employment Strategy – Labour Market Regulation and New Governance*. Oxford: Oxford University Press, pp. 242-300.

and labour productivity.[44] This was to be achieved also by means of research and experimentation[45] – which was hotly contested by part of the trade union movement[46] – with new normative techniques that were considered to be more effective, in an economic and social framework that had undergone profound change, with a view to conciliating in a pragmatic manner the need for efficiency and competitiveness of the enterprise with the protection of the workers.[47]

However, the recent labour market reform in Italy cannot simply be considered to be based on a policy – or inspired by a philosophy – of liberalisation, even in terms of the final effects rather than the original intentions.

On close examination, both the Treu measures and the Biagi law are part of a complex phase of transition in which, as in any significant reform process,[48] the influence may be seen of political programmes, political cultures and legal traditions that are quite different from each other, and that at times may even be difficult or impossible to reconcile.[49] As a result, any attempt to identify an abstract structural homogeneity in these substantial provisions is destined to failure. But an even more significant point is that the reform process cannot be said to be complete either at present or in the near future.

Even without taking into consideration the ambitious proposal for structural reform of the labour market – put forward during the thirteenth legislature[50] and then again with the tripartite pact on 5 July 2002 – aimed at introducing a

[44] See in this connection, the provisions of Article 1 (1) of Legislative Decree No. 276/2003, implementing the Biagi law.

[45] Above all the Biagi law was characterised, at least in the intention of the legislator, by the fact that it made provision for experimentation with the measures introduced. See in this connection Article 86 (12), Legislative Decree No. 276/2003.

[46] This matter is dealt with by Iorio, M.R. "Riforma Biagi e conflitto", *La riforma Biagi del mercato del lavoro*, ed. Tiraboschi, M. cit., pp. 731-745.

[47] This overall plan is dealt with in a systematic manner in Biagi, M. *Competitività e risorse umane: modernizzare la regolazione dei rapporto di lavoro*, cit., pp. 149-182.

[48] See in this connection, and with reference to the reform of labour law, Giugni, G. 1970. "I tecnici del diritto e la legge 'malfatta'", Pol. Dir., p. 479.

[49] This point, with reference to the Treu measures by Montecchi, E. "La legge n. 196/1997: una nuova fase dell'intervento pubblico sui mercati del lavoro", *Mercati e rapporto di lavoro etc.*, ed. Biagi, M. cit., p. 53, is made, with reference to the Biagi law, also in De Luca Tamajo, R. "Dietro le righe del d.lgs. n. 276 del 2003: tendenze e ideologie", *Diritto del lavoro. I nuovi problemi – L'omaggio dell'Accademia a Mattia Persiani*, cit., p. 953.

[50] See Treu, T. Politiche del lavoro e strumenti di promozione dell'occupazione etc., cit., esp. p. 11.

Work Statute or Statuto dei lavori,[51] the completion of the plan set out in the Biagi Law would require the reform of safety-net measures and the legal framework for employment incentives.[52] Not to mention the implementation at a practical level of the innovations introduced into the legal framework to facilitate company-level bargaining, that at present is held back by the power of veto exercised at the bargaining table both at sectoral and company level.[53] Evidently, it is by no means easy to identify a unified policy and inspiration in the legislative interventions considered, i.e. the Treu measures and the Biagi Law, but at the same time, it is even more problematic to provide an overall appraisal of these measures. Apart from any other consideration, such an appraisal would be possible only by means of an interpretation – that has been forward by the present author elsewhere – aimed at placing value on and identifying the systematic aspects of the numerous elements of continuity between the thirteenth and the fourteenth legislatures, which may be considered to be a natural progression from the rather confused legislative measures adopted between the end of the 1960s and the end of the 1980s.[54]

[51] Infra, § 5.

[52] Reference may be made here to the contribution of the present author. 2004. "Il sistema degli ammortizzatori sociali: spunti per un progetto di riforma", *La riforma Biagi del mercato del lavoro*, ed. Tiraboschi M., Milano: Giuffrè, pp. 1105-1121.

[53] On this point see Maresca, A. "Modernizzazione del diritto del lavoro, tecniche normative e apporti dell'autonomia collettiva", *Diritto del lavoro. I nuovi problemi – L'omaggio dell'Accademia a Mattia Persiani*, cit., p. 469-492. For an overview of the implementation of the Biagi law in collective bargaining, see the heading *Riforma Biagi* in the A-Z index at bollettinoADAPT.it.

[54] In terms of continuity, see Ichino, P. 2003. "La 'Legge Biagi' sul lavoro: continuità o rottura col passato?", Cor. Giur., pp. 1545-1549; Vallebona, A. *La riforma del lavoro*, cit.; Magnani, M. 2006. *Il diritto del lavoro e le sue categorie – Valori e tecniche nel diritto del lavoro*, Padova: Cedam, p. 35; Napoli, M. 2004. "Autonomia individuale e autonomia collettiva alla luce delle più recenti riforme", *Autonomia individuale e autonomia collettiva alla luce delle più recenti riforme*, Atti delle giornate di studio di diritto del lavoro, Abano Terme-Padua, 21-22 May. Milano: Giuffrè, p. 10; Perone, G. 2005. "Incertezze applicative ... e interpretazioni ragionevoli", *Tutele del lavoro e nuovi schemi organizzativi nell'impresa*, ed. Ficari, L., Milano: Giuffrè, p. 107; Sestito, P., and S. Pirrone. 2006. *Disoccupati in Italia – Tra Stato, Regioni e cacciatori di teste*. Bologna: Il Mulino, p. 10. However, this view is not universally supported by legal scholars. Among the many scholars who consider the elements of discontinuity to be prevalent, see Ghezzi, G. 2003. "Mercato del lavoro, tipologie negoziali e definizioni", *Scritti in memoria di Salvatore Hernandez*, Dir. Lav., No. 5, p. 322.

3. The Ambiguous Nature of the Expression "Liberalisation Policies" in Labour Market Regulation

The identification of a substantial degree of continuity in the recent labour market reforms makes it possible to refute, as clearly unfounded, the interpretations that, at times in an ideological manner and at times by way of caricature,[55] point to elements of discontinuity in the various legislative interventions which, though substantial, are often extrapolated in an artificial and arbitrary manner from their historical and cultural context.

In this perspective, a line of interpretation that is particularly emblematic is that which, deliberately setting aside the values and principles laid down in the Constitution, maintains that the reform measures not only contain significant technical defects[56] but also violations of the Constitution.

Indeed this is a feature to be found in many of the criticisms of the recent reform measures: from the reform of temporary agency work to the new provisions on working time, from the reform of the structural rules for the labour market to the regulation of part-time, job sharing and flexible employment contracts.

However, on closer examination, even if the aim is to carry out an abstract appraisal of the measures laid down in the most recent and controversial legislative intervention, the Biagi reform of the labour market, there does not appear to be any evidence to support the argument – which is actually of an

[55] Mention should be made of the argument that the recent labour market reforms have given rise to an uncontrolled proliferation of flexible and precarious types of employment contract. According to a recent study by the De Benedetti Foundation (Il Sole 24 Ore, 24 February 2006) there are at least 44 types (and more considering certification) of atypical employment introduced by the Biagi law. As I have argued elsewhere (Tiraboschi, M. 2006. *Precarietà e tipologie di lavoro: la moltiplicazione dei pani e dei pesci*, in *Bollettino ADAPT*, No. 13, the types of employment contract in the entire system, including open-ended salaried employment, amount to just over a dozen.

[56] The characterisation of the law as 'defective' is by no means original and in fact practically every legislative reform of any substance is subject to the same criticism. See on this point Giugni, G. "I tecnici del diritto e la legge 'malfatta'", cit., pp. 479-480, who rightly notes that every "new law, that has a high degree of technical and juridical content, is by its very nature subject to critical comment" (our translation). There are various reasons for this, even though "it is often and perhaps always the case that the critical comments conceal an underlying political opposition" (our translation) as may be said to be the case with the Biagi reform of the labour market. Reference may be made in this connection to the study by the present author, "Riforma del mercato del lavoro e modello organizzativo tra vincoli costituzionali ed esigenze di unitarietà del sistema", in Olivelli, P., and M. Tiraboschi, eds. Il diritto del mercato del lavoro dopo la riforma Biagi, cit., esp. pp. 40-58.

ideological nature[57] – that it is part of an overall design clearly based on neo-liberalism inspired by classical macroeconomics.[58] As if to say that today, as in the early days of the industrial revolution, the Italian labour market is left entirely to the free play of market forces, subject only to the common law of contract.

