Deregulation and Labour Law in Italy*

Deregulation and labour law: an historic-conceptual frame of reference

The subject of this national report is the analysis of the connection between deregulation and labour law. The main objective is not simply to describe the more recent evolution in Italian employment law and the most relevant factors driving the change in progress, but to look at the effects that these modifications have on capitalistic production and, in particular, their shape in juridical terms. Through the evaluation of emerging tendencies and reforms that have recently characterized Italian labour law – moving towards a progressive deregulation of employment relations – l will try to answer questions that, today more than ever, are central to our field. The questions challenge, if not the theoretical bases, at least the necessity of many rules that constitute the normative body of labour law. The questions are direct but at the same time complicated and radical: what is the future and the role of labour law in the 21st century? Do we need a new concept of labour law? To answer these questions from a perspective that allows a comparison between different legal systems, we need to clarify what we mean exactly by 'deregulation' and 'labour law', in such a way as to avoid answers that are ideological and pre-determined.

It is necessary to point out, first of all, that the term 'deregulation' can be translated with different words in Italian which then correspond to different legal concepts. Some Italian scholars, for example, use the expression 'delegification' to refer to the inversion of the trend that has brought about a

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wide 'juridification' of employment relations through coercive and mandatory rules to protect subordinate work (see Ferraro, 1990, 149). Used in this sense the term 'delegification' is not a correct translation of the word deregulation. It is true that from a technical and formal point of view the term delegification is part of the most comprehensive concept of deregulation. but a part cannot express the whole. In fact, the term delegitication simply indicates the relationship between legal sources at different levels, and more precisely, the process of devolution of regulations of specific subjects or institutions from a legislative source to a lower source (i.e. regulations or collective agreement).
By translating the term deregulation with the word delegification we actually indicate a juridical operation of a rather limited range, thereby sacrificing and losing the complex meaning of the term.
Equally limited is the doctrinal trend which suggests translating the term deregulation to indicate a broad but generic philosophical concept which supports a reduction of the area covered by state regulation, i.e. the area in which all forms of behaviour are regulated in order to satisfy public interest (for this perspective see Tremonti, 1985, 107). Again the translation of the term deregulation risks being partial and misleading even if it well represents the ideological and cultural meaning behind the word. Defined in these terms, the analysis of the connection between deregulation and labour law allows only for a superficial interpretation of the changes that have recently affected Italian labour law It is, in fact, a perspective of research that focuses attention only on the flexibilisation of employment relations, but does not contribute to a consideration of the real causes that have affected the evolution of Italian labour law. The fact that human behaviour is not subject to state regulation does not mean that such behaviour ceases to be relevant from a juridical point of view. Simply, these acts or facts have their source of regulation in private (individual or collective) autonomy. It should be noted that deregulation does not involve fewer juridical rules, but rather more correctly, fewer State rules to the advantage of a wider normative authority of private (individual or collective) autonomy. It has been rightly pointed out in this regard that when private rule, more or less broadly, substitutes the public one, the number of necessary negotiations increases because each case requires adjudication instead of being able to refer to a single rule fixed for every case by a public source.
It is surely more useful to use the term deregulation in the broad and undetermined sense, subject to precision during analysis. From this point of view the concept of deregulation must be compared with a concept of juridification. To reflect on the reasons that have brought about the

juridification of employment relations actually means questioning the reasons that have brought about the construction of the rules set up which constitute labour law. This analysis could then lead us to understand, with a better critical knowledge, die present trend widespread in all systems towards the deregulation of employment relations.

In this connection, it is useful to question and resolutely reject the validity of an interpretation that, very simplistically, identifies labour law as an instrument of protection of the Weaker party (the worker) as compared with the great contractual power of the employer, an interpretation that then leads to individualising, in the present process of deregulation of employment relations, the effort to loosen some of the stiffness and constraints on the competitiveness of enterprises in the international scene and/or contribute to the creation of new employment opportunities at a time when there are alarming rates of unemployment. The historic perspective reveals a profile often neglected by labour law doctrine, and that still points to labour law as a means of weaker party protection. As a reaction to a new organisation of production methods and circulation of wealth, the employment relations regulation was not, in fact, able simply to turn into a unilateral means of protection and emancipation of a party characterised by social under-protection and economic dependence. Although not always supported by values and/or homogenous political, economic and social objectives, right from the beginning the State's regulatory intervention in the process of industrialisation never assumed any unidirectional aspect.

Beyond the contingent motivation (declared or real) of each single given norm, the discipline of employment, as a matter of fact, assumes importance right from the start, not only under the traditional framework of worker protection, but also under the concurrent and certainly no less important context of the conservation of social peace and existing order, of the health of the young and of the integrity of descent, of the rationalisation of the production system, of the regulation of the forms of competition among entrepreneurs, etc. The product of the juridification of employment relations is therefore, undoubtedly, a *distributive* right of protection and resources, but also, at the same time. a right of production i.e. a discipline of roles and of the means of production in an industrial society.

Of particular note, from this point of view, is the historic evolution of the discipline of employment placement and the progressive suppression of private intermediary and speculative centres of employment. In an employment market profoundly modified, marked by chronic imbalances between demand and request of employment and destined to be regulated

exclusively by the blind game of contrary forces, it was, in fact, inevitable that the control of hiring and occupation flows in general ended up representing a formidable instrument of power capable of influencing not only the results of the process of capitalistic production, but even earlier, influencing the same political-institutional balances of different national systems.

Chiefly in those countries in which the industrialisation process delayed development, and conversely, where the tone of the union debates tended to undermine the very foundation of the emerging capitalistic society, the question of state control of placement became a true and proper 'question of sovereignty' to the point of legitimising the State's direct intervention in the economy, in contradiction to, only apparently, the free-trade principles then dominant. The growing power of the working coalitions on an issue so strategic to the 'wealth of a nation' – to use Adam Smith's expression 7 like that of control (monopolistic) of one of the factors of production could not do other than represent a head-on challenge of the sovereignty of the emerging national State, laboriously still trying to free itself from the pre-capitalistic super-structure and from the encrustation of the *ancien regime*. The union's capacity, real or only potential, to influence the process of creation and distribution of wealth and to affect the political-institutional balances of the State, either by control of the employment market or through reformist and revolutionary stimulus, put the question of 'economic sovereignty' as a necessary and unfailing complement of the political and territorial sovereignty.

It is precisely with reference to the question of control of the employment market- referred to by employers as an instrument for establishing economic power and the acquisition of labourers, and referred to by unions as a privileged channel of establishing an opposing union power – that determines the deep fracture between Continental European countries and Anglo Saxon countries. While the former – chiefly Italy – represent a tradition more or less markedly '*étatiste'* that in the name of the supremacy of the State has led to a progressive and massive juridification of employment relations through the intervention of the unbreakable rules of law and the State's monopoly of the juridical production. The latter, proving themselves, even with specific differences, to be '*stateless societies*', limit public intervention in the employment market to those few essential rules in order to ensure the ideal development of the capitalistic system of production, assuming a position of neutrality as regards the free flow of economic factors and of conflicts of interest that pass through the social body.

In the evaluation of the reasons for this deep fracture, it is impossible to indicate with any degree of precision the role assumed by the ideologies and

by the ideals of justice and solidarity as regards the weight of the economic and social conditioning that have accompanied, in the diverse systems, the emerging process of industrialisation. Of particular concern is the risk of evaluating past events and institutions by applying paradigms and classic models of the present to the point of misinterpreting the events and the defining processes intrinsically connected to them.

Nevertheless, in our opinion, without wanting to propose a purely deterministic view of history and of the movements of ideas,[1] two factors in particular can explain more than others why in Anglo Saxon countries 'economic sovereignty' is not considered a fundamental element for the full affirmation of political and territorial sovereignty with an affect on juridical rules of relations between capital and employment in general and on the process of casting of intermittent work through agencies in particular. In the first place, as has rightly been pointed out,[2] the true peculiarity of the Anglo-American experience is having exorcised the revolutionary violence of the union movement right from its beginnings. Whereas in other countries it has lived for a long time with the institutional practices of the unions and of the workers movement, only to fizzle out much later and not without first giving rise to deep fractures and lacerations in the social body over the processes of legitimisation of the forms of production of Wealth and of appropriation of the 'result' of the work of others. The union movements in Britain and even more so in the USA were in effect well free of the destructive practices of Luddism, from the political suggestion of Cartism and from the utopia of revolutionary socialism, thus orientating themselves towards a new unionist creed that with *self-help* participated in the optimism of the Victorian society. In this particular cultural context, union control of the employment market was seen not as a destructive force against the political-institutional order of the modern State, but rather, together With strikes and collective agreements, as a spontaneous industrial demonstration and, at the same time, a factor of regulation of the competition and rationalisation of the capitalistic system of production 'upon which (...) the maximum productivity of the community as a

[1] Still valid, in this regard, is the teaching of Max Weber (see Economia e società, Ed. Comunità, Milano), that shows well that a unidirectional relation of cause and effect does not exist between the juridical system and economic system, but rather complex interrelations that do not allow identification of necessary laws and deterministic models of development of each system.

