

Transformation and Functional Evolution of the Collective Bargaining

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International Society for Labour and Social Security Law 21st World Congress
Cape Town, 15-18 September 2015
Submitted Paper – Session of 16 September 2015
Collective Bargaining – And Beyond

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1. Scope of the paper and general questions.

The general issue which I would to examine in this paper is the one of the various innovations and modifications which affected in some countries (especially in the European Union geographical area), the phenomenon of collective bargaining.

More in detail and starting from a recall of the traditionally and general accepted functional outline of collective bargaining in some groups of law systems, my intention is to point out how these changes and innovations could be read as indications which converge in the sense of a relatively stable and substantial transformation of the role, the effects, the functions and the position of collective agreements in many national law systems.

These changes have been usually explained and examined, particularly during last years, in the perspective of the response of several countries to the pushes and to the accelerated transformation impulses due to the general economic crisis which started in 2007.

The approach which tends to focus these new elements from angle of the responses generated by the present phase of crisis is certainly appropriate, provided that, anyway, the issue of the reflects of the crisis on collective bargaining systems could also be contextualized as a single

and juncture-arising component which has to be conceived as a part of a wider evolutionary dynamic in which collective bargaining has been involved during, at less, the last three decades¹.

The starting moment of this dynamic, indeed, dates back to several years before the beginning of the economic crisis, as a consequence of a combination of factors (the end of the antagonistic dualism among Western and Eastern Europe, the advance of the European integration process, the growing of development countries and increasing of the international economic competition in the largest context of the globalization, the technological and organizational evolution) which began to influence collective bargaining starting from the end of Eighties – beginning of Nineties².

Orientating ourselves toward the search of the general trajectories and the continuity elements among:

a) this particular and recent trend (originated by the crisis) and

b) the more dated and general evolutionary tendencies which have affected collective bargaining, its functions and its connections with statutory law, could help to better identify and understand the functional and structural changes which currently affect collective bargaining with particular regard to some Civil Law systems.

The approach above suggested also entails a reduction of the risk to offer – at the purpose of the theoretical analysis and reconstruction – an explanation of these evolution *in the main or exclusive key of a regression* of the juridical values and a restraint of the bargaining power of trade unions in favour of the mere economic goals fixed by international financial institutions³.

Actually, the issue of the economic implication of collective bargaining has been examined by a vast body of literature, less and more recent, who has also taken in consideration some problematic effects of erosion of the bargaining power due to the economic crisis⁴.

¹ The most deepened and perceptive survey of the more significant underway changes in the field of collective bargaining at the beginning of the XXI century could be considered, as widely recognized, the one carried out by of Supiot, A. (2001), *Beyond Employment*, Oxford University Press, Oxford, 2001, 96-111.

² See, among others, Katz, H.C. (1993), *The decentralization of collective bargaining: A literature review and comparative analysis*, Industrial and Labor Relations Review, 47, <http://digitalcommons.ilr.cornell.edu/cb/29/>; Gernigon, B., Otero, A., Guido, H. (2000), *Collective Bargaining: ILO standards and the principles of the supervisory bodies*, ILO, Geneva

³ In this perspective, Sciarra, S. (2011), *Patterns of European labour law in the crisis*, paper presented to X ISLSSL European Regional Congress, Seville, 21-23 September 2011, http://www.europeanrights.eu/public/commenti/Sciarra_Seville_conference_newsletter_novembre.pdf

⁴ Among others and of course without demanding completeness, see Aidt, T., Tzannatos, Z. (2002), *Unions and Collective Bargaining. Economic Effects in an Global Environment*, World Bank, Washington D.C.; Traxler, F. and Kittel, B., (1999), *The Bargaining System and Performance: a Comparison of 18 OECD Countries*, Comparative Political Studies; Windmuller, J.P., (1987), *Collective Bargaining in Market Economies: a Reappraisal*, Geneva: ILO. For a more dated resume of the debate, Hutt, W.H. (1954), *The Theory of Collective Bargaining*, The Free Press, Glencoe; Hochwald, W. (1947), *Collective Bargaining and Economic Theory*, Southern Economic Journal, Vol. 13, No. 3 (Jan., 1947), pp. 228-246.

The aim of this study, nevertheless, is rather different and precisely oriented towards the analysis of *how collective agreements are structurally changing, at level of system, respect to the conceptual figure usually known and studied in the juridical tradition of several countries.*

That in the sense that some structural features and some legal effects, together with the position of collective bargaining respect to the law, are gradually and definitively changing. These transformations are happening due also but not exclusively to the trigger-effect of the crisis, which in some sense represented a sort of accelerator of a series of transformations already started and interrelated with some more general global evolution of production systems.

Disclosing in advance some of the general tendencies of these transformations, it is possible to observe that historically, since the times of Webbs' *Industrial democracy* issuing, the keywords about the aims of collective bargaining were “*uniformity*” and “*equality*” (I will come back on this point in the paragraph no. 3 and in the first of the two conclusions paragraphs) and that this axiological vocation has preserved until today.

But at the same time, this general approach to the main themes related to collective bargaining has to be nowadays counterbalanced with the possibility (or, according the different points of view, the need or, still, the opportunity) to recognize and assimilate in the general framework of the same collective bargaining and of the added value of protection which through it could be assured, the growing *differences* arising from the more and more segmentation of the labour market⁵, not only by the side of the demand of labour, but also from the one of the supply and in relation with the different reasons and causes from which this segmentation could arise.

2. Multiple definitions of the expression “*collective bargaining*”, general features of the collective agreements and the “*crisis*” of some national models of collective bargaining.

Examining the main supranational norms on association freedom and collective bargaining, it is possible to ascertain that collective bargaining is as entitled to provide “*to the regulation of terms and condition of employment*” (ILO Convention no. 98, art. 4).

Article 2 of ILO Convention no. 154 has intervened to clarify this definition stating that “*the term collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations, on the other, for (a) determining working conditions and terms of*

⁵ For a very efficacious summary of the set of problems connected with this general issue, see Deakin, S. (2012), *Legal perspectives on labour market segmentation*, presentation submitted by during the Employment Quality in Segmented Labour Markets Research Workshop, 11-12 December 2012, ILO, Geneva, posted at the web address http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_195906.pdf

employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organizations and a workers' organization or workers' organizations”.

These general definitions have to be situated in a framework where the States are entitled to guarantee, as stated in the Declaration of Philadelphia, the effective recognition of the right of collective bargaining.

Within this general frame and considering the variety of the models in which these principles could be implemented, has to be observed that in a relevant part of countries, collective bargaining systems have been built through during several years (that is, basically, over the twentieth century) with some common features, which preservation is now (since several years, in truth) called into discussion.

Among these essential qualities could be included the following ones.

I) The hierarchical dualism among law rules and collective agreements.

With this expression I would imply that even though collective agreements are considered in practice as coessential to establish the terms and conditions of the employment relations, they remain subjected, in general, to the respect of legal minimum conditions as a validity requirement of collective agreement. This scheme affects and remains applicable not only with reference to the issues corresponding to fundamental rights as discrimination matters, health and safety, working time limits, minimum wages etc., but is extended almost to the whole scope of the contents of the labour contract.

II) Inderogability and binding effectiveness of collective agreements.

