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REVUE

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2013/3

DE DROIT COMPARÉ DU TRAVAIL ET DE LA SÉCURITÉ SOCIALE

STUDIES

THEMATIC CHAPTER: The ratification of the MLC, 2006: hopes and challenges

INTERNATIONAL LEGAL NEWS

RETROSPECTIVE OVERVIEW OF 2012 COMPARATIVE LABOUR LAW LITERATURE

COMPTRASEC - UMR 5114 - CNRS - UNIVERSITÉ MONTESQUIEU - BORDEAUX IV

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International Association of Labor Law Journals

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RETROSPECTIVE OVERVIEW OF 2012

COMPARATIVE LABOUR LAW LITERATURE

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LABOUR LAW BEYOND NATIONAL BORDERS: THE CURRENT DEBATE*

I THE *JOURNALS* OF THE *INTERNATIONAL ASSOCIATION OF LABOUR LAW JOURNALS* FOR A RETROSPECTIVE OVERVIEW OF 2012

In keeping with the aims pursued by the *International Association of Labour Law Journals* (*IALLJ*) to promote the exchange of opinions and closer ties between labour law experts from different countries, this article addresses the essential aspects of the issues that occupied a sizeable proportion of the essays appeared in the course of 2012 in the 23 journals belonging to said association, a third of which were characterised by a clearly comparative, or at least supranational, approach, while the rest reflected a more markedly national viewpoint (but still attentive to the developments taking place in other countries), animated by academics from all over the world, but primarily from the European countries[1].

Within the wide variety of issues addressed in the journals in question, it was decided to focus on a matter that was immediately identified as the authentic theme of the year (even though it encompassed a longer time span), that is to say the reforms adopted, where both the individual and the collective dimensions of labour relations were concerned, in response to the severe economic and financial crisis that hit our societies (§ II); as for the other themes that attracted particular attention in the legal studies published on the *IALLJ* journals, it was decided to address them together, distinguishing between the ones that are rooted in the distant past of labour law (§ III) and those that have come to the fore after the turn of the century (§ IV); while the final part of this report aims to pave the way for a closer study of specific aspects deemed worthy of individual attention (§ V).

[1] For the complete list of the journals belonging to the *IALLJ* see www.labourlawjournals.com. Besides, the list of all journals 'abbreviations mentioned in this article follows at the end of the chronicle.

* This article, while it is the fruit of an analysis of the materials and of a reflection conducted jointly, may be ascribed to M. Aimo for §§ II and IV and to D. Izzi for §§ III and V. The authors wish to thank E. Kovács for the assistance provided in retrieving the hungarian journal *Pécsi Munkajogi Közlemények* and translating the relative essays, as well as G. Moro for the assistance supplied in the translation of German materials. Our gratitude also goes to the journal *Lavoro e diritto*, which provided the initial stimulus to conduct this study, and which published its original version (*LD*, 2013, p. 607-633); this version differs from the previous one because the italian theoretical debate has also been considered and reported.

II THE THEME OF THE YEAR: THE ECONOMIC-FINANCIAL CRISIS AND LABOUR REFORMS

Surely it is not surprising that in 2012 the attention of the journals in question mostly focused on the labour law reforms introduced in response to the crisis, and that, as we shall see, widespread criticism and sharp objections were raised against the remedies devised by the legislators to combat the crisis and, eventually, overcome it, in response to the pressures of the financial markets and the requests coming from the EU. An example of this, one of the many we shall look into, is the mapping of the reforms adopted in the 2010-2012 two-year period in twenty-four EU member states in relation to some key aspects, e.g., collective relations, non standard jobs, working hours and dismissals, as set out in the 2012 opening issue of *European Labour Law Journal* [2]. Besides pointing out the deregulation effect of the measures adopted, the articles underscore the undemocratic nature of the legislative process whereby, in most cases, the reforms were passed by means of urgency decrees and without a prior debate with the social partners; such remarks were shared by others, who noticed how the measures adopted so far, within the overall framework of more general austerity policies, have done nothing but increase inequality[3].

The labour law reform adopted in Spain surely took the lion's share, but special attention was also devoted to the laws passed in Italy, Greece and Hungary, while some authors examined the legislation of other countries, such as for instance Latvia and Portugal[4]. While the measures put in place in France and Germany, albeit significant in themselves and extensively analysed per se, mostly received from their interpreters an evaluation of tendential continuity with the legislative choices made in previous years, and were deemed of interest to legal theory mostly on account of a possible use as models to be imitated by nearby countries in formulating their future political choices[5], altogether different was the judgment expressed on reforms of the type adopted in Spain and Italy and, to an even greater extent, in Greece and Hungary. In more distant countries, consideration was also given to the repercussions on the labour market of events, other than the financial crisis, but still deemed to be of exceptional significance, albeit strictly tied to specific local conditions: this is the case, for example, of Japan, where, understandably, great attention was paid to the way labour market legislators responded the day after the great earthquake of March 2011[6].