[2] See P. Craveri (1990), voce *Sindacato (storia)*, in Enc. Dir., vol. XLXX, Giuffrè, Milano, 661.

whole depends'.[3] But even more decisive in this regard, because it also explains the peculiar behaviour of Anglo-American unionism, is the circumstance[4] that both in Great Britain and in the USA the process of industrialisation happened spontaneously and was, right from its conception, firmly in the hands of a bourgeoisie that, on the one hand, forcefully reclaimed full freedom of action and autonomy from the State and that, on the other hand, rapidly abandoned the establishment of the *ancien régime* in the centre of political and economic power. In these countries the control of production and of the appropriation of the value-added created by the work of others is achieved independently of the State and entirely entrusted, even when passing via the laissez-faire individual to the collectivity, to the self-regulating capacity of the market. In Continental European countries industrialisation occurs under the intervention of the State and through public control of economic and social factors, often overwhelming, as in the case of Italy, and not without profound tensions and social conflicts that upset the fragile politico-institutional balance of the emerging capitalistic society, Apart from rare cases, these countries respond with a notable delay to the demands of industrialisation and try, nevertheless, to bridge the gap with Great Britain and the USA, progressively increasing the intensity and the role of the State's intervention in the economic and social sphere. For these countries it was obligatory that the 'economic sovereignty' and, consequently, the control of the employment market and of the production and distribution mechanisms of wealth, became instruments for the complete affirmation of political and territorial sovereignty both internally (as opposed to a wide process of private normative protection) and externally (in comparison and competition with other nations).

It is precisely these justifications for the juridical approach to employment relations that now explain the tendency toward deregulation. The recent and numerous changes in the mechanisms of production and circulation of Wealth that have established the definitive separation between the limits of the State and those of the market,[5] now render impractical any project of law meant to combine political-territorial sovereignty and economic sovereignty. In

[3] S. Webb, B. Webb (1926 ma 1897), *Industrial Democracy*, Longmans, Green and Co. Ltd., London.

[4] Well shown by G. Baglioni (1974), *L'ideologia della borghesia industriale nell'Italia liberale*, Einaudi, Torino, 40-48.

[5] The point is well shown, among others, by S. Cassese (1993), *Oltre lo Stato: i limiti dei governi nazionali nel controllo dell'economia*, in F. Galgano, S. Cassese, G. Tremonti, T. Treu, *Nazioni senza ricchezza. Ricchezza senza nazione*, il Mulino, Bologna, 35.

countries with an '*étatiste*' tradition, the internationalisation of the economy and the globalisation of the market greatly accentuate the incapacity of the local and national protagonists to control this socio-economic phenomenon and with it, the crisis of the State-Nation. The greater ease with which the '*stateless societies*' have adapted themselves to the changes of the economic market testifies to the present ineptitude of the imperative rule of law in the form of juridical innovations and highlights at the same time the greater flexibility of jurisdictional controls and/or of the market in adapting the right solutions to the recent changes in economic-productive structures. It is certainly not the case that now, faced with the internationalisation of the economic markets, the competition between different national labour laws has progressively led to, in various countries and juridical systems, the takeover of the public monopoly on placement, and contextually, to the removal of the principle constraints that prevented the legalisation of the administration of labour. The rules of competition based by now on a supra-national scale have, in fact, brought about a progressive loosening – or, in any case, a 'circumvention' – of all those displays of the State's sovereignty that, in one way or another, represented an obstacle to the production and circulation of Wealth, proposing again in new terms the old problem of legitimisation of the forms of acquisition of the value added by the labour of others, a problem that seemed definitively resolved with the creation of the normative model of the subordinate employment contract for an indefinite period. Even when it does not translate into an escape into the 'submerged' and informal economy, the alteration of the traditional forms of acquisition and use of the work force is, by now, a constant of the modern processes of production of wealth. Very indicative in this respect is the gradual 'legitimization of negotiation formalities originally undervalued to the extent of even being considered illegitimate',[6] such as the ever more marked trend to adopt 'formulas and institutions belonging to commercial law'.[7] If the social parties and national governments do not seem presently capable of controlling the economic-productive structure and, at the most, limit themselves to look for 'palliatives to resist change and contain the effects to the social level',[8] the same supra-national protagonists are still far from identifying efficient instruments of

[6] G. Ferraro (1998), *Dal lavoro subordinato al lavoro autonomo*, relazione AIDLASS su Impresa e nuovi modi di organizzare il lavoro.

[7] S. Simitis (1997), *Il diritto del lavoro ha ancora un futuro?*, in Giornale Dir. Lav. Rel. Ind., 609.

[8] R. Blanpain (1998), *Il diritto del lavoro nel XXI secolo: l'era dei lavoratori dal 'portafoglio' creativo*, in Dir. Rel. Ind., n. 3, 333.

regulation of the market and the economy and, in most cases, are limited to merely taking note of the changes in progress.

Not even in largely homogenous areas like the European Community, is there any movement towards the elaboration of a regulative outline of the alternative juridical models of the subordinate employment contract for an indefinite period. The efforts of the European Union in this field have not, in fact, gone further than a Directive on the protection of the health and safety of temporary workers[9] and the weak and fruitless proposals of the Directive on the subject of temporary work as regards the elimination of distortions in competition and risks of social dumping resulting from the different social costs connected to the different national regulations of the forms of temporary work.[10] In comparison to these tenuous attempts at discipline of a contractual scheme alternative to those of an undefined and stable period that testify unequivocally to the persistent weakness of the European process of social integration, it has been the Court of Justice that has assumed a role of substitution, supplying a significant contribution towards the modernisation and harmonisation of the national employment markets. As shown by the events surrounding the invalidation of the Italian public monopoly of employment placement in light of the Community anti-monopoly norm,[11] the Court of Justice has contributed to an increased use of market criteria in a subject area – that of regulation of employment relations – traditionally void of such logic. In fact, though changes have occurred in the economic-productive structure, there is still today strong national resistance on the regulative level that, in line with the original constitutive character of the discipline of employment relations and of the criteria for the legitimisation of the acquisition of the value added through the work of others, operates to keep the subject of labour within the competence reserved to the State legislator.[12]

Nevertheless, in the global market ‘keeping the national protective rules stationary

without controlling the rules of running such a market means risking self-destruction: that is to say it can render invalid the competitiveness of the

[9] Directive n. 91/383/CEE.

[10] See, among others, Jeffery M., *The Commission Proposals on ‘Atypical Work’: Back to the Drawing-Board ... Again*, in Industrial Law Journal,1995, 296.

[11] See Court of Justice, causa C-55/96, Job Centre.

[12] See Treu T. (1997), *Politiche del lavoro e strumenti di promozione dell’occupazione: il caso italiano in una prospettiva europea*, in M. Biagi (a cura di), *Mercati e rapporti di lavoro. Commentario alla legge 24 giugno 1997 n. 196*, Giuffrè, Milano, 3 e ss. (now in *Scritti in onore di Giuseppe Federico Mancini*, Giuffrè, Milano, vol. I, 597 e ss.).

economic system and cause the progressive impoverishment of entire national collectives'.[13]

The uncertain results of the transition process from an economy regulated by national protagonists to a system of production and circulation of wealth governed by supra-national regulation contributes to nurturing the emergence of informal practices and *sui generis* of using the labour of others, so much so that a thin correlation is made between the globalisation of economies and the progressive 'informalisation of employment relations'. The convergence in the practice of the use of labour, according to some authors,[14] leading to the loosening of dependent work protection in response to market pressures appears therefore to be more the fruit of competition between different national labour laws than the result of a conscious process of harmonisation guided by supra-national protagonists and finalised to conciliate competitiveness with social justice.[15] The better the resistance to favour the evolution of economic-productive relations, the more risk there is of destructuring employment relations.[16]

The above should help understand that the regulation of employment relations is not responding exclusively to a ratio of pure protection of the weaker party as a result of the disorder and failures of the free market in the process of industrialisation. Presented in terms of facing off the advantages of the free market and the constraints of law, the issue of the deregulation of employment relations is not only badly posed and misleading but also historically incorrect. Firstly, because the 'advantages' of the free market versus the effect of public intervention are not at all clear. No particular proof exists showing that the deregulation of employment relations can, *per se*, bring about a reduction in unemployment or an increase in competitiveness in enterprises; on the contrary, it seems well illustrated that an excessive precariousness in employment relations, besides destroying stable work posts, ends up in the long run proving itself to be counter-productive for the entire production system, leaving the enterprises Without a qualified and reliable work-force. From this perspective of more importance are the structural policies of employment; industrial, financial and public spending management policies;

[13] See Treu T. (1994), *L'internazionalizzazione dei mercati: problemi di diritto del lavoro e metodo comparato*, in *Studi in onore di R. Sacco*, Giuffrè, Milano, vol. I, 1117 e ss.

[14] Mitchell D.J.B. (1999), *È in atto un processo di convergenza?*, General Report on Forum 5 of the Bologna Meeting of the IIRA, September 1998, in Dir. Rel. Ind., 1999/1.