As a consequence of this regulative dualism, within which collective agreements are recognized as secondary labour law sources (either formally or only on a substantial plan)⁶ in many law systems collective agreements are legally binding within their coverage area according the general principle of inderogability *in peius* and derogability *in melius*: according this scheme, if the work condition fixed by the individual labour contracts are less favourable than certain parts of the collective agreement, then the individual contractual clause is void and the clauses of the collective agreements remain valid for the employment relationship⁷.

III) Structural layout of collective bargaining as a centralized system, orbiting around the branch/central level.

⁶ See the reports presented in the XIVth Meeting of European Labour Court Judges (4 September 2006, Cour de cassation, Paris), on the topic *Collective agreements – how they work in various countries*, http://www.ilo.org/ifpdial/events/meetings/WCMS_159922/lang--en/index.htm

⁷ As stated, e.g., by article L-2251-1 of French Code du Travail, “une convention ou un accord peut comporter des stipulations plus favorables aux salariés que les dispositions légales en vigueur. Ils ne peuvent déroger aux dispositions qui revêtent un caractère d'ordre public”.

As well known, centralization of collective bargaining has been for a long time a traditional feature of many national industrial relations systems, either in the area of Civil Law countries or, sometimes, in the Common Law one⁸.

In several system, this primacy of the sectorial collective agreement at national level has been transposed into legislation, with the consequent establishment of a subalternity relation, like a sort of hierarchy between different level of collective bargaining; with the consequence of an additional species of inderogability of collective agreement signed at national level by the ones concluded at plant level or at local level.

The legal recognition of this superior position of collective agreement which affect a broader context (sectorial/national) respect to the ones which covers a more limited scope (company, region, province) has been decreed by the legislators, in many cases, in those systems which also recognize the general applicability of national collective agreement⁹.

But also in national system where there has been recognized historically a formal/informal equality among the different levels of collective bargaining (that is the case of Italy) branch collective agreement covering all the enterprises of a given sector (although on a voluntary basis) have been traditionally considered, at least in the customs of the industrial relation system, as minimum standards.

So, each local or company agreement notwithstanding national collective agreements has been considered, until the last years – and to be more precise, always referring to the Italian situation – until the general confederal agreement on collective bargaining signed on 28 of june 2011 (see the following paragraph no. 4), as an heavy element of discontinuity and as a serious breach of the extra legal and voluntary but diffusely observed rules of the industrial relation system¹⁰.

This articulated layout of collective bargaining is clearly acknowledged by the European Union Institutions, as demonstrated by the statement contained in article 28 of the Charter of fundamental rights, which reaffirms the rights of workers and employers and of the respective organizations “*to negotiate and conclude collective agreements at the appropriate levels*”, an expression which could be read as a reference to the different regulatory frameworks (legal or voluntarily established in respective industrial relation systems) in which the same rights are embedded.

⁸ For some examples, see Katz, op. cit.

⁹ It happened, e.g., in Spain with articles 83 and 85 of Estatuto de los Trabajadores (legislative decree n. 1/1995), before the amendments approved in 2012.

¹⁰ The most significant example and the case about which there has been most debate has been the one of the Fiat Pomigliano agreement signed in 2010: see, about this issue, Jacobs, A. (2014), *Decentralization of Labour Law Standard Setting and the Financial Crisis*, in Bruun, N., Lörcher, K., Schömann, I, (eds.), *The Economic and Financial Crisis and Collective Labour Law in Europe*, Hart Publishing, Oxford, 171.

At the same time it is also very important to remind that the features above described are not present and generally widespread as essential properties or identifying items of the collective bargaining in every national system.

Easily starting from the issue of the centralization of industrial relation system, for instance, in many countries the main bargaining level is not located in the branch or sector, but the industrial relation system is based on the model of company agreement, and this feature characterizes both developed countries and developing ones (in this group could be included, indeed, countries as USA, Canada, Japan¹¹, Australia, New Zealand, Korea, Mexico, Chile, Hungary, Poland, Turkey etc.). It is possible to meet also a situation as the one of the Russian Federation, where sectorial agreements can be extended by the Minister of Labour if they cover a majority of employees in a particular sector, but uncovered employers can opt out of the extension.

At the same time, not even the issue of the inderogability represents a permanent feature, as clearly appears in UK where article 179 of TULRA explicitly provides that “*a collective agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract*”.

With reference, finally, to the feature above described sub A), which alludes to the ordinary situation in which collective agreement are subject to the law, it is meaningful to remind the rule contained in the Basis Conditions of Employment Amendment Act of the Republic of South Africa (sections 49-50), according to which not all the legal rules on the employment condition are mandatory in the same way: that is because collective agreement may replace or exclude any basic condition of employment which is not included in a closed list of fundamental items as health and safety protection (included the special protection for night workers), minimum of annual leave, sick and maternity leave, prohibition of child and forced labour.

This so rapid overview, although highly incomplete, suggests, hence, that the “second degree crisis” of a determinate model of collective bargaining, usually seen as a sectorial consequence of the wider and more complex phenomenon of the economic crisis:

aa) on one hand, takes on its full meaning as a clean break from a dated and fundamental tradition in the history of labour law, the one of the systems in which this discipline has concretely born;

¹¹ With reference to the Japanese model, see Araki, T. (2013), *The relationship between state law, collective agreement and individual contract: Japan's decentralized industrial relations with internal market oriented flexicurity*, paper prepared for the conference organized by the MTA-PTE Research Group of Comparative and European Employment Policy and Labour Law held on 25-26, October 2012 in Pecs, *University of Tokyo Journal of Law and Politics*, 2013, vol. 10, 1-21.

bb) on the other hand, it should be read as an exhortation to start the reflection about the possible alternative model/s which is/are arising from the gradual, but deep and for some aspects radical, revision of this model.

3. Collective bargaining facing globalization: a problematic approach to differences, inequality, flexibilization, fragmentation.

In an article which appeared in 2008 on an Italian law journal, William Wedderburn sharply observed that one of the peculiarities of the new global capitalism of the 21th century, beside the tendency to move and to reallocate in the most favorable labour markets, could be identified in the fact that the globalization of economy produces effect on accentuating differences and inequalities among people working in different countries but also within the same domestic labour markets¹².

In the same perspective and getting some points which are closer to the issue of the present paper, Katherine Stone and Scott Cummings in 2011 have highlighted some further effects of globalization on the Trade Unions' role.

They observed how, from one hand, the more and more realistic option, for the U.S. based companies, to move abroad (Asia, South America, Western Europe), strongly diminishes labor's bargaining power.

On the other hand – and this could appear an even more important aspect to prefigure the future of collective bargaining – Stone and Cummings drew attention to the fact that the changing nature of work (mainly due or connected to the ICT economy), favored the increased use of flexible forms of employment as the ones of temporary workers, independent contractors and project workers; this flexibilization also has a significant influence, in a sort of dualistic and conflictive dynamic, on the labour relationship of the “regular” employees: that is because the risk of a “substitution” of those employees with flexible workers reduce the job security and hampers the paths towards reliable wage increase trajectories or professional development, weakening the capacity for action of the Trade Unions in general and in respect to the promotion of the interests of this specific and more and more reduced group of employees.

The conclusion deduced from these remarks appeared quite hopelessly negative, without appeal, in the sense that this new employment practices are defined as “*fundamentally antithetic to unionism*”¹³.