[2] See in particular S. Clauwaert, I. Schömann, "The Crisis and National Labour Law Reforms", *ELLJ*, 2012, p. 54, and two essays about labour law reforms adopted in Italy and Portugal (E. Ales, "The Italian Reform of the Labour Market in a Growth Perspective", *ibid.*, p. 70; R. Canas Da Silva, "Portuguese Labour Law Reform: Developments in 2011-2012", *ibid.*, p. 86). Similar observations are illustrated in the *Editorial* by S. Deakin, *The Sovereign Debt Crisis and European labour law*, *ILJ*, 2012, p. 251, where the author introduces the following articles: K. Armingeon, L. Baccaro, "Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation", *ibid.*, p. 254; A. Koukiadaki, L. Kretsos, "Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece", *ibid.*, p. 276; S. Dahan, "The EU/IMF Financial Stabilisation Process in Latvia and Its Implications for Labour Law and Social Policy", *ibid.*, p. 305.

[3] First of all gender inequalities: see J. Leschke, M. Jepsen, "Introduction: Crisis, policy responses and widening inequalities in the EU", *RIT*, 2012, p. 289, and the essays published in the monographic issue no. 4/2012 of the same journal, entitled "La crise, les inégalités et la politique sociale dans l'Union Européenne".

[4] See the essays quoted above, note 2.

[5] Regarding France see, among others, P.-Y. Verkindt, "Regards sur le droit du travail français contemporain dans la crise économique et financière", *RDCTSS*, 2012, no. 2, p. 30; H. Ysàs Molinero, "La articulación de la negociación colectiva sectorial y de empresa en Francia: ¿un modelo válido para España?", *RL*, 2012, no. 3, p. 63; regarding Germany see M. Maul-Sartori, U. Mückenberger, K. Nebe, "Le droit social allemand face à la crise financière: une protection segmentée", *RDCTSS*, 2012, no. 2, p. 60; P. Rémy, "Les accords collectifs sur l'emploi en Allemagne: un «modèle» pour le droit français?", *RDT*, 2012, p. 133.

[6] On this subject see issue no. 4/2012 of the *JLR*, entitled *The Great East Japan Earthquake, the Labor Market, and Policy Reactions*; while issue no. 2/2012 of the same journal, entitled *Unemployment and Its Detrimental Effects*, contains many essays on unemployment.

Now if we focus our attention, like the journals do[7], on the Spanish reform, termed by the national legislator a « *reforma de envergadura* » necessary to counter the rigidity of the Spanish market and do away with one of the primary causes of the alarmingly high national unemployment rate, we shall find that the measures adopted in the course of 2012 (first and foremost, RDLey no. 3/2012, converted with amendments into Ley no. 3/2012) constitute a key step in an unending reform process, that has been accelerating since 2010[8]. They differ from earlier measures not so much on account of the flexibility objectives pursued – despite the fact that in the latest measures a growing importance has been taken on by the *seguridad* of the entrepreneurs (as opposed to employment security for the workers), to be construed as a guarantee of certainty as to the consequences of their decisions, and also as a means of attraction for markets and investors – and, above all, on account of the methods followed in passing the measures and the radical nature of the solutions adopted.

On the one hand, to the objection raised above against a legislative process that deprives Parliament of its prerogatives and relegates it to a supplementary function, of validating laws already settled (albeit emendable), another criticism is added, i.e., failure to recognise the role of the trade unions in the process of crisis management; on the other hand, it is pointed out by many that the goal of enhancing the powers of the entrepreneur is being pursued with an unprecedented intensity: according to many commentators, it has overstepped the so-called « *linéas rojas* »[9], so that the labour regulation model ends up by being substantially altered, needless to say for the worse where worker warranties and rights are concerned, to the point of configuring a sort of « incorporation »[10] of the workers into a space fully governed by the enterprise, in the name of competitiveness and productivity.

Among the thresholds deemed «untouchable» up to this time – which have definitely been «touched» now – we should mention first of all the rules on dismissals, since in this connection the Spanish legislator has made a choice that marks a break with the past and will have an immediate impact, by affecting – i.e., reducing – the costs of unfair individual dismissals[11], as well as changing the substantial and procedural rules on collective redundancies[12]; equally obvious is a drastic widening of the margins of an employer's personnel management power, according to a unilateral, non negotiated flexibility model. This arises from the legislative measures concerning the rules on