[15] This was the subject of the 11th International Congress of IIRA, Bologna 22-26 September 1998.

[16] See: Simitis S. (1997), *Il diritto del lavoro ha ancora un futuro?*, op. cit., where he speaks about a process of déconstruction du droit du travail.

the rules that discipline international commerce or the access to the system of credit and to the capital market or, the local policies of support of the productive and social tissue, well represented in our country by the experience of the 'territorial pacts' and by 'area contracts'.

In Italy the deregulation of employment relations has not been guided by the legislator but accomplished in an underground way, thereby showing the uselessness of the imperative rule of law to govern. This explains the elevated levels of illegal Work and the conspicuous move away from dependent work towards self-employment and irregular forms of work. Faced with the complex transformation of the economic, political and social reality of our country, the question, cyclically posed, is no longer whether or not the juridical-institutional balances and the normative order of Italian labour law have, by now, reached the fatal level of safety or saturation beyond which it is no longer possible to proceed.[17] Unless one is prepared to admit – or concede, at least temporarily – a progressive reversal of the levels of dependent work protection, the real problem would appear to be another, i.e. how to establish a limit, and especially, through which instruments the State (legislator, magistrate, public administration) can today push on towards the rightful and irreversible recovery of underground and atypical work, so as to then avoid running the risk of breaking the fragile balances upon which we base the entire socio-economic, and thus contributing to further marginalising large strata of the productive forces of the country. The answer to this question is certainly not an easy one and is, to the contrary, made particularly complex by the relentless rules of competition at, by this stage, the supra-national scale, that gradually render ever more 'eccentric' the role of the State, given the decisive and tumultuous process of internationalisation of the economy, of the transformation of the productive process and of the distribution of the wealth. The crisis of legality that increasingly characterises the modem social State cannot, in fact, be explained merely on the basis of a diffused and vague wish to get away from the laws of the State considered 'inauspicious. confusing and invasive'.

More pervasive than the of rejection of the progressive penetration of the State apparatus into civil society is the ineffectiveness of 'State sovereignty over the rules that govern the mechanisms of production and the transfer of wealth (to affect) indirectly but in a decisive way the discipline of work'.[18]

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[17] It is the question that posed by Giugni G. (1982), *Il diritto del lavoro negli anni '80*, in Giornale Dir. Lav. Rel. Ind., 375, as regard the 'labor law of the crisis' of the eighties.

[18] See Treu T. (1994), *L'internazionalizzazione dei mercati: problemi di diritto del lavoro e metodo comparato*, cit., 1122.

There is truth in the theory formulated at the beginning of the century by Jean Cruet, according to whom 'the law does not dominate society but if anything it expresses it'.[19] This does not, however, change the fact that labour law emerges and develops in contradiction to this assumption as a form of social reform that as such imposes an undeniable effort – a tension – to change society. From this point of view, the increasing social complexity and the changes underway in the economic and productive structures cannot do other than lead to a broadening of these same efforts of public intervention, both in the traditional area of the distribution of wealth and in the new one of support for employment and for the productive system.[20]

Consequently, the scales are weighted in favour of those who recognise that labour law develops inside a market economy, that the law is more than *business efficiency*, and therefore, assign to the process of employment relations regulation the necessary means to adapt the imperative of efficiency to social justice and individual freedom.[21]

Against this background, we will go on to develop the theses on the basis of two concrete and complementary developments: (a) the introduction of private mediators in the work market and the recent legalisation of temporary work through an agency, and (b) the proposals of reform of Italian labour law in search of new answers for the 21st century. Before developing this analysis, a brief synthesis of the present evolution of Italian labour law follows.

Deregulation and labour law in Italy: the new legal framework

After a long period of relative stability, characterised by a progressive expansion of the statutes governing dependent work and the consequent move

[19] J. Cruet, *Le vie du droit et l'impuissance des lois*, Flammarion, Paris, 1908, 3 (as cited by A. Supiot, *Du bon usage des lois en maitière d'emploi*, cit., 336), according to whom, it would be interesting to verify the validity of such theory over the Century, there seems to be no doubt about his validity in the subject of labor policy: 'en ce domaine, le constat de l'impuissance des lois est tombé un jour de la bouche même du Monarque: 'Contre le chomage, on a tout essayé …' en vain! La cause dès lors semble entendue et le consensus établi: on ne crée pas d'emploi par décret; les lois ne pouvent rien à l'empli, qui procède en dernière instance d'un certain état de l'économie. Le droit de l'emploi ne pourrait guère que mettre en oeuvre les dures lois de l'économie, leur donner un visage humain pour en assurer mieux l'inexorable application'.

[20] Treu T. (1990), voce *Diritto del lavoro*, Digesto, Utet, Torino, IV ed., 1990, excerpt, 50.

[21] Mengoni L., in G. Giugni, L. Mengoni, B. Veneziani, *Tre commenti alla Critique du droit du travail di Supiot*, in Giornale Dir. Lav. Rel. Ind., 1995, 477.

away from the accepted legal framework of labour, ltalian employment law has recently gone through a great metamorphosis (see Biagi, 1998, ld., 1997).
Act no. 196/1997 (the so-called 'Treu Package') and the resulting regulations to implement the act have extended and strengthened the range of atypical forms of work: fixed-term contract, part-time work, temporary work through an agency (dispatching work), apprenticeship, training contract, work experiences, job internships (*borse lavoro*) and public works jobs (*lavori di pubblica utilità*), Act no. 59/1997 (the so-called 'Bassanini Law') and the subsequent Legislative Decree no. 469/ 1997 have thoroughly redesigned the boundaries between the public and private areas in labour market management and employment services, thus eliminating the rigidity and inefficiency of the public monopoly of placement. Already well implemented or at least on the way to being completely defined are measures to support research and technological innovations, financing of entrepreneurial development in depressed areas or in areas of urban decay, the reorganisation of incentives for hiring and geographical mobility, improving infrastructures through qualified public investment, the reorganisation of the professional training system and, in particular, of continued training as an instrument to raise employability and the quality of the worker pool. Ready for definitive take-off are new instruments of huge importance for local development such as the so-called 'area contracts' (*contratti d'area*) and 'territorial pacts' (*patti territoriali*), and only now are we beginning to appreciate the enormous impact and the future development of a previous reform: the
so-called privatisation of public employment initiated by the Legislative Decree no. 29/1993 and implemented through the Legislative Decree no. 369/ 1997 and the Legislative Decree no. 80/1998 (on this point see, in general, Treu, 1998), Concerning deregulation of individual labour relations, three main points should be emphasised:
1. The growth of the independent contract, self-employment subcontracting, insourcing and outsourcing;
2. Frequent derogation from legal norms set by protective labour legislation through the use of collective bargaining agreements; and 3. The flexibilisation of working-hours regulations.
With regard to the first point, the most impressive form of indirect deregulation is the explosion in the use/abuse of contractual schemes that, from a formal point of view, are not subordinate, but that guarantee the use of union workers without applying labour regulations. We call this form of work *quasi-subordinate* or *coordinate* and it represents a third category. This third legal scheme of private autonomy can easily escape the reach of employment

law, and it is not easy for the courts to requalify this form of work as subordinate employment. We presently have around two million workers engaged under this contractual scheme that bypass legal and collective rules. Other ways to contravene labour law include commercial contracts such as fictitious trainer contracts, franchising, sub-contracting and, in general, all kinds of out- and insourcing. This is the way to side step the rules on dismissal.

In order to control the undermining of labour law, there are more and more cases in which the legislation allows derogations from legal norms set by protective labour legislation through the use of collective bargaining agreements. This is particularly true in the use of atypical forms of contract. From a legal point of view fixed-term contracts, temporary employment through an agency and part-time work are still considered exceptions to the rule of the open-ended and full-time contract.

However, collective bargaining has the power to enlarge the use of all kinds of atypical forms of contracts and thus to get around dismissal law. In this context, it is relevant to look at the procedure adopted to request a derogation from legal norms set up by protective labour legislation:

(a) first of all, in addition to the original justifications established by the legislator, the collective agreement can identify additional circumstances that allow for an atypical contract;

(b) in doing so, the collective agreement must establish the maximum percentage of fixed-terms contracts, temporary employment through an agency, part-time contracts, apprenticeships and so on allowed in any undertaking;

(c) this is only possible in the case of a collective agreement signed by a representative trade union.

Through collective bargaining it has even been possible to introduce new legal schemes never experimented with previously like job-sharing and labour-on-call. Quite recently, with a simple circular, the Minister of Labour accepted job-sharing or labour-on-call especially when they are allowed by collective bargaining.

So, through collective bargaining it has been possible to experiment with small doses of regulated flexibility in order to remove the principal obstacles in the functioning of the regular work market and develop a favourable climate for the creation of new employment.