Nevertheless, despite this disenchanting analysis, the authors of this theoretic reconstruction do not shirk the scientific responsibility to outline a future possible scenario in which could be placed a

¹² Wedderburn of Charlton, W. (2008), *Relazioni di lavoro e nuovo capitalismo*, Lavoro e Diritto, 347

¹³ Stone, K., Cummings, S. (2011), *Labor Activism in Local Politics: from CBAs to 'CBAs'*, in Davidov G., Langille B. (eds.) *The idea of Labour Law*, Oxford University Press, Oxford, 2011.

reality, as the collective bargaining, about whose it is not neither clearly enough denounce the crisis nor realistic be feared about its disappearing.

The approach that these authors consider more predictable is the one of a growing enhancement of the local dimension of collective bargaining. At this purpose, they made reference as a confirmation to various agreement signed in the area of Los Angeles and which combined measures as wages and work conditions with some community benefits, with the purpose to harmonize the companies' activity with the needs of people living in the surrounding of the manufacturing or commercial structures, who often could be identified in the same workers. This benefits, hence, could be compared to some extent, to the welfare measures which diffusion is growing, despite the present phase of crisis, in many European big and medium companies agreements¹⁴.

The example could be read as an useful demonstration of the fact that *also the often criticized dynamic of decentralization of collective bargaining could not be read exclusively in the key of a potential depletion of work conditions respect to the ones established by sectorial collective agreements, but could efficiently get into the general framework of work transformation which goes in the direction of a growth of the differences between group of workers and individual workers.*

This experience, indeed, could be not read, in its general meaning, as an quite special or isolated situation, but on the contrary it reflects one of the transformation issues which, under different guises, have interested many systems in the more recent period.

4. The trend towards the decentralization of collective bargaining within the European Union. Some examples.

It is well known that in the European Area the recent and in some cases very deep transformation concerning collective agreement are the result of a combination of factor, which are arising, from one side, from general economic and industrial changes (it is possible to remind, at this purpose, the influence of the Fiat-Chrysler case on the important changes of Italian industrial relation system which have taken place since 2010¹⁵).

¹⁴ A recent and interesting survey about the situation of Spain, particularly interesting since it is referred to one of the European countries more affected by the economic crisis, is offered by Gómez Abelleira, F.J. (2014), *Occupational Welfare in recent collective agreements in Spain*, report presented at Budapest on 23rd of June, 2014, during the 3rd International Workshop on *Going up the high road. Rethinking the role of social dialogue to link welfare and competitiveness*, research project participated by the Fondazione Marco Biagi, <http://www.fmb.unimore.it/online/Home/AttivitaDiricercaOLD/Goingupthehighroad.Rethinkingtheroleofsocialdialoguetolinkwelfareandcompetitiveness/articolo5132.html>

¹⁵ See Sciarra, S. (2011), *Automotive e altro: cosa sta cambiando nella contrattazione collettiva nazionale e transnazionale*, *Giornale di Diritto del Lavoro e Relazioni Industriali*, 2, 345; Senatori I., Rymkevich O. (2012), *Industrial*

But from another side, and with main reference to the Euro Area Member States countries¹⁶ more affected by the financial crisis, structural reforms, included the one regarding collective bargaining, have been adopted in compliance of Memoranda of Understanding or other documents signed among National Government and the so called Troika composed of the European Commission, the European Central Bank and the International Monetary Fund¹⁷ (now substituted by Brussels Group, integrated by the representatives of the European Stability Mechanism - ESM).

It is necessary make clear, anyway, that the scope of the changes is not circumscribed to this specific area of the countries officially monitored by the European Institutions, although it must be said that countries as Spain (and Italy, too), for instance, have experienced the more significant transformation.

As yet repeatedly pointed out, one of the main meaningful issues to read and interpret the direction towards which collective bargaining is heading is the one of the decentralization. But inside this general trend it is possible to try to go deeper and to focus some different axiological approaches on which bases this choice has been made.

From this point of view, it could be useful to distinguish between the two basic situations: the first is the one in which decentralization is the result of a general economic trend which is reflected by the industrial relation system and which could be also related but not strictly connected to the crisis; on the other side, we have the different contexts in which is possible to identify a clearer and more specific causal relationship with the particular conditions of a determinate company or a specific geographical area and the contents of the specific agreement signed by the social parts to intervene on those situations¹⁸.

This distinction is often reflected also on the side of the applicable rules, because in many countries the conclusion of special agreement which are signed to intervene on specific conjunctural situations is provided and authorized by the law or is accompanied by some form of public support (e.g. introducing tax reductions on labour costs and financial incentives to recruit the long-term

Relations and Transnational Entrepreneurial Strategies: The Case of FIAT-Chrysler, paper presented to the 16th ILERA World Congress (Philadelphia 2-5 July 2012, on the issue *Beyond Borders: Governance of Work in a Global Economy*, <http://ilera2012.wharton.upenn.edu/RefereedPapers/Senatorilacopo%20MarcoBiagi%20OlgaRymkevich.pdf>

¹⁶ Which signed in 2011 the European Stability Mechanism Treaty. About the permanent role of the Fiat as a “laboratory” and as an indicator of the tendencies of the industrial relations system, see also Locke, R. (1992), *The demise of the national union in Italy: lessons for comparative industrial relations theory*, *Industrial & Labor Relations Review*, 45, 229

¹⁷ For a critical analysis of this form of intervention of the European Institution and for the denounce of the possible contrast between the contents of the measures provided in some Memoranda (e.g. about setting of wages) and the institutional competence of the Union Law, Fischer-Lescano, A. (2014), *Competences of the Troika: Legal Limitations of the Institutions of the European Union*, in Bruun, N., Lörcher, K., Schömann, I, (eds.), *The Economic and Financial Crisis and Collective Labour Law in Europe*, cit., 55

¹⁸ About this specific form of decentralization, see Keune, M. (2011), *Clausole di deroga sui salari nei contratti collettivi settoriali in sette paesi europei*, report prepared for Eurofound, http://adapt.it/adapt-indice-a-z/wp-content/uploads/2013/08/eurofound_deroghe.pdf

unemployed, or setting off programs to assist, retrain and place workers made redundant in the industrial or sectorial crisis¹⁹).

As examples of the first trend, that is the one of the adoption of a general address favorable to decentralization, it is possible to recall the ones of Ireland (where the tendency towards decentralization has developed in a general context of minimal legal intervention on the issue of collective bargaining²⁰) or Hungary, where the decentralization of collective bargaining has been significantly stimulated, in a general perspective, by the provisions contained in the new Labour Code issued in 2012²¹.

But, maybe, the most remarkable example of this shifting dynamic is represented by the Spanish reforms issued in the period 2011/2012 in response to the general and serious moment of economic and occupational crisis of the country, which have introduced, with a clear and quite radical change respect to the previous rules, the new and quite innovative principle of the priority of company level agreements²² in respect to the national sectorial ones²³.