Such a position would fail to take account of the persistent and rigorous safeguards (both legal and contractual) which at least formally, considering the loss of effectiveness of the provisions of legislation and collective agreements discussed above (supra,§ 1), regulate the matching of the supply and demand for labour, the management of the employment relationship, and above all dismissals.[59] On the other hand, it is evident – even for those who tend to underestimate the extent to which the law reflects labour policy[60] – that the Biagi reform does not affect any of the fundamental features of existing trade union and labour law.[61]

Suffice it to make a comparison, with a minimum of scientific rigour, between the Italian legislation enacted since 2001 and the neoliberal policies adopted in

[57] The Biagi reform was roundly criticised even before the legislation actually appeared. See in this connection Del Conte, M. "Il ruolo della contrattazione collettiva e l'impatto sul sistema di relazioni industriali", *La riforma Biagi etc.*, ed. Tiraboschi, M., cit, esp. pp. 636, which, on the basis of a presumed (or presumable) political will underlying the reform outlined in the White Paper on the Labour Market, describes the "preventive commentary" of a significant number of legal scholars on a legislative text that had not yet been drafted and even less approved by Parliament.

[58] In these terms cf. on the other hand De Luca Tamajo, R. "Dietro le righe del d.lgs. n. 276 del 2003 etc.", cit., pp. 953-969, and Mariucci, L. *Le fonti del diritto del lavoro etc.*, cit., esp. p. 152.

[59] On dismissal law and the principle of justification see Liebman, S. "Dispute Settlement procedures and Flexibilisation of Employment Relations: Remedies Against Unfair Dismissal Under Italian law", *Changing Industrial Relations and Modernisation of Labour Law – Liber Amicorum in Honour of Professor Marco Biagi*, cit., eds. Blanpain, R., and M. Weiss, pp. 269-276.

[60] Initially this aspect of the Biagi reform did not attract much critical attention either in terms of Act No. 39/2003 or the later implementation decrees. Among the few legal scholars commenting on this aspect, see P. Ichino, "L'anima laburista della legge Biagi – Subordinazione e "dipendenza" nella definizione della fattispecie di riferimento del diritto del lavoro", Giust. Civ., 2005, pp. 131-149.

[61] For an analytical account of the matters not dealt with by the Biagi reform, see Vallebona, A. *La riforma del lavoro*, cit., esp. p. X. The reform is considered to be in a minor key, compared to the plans laid down in the White Paper on the Labour Market, also by Alleva, P. 2003. "La ricerca e la analisi dei punti critici del decreto legislativo n. 276/2003 in materia di occupazione e mercato del lavoro", Riv. Giur. Lav, No. 1 p. 887, who recognises that in an analytical framework that is strongly critical, the reform may by no means be compared to the vision "of a sociologist or economist espousing neo-conservative theories" (our translation).

the United Kingdom by the Thatcher and Major governments – and substantially continued by the Blair administration since 1997[62] – to appreciate the fact that, even after the Biagi reform, Italy is by no means characterised by an individualistic ideology based on the self-regulation of the free market, hostile to the intervention of labour law and the State in the regulation of employment relations, with the ultimate objective of dismantling the power and prerogatives of the unions.

Rather, it may be said that it makes little sense when considering the Italian labour market to speak of liberalisation in the proper sense of the term. First of all, because such an expression takes on a specific meaning in this particular area of law, with a negative connotation since it is in contrast with the fundamental rationale for the emergence and development of a special and autonomous area of law, albeit not self-sufficient, known as labour law, aimed primarily at striking a balance between the bargaining power of the individual worker and market pressures in the negotiation of, in the course of, and on termination of the employment relation. Second, because, if it is really intended to speak of liberalisation, at least in the experience so far in Italy, these measures should be seen as interventions for modernising and updating the legal framework. In other words, as measures for the progressive rethinking of certain rigidities (often arising from case law interpretation) in the employment of the workforce – that may be seen as part of a policy of deregulation only in improperly speaking[63] – that cannot be justified in terms of the protection of the fundamental rights of the weaker party in the

[62] See in this connection the powerful analysis by Fredman, S. 2004. "The Ideology of New Labour Law", *The Future of Labour Law – Liber Amicorum Bob Hepple*, eds. Barnard, C., S. Deakin, G. Morris, (Oxford: Hart Publishing), 9-39 and p. 10, where it is argued that "as New Labour labour law demonstrates all too dishearteningly, behind the Third Way rhetoric, neoliberalism has, by stealth, become the dominant ideology, relegating social democracy to the minor partner". See also Deakin, S., and F. Wilkinson. 2005. *The Law of the Labour Market – Industrialization, Employment and Legal Evolution*, Oxford: Oxford University Press.

[63] In this connection see Giugni, G. "Giuridificazione e deregolazione nel diritto del lavoro italiano", cit., esp. p. 349 and p. 353, where he argues that in the Italian tradition deregulation cannot be seen as "the abolition of norms and hence the return to the individual contract, but the introduction of flexibility into the normative process external to it" (our translation). For the view that these policies are tantamount to pure and simple liberalisation, that in our opinion is unfounded and not based on a scientific approach, see Garofalo, M. G. "Il diritto del lavoro e la sua funzione economico-sociale", cit., esp. p. 139-141.

employment relationship[64] but that have a negative impact on the competitiveness of the Italian economy.

The trend towards a scaling back of normative restrictions and the introduction of greater elasticity in the labour market, though now decidedly more evident and explicit should not be confused in a superficial manner with a neoliberal policy based on a return to free bargaining and the self-regulation of the market. Rather, the recent normative interventions may be seen, regardless of their technical and political limitations, as an attempt to deal with certain developments in the labour market and industrial relations, which, as noted above, can be traced back to the period in which labour law had to respond to a situation of emergency and crisis.

In relation to the consolidated structure of the Italian system, the impact of the Biagi reform of the labour market cannot be said to represent more of a break with the past in qualitative or quantitative terms than other recent reforms, in particular the Treu measures. Moreover, it cannot be said to have been introduced without due regard for the negotiating procedures traditionally laid down by the Italian industrial relations system, bearing in mind the tripartite agreement concluded on 5 July 2002, with some reservations,[65] and not without a degree of opposition.[66]

As evidence of a degree of continuity with the past, reference may be made to the tripartite agreement on the regulation of the labour market concluded in January 1983,[67] that was an initial attempt to shake up the outdated public employment services, making provision for more extensive use of fixed-term employment contracts and certain new types of employment such as work training contracts and part-time work. Reference could also be made to the

[64] In this connection, see, for example, the use of the term "liberalisation" by Giugni, G. "Il diritto del lavoro etc.", cit., p. 291, with regard to the first cautious measures for deregulating the rigidities of the labour market. In the same vein see Treu, T. "Politiche del lavoro etc.", cit., esp. pp. 26-27, which, with reference to the substantial watering down, during the parliamentary proceedings and the negotiations with the social partners, of a number of innovative proposals in the first draft of the Treu measures, speaks of "the resistance of an ideological kind and on the part of vested interests encountered by deregulation in our country" (our translation).

[65] See, in particular, Montuschi, L. "Tecniche sperimentali deregolative del mercato del lavoro: un'intesa contrastata". *Scritti in onore di Giuseppe Suppiej*, cit., esp. p. 717, where he pointed out, in connection with the fact that the CGIL did not sign the agreement, that "the Pact for Italy cannot count on a high degree of social cohesion" (our translation).

[66] See the highly critical comments by Giugni, G. 2003. *La lunga marcia della concertazione*. Bologna: Il Mulino, pp. 112-118.