From this perspective – creation of new employment – the debate is now concentrated on flexibilisation and reduction of working time. Working time regulations in Italy have been based for a long time on a 1923 royal decree

limiting working hours to 8 h *per* day and 48 h *per* week. However, further legislation is about to be enacted to implant the EU regulations in this field, It should be emphasised, first of all, that this legislation has never been revised because the social partners have always preferred to regulate working time by means of collective bargaining in order to preserve their bargaining autonomy, Recently, Act 196/1997 introduced new rules, It fixed normal working time at 40 h a week and allowed for national collective agreements to provide for shorter hours and for normal working time to be the average length of work time over a period not exceeding one year, Social partners are requested by this act to negotiate a new draft legislation aimed at transposing the provisions of the EU directive on working time. This new legislation confirms the big role of collective bargaining in introducing further and more convincing regulations.

The debate on the 35-h-week has been of increasing importance recently.

Following the French model, a proposal to reduce the work week to 35 h is presently under discussion in the Parliament. The Government is proposing a legislative measure largely based upon contractual agreements. The most recent proposal is to provide some forms of incentives to reduce weekly working time and sanctions on the use of over-time. The 35h legal working time should be enacted by the next century after a transition phase based on experimental contractual agreements. Small firms could be excluded from the 35h regime, The aim is only to reduce working time, not to re-organise at plant level.

These and other interventions clearly indicate that labour law, originally intended as a unilateral method of protection established to regulate a unique model of dependent work (i.e. the typical full-time contract for an indefinite period), is today passed over not only by the ltalian legislator and but by business, which for a long time has experimented (sometimes on the boundaries of legality) with new contractual schemes of organising work. Particularly symbolic in this respect is the case of temporary work through an agency which has for a long time been experimented with in business (see Tiraboschi, 1994), in spite of a very rigid framework binding this form of work until the recent legalisation through art. 1-11 of Act no. 196/1997 (see para. III).

The reform process does not stop here. The transition from a monolithic and rigid labour law (*il diritto del lavoro*) to more comprehensive and dynamic labour laws – now defined and declined in the plural (*il diritto dei lavori*) – which take into consideration the evolving society and economy, has only just begun. Phenomena noted and constantly quoted by sociologists and

economists – like the globalisation of markets and technological innovation, together with the old economic diseases of growth of illegal work and the legal strategies to escape from the rules of dependent work – now impose a new projectile strength that allows a decisive updating of Italian employment law. Paradoxically, the same statistical evidence about atypical and irregular work[22] shows that it is not a lack of work but rather a lack of regulations and contractual schemes able to extract the work from illegality and divide it equally among all those involved in the labour market. In particular, the conceptual distinction between contract of service and contract for services is more and more inadequate in regulating the evolution of the Italian labour market.

The jobs of the future require simple and flexible rules capable of dealing with uncertainties during the process of qualification which is a traditional source of contention.

A typical characteristic of the Italian labour market is that the compression of numerous forms of work into the rigid scheme of contract of service and contract for services pushes all the atypical forms of work into a large grey area, very close to illegal work, not to mention the desire to circumvent labour regulations and the need for such forms of work for the maintenance of the business or in the interest of the workers. In order to progress from this problematic and fragmented framework it is necessary to experiment with new ways of making labour law such as the recent circular no. 43/ 1998 from the Minister of Labour which recognised the legitimacy of a contractual scheme such as job-sharing, up until then never experimented with for fear of possible controversies regarding the exact qualification of this form of working relationship (remember that part-time is still forbidden under Italian labour law). The circular demonstrated that it is not necessary to wait for Parliament to act to regulate new work schemes, but that in some cases, administrative intervention clarifying the limits and the fundamental rules of the contract is sufficient.

This does not mean removing the fundamental protection of labour law. But experimentation with 'regulated flexibility' (*flessibilità normale*) in small doses can contribute to the removal of some of the obstacles hindering the regular work market, while offering a favourable climate for the creation of new employment and for the channelling of supply and demand which, today, is dispersed and fragmented due to a lack of adequate information and

[22] In this context it is enough underline that the Italian Institute for Statistic (ISTA) has recently shown that in Italy there are more or less 5 million of irregular workers engaged in underground economy corresponding to about 23 percent of the Italian workforce.

instruments to evaluate the work-force (see Treu, l997). From this perspective, the recent legalisation of temporary work through an agency and the end of the State's monopoly of placement are symbolic for the future development of Italian labour law and, because particularly representative of the Italian climate, merit a closer look.

The abolishment of the state's monopoly in employment services and the legalisation of temporary work through an agency in Italy, between experimentation and social concertation

It should be pointed out at the outset that the recent legalisation of temporary work through an agency cannot simply be interpreted as either a process of deregulation of the Italian labour market or as a new attitude of the Italian Government faced with a drastic reduction in labour standards. Taking into consideration the ineffectiveness of regulation on the public employment service and the conspicuous presence on the Italian labour market of a sprawling illegal network made up of private agencies and co-operatives acting as intermediaries, Act no. 196/1997 represents an attempt to re-regulate a sector which has remained for too long outside the law (Tiraboschi, 1997). The introduction of temporary work through an agency into our legal system represents an opportunity to clarify once and for all the difference between the illegitimate intermediary in the hiring of labour (still illegal under article 1, Act no. 1369/1960) and legitimate intermediary justified by recent movements in the labour market and in the organisation of work. The objective of the Italian Government is to reshape some of the guidelines of labour law to make them compatible with the ever-increasing economic constraints. The procedural technique adopted by the Italian legislator is noteworthy.

Act no. 196/1997 reflects the previous agreement between the Government and the social parties (sec Employment Pact of 24 September 1996 and prior to that Agreement on the cost of labour of 23 July 1993). The *legalisation* process follows a period of indispensable social *legitimisation*. In fact, as demonstrated by comparable experience, only social legitimisation can grant a stable juridical framework and real possibilities for future development in this area (compare, for example, the French case with the German one).

Naturally, the will to reach social consensus has given way to some (perhaps excessive) compromises and limitations. But it should be pointed out that this act is for the most part experimental: after two years of enforcement, article 11 provides for a meeting between the Government and the social parties in order

to introduce, if necessary, corrections and revisions. In any case, the more contested points are left to the process of collective bargaining. This will involve the social parties that have the power to implement and effect changes in the labour regulations, especially to determine when and where temporary workers can be employed and what percentage they represent of the total number of workers of the user employer.

1. Agencies Authorised to Supply Temporary Labour Services

Article 2 of the Act lays down very strictly who is authorised to supply temporary agency labour. As in France, Germany and other European countries the supply of labour cannot be performed freely by anyone who wishes to engage in this area, but is permitted only to an 'agency' specifically authorised by the Ministry of Labour to do so, It is important to point out that the activity of supplying labour can be performed only by 'legal persons' and not by individuals. These legal persons must be registered as a company on a special list created by the Ministry of Labour.

Registration as an agency is subject to evidence that the applicant has met specific requirements:

• the legal form must be that of an enterprise/undertaking (the notion of enterprise/undertaking includes co-operatives, but additional requirements make it very difficult to use a co-operative in labour supply. See below);

• the name of the enterprise must include the words 'enterprise for the supply of temporary labour';

• provide capital of not less than l billion Italian lire and for the first two years of activity a guaranteed deposit of 700 million Italian lire; from the third year, in place of the deposit a bank or insurance guarantee for not less than 5 percent of the turnover in the previous year, net of the value added tax and in any case no less that 700 million Italian lire;

• presence of the registered office or branch within the territory of the Italian State;

• identification of the activity of supply of temporary workers as the sole business on the hypothesis that 'mixed enterprises (supply and placement of workers) can be less easily controlled and more subject to abuses and potential fraud;

• availability of offices and professional skills appropriate for performance of activity of supply of labour;

• guarantee that the service is available throughout the national territory and in not less than four Regions.

Special provisions pertain to the personal qualifications of directors, general managers and managers:

• absence of criminal convictions: for crimes against the state, crimes against the public trust or against the public economy, for the crime of association of a mafia-like character (under article 416-bis of the Penal Code) or of unpremeditated crimes carrying a penalty of imprisonment for not less than three years for crimes or misdemeanours under laws aimed at the prevention of accidents at work or under laws on labour or social security;

• not subject to preventive measures: special surveillance by the police, interdiction to reside in one or more municipalities other than that of legal or habitual residence as provided for under Italian law.

Authorisation to supply temporary agency labour may also be granted to a workers' co-operative which, in addition to meeting the conditions required for other companies, must have at least fifty members and, among these, as financing member, a fund for the development of co-operative; and it must employ non-partner-employees for a number of days not exceeding one third of the days of work performed by the co-operative as a whole. In this case, however, not the worker-partners but *only* the workers employed by the co-operative can be supplied by the co-operative as a temporary labour. This provision is highly controversial since it seems to be in opposition to the general principle governing workers co-operatives under which priority and preference in job opportunities are given to partners, not to non-partners. Authorisation may also be issued to companies directly or indirectly controlled by the State with the aim of promoting and providing incentives for employment.