[7] Besides various articles published on spanish journals belonging to the *IALLJ* (quoted below), see in particular: F. J. Barba Ramos, "Labour Relations in Spain following the Labour Market Reform", *BCLLR*, 2012, no. 80, p. 185.; M. Fröhlich,T. Velasco Portero, "Die Reform des Arbeitsrechts in Spanien 2010", *EuZA*, 2012, no. 4; E. Martín Puebla, "La reforme 2012 du marché du travail en Espagne: la flexibilité jusq'au bout", *RDT*, 2012, p. 418; F. Valdés Dal-Ré, *Flexibilité interne et réforme du marché du travail: le cas espagnol*, *RDTCSS*, 2012, no. 2, p. 18; M. Rodríguez-Piñero, "La réforme espagnole de la négociation collective de 2011/2012", *RDCTSS*, 2012, no. 1, p. 1; M. V. Ballestrero, "Declinazioni di flexicurity. La riforma italiana e la deriva spagnola", *LD*, 2012, p. 441; J. Cruz Villalón, "Testo e contesto della riforma spagnola della contrattazione collettiva del 2011", *DLRI*, 2012, p. 233.

[8] Described as a «convulsión normativa» in the *Editorial*, *Con el agua al cuello*, *RDS*, 2012, no. 58, p. 8.

[9] M. Rodríguez-Piñero, "Las claves de la reforma laboral 2012", *RL*, 2012, no. 23-24, p. 3.

[10] See the *Editorial* quoted above, note 8, p. 10.

[11] See J. Cruz Villalon, "Los cambios en materia de extinciones individuales en la reforma laboral del 2012", *RL*, 2012, no. 23-24, p. 121; F. Fernández López, "La reforma del régimen del despido por la vía de la reducción de sus costes", *RDS*, 2012, no. 57, p. 199; D. Toscani Giménez, "Las reformas llevadas a cabo en el régimen jurídico del despido por la reforma laboral de 2012", *RL*, 2012, no. 19-20, p. 57; J. Gorelli Hernández, "La reforma laboral de 2012 y su impacto en los despidos individuales y otras formas de extinción del contrato de trabajo", *TL*, 2012, vol. 115, p. 275. See also G. Herma van Voss, B. ter Haar, "Common ground in European dismissal law", *ELLJ*, 2012, p. 215; G. Orlandini, "La tutela contro il licenziamento ingiustificato nell'ordinamento dell'Unione europea", *DLRI*, 2012, p. 617.

[12] See E. González-Posada Martínez, "El despido colectivo", *RL*, 2012, no. 23-24, p. 149, who underlines the significant abolition of the administrative authorization required by the previous procedural legislation (on this point see, among others, J. Cabeza Pereiro, "La supresión de la autorización administrativa en los despidos colectivos", *RDS*, no. 57, p. 183; M. Miñarro Yanini, "La flexibilización del despido colectivo por la Ley 3/2012 y su incidencia en la formulación de las causas justificantes: voluntad liberalizadora versus límites jurídicos y función judicial", *RL*, 2012, no. 19-20, p. 33).

the functional and geographic mobility of the workers, the substantial changes made to working conditions – and worker remuneration conditions in particular[13] – as well as to the regulations governing contract suspension and reductions in working hours due to financial, technical, production and organisational causes[14]. In the legislator's intention, such measures should serve as a strong stimulus to encourage the entrepreneur to make use of internal flexibility, or functional flexibility in a broad acceptation of the term, as a viable alternative to employee dismissals when confronted with severe difficulties, but in actual fact, there is a risk of such measures turning into a « rhetorical bet »[15] in view of the contextual weakening of the rules that set limits on dismissals.

The aim of promoting resort to internal flexibility was advocated again by the legislator as the motivation for the "studs-up" intervention made in 2012 on the rules governing collective bargaining, which had already been amended (giving rise to heated a debate) in the 2010-2011 two-year period. It is claimed by many that the role of independent collective bargaining has been gradually reduced to that of a tool for the flexible management of employment relations to suit employer needs, to the detriment of the broader purpose of promoting and safeguarding worker rights, the task entrusted to the trade unions by the constitution[16]. By rewriting a number of regulations, in 2012, the legislator substantially modified the keystones of the entire system of trade union relations, altering the balance between the forces involved; in particular, the new rules that expand the possibility of disapplying the established working conditions, over a considerable range of aspects provided for in the industry and company-specific labour contracts in force, through derogation agreements (the so-called *descuelgues*), together with the change in status, from possible to imperative, of the rule on the priority of company-specific collective labour contracts, again on a significant number of aspects, over the provisions of the collective labour contract for the sector (whereby the social partners are no longer at liberty to decide otherwise), have made the enterprise into the predominant venue for bargaining, with prejudice to the negotiation process as a complex and orderly system[17]. A strong hazard is therefore perceived of drifting rapidly towards an «atomisation» of collective bargaining, and – in view of the prevailing characteristics of the Spanish production system, made up of small and medium enterprises – there is growing risk of the rules being ultimately determined by the employer, e.g., the rules on wages and working hours, leading to a progressive individualisation of labour relations, so as to configure the individual company as a « sealed compartment »[18], with all the ensuing distortions in the functioning of the labour market in general.