[67] With regard to the Scotti protocol, reference may be made to Giugni, G. *La lunga marcia della concertazione*, cit., esp. pp. 39-55.

structural measures on employment policy contained in the protocol of July 1993,[68] in favour of the employment of young people, the revival of the labour market and the management of the crisis in employment. More extensive provisions were implemented with the agreement of September 1996,[69] paving the way for the Treu measures, introducing temporary agency work in the face of a certain amount of opposition. The 1996 agreement provided for the introduction of training and career guidance placements, a reorganisation of training contracts, new forms of employment with reduced and flexible working hours, a reform of the sanctions relating to fixed-term employment, the abolition of the public monopoly on employment services, and the recognition of the legitimacy of private employment agencies.[70]

If these measures, representing a clear break with the traditional paradigm of labour law, are not considered to be representative of a neoliberal approach,[71] the same may be said of the recent reform of the legal framework,[72] which responds to the same need for rationalisation of employment safeguards in response to changes that are under way, in particular, the expansion of the hidden economy and irregular employment, the modification of productive processes and organisational innovation due to the use of new technology, the globalisation and internationalisation of markets, the growth of the tertiary sector, the increasing importance in the labour market of workers (especially women and young people) who require flexible working arrangements,

[68] On the labour measures contained in the Giugni protocol, see D'Antona, M. 1993. "Il protocollo sul costo del lavoro e l''autunno freddo' dell'occupazione", Riv. It. Dir. Lav., No. 1, esp. pp. 426-427, where he highlights the limits of a reform project that followed a well-trodden path, starting from the "proliferation of employment contracts of dubious value" (our translation). This criticism is now levelled at the Biagi law, but with a line of reasoning, as we can see, that is not new.

[69] On the 1986 labour agreement see Antonello, M. "Note sulla genesi della legge n. 196/1997", *Mercati e rapporti di lavoro*, cit., pp. 55-57.

[70] An extensive analysis is provided in Biagi, M., ed. Mercati e rapporti di lavoro etc.,cit.

[71] This view is expressed by Giugni, G. *Giuridificazione e deregolazione nel diritto del lavoro italiano*, cit., pp. 349-350. Along similar lines, Treu, T. *Politiche del lavoro e strumenti di promozione dell'occupazione etc.*, cit., p. 3.

[72] It is by no means easy to understand why the measures introduced by Treu are for certain legal scholars the "continuation of a long period of reform of traditional practices, of a long-standing commitment to reforms which has the support of the large trade union confederations in person" (Mariucci, L. *Le fonti del diritto del lavoro etc.*, cit. p. 151), whereas the Biagi law, that does not go any further towards a break with traditional labour law practices, is seen as a neoliberal plan for the deregulation of the labour market. However, one author who gives due recognition to the fact that the issues tackled by the most recent labour market reforms can be traced back to the 1980s is Carabelli, U. 2006. "Leggi sul lavoro, ricominciamo da cinque", Eguaglianza & Libertà www.eguaglianzaeliberta.it.

particularly in terms of working hours and the possibility of re-entering the labour market after a period away from paid employment.[73]

4. Deregulation, Reregulation, Decentralisation

The recent reform cannot therefore be seen as a process of liberalisation at least in the strict sense, with the negative connotation that the term takes on in relation to the original raison d'être of labour law. In addition, it cannot be argued that there has been a de-structuring of labour law or of the fundamental values laid down in the Italian Constitution. In the disciplinary area that studies labour market developments and regulation, it is clearly useful to analyse the evolution of legal provisions in an interpretative framework that makes a distinction between the reregulation (or reformulation) and/or decentralisation (or devolution) of the normative sources on the one hand, and measures that may be considered to be a form of deregulation properly speaking.[74] This is the most favourable perspective for putting to good use the teachings of a leading scholar recently departed such as Matteo Dell'Olio, even though he has raised objections to the recent legislative reforms.[75] "In relation to a law that is in force", wrote Dell'Olio recently[76] – "the approach of the legal scholar should be to make a fair attempt to interpret and apply it in the most rational and reasonable way possible, without 'hunting for errors,' that is of little value", (our translation) and, it may be added, without an ideological response and preconceived ideas.

[73] In questo connection see Biagi, M. *Competitività e risorse umane: modernizzare la regolazione dei rapporti di lavoro*, cit., esp. p. 151.

[74] On this point cf. Giugni, G. *Giuridificazione e deregolazione nel diritto del lavoro italiano*, cit., esp. pp. 352-361.

[75] Reference may be made to the critical observations in Dell'Olio, M. 2005. "Ordinamento civile e diritto del lavoro: tecniche, fonti, figure", *Diritto del lavoro – I nuovi problemi. L'omaggio dell'Accademia a Mattia Persiani*, cit., esp. pp. 107 ff. See also Dell'Olio, M. "I rapporti di lavoro atipici nella recente riforma", Arg. Dir. Lav., p. 69-94.

[76] Dell'Olio, M. 2005. "Intervento". *Tutele del lavoro e nuovi schemi organizzativi nell'impresa*, ed. L. Ficari, Milano: Giuffrè, p. 160.

4.1. The Organisation and Regulation of the Labour Market and Support for Bilateralism

An instance of genuine deregulation did undoubtedly take place in relation to the organisation and governance of the labour market.[77]

However, this occurred from the 1980s on,[78] with measures prefiguring the abolition of the principle of the state monopoly on employment services, formally introduced only in the late 1990s.[79] It should be noted that the plan for a public system for matching the supply and demand for labour was never fully implemented, and as a result the subsequent normative changes took the form of a reorganisation of employment services, made necessary by EU policies on employment and competition, and by the reassignment of powers between the State and the regions arising from the reform of Title V of the Constitution.[80]

There seems to be little reason to speak of indiscriminate liberalisation and policy deregulation[81] with regard to a system for matching the supply and demand for labour which, unlike the system in many other European countries,[82] still prohibits private companies from operating on the market unless they have an administrative authorisation that is issued only on the basis of rigorous formal and substantial requisites.[83] Rather, it is the case that

[77] In this case I refer to the labour market in the strict sense, with reference not to labour law as a whole, but to the regulation of hiring and the channels for matching the supply and demand for labour.

[78] See for a brief comment, Giugni, G. 1984. "Giuridificazione e deregolazione nel diritto del lavoro italiano", cit., p. 353. For an in-depth analysis, Ichino, P. "Politiche del lavoro e strategia di deregulation", Riv. It. Dir. Lav., No. 1, pp. 590-598, and Tullini, P. 1992. "La liberalizzazione 'guidata' del collocamento", Riv. It. Dir. Lav., No. 1, pp. 48-81.

[79] Cf., as one of many authors, Ales, E. 1998. "La nuova disciplina del mercato del lavoro tra 'decentramento controllato' e 'liberalizzazione accentrata'", Arg. Dir. Lav., p. 527.

[80] Cf., on this point, Olivelli, P. "Pubblico e privato nella riforma dei servizi per l'impiego", *Il diritto del mercato del lavoro dopo la riforma Biagi*, cit., esp. pp. 7-12.

[81] But on this point see Angiolini, V. "Le agenzie del lavoro tra pubblico e privato". *Il lavoro tra progresso e mercificazione etc.*, cit., p. 36, and Mariucci, L. *Le fonti del diritto del lavoro etc.*, cit. For a more complete and convincing analysis of the Biagi reform of the labour market, highlighting the elements of continuity with the past, see Napoli, M. *Autonomia individuale e autonomia collettiva alla luce delle più recenti riforme*, cit., p. 9 ff.

[82] See the comparative study by Spattini, S. 2006. *Il governo del mercato del lavoro tra controllo pubblico e neo-contrattualismo*, Milano: Giuffrè.