¹⁹ For some examples, see Glassner, V., Keune, M. (2010), *Collective bargaining responses to the economic crisis in Europe*, ETUI Policy Brief, 1/2010, <https://www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/Collective-bargaining-responses-to-the-economic-crisis-in-Europe>

²⁰ See Dundon, T., Hickland, E. (2014), *The Reform of Joint Regulation and Labour Market Policy during the Current Crisis: The Republic of Ireland*, report presented within the research project on *Social dialogue during the economic crisis: The impact of industrial relations reforms on collective bargaining in the manufacturing sector (incorporating social dialogue in manufacturing during the sovereign debt crisis)*, led by the University of Manchester, <http://www.research.mbs.ac.uk/ewerc/Portals/0/Documents/SDDTEC/Ireland%20Final.pdf>

Despite this general shift from national to enterprise-level bargaining, in Ireland have been registered many attempts to preserve the position and the role of the national social partners; they were cultivated by the Government, which in 2009 issued the recover plan entitled 'Further measures to support national recovery through social partnership' (see Glassner, V., Keune, M. [2010], *Negotiating the crisis? Collective bargaining in Europe during the economic downturn*, ILO – Industrial and Employment Relation Department – Dialogue, Working Paper no. 10, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_158354.pdf) and by the same National Unions and Employers Associations, which in March 2010 agreed a voluntary protocol 'for the orderly conduct of industrial relations and local bargaining in the private sector'.

²¹ Kun, A. (2014), *Hungary National Report* presented to the ISLSSL Young Scholar Session held During the XI European Regional Congress, Dublin, 17th September 2014, <http://islssl.org/wp-content/uploads/2014/08/Hungary-National-Report.pdf>

²² See, also for further bibliographical references, Fernández Rodríguez, C.J., Ibáñez Rojo R., Martínez Lucio M. (2014), *The Reform of Collective Bargaining in the Spanish Manufacturing Sector with Reference to the Metal and Chemical Sectors: Legacies and Risks in the Reform of Regulation since 2008*, report presented within the above mentioned research project on Social dialogue during the economic crisis... <http://www.research.mbs.ac.uk/ewerc/Portals/0/Documents/SDDTEC/Spain%20Final%20.pdf> ; moreover, see Espín Sáez, M., Guamán Hernández, A., Maneiro Vázquez, Y., Miranda Boto, J.M., *La evolución del derecho del trabajo y de la seguridad social en España durante los años de crisis económica y financiera (2007-2014)*, Report presented to the ISLSSL Young Scholar Session held During the XI European Regional Congress, Dublin, 17th September 2014, <http://islssl.org/wp-content/uploads/2014/08/Spanish-National-Report.pdf>

²³ A different scheme is the one which has been adopted in Portugal, where the Law. no. 23/2012 intervened on the issue of decentralized collective bargaining allowing workers' councils to negotiate at plant level in firms with a minimum number of 150 employees though this must be authorized by the trade unions: see Palma Ramalho, M. (2013), *Portuguese labour law and industrial relations during the crisis*, ILO – Governance and Tripartism Department, Working Paper no. 54, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_232798.pdf . More recently, the Law nr. 55/2014 (as reminded by

Following the second approach, some countries have recently adopted measures which facilitate decentralization and allow to company level agreement to introduce specific measures with the specific purpose to overcome a time of crisis (or, and it's the case of Italy, to promote occupational development); these measures could include wage reductions or modifications of other work conditions also below the standards provided by the national collective agreement, where existing.

This scheme of the crisis agreements or in any case of the agreements expressly aimed at some occupational objective has been experimented, among others, in Denmark, France²⁴, Germany, Finland, Belgium²⁵, in Poland (although in this country the industrial relation system is mainly based on the enterprise level)²⁶.

With regard to Italy, the first attempt to introduce some provisions about modifications of national agreements at the plant level in the companies which are facing a crisis or with the aim to promote the employment and economic development of certain areas was endeavored in 2009 by a general agreement signed by some national Trade Unions and Employers' Organization which met the strong opposition of the Trade Union Confederation CGIL²⁷. Then in 2011, all the main organization of employees and employers Confindustria, CGIL, CISL and UIL signed an intersectoral agreement on representativeness and the criteria for making company-level bargaining, which provides that company-level agreements on economic and normative elements could include derogations from industry-wide agreements.

Vasconcelos, J. [2014], *Economic Crisis and Labour Law Reforms in Portugal*, paper presented during the XI European Regional Congress, Dublin, 18th September 2014, <http://isssl.org/wp-content/uploads/2014/10/RoundTable2-Portugal-JoanaVasconcelos.pdf>) has provided that the condition provided by the national collective agreement could be totally or partially suspended when the suspension could result as an appropriate measure to ensure the business's survival and to prevent dismissals in the context of a business crisis or whenever due to market, structural or technological motives, the occurrence of a catastrophe or other reason, the firm's normal operation is seriously affected.

²⁴ With reference to the new figure of the "accords de maintien dans l'emploi" introduced in France by the General National Agreement signed on 11th of January of 2013, Peskine, E. (2014), *Les accords de maintien dans l'emploi, ruptures et continuités*, *Revue de droit du travail*, 168.

²⁵ For a description of the contents of the main agreement signed in these countries, see Glassner, V., Keune, M. (2010), *Negotiating the crisis?*, cit.

²⁶ Skupień, D. (2012), *Legal framework for collective agreements and other collective agreements in Poland, Überbetriebliche versus innerbetriebliche Kollektivvereinbarungen*, 5. *Arbeitsrechtlicher Dialog*, ed. G. Ring, Baden-Baden; with reference to the crisis agreement provided since 2002 by the article 9 of the Polish Labour Code, see Skupień, D., Laga, M., Pisarczyk, L. (2014), *Polish Labour and Social Security Law: the impact of the Economic Crisis and Demographic Problems*, Poland National Report presented to the ISLSSL Young Scholar Session held During the XI European Regional Congress, Dublin, 17th September 2014, <http://isssl.org/wp-content/uploads/2014/08/Polish-National-Report.pdf>

²⁷ About this specific experience, see Keune, M. (2010), *Derogation clauses on wages in sectoral collective agreements in seven European countries*, Eurofound, 2010. For a diachronic reconstruction of the evolution of collective bargaining structures in Italy and with specific reference to the 2009 agreement, see Treu, T. (2011), *Labour Law in Italy*, Kluwer Law International, The Netherlands, 189.

http://www.bollettinoadapt.it/old/files/document/10196eurofound_2010_2.pdf

This option has been confirmed shortly thereafter (although with some additional and controversial features) by the decree law of 13th of August 2011, n. 138, converted by the Law n. 148 of the following 14th of September²⁸, which article 8 provides that if there are local or company agreements concluded with majority of the consent and pursuing some specific aims (as the ones to save or increase employment, to increase competitiveness, to favour the starting of new activities etc.), these agreements are valid and legally binding for all the workers employed in the firms or in the territories covered by the agreement and moreover they are authorized to modify (also *in peius*) the standards established by the national agreement and also (under some conditions) the law rules on work relationship²⁹.

It should be noted, too, that in some cases the border between the model of “conjunctural” decentralization and the “structural” decentralization one could result very fluid and susceptible to shift. From this point of view it could be mentioned as an exemplary one the case of Greece. In the Greek legislation, indeed, has been registered in the space of few years a significant change about the issue of the relationship between collective agreement of different scopes (national/company level). During 20 years, since the issuing of the Law 1876/1990 the principle remained in force was the one of the applicability of the more favorable condition, but this layout has been radically changed.

The path which led to this transformation passed through three steps (represented by the Laws 3845/2010, 3899/2010 and finally 4024/2011). While the first of these laws admitted initially that the company agreements could have been allowed to provide also less favorable work conditions respect to the collective agreement having a wider scope, the following step of this process appears as more important in the perspective of this description.