The aforementioned principles of the preference accorded to the application of company contracts may be clearly

[13] On the modified text of articles 39-41 Estatuto de los trabajadores (ET) see M. Martinez Barroso, "Medidas de flexibilidad interna", *RL*, 2012, no. 23-24, p. 85.

[14] As to the new article 47 ET see L. Mella Mendez, "La suspensión del contrato y reducción temporal de jornada", *RL*, 2012, no. 23-24, p. 177. Regarding the legal tools of internal flexibility, as changed in 2012, see L. A. Fernández Villazón, "La reducción de la jornada de trabajo come medida de flexibilidad interna", *RL*, 2012, no. 19-20, p. 21 and M. C. Sáez Lara, "Medidas de flexibilidad interna", *TL*, 2012, vol. 115, p. 221.

[15] J. Baz Rodríguez, "El contrato de trabajo indefinido de apoyo a los emprendedores. Analisis crítico de una apuesta por la «flexiinseguridad»", *RDS*, 2012, no. 59, p. 91. As to hiring flexibility, the changes of 2012, albeit significant, are less radical (see R. Escudero Rodríguez, "Nuevos derechos de formación y contrato para la formación y el aprendizaje", *RL*, 2012, no. 23-24, p. 49). Regarding the major innovation on this matter, *i.e.* the contrato de trabajo indefinido de apoyo a los emprendedores, see below § IV.A.

[16] See F. Valdés Dal-Ré, "La reforma de 2012 de la negociación colectiva: la irrazonable exacerbación de la función de gestión", *RL*, 2012, no. 23-24, p. 221; A. Baylos Grau, "El sentido general de la reforma. La ruptura de los equilibros organizativos y colectivos y la exaltación del poder privado del empresario", *RDS*, 2012, no. 57, p. 9; M. Correa Carrasco, "La ordenación de la estructura de la negaciación colectiva tras las recientes reformas laborales", *RDS*, 2012, no. 59, p. 35.

[17] For an explanation of the regulations at issue (in particular articles 82 e 84 ET), full of controversial implications, see, apart from the essays of F. Valdés Dal-Ré and M. Correa Carrasco, quoted above, note 16, M. E. Casaas Baamonde e M. Rodríguez-Piñero, "Las reformas de la reforma laboral de 2012", *RL*, 2012, no. 15-18, p. 25; J. Cruz Villalón, *op. cit.*, note 7.

[18] M. Correa Carrasco, *op. cit.*, note 16, p. 48. As to the similar questions appeared in Italy, see V. Bavaro, "Rappresentanza e rappresentatività sindacale nella evoluzione delle relazioni industriali", *DLM*, 2012, p. 31.

observed nowadays in the reformed legislation of other countries too[19]: in this connection the interest of the journals has been attracted in particular by the reforms adopted by the Italian and the Greek legislators.

As for the former, the discussion focuses primarily on the « extreme »[20] measure represented by art. 8 of Italian law no. 148/2011, which assigns to bargaining at company or territorial level – referred to as « contrattazione di prossimità » – a virtually exhaustive capacity to derogate, with *erga omnes* effects, not only from the national labour contracts, but also from applicable legislative provisions: a measure that may clearly have a potentially devastating impact on the Italian system of the sources of labour law, and whose constitutional legitimacy has been challenged by various authors[21]. Again with reference to Italy, the labour reform passed by the "technical" government headed by President Monti in the summer of 2012 – with law no. 92/2012 – was from the very start a hot topic in the end-of-the-year issues of the journals of the association, and Italian journals in particular[22]. Indubitably, among the most important and most controversial new measures introduced by a reform that « did not go down well with the right and the left, with the trade unions, and even with Confindustria »[23] and had significant effects on the discipline of individual employment relations and income support policies, we should mention the new terms on unfair individual dismissals, which leave less room for sanctions resulting in worker reinstatement in the workplace, and engender a « complicated and confusing »[24] fragmentation of protective measures.

In analysing the Greek reform, the first question to be addressed is what has become of the right to work guaranteed by art. 22 of the Greek Constitution; the new regulations have been defined as the « right to work in an occupied country »[25], i.e., under the yoke of the non negotiable conditions imposed by the so-called *troika*, the triumvirate made up of the European Commission, the European Central Bank and the International Monetary Fund. In terms of collective labour relations, in fact, from 2010 to this day we have seen the keystones of Greek trade union law being dismantled one at a time, in the name of a transition to a decentralised, more flexible collective bargaining system, whose future effects, however, have given rise to perplexities among the experts[26]. Consider, for instance,

[19] Regarding the French and German legislation see the essays quoted above, note 5.