[83] See, for example, Lassandari, A. "L'intermediazione pubblica e privata nel mercato del lavoro", *Mercato del lavoro etc.*, cit., pp. 393-408, and Magnani, M. "La riforma dell'organizzazione del mercato del lavoro". *Il diritto del mercato del lavoro etc.*, cit., pp. 24-39.

the measures taken to improve the fluidity of the labour market, with the transition from the concept of a public function to that of a service, are aimed solely at achieving social objectives by means of private economic initiative,[84] in a far more effective manner than the previous system based on prohibitions that was highly rigorous in formal terms but largely ineffective in practical terms. The primary aim of the reform is to create a properly functioning labour market, so that the right to work becomes effective[85] in compliance with the principles of subsidiarity, transparency and efficiency,[86] and certainly not liberalisation without rules governing the matching of the supply and demand for labour.

Together with the scheme for the authorisation of private operators,[87] particular importance is given in the context of the reregulation and reformulation of the labour market to regional accreditation schemes,[88] aimed at facilitating the development of an integrated and decentralised network of employment services at territorial level (placement services, the prevention of long-term unemployment, the promotion of access to work for disadvantaged groups, support for the geographic mobility of workers, and so on) based on cooperation and active links between public bodies and private operators.[89]

In connection with the territorial level, mention should be made of the legislative provisions for bilateral bodies[90] as a privileged channel for the

[84] See Liso, F. "Appunti sulla trasformazione del collocamento da funzione pubblica a servizio". *Mercato del lavoro etc.*, cit., esp. p. 367.

[85] See Dell'Olio, M. 2002. "Mercato del lavoro, decentramento, devoluzione", Arg. Dir. Lav., esp. p. 176.

[86] For an in-depth study, that is beyond the limits of the present work, reference may be made to the paper by the author, "Riforma del mercato del lavoro e modello organizzativo tra vincoli costituzionali ed esigenze di unitarietà del sistema". *Il diritto del mercato del lavoro etc.*, cit., pp. 40-96.

[87] In this connection see Spattini, S., and M. Tiraboschi, "Le agenzie per il lavoro: tipologie, requisiti giuridico-finanziari e procedure di autorizzazione". *Il diritto del mercato del lavoro etc.*, cit., pp. 127-168, and the bibliography therein.

[88] On the system of regional accreditation, see Rosato, S. "I regimi di accreditamento: profili generali e prospettive regionali di sviluppo". *Il diritto del mercato del lavoro etc.*, cit., pp. 127-168, and Falasca, G. 2006. *I servizi privati per l'impiego*. Milano: Giuffrè, pp. 103-150.

[89] For an in-depth treatment, that cannot be attempted here, see Tiraboschi, M. "Riforma del mercato del lavoro e modello organizzativo tra vincoli costituzionali ed esigenze di unitarietà del sistema", cit., esp. pp. 74-79.

[90] On this topic, also for a survey of the many normative references to bilateralism contained in the Biagi law, see Proia, G. 2003. "Enti Bilaterali e riforma del mercato del lavoro", *Scritti in memoria di Salvatore Hernandez*, Dir. Lav., pp. 647-657, and Napoli, M. 2003. "Gli enti bilaterali nella prospettiva di riforma del mercato del lavoro", Jus, pp. 235-246, and Napoli,

regulation and shared governance of the labour market.[91] Comparative experience shows that active labour market and income support policies are particularly efficient and effective when jointly managed, in whole or in part, with the social partners.[92]

In addition, the bilateral approach is associated with an industrial relations model of a collaborative and cooperative type that promotes territorial development and regular employment of good quality. Bilateralism does not eliminate conflict, nor does it alter the function of the trade union with a shift towards a liberal approach to labour market regulation,[93] but may be a useful instrument for the implementation of contractual terms, i.e. the conditions negotiated during collective bargaining, with a view to promoting human capital, in line with developments in employment relations in the matching of the supply and demand for labour, vocational training, the certification of employment contracts and income support,[94] that are particularly suited to modes of production that are increasingly fragmented and intermittent.

4.2. Outsourcing and the Recourse to External Labour Markets

A similar argument can be put forward with regard to the regulation of the outsourcing of labour. The abrogation of Act No. 1369/1960 (followed by the formal abrogation of Articles 1-11 of Act No. 196/1997 on temporary agency work), represents an attempt, at least in the intention of the legislator,[95] to reform an area characterised by antiquated and inderogable legal provisions which over the years had become increasingly inadequate for regulating the new models of production and labour organisation.

M. 2005. "Riflessioni sul ruolo degli enti bilaterali nel decreto legislativo 10 settembre 2003, n. 276", Jus, pp. 309-321.

[91] See Article 2 (1) (h), Legislative Decree No. 276/2003.

[92] Spattini, S. *Il governo del mercato del lavoro tra controllo pubblico e neo-contrattualismo*, cit.

[93] For an opposing view, Mariucci, L. 2003. "Interrogarsi sugli enti bilaterali", Lav. Dir., 167-177.

[94] On the certification of employment contracts see Pasquini, F. "Il ruolo degli organismi bilaterali nel decreto attuativo della legge 14 febbraio 2003, n. 30: problemi e prospettive". *La riforma Biagi del mercato del lavoro etc.*, cit., pp. 650-678. See also the documentation available at bollettinoADAPT.it, index A-Z, under the heading *Enti bilaterali*.

[95] For an in-depth analysis of the rationale of the Biagi law in relation to outsourcing and insourcing see the paper by the present author, "Somministrazione di lavoro, appalto di servizi, distacco". *La riforma Biagi del mercato del lavoro etc.*, cit., pp. 205-229.

In the Italian context the attempt to facilitate the movement of labour between companies and the possibility, within an increasingly complex productive system, to assign the employees of a company to work to be carried out outside the company has been strongly criticised by a number of legal scholars.[96] Once again, reference has been made to a model of organisation of the productive system that is unequivocally neoliberal in character, aimed at dismantling the existing legal restrictions on decentralisation and contract labour, in order to protect the organisational choices and economic interests of the employers, while defining as illicit "only those processes consisting of fraudulent and anti-labour practices" (our translation).[97]

However, as rightly noted by legal scholars adopting a less ideological stance and paying greater attention to the actual provisions of the law,[98] the abrogation of the outdated legislation that had failed to effectively govern the processes of labour outsourcing and insourcing was not an act of deregulation "but simply the condition for a normative reform of the entire matter" (our translation).[99]

In place of the drastic prohibition of every form of agency work, even when not accompanied by intentions of a fraudulent nature or when detrimental (or potentially detrimental) for the workers,[100] attenuated only by the derogations and exceptions laid down by Act No. 196/1997, the recent reform introduced a

[96] See among others, Alleva, P. "La nuova disciplina degli appalti di lavoro". *Il lavoro tra progresso e mercificazione – Commento critico al decreto legislativo n. 276/2003*, cit., p. 166; Chieco, P. "Somministrazione, comando, appalto. Le nuove forme di prestazione di lavoro a favore del terzo". *Lavoro e diritti dopo il decreto legislativo 276/2003*, cit., esp. p. 92; Speziale, V. "Somministrazione di lavoro". *La riforma del mercato del lavoro e i nuovi modelli contrattuali*, eds. Gragnoli, E., and A. Perulli, Padova: Cedam, esp. pp. 277-279, and Scarpelli, F. 2004. "Appalto", *ibid.*, esp. p. 437; Romagnoli, U. 2004. "Radiografia di una riforma", Lav. Dir., esp. pp. 39-38, and Mariucci, L. 2004. "I molti dubbi sulla c.d. riforma del mercato del lavoro", Lav. Dir., p. 11.

[97] See De Luca Tamajo, R. *Tra le righe del d.lgs. n. 276/2003 etc.*, cit., esp. p. 351

[98] Cf. Magnani, M. 2005. "Le esternalizzazioni e il nuovo diritto del lavoro". *Organizzazione del mercato del lavoro e tipologie contrattuali*, eds. Magnani, M., and P. A. Varesi, Torino: Giappichelli, pp. 283-297; Del Punta, R. 2004. "La nuova disciplina degli appalti e della somministrazione di lavoro". *Come cambia il lavoro*, Various Authors, Milano: Ipsoa; Ichino, P. 2004. "Somministrazione di lavoro, appalto di servizi, distacco". *Il nuovo mercato del lavoro*, Various Authors, Bologna: Zanichelli, pp. 258-326; Romei, R. "La distinzione tra interposizione e appalto e le prospettive della certificazione". *La riforma Biagi del mercato del lavoro etc.*, cit., pp. 287-306.