2. The Contract for the Supply of Temporary Workers

The contract for the supply of temporary workers (*contratto di fornitura di lavoro temporaneo*) is a commercial contract through which an agency authorised by the Minister of Labour supplies one or more workers employed by the agency for either a specific mission or for an indefinite period to be al the disposition of a firm – or 3 public administration – who benefits from these workers 'in order to satisfy the need for temporary work' (art. 1). This contract is the pivotal element on which the entire trilateral legal scheme rests in the sense that it connects the three parties involved directly by identifying the

legal relations between the agency and the user and indirectly by specifying the kind of work, the duration the remuneration and so on This explains why, although it is a normal commercial contract the Italian legislation has put a lot of emphasis on its regulation. The protection of the worker derives from the regulations which govern the contract and especially from the division of the rights, the powers, the obligations and the responsibilities between the agency and the user.

As a general rule, the supply of temporary workers is still forbidden;

• for jobs of 'low professional content' identified as such by the national collective agreement of the industry to which the client organisation belongs, signed by the 'comparatively representative' trade union organisations;

• to replace workers exercising the right to strike;

• in production units in which, during the previous twelve months, there have been collective dismissals involving workers assigned to the tasks to which the temporary labour refers, except in the event that it is to replace absent workers with the right to retain their job;

• in production units in which there is a suspension of relations or a reduction in hours with the right to 'wage integration' (a kind of unemployment pay) involving workers employed on the tasks for which the supply of temporary services is requested;

• to client organisations that do not demonstrate to the Provincial Labour Office that they have carried out the risk assessment required by Italian law;

• for work that requires special medical surveillance and for particularly hazardous work identified by decree of the Minister of Labour and Social Security and issued within sixty days of the present Act taking effect;

• in agriculture and construction temporary work supply contracts can only at the present time be introduced on an experimental basis following an agreement on the areas and models of experimentation between the employers' organisations and the trade unions 'comparatively representative' at the national level.

The law (article l) provides that such a contract can be made:

(1) 'in cases of replacement of absent workers'. In comparison to Act no. 230/1962 on fixed-term contracts, this is a possibility of using temporary work through an agency to substitute for absent employees, including those who do not have the right to maintain their job. Under Act no. 230/1962, the use of temporary work in the form of fixed-term contracts was allowed only in order to substitute for workers with the right to maintain their job. If the collective agreement, legitimised by Act no. 56/1987, allows for the possibility to establish fixed-term contracts to substitute for those absent without the right to

maintain their job, the type of contract chosen by the user can depend solely on financial considerations. The business must decide between the inferior cost of fixed-term contracts and the relevant advantages gained through agency employment in terms of the quality of service of highly skilled and well-trained workers.

(2) 'in cases of a temporary need in an area requiring qualifications not covered by the firm's ordinary production organisation'. This offers an exception to Act 1369 of 23 October 1960 outlawing intermediaries in the hiring of labour and banning labour-only sub-contracting. Therefore, these cases must be interpreted in a restrictive sense. In particular, this second case does not seem to allow for the use of temporary work through an agency in order to satisfy a boom in production which is not manageable using the ordinary production organisation. In other words, the concept of a 'need in qualifications not covered by the firm's ordinary production organisation' must be expressed in an objective sense rather than referring to the skills and specialisations present in the firm. This interpretation conforms with the philosophy behind the Act: temporary work through an agency should not be considered an *alternative* to regular employment, but constitutes a *complementary* instrument. For these reasons one cannot agree with authors who consider that the new norm allows in principle for a company to understaff the business, filling gaps with temporary employees. The high cost of temporary work through agency renders this strategy of HRM irrational rather than illegal from a juridical point of view;

(3) 'in the case provided for in the national collective agreement negotiated for the industry to which the client organisation belongs and signed by the comparatively representative trade unions'. Attention should be paid to the new formula 'comparatively representative unions' which reflects the increasing problem of a number of unions co-existing in the same industry, equally claiming to represent employees. This formula should empower the Government and local authorities to select those unions which, in the context of a specific sector/branch, are more representative than others, in comparative terms representing (not necessarily organising) more workers than others. It is unlikely that this legal solution will be able by itself to solve the problem of union representation. One should add that it is necessary to develop appropriate legal mechanisms to test in more effective ways the ability of trade union organisations to represent workers not affiliated with them as well.

The contract for the supply of temporary workers must be in written form, the worker who provides his/her work to the client organisation is deemed to have been employed by the latter under an open-ended employment contract, Any

clause intended to limit, even indirectly, the right of the client organisation to employ the worker at the end of the contract for temporary work is null and void. Further, a copy of the contract for temporary workers must be sent by the supplying agency to the Provincial Labour Office responsible for the territory within ten days of its signing.

3. The Contract Between the Worker and the Agency

The temporary agency employment contract is the contract by which the temporary employment agency employs due worker. The worker may be employed under a fixed-term contract, i.e. for a specified time corresponding to the duration of the work for the client organisation, The worker may also, at the discretion of the temporary work agency, be employed on the basis of an open-ended contract, i.e. for an indeterminate time. Once employed, the temporary worker is required to carry out his/her activities in the interest and under the direction and control of the client organisation. The exercise of disciplinary power still belongs to the agency, on the assumption that the employment relationship is established between the agency and the worker. Nevertheless, Act 196/1997 provides that the client/user company shall report to the agency on possible violation of work duties by the worker for possible disciplinary action. Commentators have underlined that this solution seems to be rather complicated, a consequence of the 'triangular' arrangement characteristic of the temporary agency work.

In the case of employment for an indeterminate period, the worker remains at the disposal of the agency even in periods when he/she is not working for a client organisation. In this case, the contract between the employee and the agency shall make provisions for an income guarantee for periods in which no work is performed ('availability bonus'). As far as the application of statutory or collectively agreed employment protection standards is concerned, the temporary work agency workers are not considered part of the workforce of the client/user firm, with the exception of health and safety provisions. The temporary work contract must be in written form and a copy must be given to the worker within five days of the start of activity with the client organisation. In absence of a written contract or indication of the start and finish of the job at the client organisation, the contract for temporary employment converts into a contract for employment binding the agency for an open-ended period. However, the stated period of initial assignment may be extended, with the consent of the worker and in writing, in those cases and for the duration

provided for in the national collective agreements for the category, lf the work continues beyond the specified time, the worker is deemed to have been employed in an open-ended relationship by the client organisation after the expiration of the specified time of temporary services. Thus, if the temporary work continues beyond the term initially agreed upon or subsequently extended, the worker has the right to an increase of 20% in daily pay for each day of continuation of the relationship for ten days. This increase is chargeable to the agency if the continuation of the work has been agreed upon.
Temporary workers must be employed with pay and other terms and conditions of employment equal to those to which employees at the same level of the client organisation are entitled. The principle of parity of treatment between permanent and temporary workers is found in the legislation of many European countries. However, the collective agreement of the industry to which the client organisation belongs can identify modalities and criteria for determination and payment of wages and salaries in relation to the results achieved in implementing programs agreed upon between the parties or linked with the economic results of the organisation.

4. The Legal Statute of Temporary Workers

The great difficulties of providing effective protection of the individual and the collective rights of groups involved in the supply of temporary work have consistently paralysed the process of legalising this option. These stem not from the temporary and intermittent type of work in a user company, but from the structural and programmatic separation between the (holder of the) contract and the (real user of the) *working relationship*. In fact, for the temporary worker, an employment contract that involves two potential employers (the agency and the final employer), can mean a contract with ‘no stated effective employer’ (Siau, 1996, p. 16) or, in any case, with no visible control over the power and responsibilities connected to the use of a dependent work force.
A particularly indicative example can be taken from the British experience.
The deep uncertainties shown by the case law with regard to the contract between the intermittent worker and the temporary work agency, together with the difficulty of integrating the requisites of continued seniority required by British legislation, have made labour law to protect dependent employment relationships substantially irrelevant for the majority of this kind of worker.

There is a real danger that in this and other cases the worker is demoted 'from subject of rights to transitory object' (Ghezzi, 1995, p. 229).

To face up to the danger of masking the real relationships of production and, consequently, that of a substantial undermining of workers' rights, the legislator has introduced a series of corrections to guarantee, although only in an indirect way, the rights of temporary workers: rigorous selection of those qualified for the supply of temporary work (art. 2); limitation of the cases of a legitimate appeal to the supply of temporary work and reference, for the non-disciplined cases, to the provisions of Act no, l369/ 1960 that today still represent the general rule with respect to the qualification of the interposing phenomena (art. 1, 10); clear and unequivocal division of the responsibilities and obligations of the assignor and the assignee with regard to the protection of the health and safety of temporary workers (art. 6, 1), to social security benefits and contributive and welfare services (art. 9, 1), and to the transfer to the worker of wages (art. 6, 3), to the damages caused to third parties by temporary workers during their mission (art. 6, 7), to accident and professional diseases insurance (art. 9, 2), etc.

Coupled with these 'indirect' guarantees of protection of temporary workers' rights – purely instrumental, most of the time, to safeguard steady work and full-time employment – is Act no. 196/1997 with some important provisions for 'direct' protection of individual and collective temporary worker's rights which can be considered a sort of real 'statute' of temporary workers. The 'duplicity' – factual, if not juridical because of the negotiated agreement – of employers with whom the worker has to interact does not allow for an effective assimilation of the temporary work supplier's rights with those of the workers already employed, whether under standard or atypical contracts. Instead, precise specifications (if possible through the stipulation of a collective agreement for temporary work agencies' employees, cf. art. 11, 5) regarding the active and passive legal position of the worker, both in the supplier agency and the user enterprise, is required.