[20] M. Correa Carrasco, *op. cit.*, note 16, p. 48. On this measure see, among others, O. Mazzotta, "«Apocalittici» e «integrati» alle prese con l'art. 8 della legge n. 148 del 2011: il problema della disponibilità del tipo", and R. Del Punta, "Cronache da una transizione confusa (su art. 8, l. n. 148/2011, e dintorni)", *LD*, 2012, respectively, p. 19 and 31; F. Liso, "Brevi note sull'accordo interconfederale del 28 giugno 2011 e sull'articolo 8 della legge n. 148/2011", M. Napoli, "Osservazioni sul sostegno legislativo alla contrattazione aziendale", *DLRI*, 2012, respectively, p. 453 and 467; M. Delfino, "Contratti collettivi di prossimità e deroga alle normative europee", *DLM*, 2012, p. 465.

[21] See V. Leccese, "Il diritto sindacale al tempo della crisi. Intervento eteronomo e profili di legittimità costituzionale", *DLRI*, 2012, p. 479; M. C. Cataudella, "L'efficacia generale degli accordi aziendali e territoriali", *DLM*, 2012, p. 63.

[22] The *LD* journal published a monographic issue on this reform, that begins with an essay written by U. Romagnoli, "Il diritto del lavoro davanti alla crisi", *LD*, 2012, p. 399 and develops with many other essays; see also M. T. Carinci, "Il rapporto di lavoro al tempo della crisi: modelli europei e flexicurity «all'italiana» a confronto", and E. Gragnoli, "Gli strumenti di tutela del reddito di fronte alla crisi finanziaria", *DLRI*, 2012, respectively, p. 527 and 573; M. V. Ballestrero, "Habemus legem!", and G. Santoro-Passarelli, "Crisi economica globale e valori fondanti del Diritto del lavoro", *in DLM*, 2012, respectively, p. 229 and p. 425; E. Ales, "The Italian Reform of the Labour Market in a Growth Perspective", *op. cit.*, note 2; M. T. Carinci, "The Italian Labour Market Reform under the 'Monti' Government (Law No. 92/2012): Stated Objectives and Real Aims", *ELLJ*, 2012, p. 305.

[23] M. V. Ballestrero, *op. cit.*, note 7, p. 442.

[24] L. Mariucci, "È proprio un very bad text? Note critiche sulla riforma Monti-Fornero", *LD*, 2012, p. 428; see also L. Nogler, "La nuova disciplina dei licenziamenti ingiustificati alla prova del diritto comparato", *DLRI*, 2012, p. 661; P. Lokiec, S. Nadalet, "Italie: la réforme du droit du licenciement", *RDT*, 2012, p. 514.

[25] C. Papadimitriou, "Le droit du travail grec face à la crise: un passage dangereux vers une nouvelle physionomie juridique", *RDCTSS*, 2012, no. 2, p. 7.

[26] See A. Koukiadaki, L. Kretsos, *op. cit.*, note 2; C. Papadimitriou, *op. cit.*, note 25; C. A. Ioannou, "Recasting Greek Industrial Relations: Internal Devaluation in Light of the Economic Crisis and European Integration", *IJCLLIR*, 2012, p. 199; C. Papadimitriou, "Le

that besides abolishing the power of the Minister of Labour to extend *erga omnes* the efficacy of collective labour agreements for a specific sector, the reform has reversed the traditional bargaining hierarchy, with a prevalence, in a majority of cases, of company-specific contracts, which may be signed by simple "groupings of people" (small groups of workers accounting for at least three fifths of the total number of company employees), over collective agreements for the sector; also radically changed are the conditions of extended validity of collective labour agreements in the event of non-renewal, and so are the rules on the settlement of labour disputes by arbitration; all these factors have obvious repercussions in terms of a progressive erosion of the role of the trade unions.

The drastic measures adopted in Greece on labour relations are invariably described, in the articles that appeared on the *IALLJ* journals, by resorting to strong expressions, such as « transfiguration », « deconstruction », « change of foundation and physiognomy »: in actual effect, there can be no other way to qualify measures such as a drastic reduction in interprofessional minimum wages (of between 22 and 32%), accompanied by a contextual reduction in the cost of overtime, and furthermore, where dismissals are concerned, reduced indemnities for dismissal (or not at all for workers with a seniority of less than 12 months), the abolition of conventional stability clauses as well as restrictions to the scope of regulations on collective redundancies. All these measures – combined with those concerning collective labour relations – motivate the bitter conclusion that so far « the cure has been worse than the disease »[27].