[99] See Magnani, M. "Le esternalizzazioni e il nuovo diritto del lavoro", cit., esp. p. 284.

[100] In this connection, for a useful survey of the main opinions among legal scholars and in case law, see Bano, F. 2004. "La somministrazione di lavoro". *Impiego flessibile e mercato del lavoro*, ed. Perulli, A., Torino: Giappichelli, esp. pp. 3-5.

normative framework, in line with a number of case law rulings,[101] that provides a more effective response the needs of the enterprise.

However, workers continue to be protected by a general prohibition on intermediation in employment,[102] and this prohibition has now been made more effective by bringing to light irregular and fraudulent forms of contract labour.[103]

At the same time, the regulation of service contracts and the transfer of undertakings has been reformed, with a view to improving company performance and providing greater safeguards in terms of stability of employment.[104] In this way, there is greater flexibility for undertakings wishing to make use of external human resources, while rethinking their models of work organisation in the belief – shared by the EU institutions[105] –

[101] See Calcaterra, L. 2002. "Il divieto di interposizione nelle prestazioni di lavoro: problemi applicativi e prospettive di riforma". I *processi di esternalizzazione. Opportunità e vincoli giuridici*, ed. De Luca Tamajo, R. Napoli: ESI, pp. 127-181, and, more recently, Luzzana, M. 2005. "Outsourcing/insourcing: vincoli e opportunità alla luce dei più recenti orientamenti della giurisprudenza". *Lo sviluppo del 'capitale umano' tra innovazione organizzativa e tecniche di fidelizzazione*, eds. Malandrini, S., and A. Russo, Milano: Giuffrè, Milan, pp. 95-110.

[102] Among legal scholars, see Magnani, M. "Le esternalizzazioni e il nuovo diritto del lavoro", cit., esp. p. 284. Case law rulings: Cass. 21 November 2005 (hearing 25 October 2005), No. 41701, Cass. 26 April 2005 (hearing 1 February 2005), No. 15579; Cass. pen. 3 February 2005 (hearing 20 December 2004), No. 3714; Cass. pen. 26 January 2004 (hearing 11 November 2003), No. 2583; Cass. pen. 24 February 2004 (hearing 29 January 2004), No. 7762; Cass. pen. 25 August 2004 (hearing 16 June 2004), No. 34922, all of which are available at bollettinoADAPT.it, index A-Z, under the heading *Somministrazione*. For one of the first comments Tuffanelli, A. "La somministrazione di lavoro altrui: nuovo quadro legale e regime sanzionatorio". *Il diritto del mercato del lavoro dopo la riforma Biagi*, cit., pp. 461-473, and in particular in relation to Cass. pen. 25 August 2004 (hearing 16 June 2004), No. 34922, cit., and on Trib. Ferrara, sez. pen., 24 December 2003 (Riv. it. dir. lav., 2005, II, p. 726) see the comment by Romei, R. 2005. "L'elisir di lunga vita del divieto di interposizione", Riv. it. dir. lav., No. 2, pp. 726-736. See also the analysis provided, in the form of obiter dictum, in Cass. 1 April 2005, No. 6820, available at bollettinoADAPT.it, index A-Z, under the heading *Somministrazione*.

[103] For an overview of the problem, and an in-depth treatment that is beyond the scope of this paper, reference may be made to the work of the present author. 2006. "Esternalizzazioni del lavoro e valorizzazione del capitale umano: due modelli inconciliabili?". *Le esternalizzazioni dopo la riforma Biagi*, ed. Tiraboschi, M., Milano: Giuffrè, pp. 1-38.

[104] For an in-depth analysis see Del Conte, M. "Rimodulazione degli assetti produttivi tra libertà di organizzazione dell'impresa e tutele dei lavoratori". *Le esternalizzazioni dopo la riforma Biagi*, cit., pp. 419-434.

[105] European Commission. 2002. *Anticipating and Managing Change: a Dynamic Approach to the Social Aspects of Corporate Restructuring*. Brussels: European Commission, esp. p. 2, available at bollettinoADAPT.it, index A-Z, under the heading *Lavoro (organizzazione del)*.

that only by governing change is it possible to maintain and develop the human capital of a given system of production.
In the light of variations in transaction costs in each company and productive sector, regarding the costs arising from decision-making and acquiring experience, management (concerning contracts and labour relations) and change (arising from the transfer from one type of contract to another)[106] – agency work cannot simply be considered as directly equivalent to open-ended salaried employment. Rather, in the provisions laid down by Legislative Decree No. 276/2003, it is seen as a specific organisational and management resource operating in favour of flexibility in employment but also, and perhaps above all, in favour of the modernisation of the productive system – and of the public administration[107] – by means of models of contractual integration between companies coordinated by actors providing a range of services with a high degree of specialisation, as is the case with employment agencies today.[108]

4.3. Human capital, Flexibility in Employment Contracts, Organisational Innovation and the Power of the Employer

Human resource development and organisational innovation also give rise to the need for the reform of the various types of training contracts, atypical work, and the organisation of working hours. In this perspective, the reform of the regulation of fixed-term employment is of central importance[109] in the modernisation of the Italian labour market, following the Treu measures of 1997.[110] In effect, setting aside the considerable controversy surrounding the "strange case" of Legislative Decree No. 368/2001 implementing EU

[106] On this point see Rugiadini, A. 1985. "L'efficienza delle scelte manageriali fra organizzazione e mercato". *Organizzazione e mercato*, eds. Nacamulli, R.C.D., and A. Rugiadini, Bologna: Il Mulino, and Golzio, L. 2005. "L'evoluzione dei modelli organizzativi d'impresa", Dir. Rel. Ind., pp. 313-323.
[107] See Verbaro, F. "Il fenomeno delle esternalizzazioni nella pubblica amministrazione". *La riforma Biagi del mercato del lavoro etc.*, cit., pp. 489-512.
[108] For an in-depth analysis reference may be made to the work of the present author, "Somministrazione di lavoro, appalto di servizi, distacco". *La riforma Biagi del mercato del lavoro etc.*, cit., pp. 205-229.
[109] Cf. Legislative Decree No. 368/2003 and the papers in Garilli, A., and M. Napoli, eds. 2002. *Il lavoro a termine in Italia e in Europa*. Torino: Giappichelli.
[110] In this connection see Biagi, M. 2002. "La nuova disciplina del lavoro a termine: prima (controversa) tappa del processo di modernizzazione del mercato del lavoro italiano". *Il nuovo lavoro a termine*, ed. Biagi, M. Milano: Giuffrè, pp. 3-20.

Directive No. 99/70/EC,[111] the measures taken by the legislator reregulate and reformulate a fragmentary and contradictory legislative framework in which over the years the exception, compared to the rigorous provisions of Act No. 230/1962, had become the rule. The result was that fixed-term contracts had become "not a subordinate but an alternative (and rival) model compared to open-ended employment" (our translation).[112]

The regulatory technique in the case of the legitimate use of fixed-term employment adopted in Legislative Decree No. 368/2001 is undoubtedly innovative. The explanatory memorandum appended to the Decree provides evidence of this,[113] stating that, compared to the previous regulations, "the approach adopted [...] is undoubtedly innovative, simpler and, at the same time, less likely to be subject to evasion by means of fraudulent practices. Rather than stating that fixed-term employment is forbidden, except in the cases explicitly laid down by the law and/or by collective agreements (often subject to specious interpretation), it has been decided to adopt a clear formulation as found in other European systems: the employer may hire employees on fixed-term contracts, on condition that at the same time written motivation is provided of a technical, productive or organisational nature, or for the substitution of personnel" (our translation).