Law 3899 introduced the figure of the “*special company collective agreement*” which were authorized to provide less favorable terms with the specific aims “*to save jobs and to improve competitiveness*”.

Nevertheless, the persisting configuration of this option as an exceptional one fomented the disfavor and the opposition of the trade unions toward this instrument and highlighted its unsuitableness respect to the more widespread and serious needs to face the impact on employment

²⁸ With reference to this law, see the articles in *Diritto delle relazioni industriali*, no. 2012, and particularly De Luca Tamajo, R., *Crisi economica e relazioni industriali: alcune osservazioni sull'art. 8 della legge n. 148/2011*, http://moodle.adaptland.it/pluginfile.php/869/mod_resource/content/1/2012_1.pdf; Carinci, F. (2012) (ed.) *Contrattazione in deroga*, Ipsoa – Wolters Kluwer, Milano.

²⁹ See Comandè, D. (2014), Italy, in Corby, S., Burgess, P. (eds.), *Adjudicating Employment Rights, a Cross-National Approach*, Macmillan, UK, 114; Senatori I., Rymkevich O. (2012), *Industrial Relations and Transnational Entrepreneurial Strategies: The Case of FIAT-Chrysler*, cit., See also the Italian Report (edited by Corti, M., Delfino, M., Spinelli, C.) on The Impact of the Global Economic Crisis on the Evolution of Labour Law in the National Legal Systems presented to the ISLSSL Young Scholar Session held During the XI European Regional Congress, Dublin, 17th September 2014, <http://isssl.org/wp-content/uploads/2014/08/Italian-National-Report.pdf>

of the crisis which interested the whole Greek economic system. So, the alternative which has been sought by the Law 4024/2011 has been the different one to modify in a general way the regime of “*special enterprise collective agreements*”³⁰ and to impose the general and clear priority of company collective agreements in relation to branch agreements³¹.

This particular itinerary could be clearly read, hence, as a confirmation of the general scope of the trend towards decentralization, which extension could be better understood considering that not also countries which are affected by the more acute effects of the crisis, but also nations which are living period of economic and occupational expansion adopt an industrial relation system mainly based on company level agreements or in which does not exist a relationship of hierarchy between branch/sectoral agreement and company-level agreement.

5. Decentralization of collective bargaining as an adaptive response to the growing diversification of labour markets.

The most commonly raised caveat about the decentralization of collective bargaining is in the sense that it could represent a serious factor of deterioration in the industrial relation systems historically based on the national/sectorial dimension of collective agreement.

In particular, according several opinions, decentralization could seriously weaken the fulfilment of the main function of collective agreement, that is the one to efficiently act as a counterbalance machinery between the positions of employers and employees in regulating terms and conditions of work relationship³².

Collective bargaining processes could more incisively achieve this goal, according the prevailing view, when the trade unions negotiate at national level, while at plant level, either in situations in which enterprises are suffering from temporary economic hardship or in different cases in which the enterprises have to face an hard business competitiveness, the focus of collective bargaining could shifted from bargaining over improvement in pay and work conditions to bargaining over concessions to pay and work conditions.

³⁰ About this transition see Papadimitriou, D., Skandalis, I., Tsetoura, A. (2014), *Greek report on The Impact of the Global Economic Crisis on the Evolution of Labour Law in the National Legal Systems* presented to the ISLSSL Young Scholar Session held During the XI European Regional Congress, Dublin, 17th September 2014, <http://islssl.org/wp-content/uploads/2014/08/Greek-National-Report.pdf>; Papadimitriou, C. (2013), *The Greek labour law face to the crisis: A dangerous passage towards a new juridical nature*, European Labour Law Network - Working Paper series 3/2013, http://www.labourlawnetwork.eu/working_paper_series/working_papers/prm/201/0/index.html

³¹ In fact, starting from 2012, there has been registered in Greece a significant increase of company level bargaining, as pointed out by Koukiadaki A., Tavora I., Martinez Lucio M. (2014), in the final report of the research project on The Reform of Joint Regulation and Labour Market Policy during the Current Crisis, http://www.research.mbs.ac.uk/ewerc/Portals/0/docs/SDDTEC/Comparative%20report-final%20version%20Koukiadaki_Tavora_MartinezLucio.pdf

³² About the different implications of decentralization trend, see, recently, Visser, J. (2013), *Wage Bargaining Institutions – From Crisis to Crisis*, Economic Papers 488, European Commission, Brussels

Nevertheless, it has been recently observed how the outcome of these decentralization dynamics does not always correspond to this generally negative appraisal, also considering that, actually, the forms of decentralization could vary much across countries³³.

Many authors have already shown that decentralization could be the convergence point of many aims, and that very often the main one of them it is not represented by the intention to lower labor costs or imposing work conditions which could represent a serious regression with reference to the workers' general situation, but rather the one to support the introduction and the efficiency of new technologies and new methods of work organization.

The achievement of the goals connected to these innovations could involve “*changes in a variety of employment practices, including team work, performance-based pay methods, participatory programs, extensive training and, in some cases, employment security*”³⁴, all measures which could not be adequately and cautiously adjusted through the regulatory instrument of the national collective agreement.

Furthermore, recent analysis confirm that decentralization of collective bargaining could not produce in any case an effect of erosion of the coverage area and of the qualitative and quantitative level of the work conditions regulated by the same agreements.

It has been proposed at this purpose – and developing the theories of Franz Traxler on the differences between the organized and disorganized decentralization³⁵ –, a division between systems in collapse, systems in corrosion and systems in continuity (those are the systems in which the trend towards decentralization has been more gradual and fulfilled with a more intense participation of the social partners); and has been observed, with reference to the last ones, that “*in cases where the reforms were rather incremental, Italy being a case here, the strengthening of decentralized bargaining was generally considered a necessary step to making the regulatory framework more adaptable to local conditions, in a way that can contribute to mutual gains and economic growth*”³⁶.

³³ For this observation, see Katz, H.C. (2007), *The Role of National Level Labor-Management-Government Dialogue in the Midst of Increasingly Decentralized Collective Bargaining*, paper Presented at the Global HR Forum in Seoul, October 24-25, 2007, <http://author.ilr.cornell.edu/international/news/upload/Katz-korea-global-HR-forum-paper3.pdf>

³⁴ Katz, H.C. (1993), *The decentralization of collective bargaining: A literature review and comparative analysis*, cit.

³⁵ Traxler, F.(1995), *Farewell to Labour Market Associations? Organized versus Disorganized Decentralization as a Map for Industrial Relations*, in Traxler, F., Crouch, C. (Eds.), *Organized Industrial Relations in Europe: What Future?*, Aldershot, Avebury, 3

³⁶ Koukiadaki, A., Tavora I., Martinez Lucio M. (2014), in the above mentioned final report of the research project on *The Reform of Joint Regulation and Labour Market Policy during the Current Crisis*, quoting Pedersini, R., Regini M. (2013), *Coping with the crisis in Italy: Employment relations and social dialogue amidst the recession*, ILO – Governance and Tripartism Department, Working Paper no. 50, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_223695.pdf

Focusing the issue of decentralization from this angle, hence, it could lead to evaluate the change of the main dimension of collective bargaining not necessarily as a regressive modification of the traditional layout, but maybe as an essential transition towards a labour market and an entrepreneurial fabric which appear increasingly being characterized by a very high degree of diversification on both sides of enterprises and employees figures.