Even greater concerns and bitter comments accompanied the coming into force (on 1st July 2012) of the new Hungarian labour code[28], which definitely did not go unnoticed and whose watchwords may be summarised in deregulation and flexibility, combined with a special emphasis placed by the legislator on the objective of underscoring the contractual freedom of the parties, overlooking their intrinsic disparity. The greater and more significant margins of flexibility, in terms of space and time, granted to the employer by the new code, and the extension of the employer's disciplinary power, has been compounded – to make matters worse for the workers – by the rewriting of the rules governing the employers' liability for damages suffered by a worker and, above all, by the passing of new rules on dismissals[29]. In the area of trade union relations, the changes relative to the earlier situation are described in the journals as disruptive and dangerous, and posing serious doubts as to their conformity to EU principles, especially in terms of information and consultation rights. Nowadays, in fact, a priority of role in collective labour relations is accorded to company committees to the detriment of the trade unions, thereby depriving the latter of information and consultation rights which are only partly transferred to the former. However, an appropriate recognition of rights and guarantees in favour of the committee members does not accompany their newly acquired primary role, which may also be observed in collective bargaining, where it is permitted by way of derogation *in pejus* from the legislative provisions[30]. The aim of the Hungarian government to make the national labour market « one of the most flexible in the world »[31] is probably not far from being reached, an achievement attained at a high cost to individual and collective worker rights, by taking the EU directives into little or no account[32].

recenti trasformazioni del diritto del lavoro in Grecia", and S. Zambarloukou, "La crisi economica e le relazioni industriali in Grecia", *DLRI*, 2012, respectively, p. 389 and p. 401.

[27] A. Koukiadaki, L. Kretsos, *op. cit.*, note 2, p. 303; the authors underline that these reforms, totally unable to give rise to the economic growth, have taken to the worsening of working and life conditions.

[28] See e.g. C. Kollonay Lehoczky, "Une «troisième voie» en droit du travail? Un panorama du nouveau code du travail hongrois", *RDCTSS*, 2012, no. 2, p. 75.

[29] See T. Gyulavári, N. Hős, "The road to flexibility? Lessons from the new Hungarian labour code", *ELLJ*, 2012, p. 252.

[30] See C. Kollonay Lehoczky, *op. cit.*, note 28 and T. Gyulavári, N. Hős, *op. cit.*, note 29.

[31] As hoped in the *Magyar Munka Terv* (Hungarian plan for work) presented by Viktor Orbán's Government in June 2011.

[32] More in general, in view of the considerable and highly controversial changes made to the Hungarian Constitution since 2012, the EU representatives in Brussels spoke of a «Hungarian question», which - following an infraction procedure initiated to counter a number of measures against the independence of the judiciary, and, in particular the decision to lower the mandatory retirement age for judges – led to a conviction inflicted by the Court of Justice of the European Union to Hungary for violation of Council Direc-

III Classical themes in their modern versions

Besides the dominant theme of the reforms brought about in the national labour laws by the economic and financial crisis, considerable attention is devoted by the journals in question to issues that were already pivotal – not in the same terms as today's, but in their essential aspects – at the time when labour law began to be developed. We are thinking *in primis* of the complex issue of the collective expression of the workers' voice, which by itself encompasses the key problems of the recognition of trade union organisations and their rights of collective bargaining and collective action, but goes well beyond this classical profile: just consider the importance taken on in Europe, in the course of the last few decades, by the worker rights of information, consultation and participation[33], now deemed an essential component of the discourse on the «capability for voice», according to the effective formula coined by combining the known theory of the "capability" with the juridical need for an effective and incisive manifestation of the employee voice[34]. In terms of individual labour relations, instead, the issues that should be examined, on account of the attention received, include equality and non discrimination: in this connection, notwithstanding the progress made in national and supranational legislations to overcome the obstacles that hinder - essentially from the qualitative viewpoint – women's participation in the labour market, the disparities that affect women continue to be the worst thorn in the side of an imposing and multi-oriented body of rules such as the current anti-discrimination law.

A Freedom of association, collective bargaining and strike

At a time characterised by the ever greater competitive pressure arising from the globalisation of the markets and by the erosion of trade union powers, the central role acquired in the global scenario of legal theorists by traditional collective labour rights is not at all surprising, if you look closely. In the old continent, in fact, at stake is the effectivity of those negotiation and collective action rights that, having obtained a solemn and binding recognition with the Charter of Fundamental Rights of the European Union, now see their contents perilously undermined by the restrictive interpretation given to the Charter by the Court of Justice[35]; at the same time, across the ocean, a growing aspiration towards the constitutionalisation of the rights of association, collective bargaining and strike reflects an attempt to place such juridical values beyond the reach of governmental action[36].

tive 2000/78/EC (CJEU 6.11.2012, case C-286/12, *Commission v. Hungary*), although in the meantime the Hungarian Constitutional Court had pronounced a decision on the matter: see G. Kiss, "The decision of the Constitutional Court on the unconstitutionality of certain rules on the status and remuneration of judges", *PMK*, 2012, p. 141.