However, at least with regard to the implementation at a practical level of fixed-term contracts, it is difficult to speak of a reversal of previous provisions,[114] resulting in a radical and indiscriminate liberalisation of such contracts.[115] The formal innovations introduced by Article 1(1) of Legislative Decree No. 368/2001, though appearing to be radical on the basis of a purely textual comparison with the wording of Act No. 230/1962, are not actually

[111] The matter is examined by Pera, M. 2001. "La strana storia dell'attuazione della Direttiva CE sui contratti a termine", Lav. Giur., esp. p. 306, with reference to the complex social dialogue leading to a joint agreement (without the signature of the CGIL) and the intention of the Italian legislator concerning the obligations laid down in the Directive. For an overview of this issue see also M. Biagi, *La nuova disciplina del lavoro a termine etc.*, cit.

[112] See Montuschi, L. 2000. "L'evoluzione del contratto a termine. Dalla subalternità all'alternatività: un modello per il lavoro, in Il lavoro a termine", Quaderni Dir. Lav. Rel. Ind., pp. 10-11.

[113] Available at bollettinoADAPT.it, index A-Z, under the heading *Lavoro a termine (o a tempo determinato)*.

[114] In this sense see on the other hand Angiolini, V. "Sullo "schema" di decreto legislativo in materia di lavoro a tempo determinato (nel testo conosciuto al 6 luglio 2001)", available at www.cgil.it/giuridico.

[115] In addition to the author cited in the preceding footnote, see in particular Roccella, M. "Prime osservazioni sullo schema di decreto legislativo sul lavoro a termine", available at www.cgil.it/giuridico.

radical if considered in the light of recent developments in the use of fixed-term contracts.[116]

Evidence in support of this argument is to be found in case law interpretation[117] – but also in the measures adopted by collective bargaining[118] – revealing a considerable degree of continuity with the past "in spite of the innovations and perhaps mainly to counteract the changes considered to be more apparent than real" (our translation).[119] As a result even legal scholars who in relation to earlier changes in the law had spoken of fixed-term contracts as a factor likely to polarise labour law[120] defined the process of reform set in motion by Legislative Decree No. 368/2001 as "the negation of liberalisation" (our translation).[121]

In fact, it may be argued that with the regulatory technique introduced by Legislative Decree No. 368/2001 the Italian system has once more adopted the anti-fraudulent approach of the early regulation of fixed-term contracts,[122] moving away from the extremely rigid practices that had emerged from certain interpretations of Act No. 230/1962 that tended to impose restrictions reducing the flexibility of workforce management, while failing to safeguard the fundamental rights of the worker.[123]

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[116] For an attempt to provide an analysis, see the paper by the present author: Tiraboschi, M. 2005. "L'apposizione del termine nel contratto di lavoro dopo il decreto legislativo 6 settembre 2001, n. 368". *Compendio critico per la certificazione dei contratti di lavoro – I nuovi contratti: lavoro pubblico e lavoro privato*, eds. Enrico, C., and M. Tiraboschi, Milano: Giuffrè, espec. § 1.

[117] See Senatori, I. 2006. "Gli orientamenti della giurisprudenza di merito in materia di lavoro a termine", Dir. Rel. Ind., pp. 148-150.

[118] See Senatori, I. 2006. "Gli orientamenti della contrattazione collettiva sul lavoro a termine", Dir. Rel. Ind., pp. 231-233.

[119] See Montuschi, L. 2006. "Il contratto a termine e la liberalizzazione negata", Dir. Rel. Ind., pp. 109-129.

[120] Montuschi, L. "L'evoluzione del contratto a termine. Dalla subalternità all'alternatività etc.", cit., p. 9.

[121] See once again Montuschi, L. "Il contratto a termine e la liberalizzazione negata", cit.

[122] On the original antifraudulent aims of the 1962 law see Giugni, G. 1979. "Intervento", *Il lavoro a termine*, Atti delle giornate di studio di Sorrento 14-15 April 1978, Milano: Giuffrè, esp. p. 125, that makes reference in this connection to Balzarini, G. 1966. La disciplina del contratto a tempo determinato. Milano: Giuffrè.

[123] Reference may be made to the paper of the present author, L'apposizione del termine nel contratto di lavoro dopo il decreto legislativo 6 settembre 2001, n. 368, cit., and in a comparative perspective, Tiraboschi, M. "La recente evoluzione della disciplina in materia di lavoro a termine: osservazioni sul caso italiano in una prospettiva europea e comparata", *Il nuovo lavoro a termine*, cit., pp. 41-86.

The reform of 2001, that prefigures the contents and methods of the Biagi law, had the objective of curtailing the power of the employer, that would otherwise be discretionary, to place a limit on the duration of the employment contract, while setting aside the traditional prejudice towards temporary work.[124] At the same time, it must be pointed out that the use of fixed-term contracts has not been liberalised but is required to be justified by reasons of a technical, organisational or productive nature, or for the substitution of personnel.

As a result, in terms of safeguards for the employee, the burden of proof concerning the legitimacy of certain organisational and managerial decisions falls on the employer.[125] Along similar lines, with regard to the controversial area of parasubordinate employment (collaborazioni coordinate e continuative), the Biagi law takes measures to combat the fraudulent use of these contracts by requiring the negotiating parties to specify in advance how the work is to be organised, in order to ensure that the contract is not used to mask salaried employment.[126] As confirmed by the first court ruling on this matter, "project work" is not a new type of employment contract, but a way to manage parasubordinate employment in compliance with Article 409(3) of the Code of Civil Procedure.[127] However, certain restrictions are introduced in the form of definitions and sanctions in order to limit the use of such employment contracts to genuine self-employment, in which work is aimed at producing a predetermined result, which characterises it and limits its duration.

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[124] This may be seen also from the abolition of the presumption of the open-ended nature of employment contracts, pursuant to Article 1 (1), Act No. 230/1962, save for the (limited) exceptions permitted by the same law. A presumption which, as pointed out in Giugni, G. "Intervento", *Il lavoro a termine*, Atti delle giornate di studio di Sorrento 14-15 April 1978, cit., p. 126, resulted in Italy being "basically the only country where fixed-term contracts (were) seen as detrimental, as an exception to be allowed only in limited circumstances).

[125] See once again the paper by the present author, "L'apposizione del termine nel contratto di lavoro etc.", cit., esp. pp. 106-109.

[126] See the case law available at bollettinoADAPT.it, index A-Z, under the heading *Lavoro a progetto* (Trib. Milano, 11 July 2007, Judgment No. 5223.; Trib. Torino 23 March 2007; Trib. Bergamo 22 February 2007; Trib. Bologna 6 February 2007; Trib. Milano 5 February 2007; Trib. Milano 2 February 2007; Trib. Livorno 8 January 2007; Tar Lazio, sez. I, Ordinance 22 November 2006; Trib. Milano 2 August 2006, Judgment No. 2655; Trib. Torino, 17 May 2006; Trib. Torino, 10 May 2006; Trib. Modena 19 April 2006; Trib. Genova 7 April 2006; Cons. Stato, 3 April 2006, Judgment No. 1743; Trib. Milano 23 March 2006; Tar Sicilia, Catania, 14 February 2006, Judgment No. 202; Trib. Torino, 26 January 2006; Trib. Milano, 10 November 2005; Trib. Ravenna 25 October 2005; Trib. Torino 15 April 2005).

[127] For an analysis of the notion of parasubordinate employment, see Santoro Passarelli, G. 1979. *Il lavoro 'parasubordinato'*. Milan: Angeli.

Also in this instance, as in the case of fixed-term contracts, project work places the burden of proof on the principal, in derogation of the provision of Article 2607 of the Code of Civil Procedure. Thus there is a requirement on the part of the parties to the contract to specify in advance – by identifying a project or programme of work or a particular phase of the project – the result to be achieved in a manner that safeguards the effective autonomy of the worker.[128] In the absence of such a provision, the relation is classified as open-ended salaried employment from its inception.[129]

The aim of dealing with the vast area of irregular or grey labour that is often concealed behind parasubordinate employment contracts, that limits the use of organisational models providing an alternative to policies aimed merely at the containment of labour costs, gives rise to the need for an intervention in the area of subordinate employment in order to provide employers with a valid alternative to the improper use of flexible arrangements in the form of self-employment that result in a form of unfair competition.[130]

This explains the regulation of working time,[131] the redefinition of short-time working, modular and flexible working hours,[132] the introduction of certification for ascertaining the free consent of both parties to the contractual

[128] See Proia, G. "Lavoro coordinato e lavoro a progetto", *Diritto del lavoro. I nuovi problemi – L'omaggio dell'Accademia a Mattia Persiani*, cit., esp. p. 1408, though this author considers project work as a new type of employment contract. For the opposing view, Tiraboschi, M. "Il lavoro a progetto: profili teorico-ricostruttivi", cit., and Napoli, M. "Riflessioni sul contratto a progetto", *Diritto del lavoro. I nuovi problemi – L'omaggio dell'Accademia a Mattia Persiani*, cit., esp. p. 1349.