So, considering the multifaceted context in which trade unions currently act, decentralization of collective bargaining appears, in a growing measure with respect to the past, an appropriate approach for the fulfilment of the functions to improve terms and conditions of employment and protect workers in terms of real effectiveness: that is in a compatible way with respect to the economic conditions and perspectives and the potentialities of productivity development of enterprises.

Negotiating adequate adjustments at plant or company level is truly a really demanding task for the parts and involves the danger of a loss of consensus and of disaffection towards the trade unions when this adjustments entail a total or partial reduction or lowering of the condition contained in the national/sectorial agreements.

For this reason it appears even more important, as indicated by the essays already recalled, that the decentralizing process could proceed “in continuity”, that is being coordinated and fostered both by the law and the same social parts: this happened in Italy starting from 2011, when on one side the main trade union confederations accepted to regulate the possibility for the company agreement to introduce modifications to the national agreements’ regulations (an option which has been confirmed in the general agreement on trade unions representativeness signed in January of 2014), and on the other side the law 148/2011 has recognized the binding nature of the “proximity agreements” (derogating the national regulations and, under some conditions, also derogating law rules), if approved according the majority principle.

The crucial importance of the accomplishment of model of collective bargaining in which could coexist in harmony different levels of agreements without a rigid hierarchy based on the scope of each agreement has been confirmed by a recent survey carried out by the European Central Bank: the conclusions of this study basically indicate that in the areas where the centralized collective bargaining model is stronger and less open to adjustment by local or company level collective agreements it results higher the number of the enterprises which decide to reduce the number of employees (due to the lack to other instruments and methods to be used to react to shocks)³⁷.

³⁷ Di Mauro, F., Ronchi, M. (2015), *Centralisation of wage bargaining and firms’ adjustment to the Great Recession – a micro-based analysis*, CompNet Policy Brief no. 8/may 2015,

But, at the same time, a survey of the recent experiences of decentralized bargaining points out that agreeing to wage reductions, which as a matter of common knowledge represents the hardest measure to accept for a trade union has been not always sufficient to prevent job losses³⁸.

Taking into account the finding of these investigations and crossing them, it seems possible collective bargaining decentralization dynamics confirm some of the conclusions reached by Traxler in 1995.

In particular, the empirical findings say that the trend towards decentralization could perform better when it develops not as a disorganized process of a deconstruction of the previous centralized layout, but rather in the form of a coordinated process of adaptation (coordinated by the union themselves or by the law or both) to structural changes of entrepreneurial fabric as well as to the conjunctural ones (as the ones due to the crisis). Secondly, a coordinated path toward decentralization could prevent a possible approach which some organizations could adopt as a response to the environment changes, which is the one of attempt to reaffirm self-reference towards immobility; an attitude often experimented by trade unions in many countries in last decades, always with markedly negative consequences in terms of loss of consensus, loss of coverage and of bargaining power.

It has been recently observed that “*employers can benefit from collectively agreed solutions because even when these involve negative outcomes for workers, their involvement in the design of the solutions can help prevent the decrease of trust, morale and commitment that unilateral decisions by management can generate*”³⁹. But the same consideration could be valid with reference to the trade unions, which could appear more reliable and could acquire more consensus as much as the agreed solution could result efficacious and incisive.

It is true that it is also possible encounter some interesting examples of spontaneous decentralization, as the recent one of the collective agreement regarding the circa 85,000 workers of Fiat Chrysler Automobiles and Case New Holland employed in Italy signed last 7 of July, which introduced, besides some modification on work conditions with respect to the national agreement of the mechanic industries (no more applied by FCA), a new wage structure which includes a performance-based compensation scheme (with bonus from 7,000 and 10,700 euros in the four years of validity of the agreement) linked to the achievement of certain efficiency and profitability targets. But, due to the uncommon dimensions and the peculiarities of these industrial

https://www.ecb.europa.eu/home/pdf/research/compnet/Policy_Brief_8_diMauro_Ronchi.pdf?3bb54e0e4540aa12e63eaa2ec8486c86

³⁸ Koukiadaki A., Tavora I., Martinez Lucio M. (2014), 73, with references to the cases of Ireland and Greece.

³⁹ As stated by Koukiadaki A., Tavora I., Martinez Lucio M. (2014), 73, quoting Marginson, P., Keune, M. and Bohle, D. (2014), *Negotiating the effects of uncertainty? The governance capacity of collective bargaining under pressure. Transfer, European Review of Labour and Research*, 20(1) 37-51.

groups, the example could only work as an evidence of the usefulness of an adequately flexible framework of collective bargaining, but not as an indication of the preferability of spontaneous decentralization dynamics.

6. Changes in the relationship between law and collective agreements: bilateral derogability and regulatory interchangeability after the recent reforms adopted in some European Countries.

Another important issue which reflects some significant functional development of collective agreement should be identified in the relationship between law and collective bargaining.

As already reminded, some very common features of collective agreements are their normative character, also known in some system as their “inderogability”, and above all their ordinary derogatory effects *in melius*, that is in favour of employees⁴⁰, with respect to the floors of rights set by the law.

With reference to these relationships, a specific trend which is developing in several national laws is the one of the entrusting to collective bargaining of the competence not to increase these basic standard conditions determined by the statutes, but rather to settle some issues in a different way with respect to the law rules.

It is possible to say that this trend represent a further progress towards that revision of the principle of employees’ favour which already started several years ago and which has been pointed out as one of the more significant indications of the underway and widespread transformations in collective labour law⁴¹. Nevertheless, there are signals which confirm that currently this trend is materializing itself in deeper and more intense forms, and in a wider range of issues, which goes far beyond the traditional fields of the derogatory measures (like e.g. wage settlements or working time).

From the point of view of the structure of the law rules which confer this authority to the collective agreements, it could be observed that legislators choose among three different solutions (which sometimes, anyway, could appear very similar and seem to overlap each other).

The first and older one is the combination between the statutory regulation of some specific matters and the decision to allow the collective agreements to derogate to the same rules (under determinate conditions or without imposing any condition). This solution has been adopted, as said, in Italy, by the Law no. 148/2011, which flexibilized in this way a very wide range of matters, as

⁴⁰ With reference to these effects, see recently Sewerynski, M. (2003), *Collective Agreements and Individual Contracts of Employment in Labour Law – General Report*, in Sewerynski, M. (ed.), *Collective Agreement and Individual Contracts of Employment*, Kluwer Law International, The Hague, 1.

⁴¹ See again Sewerynski, M. (2003), 9.

the working time, the employer's power to modify the worker's functions or the employer's power to control workers and in a more general meaning with reference to the whole "regulation of work relationship" (article 8, paragraph 2 and 2 *bis*, of Law no. 148/2011).

A similar provision has been recently introduced in the Slovenian Employment Relation Act, which has been amended several times since 2008 (lastly in 2013). Article 9, paragraph 3, of the ERA provides a long list of issues (like conditions to stipulate fixed-term contracts, enlargement of quotas of temporary agency workers, arrangement of working time and limits to overtime work, disciplinary sanctions, seniority bonus etc.) on which collective agreements could intervene to lay down some settlements also in terms less favourable for workers⁴².

In these cases, the possibility of a derogatory intervention of collective agreements remains an exception with respect both to the general statutory regulations and to the maintenance of the principle of the employees' favor as a general rule.