[33] Not by coincidence not ignored by the journals rooted in the old continent: for a highly critical analysis of Community directives and case law relating to these matters, see T. Royle, "Socially Inclusive or Exclusive? An Analysis of European Social policy, Legislation and European Case Law", *BCLR*, 2012, n. 80, p. 25; on the implementation of directive n. 2002/14 and the problems existing in Hungary and Germany see respectively W. Portmann, "Information and consultation of the employees – Practise, implementation and development of the Directive 2002/14/EC", *PMK*, 2012, p. 81 and M. Huber, M. Schubert, P. Ögüt, "Die Absicherung befristet beschäftigter Betriebsratsmitglieder", *AuR*, 2012, p. 429; finally, as to the valorisation of rights of participation see M. Seyboth, "Mitbestimmung als Teil des demokratischen Prinzips in Europa", *AuR*, 2012, p. 339.

[34] S. Deakin, A. Koukiadaki, "Capability Theory, Employee Voice, and Corporate Restructuring: Evidence from U.K. Case Studies", *Comp. Lab. LPJ*, 2012, vol. 33, p. 427.

[35] See, among others, F. Guarriello, "I diritti di contrattazione collettiva in un'economia globalizzata", *DLRI*, 2012, p. 341. The matter will be considered again in the final part of this paragraph.

[36] See, with specific but not exclusively reference to Canada, E. Tucker, "Labor's Many Constitutions (And Capital's Too)", *Comp. Lab. LPJ*, 2012, vol. 33, p. 355.

The difficulties arising, on the one hand, from the decline experienced by the trade union (more marked in western Europe, but observable in all industrialised countries)[37] and, on the other hand, from the transfer outside the national boundaries of economic dynamics and its effects on the living conditions of the workers make it urgent and indispensable to establish a « transnational solidarity among trade unions », that is to say, international cooperation and coordination ties – not an easy task in itself, and yet « crucial more than ever before » – that presuppose on the part of the unions an awareness of the conspicuous differences between them and, beyond that, unwavering mutual respect[38]. To give voice to the workers, also in view of the enhanced heterogeneity of their positions, the trade unions are called upon to try new roles, other than their classical ones, and to explore new roads[39]. In this connection we should mention, on account of the attention received from the journals being considered, the experience of the international framework agreements, interesting for its projection at transnational level, even though it was probably something that the unions underwent, rather than undertaking of their own accord; such agreements, in fact, account duly taken of the growing differences emerging between the signatories as to their use and their potential (even outside Europe, where such agreements were born), appear to be construed more as a reaction of the trade unions to their decline and the changes taking place in the global scenario than as a response to the dissemination of company codes on the social responsibility of the enterprise[40].

In any event, careful consideration goes to the contribution that the tools of private transnational law may give for purposes of trade union freedom and its corollaries, whose actual recognition obviously cannot be taken for granted in several countries[41]. In common law legal systems adopted in the countries across the ocean (or two oceans, in the case of Australia and New Zealand), in particular, a lively discussion is currently underway on the degree of protection to be afforded to collective bargaining: in Canada the question was at the core of the famous *Fraser* case, whose significance is explained in detail later on (§ V.A.); while elsewhere, and especially in Australia – where the *Fair Work Act* of 2009 made it a legal obligation to recognise the workers' unions for purposes of collective bargaining, but

[37] Notwithstanding the enormous differences in trade union organisation rates between the various countries: just compare Sweden (with a rate of 71% in 2008) with Japan (with a rate as low as 18.5% in 2012), according to the data obtained by a comparative study on "System of Employee Representation at the Enterprise" presented by H. Nakakubo, T. Araki in *BCLR*, 2012, n. 81, p. XIX. For an italian perspective of the question see G. Perone, "Guardare all'attuale crisi e al futuro del sindacato con equilibrio e lungimiranza", *DLM*, 2012, p. 19.

[38] These are the conclusions reached in the conference on *Trade Union Rights at the Workplace* promoted in honour of Manfred Weiss, on the occasion of his seventieth birthday, and reported in BCLR, 2012, n. 79: for the two quotations see respectively T. Klebe, M. Schmidt, B. Waas, *Editorial*, p. XIX, and M. Weiss, "Drawing a Synthesis: A Mission Impossible", pp. 91-93.

[39] See A. Bogg, T. Novitz, "Investigating «Voices» at Work", *Comp. Lab. LPJ*, 2012, vol. 33, p. 325; but also H. Nakakubo, T. Araki *in* the introduction of the issue of the *BCLR*, 2012, n. 81, quoted above, note 37.

[40] B.K. Burret, "International Framework Agreements: An Emerging International Regulatory Approach or a Passing European Phenomenon?", *CLELJ*, 2012, vol. 16, p. 81. Concerning the so called IFAs see also D. Stevis, M. Fichter, "International Framework Agreements in the United States: Escaping, Projecting, or Globalizing Social Dialogues?", *Comp. Lab. LPJ*, 2012, vol. 33, p. 605 and M.A. Hennebert, P. Fairbrother, C. Levesque, "The Mobilization of International Framework Agreements: A Source of Power for Social Actors?", *ibid.*, p. 691.