A fundamental frame of reference in adjusting the general regulations to the particularities of this situation should be based on the principle of equal treatment, or of not distinguishing between permanent workers of the user enterprise and temporary work suppliers. In the relationship between the temporary work agency and the user enterprise, the principle of equal treatment should modify the character of manpower supply as mere speculation on other people's work (art. 3, Act no. 1365/1960), and with regard to the individual worker's legal position, guarantee a good social integration of the worker into the collective of the user enterprise. Weighted

according to collective relationships, the principle of equal treatment allows for the expression of the intermittent work force's concerns that coincide with those, usually prevalent in union dynamics, of the permanent personnel either of the temporary work agency or of the user enterprise, avoiding both the dangerous phenomenon of social dumping and a polarisation of interests between different groups of workers present in a given production context.

For these reasons, in spite of the rubric of article 4 that refers to the economic conditions of the temporary worker, it seems reasonable to assume by equal treatment not only that which is economic but also normative. In this sense the social parties have expressed themselves in the 1993 and 1996 Agreements which provide temporary workers, as evidenced by the same accompanying report of Bill no. 1918/1996, with 'conditions of full parity with the employees of the user company'.

Article 4, para. 2 states, however, that the worker temporarily assigned to a user enterprise must be 'paid out a wage not inferior to the one the employees at the same level of the user enterprise are entitled to receive', without any specific referral to remuneration, while article 1, paragraph 5, lett. (c) and article 3 paragraph 3 lett. (f) require that both the supply contract and in the temporary work contract specify the place, the working hours, 'and the economic and normative remuneration of the working services', Practically speaking, several problems emerge, especially with reference to inconsistent arrangements between the supplier and the user. More problematic is establishing wage levels for tasks and qualifications that according to die law that legitimises the resort to temporary labour, presumably do not normally exist in the enterprise.

In case of open-ended hiring, the temporary work contract has to provide for a monthly indemnity of availability 'divisible into hourly shares, and it will have to be paid by the same supplier enterprise during the periods the worker is waiting for assignment (art. 4, 3). The indemnity should conform with the amount agreed upon by the collective agreement and should not be interior to the minimum fixed by Decree of the Ministry of Labour and Social Security; in the case of part-time work the amount is proportionally reduced. It is important to note that the indemnity of availability is characterised as a type of minimal remuneration due to the worker hired with an open-ended contract. lf, as is the case with short periods of assignment, the remuneration received for the work effectively carried out in the user enterprise does not reach the indemnity level, the supplier enterprise is obliged to increase the remuneration until it equals the indemnity of availability.

Special consideration should be given to die provision in article 3, paragraph 4 according to which the worker '*has the right to supply his work for the whole period of assignment*, except in the case of not passing the trial period or the advent of a just cause for withdrawal from the contract'. In fact, in one way, the right to supply the 'work 'for the entire period of the mission represents a guarantee with respect to possible discriminative practices against the worker, although it is easy to imagine how in practice the effectiveness of this provision is greatly weakened because of the relationship of power and economic interest that exists between worker and agency, on the one hand, and between the agency and the user enterprise, on the other.

For these reasons it is not correct to state that article 3, paragraph 4 regulates only the withdrawal for just cause from the contract for fixed-term temporary work and refers to the general legislation on dismissals in the case of an open-ended temporary work contract. Just cause for withdrawal, dealt with in article 3, paragraph 4, involves malfunctions which affect the contract for the supply of temporary work and therefore, primarily, the relationship between the supplier and the user enterprise. Paradoxically, in the contrary case, the temporary worker employed under an open-ended contract would be entitled to complete his mission even in the presence of justified reason (subjective or objective) for dismissal, although a just cause for withdrawal from the employment contract is not mandatory. Similarly, the temporary worker, even if hired with an open-ended contract, should be allowed to withdraw freely from the employment relationship by giving his/her resignation during the trial period, even though he/she has received the indemnity of availability in die waiting period before assignment.

The advent of a cause for the legitimate cancellation of a contract for the supply of temporary work will obviously also have effect on the temporary work contract, in the sense that the fortunes of the employment contract are subordinate to those of the contract which join the temporary work agency and the user enterprise.

Such a case will imply, as a consequence, the cancellation of the fixed-term temporary work contract that, by definition, is effective for the length of time of the work

performed for the user enterprise. There are, however, greater problems concerning the future of the open-ended temporary work contract, even if in this case strong doubts as to the logic and systematic nature can be raised concerning the application of the general legislation of Act no. 604/1966 on the temporary work contract and the subsequent effects.

This subject deserves attentive analysis (also with reference to problems connected with disciplinary action) that cannot be developed during a first consideration of articles 1-11 of Act no. 196/1997. In the following discussion, it should be remembered that the general legislation concerning dismissals is structurally unrelated to the open-ended temporary work contract, on the one hand

because it deals with a form of negotiation not related to article 2094 of the Civil Code and, on the other hand, because the withdrawal from the contract with notice is hardly compatible with the assignment period of the worker to the user enterprise.

The question deserves more attentive consideration because the position mentioned above in purely problematic terms is a minority position. With respect to the open-ended temporary work contract, only two premises for cancellation are admissible, both requiring a just cause for withdrawal from the employment contract: the mission interruption for a just cause for withdrawal from the supply contract that reflects (though not automatically, as in the fixed-term employment contract) its effects on the temporary work contract, on one hand, and the groundless refusal of a worker in availability to accept the execution of a mission, on the other.

lf these considerations prove to be of merit, one can exclude the existence of another possibility for the withdrawal from the temporary work contract. It is not clear, however, what interest a temporary work agency could have in paying a fixed-term worker 'in availability' who, as in this last case, once having accepted the mission, can then freely determine the cessation of the contractual obligation through simple notice.

In this matter, the collective agreement for employees of the temporary work agency (cf. article 11, para. 5) will both regulate the procedures for withdrawal with notice during the periods of availability of the worker hired with an open-ended contract prior to the assignment of a certain mission, and categorise the causes of withdrawal considered justified for the temporary worker's periods of assignment, irrespective of the type of contract under which he was hired. This is the only way, at least in order not to completely ignore the interests of the temporary work agencies (already reasonably limited), to draw up open-ended temporary employment contracts. Thinking differently, the circumvention of the general legislation on dismissals will flow *de facto* from the economic choices made by the supplier enterprises that will probably limit themselves to concluding fixed-term contracts with temporary workers, thus basically excluding the possibility that these workers benefit from a minimum income between one mission and another (this has so far come up in Germany

where in contravention to the obligation to hire the temporary worker with an open-ended contract, practice shows a net predominance of precarious and temporary contractual relations).

Aimed at limiting, if not completely excluding, the undeniable risks of 'precariousness' inherent in the situation of the temporary worker is article 5 of Act no. 196/1997 on professional training of temporary workers, in harmony with both the 1996 Agreement for work and the general efforts at reorganising professional training outlined by article 17 of the same Act. Article 5 of the act sets up a Fund aimed at financing the temporary worker's professional training and sustained by the supplier enterprises' payment of a contribution equal to 5% of the remuneration paid to such workers. If states in the collective agreements applicable to the supplier enterprises, the Fund can, moreover, assign resources to support workers' incomes 'in periods of work shortage' (art. 5, para. 4), The implementation of this provision is subject to the issuing of a decree within sixty days from the date when the law goes into force. At this time it can only be assumed that training will occur in the periods which elapse between the several work assignments (see Vittore and Landi, 1997).

With specific reference to professional training as an 'antidote' to precariousness in employment relations, one can only puzzle over the exclusion of workers with limited professional qualifications from the field of application of the act. It is surely paradoxical that these workers in particular – already excluded from the ordinary labour market and, therefore, relegated to the hidden one – will not be able to benefit from those unique professional training initiatives mat could contribute to a real elevation out of their precarious status (Veneziani, 1993, Treu, 1995). Article 5 is perplexing from the user enterprises' point of view as well. Within the general context of articles 1-11 of Act no. 196/1997, Art. 5 does not in fact guarantee the temporary work agencies any competitive advantage based on the 'quality' of their human resources which time and time again are put at the disposal of the user enterprises. In fact, temporary workers' training, as it is organised, presents itself as a purely coercive measure that does not fulfil a corresponding interest of the temporary work agency to raise the professional level and specialisation of its own employees. It must not be forgotten that all those clauses were intended to limit, even indirectly, the ability of the user enterprise to hire the worker at the end of contract for the supply of temporary work (art. 1, para, 6 and art. 3, para. 6). Even if this pro-vision is justified with respect to temporary employment contracts for a specified period, it is unreasonable if applied to temporary employment contracts for an indefinite period.