The second option is the one in which statutory rules and collective agreements settlements are considered as completely alternative, with reference to some specific matters or, otherwise, with respect to the entirety of the work relationship (with few exceptions, more or less corresponding to the absolutely fundamental rights).

This last layout matches to the one chosen by the Hungarian legislator when drawing up the new Labour Code enacted in 2012, which regulations are recognized as dispositive for the most parts⁴³.

The method of equalization among statutory rules and collective agreements has been also extensively adopted by Italian legislator, although with reference to some specific issues; the first appearance of this regulatory system dates back to 1982, when it was introduced with reference to the calculation of T.F.R. (that is the deferred compensation that accrues year by the norms which recognize alternatively the regulatory competence to both sources has registered a significant increase).

Also in the legislative decrees through which the government is implementing the general reform project contained in the Law no. 183 of 2014 (so called *Jobs Act*) – specifically in the legislative decree of last 15th of June, n. 81 – it is possible to find several examples in which the law empowers collective agreements to establish alternative regulations, with reference, among others, to the maximum duration of fixed terms contracts or the quotas of fixed term contracts allowed, as

⁴²Tikar, L. (2014), *Recent developments of Labour Legislation in Slovenia within the context of Economic Crisis*, Slovenian report on The Impact of the Global Economic Crisis on the Evolution of Labour Law in the National Legal Systems presented to the ISLSSL Young Scholar Session held During the XI European Regional Congress, Dublin, 17th September 2014, <http://islssl.org/wp-content/uploads/2014/08/Slovenian-National-Report.pdf>

⁴³ Kun, A. (2014), Hungary National Report, cit.

well as with reference to the terms and conditions according to which the parts of part time labour contracts could agree on specific clauses regarding the specific forms of flexibility connected to this labour contract (so called “elastic clauses”).

The third option is the one which overturns the ordinary relationship between law and collective agreements: that is because the law entrusts to the last ones the competence to regulate some specific issues, and only provide for a substitutive regulation which could be applied in absence of relevant collective agreements: this is the case, always referring to Italian legislation, of the situations in which it can be permitted to sign a job-on-call contract (*lavoro intermittente*)⁴⁴. The same procedure is permitted now from article 3 of the legislative decree no. 81/2015 for the delimitation of the period maximum of temporary assignment of the employee to a job corresponding to a higher classification in the job scale.

7. Conclusions 1. Collective Bargaining and Equality. Can collective agreement still be considered a source of standards?

In conclusion, the evolutions above described involving the effect, the force and the position of collective agreements indicate that the value of such agreements within the system of the sources of rules, at least in some (several) national contexts, is going through considerable change with respect to the past.

The aspects under which these changes appear more evident are those regarding the relationship between collective bargaining and equality (given that collective agreement has historically been considered as a mean to pursue equality) and the boundary line between legislation and collective bargaining.

With reference to the first of these two aspects, for a long period has been generally accepted the idea that the main purpose of collective bargaining could be summarized, on the workers’ side, in meeting the expectation “*that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and has to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secure*”.

The usual approach to guarantee this satisfaction, in turn, has been generally described as “*the creation and the maintenance of certain standards over a given area and period, standards of*

⁴⁴ This flexible contract has been introduced in Italy in 2003 and is currently regulated by articles from 13 to 18 of the Legislative Decree no. 81 of 15th of June 2015. In the absence of such agreements, the situations in which is allowed to hire intermittent workers will be established by a specific decree of the Ministry of Labour and in any case if the workers are less than 24 years or over 55 years of age.

distribution of work, of rewards, and of stability of employment”⁴⁵. So, the connection between equality, in the form of the setting of standards, and collective bargaining constantly remained indissoluble according to the shared vision of this juridical phenomenon.

Furthermore, the idea of the collective agreement as a “container” and source of standards, of course, was closely linked with to the fordist paradigm and was based on the axiom (partially fictional) of its universality. But this vision (as stressed in an essay written in 2002 by Adelle Blackett and Colleen Sheppard for the ILO⁴⁶) entailed inevitably some exclusionary implications. There have been, indeed, some groups of workers which have been historically marginalized with respect to the main industrial model to which collective bargaining was mainly inspired and on which collective agreement contents were shaped.

So therefore, it is possible to say that is the very same relation between the general rule (dominant model) and the more and more numerous potential exceptions with respect to that model, that results radically undermined.

It has become extremely more difficult than in the past, in fact, to outline the contour of this model, because the coexistence between globalized economy, traditional industrial economy and other phenomena as e.g. the growing spreading of the SMEs, that determines a corresponding exponential rise of the element of differentiation also among enterprises operating in the same sector.

This fragmentation, thus, is inevitably reflected in the contents and dynamics of the collective bargaining, since the growing differentiation affects the working conditions, of productivity, of the well-being at work, of the forms of participation of workers’ to the work organization, and of course of the wage policy: in a few words, on the whole workers’ position.

As an another epiphenomenon resulting by this wider process of segmentation, there is the growing difficulty for the trade unions to elaborate and express points of synthesis of the collective interests.

Such difficulty is firstly rooted in the hard task of identifying such standards, which is not impossible⁴⁷, but appears more and more demanding.

⁴⁵ Quoting Kahn-Freund, O. (auth.), Davies., P. and Freeland, M. (eds.), *Labour and the Law*, Third Edition, Stevens & Sons, London, 1983, 69. For a definition of the collective agreement as a form of standard conditions, see also Schmidt, F., Neal A. (1984), *Collective Agreement and Collective Bargaining*, Martinus Nijhoff, The Hague, 14.

⁴⁶ Blackett, A., Shepard, C. (2003), *The Links between Collective Bargaining and Equality*, ILO Working Paper no. 10, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_wp_12_en.pdf

⁴⁷ As an example, it is possible to mention the so called “group Fight for 15\$”, which promoted the biggest-ever strike in the fast-food industry last 15th of April demanding a wage increase for the workers employees in McDonald’s franchise stores. The demand of this group, moreover, could maybe potentially go beyond the specific entrepreneurial area in which has been proposed, considering the broader and significant scope of the low-paying retail sector in U.S.

On the other side and due to the composite structure of the labour market and the variety of its stakeholders, such segmentation results in a significant weakening factor for the workers' organizations in general.

These overall transformations – which the more evident effects combines with those generated by the crisis – explains the analysis carried out in the previous paragraphs, that showed how the current collective agreements, besides and as a partial alternative with respect to the settlement of standards, fulfil the important function to adjust the regulation of the work relationships to the peculiarities of the specific context in which collective bargaining takes place and demonstrates that the importance of this *adaptive function* often exceeds the one of the fixing of standards which appear less useful than in the past.

8. Conclusions 2. The changing relationship between collective agreements and statutory rules. Adaptive function outclassing the standards' settlement one.

The second aspect deserving now some further conclusive considerations is how this shift affects the issue of the pre-existing relationship between statutory regulation and collective agreements, in the general layout of the regulatory sources of work relationships.

According to Kahn-Freund's vision, "*regulatory legislation is apt to prevail over collective bargaining where and when the political pressure power of the workers exceeds their industrial pressure power*"⁴⁸.

At the same time, however, the eminent Author also observed that "*legislation is generally more rigid than collective bargaining and obviously much less responsive to economic change...the flexibility of collective bargaining allows an adjustment on the agreed standards to changed conditions, whilst it may be out of the question to amend a statute*"⁴⁹.