[129] As confirmed by the first case law rulings, that are available in the monographic issue of the *Bollettino ADAPT* dedicated to *Il lavoro a progetto*, cit. in note 145 above.

[130] For this interpretation of the Biagi law and its main provisions, see the papers in Tiraboschi, M., ed. 2004. *La riforma Biagi del mercato del lavoro – Prime interpretazioni e proposte di lettura del d.lgs. 10 settembre 2003, n. 276. Il diritto transitorio e i tempi della riforma*. Milano: Giuffrè; and in particular the introductory paper (also available at bollettinoADAPT.it).

[131] Cf., for example, the papers in Cester, C., M. G. Mattarolo, and M. Tremolada, eds. 2003. *La nuova disciplina dell'orario di lavoro*. Milano: Giuffrè. See also, although the arguments put forward are not entirely convincing, Carabelli, U., and V. Leccese. "Il sofferto rapporto tra legge e autonomia collettiva: alcune riflessioni ispirate dalla nuova disciplina dell'orario di lavoro", *Percorsi di diritto del lavoro*, cit., pp. 193-224.

[132] See, for example, Voza, R. 2005. "I contratti di lavoro a 'orario ridotto, modulato o flessibile' (part time, lavoro intermittente lavoro ripartito)", WP C.S.D.L.E., No. 37. For a different approach see Russo, A. "La nuova disciplina del lavoro a tempo parziale", *La riforma Biagi del mercato del lavoro etc.*, cit., pp. 179-192.

provisions,[133] the reform of the labour inspectorate and labour inspection procedures[134] and, finally, the reform of the various kinds of training contract (apprenticeships, work training contracts, and access to employment contracts),[135] for the purposes of providing effective training programmes in line with the objective of lifelong learning, while at the same time combating the practice, that is quite widespread in Italy, of making improper use of employment training contracts and training funds to provide covert subsidies for undertakings.[136]

It appears to be difficult to claim that these developments subvert the rationale of the protection provided by labour law. The recent reforms go no further than enabling economic operators and legal specialists to strike a balance between productive efficiency, which is essential for the enterprise, and the values of social justice that are at times jeopardised by a line of reasoning that is based on ideological, one might even say theological, considerations.[137]

In this way it becomes clear, or at least clearer than in the past,[138] that management power is not subject solely to internal limits, but also to external limits arising from formal and/or substantial conditions of legitimacy and the countervailing power of the unions, while remaining free of judicial control over company decision-making. This should lead to a reduction in the level of legal uncertainty[139] by limiting control over the legitimacy of company decision-making, while facilitating greater uniformity of judicial decisions,

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[133] See the papers in Enrico, C., and M. Tiraboschi, eds. *Compendio critico per la certificazione dei contratti di lavoro etc.*, cit., and the bibliographical references therein.

[134] See the papers in Monticelli, C. L., and M. Tiraboschi, eds. 2004. *La riforma dei servizi ispettivi in materia di lavoro e previdenza sociale*. Milano: Giuffrè.

[135] For further analysis and bibliographical references, see Tiraboschi, M. 2006. "Productive Employment and the Evolution of Training Contracts in Italy", The International Journal of Comparative Labour Law and Industrial Relations, No. 4.

[136] On this point, with reference to the debate on precarious employment, see Tiraboschi, M. 2006. "Young People and Employment in Italy: the (Difficult) Transition from Education and Training to the Labour Market", The International Journal of Comparative Labour Law and Industrial Relations, No. 1.

[137] For an overview of the problem, see Persiani, M. "Diritto del lavoro e autorità dal punto di vista giuridico", cit., esp. pp. 13, 17-19.

[138] The problem of legal certainty is highlighted, among others, by Vallebona, A. 2003. "L'incertezza del diritto e i necessari rimedi", *Scritti in memoria di Salvatore Hernandez*, Dir. Lav., No. 6, pp. 881-900, and in particular pp. 888 et seq. for a discussion of the system of certification of employment contracts introduced by the Biagi law.

[139] Reference may be made once again to Persiani, M. 1995. "Diritto del lavoro e razionalità", Arg. Dir. Lav., pp. 1-36, esp. pp. 2-3, where the author examines certain interpretations, ideologically oriented and reflecting vested interests, in support of the theory of internal limits.

resulting, if not in legal certainty, at least in court rulings that are more predictable.[140]

5. Prospects for the Future

An assessment of the Biagi law and the recent reforms of the labour market is beyond the scope of this study and, at present, it is still too early to attempt such a task.[141] However, it is likely that over the coming years the legal framework will undergo further significant change, above all with regard to flexibility in the termination of contracts (the law on dismissals) and, hopefully, with regard to safety-net measures.[142]

On close examination the controversy surrounding the Biagi law, and before that the reform of the regulation of fixed-term contracts and the Treu measures, reveals the cultural difficulties that still exist in Italy in dealing with the central issue of the modernisation of labour law, which is certainly not the liberalisation of the labour market, but rather, as argued by Matteo Dell'Olio),[143] the progressive reduction of the gap that has arisen "between an area that is heavily laden with protective measures for the worker and an area that is devoid of them" (our translation).[144] The issue to be faced, without further delay, is that of an overall realignment of protective measures, only partially attempted by the Biagi law,[145] in such a way as to overcome the

[140] This matter is discussed in general terms that are still relevant for our line of reasoning in Castelvetri, L. 2001. "Correttezza e buona fede nella giurisprudenza del lavoro. Diffidenza e proposte dottrinali", Dir. Rel. Ind., p. 248. Along similar lines, Ferraro, G. 1991. "Poteri imprenditoriali e clausole generali", Dir. Rel. Ind., p. 169, and Persiani, M. "Diritto del lavoro e razionalità", cit., esp. p. 36.

[141] Tiraboschi, M. 2006. "A due anni della Riforma Biagi del mercato del lavoro: quale bilancio?", *Dopo la flessibilità, cosa? – Le nuove politiche del lavoro*, ed. Mariucci, L., Bologna: Il Mulino. See also Tiraboschi, M. 2005. "The Italian Labour Market after the Biagi Reform", The International Journal of Comparative Labour Law and Industrial Relations, No. 2.

[142] This is the matter that needs to be dealt with in order to complete the Biagi law. Reference may be made to Tiraboschi, M. "Il sistema degli ammortizzatori sociali: spunti per un progetto di riforma", *La riforma Biagi del mercato del lavoro, etc.*, cit., pp. 1105-1121.

[143] Cf. Dell'Olio, M. 1998. "La subordinazione nell'esperienza italiana", Arg. Dir. Lav., esp. p. 708.

[144] Dell'Olio, M. "Il lavoro sommerso e la lotta per il diritto", cit., esp. p. 46, and Dell'Olio, M. 1994. "Violazione della legge in materia di lavoro", Enc. Giur. Treccani, Rome, vol. 32. Along similar lines, Persiani, M. 2005. "Individuazione delle nuove tipologie tra subordinazione e autonomia", Arg. Dir. Lav., esp. p. 2.