Paradoxically, a provision conceived in the interest of temporary workers ends up being turned against them since it discourages the establishment of stable relations between user company and workers. A comparison can be made with Spain and Japan. Spanish and Japanese legislation consent indifferently to supplier enterprises establishing fixed-term or open-ended employment relationships with their own temporary workers. In practice, while the Spanish temporary work agencies have immediately tended towards fixed-term contracts. Japanese agencies, putting more stress on training and on investment in human resources, do not hesitate. on the contrary, to hire the huge majority of temporary workers (more than 80%) for an indefinite period (cf. Tiraboschi, 1995). It is easy to predict that, since provisions to sustain employment for an indefinite period are missing, Italian agencies will orient themselves, as the Spanish do, towards the activation of precarious contracts.

If this is to be the orientation of the Italian supplier enterprises, it will be particularly difficult to assign to the temporary worker professional training with a connection between one assignment and another. The lack of juridical stability in employment relations with the temporary work agency will probably make the training process of the work force casual and irregular, both intricate and fragmentary. An analysis of the temporary workers' union rights reveals a noted distinction between me relations in a temporary work agency and those between temporary worker and user enterprise. As far as the forms of representation of temporary workers within the temporary work agency are concerned, there are few regulations which establish ad hoc rules or provide for an adaptation of the general rules to the peculiarities of this case. With the result – largely taken for granted – that this primary channel of representation for temporary workers is completely hypothetical and secondary. The formulation adopted by the Italian legislator on this point is quite limiting: 'to the user enterprises' employees have to apply the union rights stated by Act no. 300, 20 May 1970 and following modifications' (art. 7, para. 1). Not only is any co-ordination missing between the forms of representation of the temporary work agency's permanent workers and the temporary workers (for example using a mechanism of polls division with respect to the creation of a RSA) and, within this last category, between workers hired with a fixed-term contract and workers hired with an open-ended contract, but there are also no minimal directions on how to quantify the work force that is, by definition, temporary and fluctuating. Italian regulations typically do not give any consideration to how, concretely, to reconcile the enjoyment of union rights (both active and passive) with a particular type of work and with the phenomenon, typical of the professional supply of manpower, of

fragmentation and dispersion of the enterprise collective. The risk is that the important principle affirmed in article 7, para. 1 will remain a dead letter.
The problem of counting the temporary work agency's employees emerges, obviously, with regard to enforcement of the Workers' Statute. Taking into consideration the formulation of Act no. 196/1997, it is beyond dispute that the dimensional
requisites of article 35 of the Statute can also be applied to temporary work agencies' employees. With reference to union rights of temporary workers assigned to a user enterprise, article 7, para. 3 of Act no. 196/1997 does not hesitate to affirm that 'the temporary worker, for the whole length of his/her contract, has the right to exercise within the user enterprise the rights to freedom and to union activity, and even to participate in the assemblies of the user enterprises' employees'. If, however, one tries to align the formal provision of the act with union practices, it clearly appears that. in this case as well, the acknowledgement of some rights to the temporary worker runs the risk of being purely theoretical.
From a comparison of the provisions concerning temporary workers' rights included in the national multi-industry Agreement of 20 December 1993 about the creation of unitary union structures, it is possible to infer that a temporary worker can rarely satisfy the requisites stated in the agreement necessary to remain in the enterprise. With particular reference to the delicate question of the right to stand as a candidate, the collective bargaining at industry level which came after the national multi-industry Agreement of 20 December 1993, even if slightly different in wording, has substantially confirmed this interpretation. In C.c.n.l., the eligibility of workers with a fixed-term contract or rather with a *non-open-ended contract*, including temporary workers, is provided for, at least theoretically. But this possibility is generally limited to the condition that, on the date of the elections, the employment contract is for a period which is not inferior to 6 months. The right to stand as a candidate is therefore closed to those workers hired with a contract for a duration inferior to 6 months, and, in another situation, no device is provided to match the temporary/precarious employment period with the three-year office as RSU member.
At the end of the non-open-ended employment contract, the appointed mandate expires automatically. However, even if one were to assert that these rules are not applicable by analogy to the temporary labour force, it is, in any case, true that Italian union procedures have shown a total indifference towards the mechanisms of representation of the labour force present inside the company on a merely temporary basis (cf. Tiraboschi, 1996). On this

point, a restrictive interpretation prevails that will lead to the exclusion, at the root, both of the right to vote and the right to stand as a candidate to the temporary worker on the presumption that this worker has no contractual obligations with the user enterprise (some have tried to refute this position through the valorisation of the existent bargaining connection, insisting on its application on a theoretical and practical level), And yet, despite some obvious difficulties, it does not appear that the status of the temporary worker is radically incompatible with the exercise of the right to vote. At the company level, the temporary worker must at least be recognised as having the right to participate in the elections of the representative for workers' safety since article 18 of Legislative Decree no. 626/1994 holds that 'the representative for safety is elected directly by the workers and chosen among them', and does not require that the worker be in a position of legal subordination to the user.

Union rights, according to article 7 of Act no. 196/1997, only attain a significant degree of efficiency if they apply to the collective interests of the stable labour force of the user enterprise. User enterprises are required by Article 7, para. 4 to communicate to the unitary union structure, or to plant-level union structures and, in their absence, to the territorial trade associations adherent to the comparatively representative national confederations, the frequency and the reasons for recourse to temporary work rather than the supply contract, as well as, every 12 months, the number and the reasons for the temporary work supply contracts, their length, the number and the qualification of the workers involved.

As already affirmed elsewhere (Tiraboschi, 1996), in order to resolve the delicate problem of representation of the temporary work-force's collective interests, while avoiding tensions and antagonisms between the precarious labour force and the steady one, it must be recognised as part of the general problem of 'participation'. One cannot but agree with those who, faced with 'the mutation that (...) the labour factor is undergoing, both in contents and execution (and in the contractual typologies used)', presses for 'a corresponding process of change and adaptation of union action, in the exercising of its protective function of workers' interests (...) and the opening towards participation models' (on this point see Carabelli, 1996). With reference to temporary work through an agency, the search for adequate channels of communication between the individual and the collectivity cannot be limited to traditional profiles concerning union rights or the access for temporary workers to the functions of representation inside the company, but must reach far beyond, through research and experimentation of new forms of representation and the merging of these, so to speak, disparate interests.

Deregulation and reform of collective labour relations

In collective labour relations, we cannot speak of a process of deregulation because this area of labour law is still completely unregulated. New pieces of legislation are under discussion and soon we will have an act on collective bargaining and trade union representation. If we look at present practice, it is not possible to speak even of a process of decentralisation of collective bargaining. Rather the key issue is the co-ordination between the three levels of bargaining, inter-confederation, national industry-wide enterprise and plant level.

In the absence of state regulations, a major contribution to the co-ordination of the bargaining system came from the tripartite agreement of July 1993. As agreed in this social pact, the clauses in the national contract governing hiring and firing practices, job classification, working hours, career paths are to be negotiated every 4 years, while wage clauses will be renewed every 2 years. Bargaining will take place at both national and plant level. However, plant level bargaining takes place only every 4 years and only on issues not already regulated by the national contract.

This co-ordination supports a trend towards consensual governing of industrial relations and provides at least de facto a major control of conflicts.

Collective bargaining, supported by new legislation, will probably continue to be the main instrument in governing industrial relations in the future. It may be a complement but not a substitute for more or less institutionalised forms of joint consultation and workers participation. There is still a wide distrust in Italy regarding participation. Workers, without wishing to create tension and antagonisms between the stable and the precarious workforce, no longer side step the problem of participation.

The changes in the workforce press for a corresponding process of change and adaptation within the union in exercising its function of protecting workers interest and opening towards participation models. In this respect the hot issue is the request by the employer associations for lower pay rates in the depressed area of the south of Italy. While CISL and UIL trade union confederations have indicated that they are willing to open negotiations on allowing companies in the south to pay wages below the national minimum rates for a fixed period, CGIL is strongly opposed.

More recently we have experimented with new kinds of negotiation through the introduction of area contracts and territorial pact. These contracts and pacts are broad agreements at local level between companies, trade unions, banks

and local authorities to promote economic development and reduce unemployment through a high level of flexibility in regulating employment relationships. The continued control at national level of wages is meant to regulate competition among employers, in the Italian case it has also been an instrument of controlling inflation in order to respect the criteria laid down in Maastricht by the E.U.

Evaluation of current deregulation (driving forces of deregulation)

As far as Italy is concerned, all the points indicated in our program apply: counter-measures against unemployment, pressure from global competition, international pressure to harmonise regulation. In employer and in some academic circles there is a strong emphasis on deregulation as an instrument to revitalise the economy and fight the high level of unemployment. Employment legislation is seen more and more as an obstacle to the development of the economy and one of the most important factors that lead to high unemployment. In my opinion, from a position balancing the advantages of the free market and the constraints of law, the issue of the deregulation of employment relations is not only badly posed and misleading but also historically incorrect.