Applying these statements to the modern context, one could say that while the concepts expressed in the second one are still absolutely valid, the first needs to be reinterpreted in the light of the changes occurred since that book was written.

It is certain that in the last decades the negotiating power of the trade unions is generally decreased and that this is even more true with reference to the last eight years.

In the light of this constant trend, it would have been predictable, according the dynamic above described, a correspondent trend towards a strengthening of the statutory legislation.

This expectation was partially met. Most of the great changes in national laws were determined by important legislative reforms gradually issued in several countries and especially in

⁴⁸ Kahn-Freund, O., *Labour and the Law*, cit., 52.

⁴⁹ Kahn-Freund, O., *Labour and the Law*, cit., 58.

those which were more affected by the crisis, reforms which sometimes has been adopted as a result of a tripartite dialogue (although this dialogue is becoming more and more difficult as and when the effect of the crisis become more severe).

But since one of the main causes of this decline is represented by the more and more deep industrial changes (due, among other factors, to industrial fragmentation and expansion of the service sector) the density, the completeness, the level of detail and above all the mandatory nature i.e. the inderogability of these statutory rules fail the purpose of being as self-sufficient or independently working regulatory instrument with respect to collective bargaining.

On the contrary, many of the most innovative rules which has been introduced in the recent years are expressed in terms of general principles (as for instance the ones recognized by the European Charter of fundamental rights), which require to be implemented into specific provisions. And very often, in implementing those principles, the legislators choose to integrate the collective bargaining in this process, devolving to the collective agreements the regulation of some specific aspects.

Moreover, it cannot even be said that the functional relationship between statutory rules and collective agreements could be still exhaustively described as a sort of regulatory stratification in which the lower and more stable level is represented by the statutory rules and the upper and more variable level consists of the additional condition introduced by collective agreements⁵⁰.

In the current scenario, indeed, the order and the functions of these two regulatory instruments could be highly variable, as well as the competences entrusted to these two categories of sources⁵¹.

As seen, there it's becoming more and more frequent the situation in which the law enables collective agreements to derogate or, still more interesting, to regulate some issues in an alternative and substitutive way with respect to the statutory provisions.

In this second hypothesis, so, the hierarchic order between the two sources (and so their implied relation as general rule and exception, confirmed by the derogatory scheme) appears as remarkably undermined and rather oriented towards a substantial equalization among the two sources.

These changes, thus, results in line with the theoretical perspective adopted by those traditional reconstructions which have pointed out the particular nature and the particular position

⁵⁰ With reference to this perspective see again Kahn-Freund, O., op. cit., 57, when the Author pointed out that "*which can be achieved for the workers through legislation is very frequently far below that which they can get through collective bargaining*".

⁵¹ See recently, for general consideration with reference to the assignment to collective agreements of competences "*that used to be within the purview of the statutory law*", Goldin, A. (2011), *Global conceptualization and Local Constructions of the Idea of Labour Law*, in Davidov G., Langille B. (eds.) *The idea of Labour Law*, cit.

of collective agreements with respect to the law, due to the peculiarity of this specific category of contracts which have been historically considered as having – recalling a famous statement of an eminent Italian scholar – “the body of the contract and the soul of the law”⁵².

But I would like to especially remind that, with reference to Italian Labour Law scholarship, the approach towards the collective bargaining as an autonomous regulatory system, which constantly coexist with the statutory one and might come into contact through the references that the law could confer to the collective agreement, found its clearest formulation in the theoretical reconstruction proposed in 1960 by Gino Giugni⁵³.

In the pages written by this eminent author, the combination among statutory rules and collective agreement was focused on the perspective of the legal plurality (discovered by Santi Romano), which led him to recognize the inner and autonomous legal value of the rules (mainly the ones issued through the collective agreements), which source has to be identified in the industrial relation system.

On the basis of this representation of legal system and industrial relation system as parallel sources of rules, Giugni emphasized the feature which he denominated as the “regulatory bivalence” of the collective agreements, which reveals itself each time that the statutes recognize some regulatory intervention carried out by collective agreement and confers juridical value to that rule also in the legal system: a description which could be adapted in a very suitable way to the articulated dynamic through which the functions of collective agreements have been gradually increased.

In particular and among the other aspects, it’s still useful to remind how the theories of Giugni were an inspiration source for the following studies about the links between collective bargaining and the mandatory nature of most of labour law rules.

Using his approach, indeed, another Italian distinguished scholar, Raffaele De Luca Tamajo, argued that, just because collective bargaining represent the product of an autonomous normsetting mechanism, this could justify the recognizing of the derogatory character of collective bargaining with respect to the law, even if the balancing of interest (in terms of wage settlement of other works conditions) accepted and agreed within this autonomous system could eventually result less favorable with respect to the statutory rules⁵⁴.

⁵² Carnelutti, F. (1928), *Teoria del regolamento collettivo dei rapporti di lavoro*, Cedam, Padova.

⁵³ Giugni, G. (1960), *Introduzione allo studio dell'autonomia collettiva*, Giuffrè, Milano; on Giugni’s theory see also Sciarra, S. (2013), *Building on Italian Law Scholarship in a Transnational Perspective*, in Numhauser-Henning (A), Rönmar, M. (eds.), *Normative Patterns and Legal Development in the Social Dimension of EU*, Hart Publishin, Oxford and Portland

⁵⁴ De Luca Tamajo, R. (1976), *La norma inderogabile nel diritto del lavoro*, Jovene, Napoli

This solution, as observed, has been later diffusely adopted, becoming one of the clearer symptoms of the incoming changes relating to collective bargaining and its relationship with the law. These changes, in most cases, could be represented as the shifting of a value judgment concerning the regulation of the work relationship from the sphere of the law to the one of the collective bargaining.

Generally speaking, it is possible to underline that enhancing the substance of the collective agreements as an outcome of the industrial relation system in great part autonomous and not completely subordinate to the statutory law, could help to point out and to synthesize the salient features of the evolution which I have sought to examine in the previous paragraphs.

Such features could be summarized, in a few words, *in the transition from a conceptualization of the collective agreement as a tool for the settlement of standards (usually raising them above the measure fixed by statutory rules), to a new understanding in which the main function of the collective agreement is to adjust the regulation of the work conditions with reference to the specific situation in which the work relationship takes place.*

The latter one is a definition which assumes, as a point of departure, that the “standard” employment relationship is becoming more and more an abstraction and that consequently the search of the balance between the different position of the parts of such relationship shall be carried out in a more empirical way, having as an objective, rather than the solution quantitatively more satisfying, the one qualitatively more adaptive.

This change of perspective entails that, more than to the specific contents of the agreements, the attention should be addressed towards the procedural issues, in terms of the methods through which the negotiation are conducted, the positions of each group of actors involved, the evaluation of the representative action carried out by the unions, on the basis of some experiences which in some countries led to significant results⁵⁵, while in other systems still represents a sort of *terra incognita* of the collective labour law.

And it could be, probably, a following step of a research path that, starting from this reflections, could be continued.

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⁵⁵ At this purpose it could be It is possible make reference to the issue of the duty of fair representation, widely studied in U.S.: among others, see Finkin, M. (1980), *The Limits of Majority Rule in Collective Bargaining*, *Minnesota Law review*, 64, 183 and Summers, C. (1977), *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, *University of Pennsylvania Law Review*, 126, 251

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