[145] As argued by Treu, T. *Il diritto del lavoro etc.*, cit., esp. pp. 518-520.

contrast between insiders and outsiders,[146] which is both the cause and effect of the proliferation of atypical and irregular forms of employment and jobs in the shadow economy.[147]

Arguably the most recent reforms, far from promoting a process of unbridled liberalisation of the labour market, have laid down the conditions for reformulating employee protection by means of the codification of a Statuto dei lavori or Work Statute,[148] i.e. a body of fundamental rights for all workers, and not only those in the public administration or in medium-sized and large enterprises, with a view to moving beyond – once and for all – the dualism between those enjoying a high level of protection on the one hand, and precarious employees on the other, resulting from an ill-conceived and short-sighted allocation of employee protection.[149]

In order to be consistent with its original principles,[150] and at the same time to support the development strategies of Italian enterprise, labour law will inevitably need to move beyond the limits of the traditional – yet inefficient – distinction between self-employment and salaried employment in order to bring within its area of application all types of employment contract, in keeping with the most recent developments in EU rulings[151] and constitutional

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[146] This is a point that is rightly underlined by Ichino, P. 1996. *Il lavoro e il mercato*. Milano: Mondadori.

[147] In this connection see Biagi, M. *La nuova disciplina del lavoro a termine etc.*, cit., pp. 18-19.

[148] See, most recently, Proia, G.2006. "Verso uno Statuto dei lavori?", Arg. Dir. Lav., pp. 61-72. On this topic see the draft proposals, the positions of the social partners, and the substantial amount of comment by legal scholars available at bollettinoADAPT.it, index A-Z, under the heading *Statuto dei lavori*. See also the papers at the conference on *Tutele senza lavoro e lavori senza tutele. Uno Statuto per rimediare?*, Benevento 10 May 2004. In the international debate, in connection with the transition from the "Statuto del diritto del lavoro" to the "Statut de l'actif", see Gaudu, F. *Libéralisation des marchése et droit du travail*, cit., esp. p. 513.

[149] This point is made, among others, by Ichino, P. 2000. Il Contratto di lavoro. Milano: Giuffrè, p. 59 et seq. In this perspective see Hepple, B. 1986. "Restructuring Employment Rights", Industrial Law Journal, p. 74. In the mid-1980s Hepple proposed the adoption of a wider and more comprehensive definition of employment, leading to the identification of a new legal criterion for the assignment of labour protection, including labour of an intermittent or casual nature, and employment relations characterised by the continuity of the work carried out.

[150] On the connections between the essential component leading to the foundation of labour law (the subordinate position of the employee) and the original rationale for the protection of the worker, see Dell'Olio, M. "La subordinazione nell'esperienza italiana", cit., pp. 697-713.

[151] See in particular the Lawrie-Blum ruling of the European Court of Justice, No. 66/85, 3 July 1986, available at bollettinoADAPT.it, index A-Z, under the heading *Statuto dei lavori*,

case law,[152] based on a broad definition of employment. The extension of the definition of employment to include all forms of work with an economic value carried out in an organisational context on behalf of others is the first step towards redesigning the system of employment protection – in compliance with the applicable provisions [153] – on the basis of a model of concentric circles underlying certain labour law reform proposals put forward over the past decade[154] and the idea of a Statuto dei lavori.[155]

In short, there is a need to identify a fundamental nucleus of universal safeguards,[156] applicable to all employment relations regardless of the classification of the contract as self-employment, salaried employment or parasubordinate employment pursuant to Article 1322 (2) of the Civil Code. The forms of protection that would be included in this area, that would be extensive and without subdivisions, would be, by way of example, freedom of opinion and protection of the dignity of the worker, trade union rights, prohibition of discrimination, health and safety at work, the right to lifelong training, the protection of privacy, access to employment services and employment information services, and the right to fair remuneration. The remaining forms of protection would be determined on the basis of the following criteria, in relation to which the subordinate nature of the employment would continue to be a significant but not an exclusive factor:[157]

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according to which the essential characteristic of the employment relationship is that the individual concerned supplies labour of economic value to another person under the direction of that person, receiving remuneration in exchange.

[152] C. Cost. 5 February 1996, No. 30, available at bollettinoADAPT.it, index A-Z, under the heading *Statuto dei lavori*, which speaks of work "intended to be carried out in the context of a productive organisation and with a view to producing a result that the owner of the organisation (and of the means of production) is immediately entitled to utilise" (our translation).

[153] See Treu, T. *Il diritto del lavoro etc.*, cit., esp. pp. 472-473.

[154] See Dell'Olio, M. "La subordinazione nell'esperienza italiana", cit., esp. p. 708, where he identified in the reform proposals "the intention to extend the area of labour law to all forms of work of a prevalently personal nature".

[155] See the documentation available at bollettinoADAPT.it, index A-Z, under the heading *Statuto dei lavori* and, in particular, the Relazione Finale (final report) of the High-Level Commission for drafting a Work Statute set up by Ministerial Decree on 4 March 2004.

[156] In this connection see Zoppoli, L. "Politiche del diritto e ambizioni statutarie", paper presented at the conference on Tutele senza lavoro e lavori senza tutele. Uno Statuto per rimediare?, cit. in footnote 165 above.

[157] Dell'Olio, M. "La subordinazione nell'esperienza italiana", cit., esp. pp. 712-713, raises objections to the idea that the proposals for a Statuto dei lavori would result in moving forward from the fundamental concept of subordination. However, this is not necessarily the case, considering that this concept would continue to play a key role, supported by other

1) the degree of economic dependency (an initial indicator of which is whether a person works for one or more than one employer);[158] 2) seniority of service on a continuous basis (for example, confirmation of the stability of employment as laid down by Article 18 of the Work Statute for all workers who have completed a period of continuous service with the same employer of at least two years); 3) the type of employer (public/private, non-profit sector, etc.) and the size of the company as factors to be taken into consideration, not just in terms of the number of employees but also the volume of business); 4) the subjective or objective conditions of the worker in a perspective of positive discrimination and norms providing incentives for hiring (for example, the long-term unemployed, people with disabilities, immigrants, those in search of employment for the first time, those resident in geographic areas with particularly high levels of unemployment, or low levels of employment); 5) the manner in which work is to be carried out under the contract (for example, the type of work, the degree of management control, whether the work is merely coordinated, continuity over time) or the type of activity (for example, periods of work alternating with training, the need for a high degree of vocational skill or specialisation) or the purpose of the contract (access to employment or a return to the labour market, work of public utility, etc.); 6) other parameters as laid down by collective bargaining or by bilateral bodies in cooperation with employment contract certification agencies.

Alongside employment safeguards that were partially promoted by the Biagi law, the development of labour law requires the construction of a system of protection in the labour market. By way of example: efficient employment services, bilateral bodies, the recognition of training rights for employees (also in the form of training credits), the reform of the system of safety-net measures and incentives, the regulation of labour on the fringes of the market, measures for promoting access to employment after time out from the labour market (similar to those laid down in Articles 13 and 14 of Legislative Decree No. 276/2003), recognition of previous experience and employment in the transition between active, inactive, salaried and parasubordinate phases.

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indicators for the purposes of assigning protection. In this connection the English system is particularly significant, as in most cases it is not sufficient – and in other cases it is not even necessary – to be a salaried employee in order to be covered by the legislation granting employment protections. Reference may be made to my paper: Tiraboschi, M. 1996. "Autonomia, subordinazione e contratti di lavoro sui generis: un recente revirement della giurisprudenza inglese", Dir. Rel. Ind., No. 2, pp. 153-176.

[158] On the relevance of the criterion of economic dependency, see Treu, T. *Il diritto del lavoro etc.*, cit., esp. pp. 494-495, who also mentions the use of this criterion in systems as varied as those of Germany, France, the Netherlands and the United Kingdom.

Labour law needs to come to terms in the near future with the redesigning (and certainly not the dismantling) of employment safeguards, and this process needs to take place not just by means of abstract notions predetermined by the legislator, but also by means of the certification of provisions negotiated between the parties. This is the proposal contained in the White Paper on the Labour Market of October 2001, that identified a nucleus of inalienable rights (in addition to universal safeguards and those dependent on status) distinct from safeguards of a non-essential nature, that is to say subject to negotiation during collective bargaining and/or individual agreements supported by certification of the employment contract.

This is the challenge facing the legislator and labour law scholars but also and above all the social partners.