As a reaction to a new organisation of production methods and circulation of wealth, employment regulation was not, in fact, a unilateral method of protection and emancipation of the weaker party of the contract. Not always supported by values and unified political, economic and social objectives, right from the very beginning the state's regulatory intervention in the labour market never assumed a unidirectional aspect. Beyond the contingent motivation of each single norm, the regulation of employment assumes importance right from the beginning not only as part of the traditional framework of worker protection, but also of those concurrent and certainly no less important factors like conservation of social peace, rationalisation of the productive system, regulation of the forms of competition among entrepreneurs, The product of the legislation of employment relations is therefore, undoubtedly, not only a distributive right of protection of resources, but also, at the same time, a right of production, i.e. a discipline of roles and of the means of production in an industrial society.

For these reason I don't think it is correct to speak of a crisis in labour law connected to the recent process of deregulation, In my opinion, labour law is simply an instrument of regulation of society and of the economy and it can

work or not work. Probably it is more correct to speak of a crisis of a certain image of labour law, but this is quite different. The emphasis is now not only on the protection of the weaker party but moreover on the rationalisation of the productive system. Labour law as an instrument of regulating the way of working in a capitalistic society is still valid. So we have to find ways to help labour law work better. In this way the stress is more on 'derigiditication', simplification, and nationalisation than on a mere deregulation and a return to market rules. In any case the advantage of the free market as regard the substance of the economy and the fight against unemployment is not at all clear. No particular proof exists showing that a deregulation of employment relation can, per se, bring about a reduction in unemployment on an increase in competitiveness in enterprises. On the contrary, it seems well-illustrated that the excessive precariousness of employment relations, other than destroying stable work posts, ends up, in the long run, proving itself to be counterproductive for the entire productive system by taking away from the enterprises a qualified and particularly reliable work-force.

From this perspective, what seems to have more importance is not brutal deregulation but structural policies of employment, access to the system of credit and to market capital, locally based policies of support of the local productive and social system, and moreover the rules that discipline international commerce and relations among different national states. I believe that the recent deregulation of labour law and the crisis of legality that characterises Italy, a crisis characterised by the extremely high level of black market work and an informal economy, cannot be, in any case, explained merely on the basis of a diffuse wish to escape from regulation considered invasive and too heavy for the employer. In my opinion it is the recent loss of state sovereignty over the rules that control the mechanism of production and transfer of wealth that affect indirectly but in a decisive way the ineffective discipline of work, So globalisation and internationalisation of the economy are really the most powerful driving force of the process of deregulation.

In this respect I think that not only national government but also international institutions like the European Community are not at present capable of controlling the economic-productive structure, and at the most, limit themselves to finding palliatives to resist change and contain the effects at the social level or are reduced to merely taking note of the change in progress. Not even in large homogeneous areas like the E.C. is there any movement towards the elaboration of a regulative method of alternative juridical models of the subordinate employment contract for an indefinite period, Two years ago I was in a large research group on the transposition in five different countries of

the directives on health and safety at work, and the result of this research clearly indicated that the process of transposition led to a process of diversification rather than harmonisation of rules. In reality, even though changes have occurred in the economic production system, on the regulative level there is still today strong national resistance to a supra-national project of re-regulation of the criteria of legitimisation of the acquisition of the value-added through the work of others. Without any form of supra-national control I see, at least in Italy, the start of a process-informalisation from contract toward status. I wonder if the recent changes in the economy will lead us to abandon the traditional distinction between subordinate workers and the self-employed in order to arrive at an essential core of imperative regulations and principles common to all bargaining relationships concerning labour.

The role of labour law in the 21st century: do we need a new concept of labour law?

The technique adopted by Act no. 196/1997 for the regulation of temporary work through an agency represents undoubtedly a substantial starting point to begin a more exhaustive reform of Italian employment law and to provide a clear regulation of atypical work forms in general. Given the specific legal and cultural context of Italy, simple deregulation is not possible. On the contrary, it will be necessary to experiment, as we have said, with doses of 'regulated-by-law flexibility' which contribute to the creation of a climate favouring employment and to the recovery of the broad areas of black market work. The Government's commitment, formally affirmed in agreements with the social parties, consists in fact in loosening some of Italian labour law's real rigidities, but without destructuring the market of steady and full-time labour. Within this broad context, characterised by specific bonds of economic and social compatibility, the inevitable problem of redefining the boundary between independent and dependent work cannot be simplistically – and unrealistically – achieved by intervention directed at penalising atypical work, the co-ordinated arrangements and new forms of work organisation. Legislative intervention to establish a typology for a new bargaining scheme (co-ordinated work) does not seem relevant either. The market requires flexibility, simple rules, certainty of the law: a new definition introducing a contractual *tertium genus* would do nothing but foster litigation, uncertainties in definition and an escape into the black economy.

More convincing and realistic is the idea of a *Statute of new work* which, pragmatically, would address the problem of new employment forms from the point of view of protection (and of their remodelling as regards all employment relations), rather than with a view to the creation of formal definitions and concepts. The idea should be abandoned of defining and classifying a contractual reality which rapidly and constantly changes, in order to arrange, on the contrary, un essential and limited core of imperative rules and principles (above all with reference to the Constitution) common to all bargaining relationships concerning labour.

In brief, the *Statute* should be operative at two separate levels but with the aim of sustaining each other. On the one hand, we could conceive a voluntary measure to stimulate certification, in the administrative setting, of the qualification assigned by the parties to a specific labour relationship; on the other hand, in order to make such a measure effective, it will be necessary to move towards a removal of some of the clauses which contribute to promoting litigation over employment relations and the *physical* escape into the black market and the area of atypical employment (as distinguished from the *pathological* escape that, in addition to an erosion of labour guarantees, is also an element of distortion of the competition between enterprises and must therefore be terminated), outlining a new way of fundamentally reducing the distinctions under the present norm and most of all the characteristics which, at the moment, define independent and dependent employment relations. The mechanism of employment relations certification can reasonably work only if, in the *interim*, the game of convenience (for both parties) is made more balanced. The convenience game is the return of employment relations into a particular bargaining scheme rather than into a new one, only because it is convenient for the parties. From this perspective, a *Statute of new work* could offer the possibility of modulating and graduating (typologically) the protection enforceable in every kind of agreement in conformity with the categories represented by concentric circles which – along with a continuum of modalities in work execution – extend from the minimum and imperative protection enforceable for all employment relations, to the guarantees belonging only to dependent work (protection against dismissals).

The issue of employment relations certification as an answer to the swell of legal cases on the subject of contract qualification, does not seem to pose any particular problems, on the condition, obviously, that the bargaining program ex ante agreed upon by the parties will be respected during the exercise of the employment relations. In order to foster certification and support the parties' will, it would be useful, moreover, to distinguish between an area of absolute

incontrovertibility or of public order (in other words, related to the worker's fundamental rights), and not at the parties' disposal under penalty of relations re-qualification in judicial session, and an area of relative incontrovertibility, administrated by the collective partners during collective bargaining and/or by the same individual partners as established by the employment relation but, in this last case, only before the administrative body qualified for the certification (wages over minimum, management of career paths, terms of notice, relationship stability, allowance in case of relationship suspension, working time modulation, etc.).

More critical, undoubtedly, is the part concerned with the remodelling of employment protections for which adequate political and social consent can hardly be realised, but, surprisingly, taboos and ideological difference emerge anew.

Nevertheless, it is clear that the regulation of atypical work imposes a rewriting (at least in pan) of the traditional dependent work protections, for the corresponding normative realignment of social security benefits, an outlining of a social security regime common to all independent and dependent workers Which, granting a basic social-insurance tax revenue for all employment relations, contributes to making less dramatic the qualifying problem of individual work forms for the social insurance providers as well. An intervention of mere regulatory nature into atypical work forms, without a corresponding redefinition of the dependent work statute, will only contribute to making labour management rules more pervasive, and thus stimulating a further escape into the hidden economy and a reaction in the form of labour outsourcing and enterprise relocation.

A serious reform bill cannot, in consequence, ignore this issue. In this connection, frankly puzzling is the ideological preliminary question concerning dismissals posed by some political and trade union forces, referring to a normative and social framework which already provides for broad forms of evasion of the employment stability rule. Apart from black, grey, etc. work, nobody can deny, watching developments in the dependent labour market, for the most part through the legitimate resort to temporary work typologies, fictitious training contracts (apprenticeship, work-training contract) and to independent and co-ordinated work contracts where the rules concerning dismissals are not enforced. Why should we accept this hypocrisy, if only to not touch on the dismissal issue, instead of following a policy aimed at effectively re-launching the open-ended labour contract and youth employment? There is no shortage of ideas about these matters. Apart from the prohibition of discriminatory dismissals or for illness or maternity, one could

cease enforcing individual dismissals, without impairing the protections of the adult labour force firmly inserted in a business context (a) for those workers in their first working experience with an open-ended dependent employment contract and not over the age of 32; (b) for all new hiring, during the first two years of work, in provinces where the average yearly rate of unemployment, according to the broadened ISTAT definition, recorded for the year before the hiring, reaches the level of at least 3% with reference to the national average as it results from the same record; (c) for those workers who have less than two years' seniority of service with the same employer.

There is no shortage of ideas. What is missing is the capability (the courage?) of abandoning old schemes and consolidated paradigms which do not correspond anymore to the reality that we would like to regulate (on this point see Blanpain, 1998).

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