[41] On this matter see the numerous essays contained in the issue devoted to *Freedom of Association in Private Transnational Law: How Enforceable Are the Commitments of European Companies in North America?*, *Comp. Lab. LPJ*, 2012, vol. 33, n. 4. The answers that international private law may develop for transnational regulation of work, with particular regard to posted workers, are examinated by A. Mattei, "Prospects for Industrial Relations: Overriding Mandatory Provisions in the Transnational Labour Market", *BCLR*, 2012, n. 80, p. 151.

the jurisprudence is still reluctant to ascribe a substantial content to such obligation[42] – the focus of the debate is the controversial efficacy of resorting to legislative means to promote good faith bargaining[43]. The enhanced support provided by the law to a good faith bargaining obligation is being blamed for causing, in Australia as in the U.K., detrimental effects on the right to strike, as, in actual fact, the conditions imposed on the exercise of this right, albeit inspired by the noble principle of deliberative democracy (with majority vote mechanisms), seem more apt to erode the space available to collective action rather than to promote a responsible behaviour on the part of trade unions[44].

As for collective action, while in North America the positions developed within the ILO and the European Court of Human Rights concerning the recognition of the right to strike as a necessary postulate of the freedom of association are looked at with diffidence or with hope, depending on the point of view[45], in the old continent the attention of legal theory, as well as that of the EU authorities, continues to be focused on the restrictions arising from the well known *Laval* and *Viking* ECJ rulings[46]. The year 2012 in fact saw the European Commission adopt (on 21 March) and then revoke (on 12 September) the so-called Monti II regulation proposal on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. Formulated with the intent to address the problems posed by the aforementioned ECJ decisions, the proposal was blamed for failing to counter the process of erosion of the right to strike triggered by the Court of Justice[47] and was formally objected to by the parliaments of twelve member states through the "yellow card" procedure (a procedure envisaged to oppose legislative initiatives by the Commission deemed prejudicial to the EU principle of subsidiarity), which was used in this case for the very first time. An active role in bringing about the withdrawal of the Monti II regulation was also performed by the ETUC, actively pursuing the difficult task of fighting the neo-liberal policies strongly advocated in the Union[48].

[42] According to several decisions the *Fair Work Act* does not consider that employer direct dealing with union represented employees during bargaining will necessarily breach the obligation to bargain in good faith: see R. Read, "Direct Dealing, Union Recognition and Good Faith Bargaining under the Fair Work Act 2009", *AJLL*, 2012, p. 130.

[43] For a not satisfying evaluation of the legislative encouragement of good faith bargaining in Australia and New Zealand see B. Creighton, P. Nuttall, "Good Faith Bargaining Down Under", *Comp. Lab. LPJ*, 2012, vol. 33, p. 257; more positive is instead the judgement of A. Forsyth, "The Impact of "Good Faith" Obligations on Collective Bargaining Practises and Outcomes in Australia, Canada and United States", *CLELJ*, 2012, vol. 16, p. 1.

[44] These are the worries expressed by S. McCrystal, T. Novitz, "Democratic Pre-conditions for Strike Action: A Comparative Study of Australian and UK Labour Legislation", *IJCLLIR*, 2012, p. 115. Problems concerning restrictions to the right to strike arose also in Italy, especially in the Fiat case: see E. Ghera, "Titolarità del diritto di sciopero, tregua o pace sindacale (spunti critici e di metodo)", *DLM*, 2012, p. 243; L. Nogler and R. Romei, "Ripensare il diritto di sciopero?", *DLRI*, 2012, respectively p. 315 and p. 331.

[45] See in the first sense S. Regenbogen, "The International Labour Organization and Freedom of Association: Does Freedom of Association Include the Right to Strike?", *CLELJ*, 2012, vol. 16, p. 385; in the second one P. Barnacle, "European Judicial Approaches to Freedom of Association and their Implications for a Constitutional Right to Strike", *ibid.*, p. 419.

[46] These rulings are contested, among others, by T. Royle, *op.cit.*, note 33, and S. Evju, "Das Recht auf kollektive Maßnahmen unter der Sozialcharta des Europarates", *AuR*, 2012, p. 276.

[47] For more or less harshly criticism on the so-called Monti II regulation proposal see N. Bruun, A. Bücker, F. Dorssemont, "Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma?", *IJCLLIR*, 2012, p. 279; M. Rocca, "The Proposal for a (so-called) 'Monti II' Regulation on the Exercise of the Right to Take Collective Action within the Context of the Freedom of Establishment and the Freedom to Provide Services", *ELLJ*, 2012, p. 19; finally, after the withdrawal of the proposal, N. Castelli, "Derecho de huelga en el espacio europeo y la propuesta de regulación Monti II", *RDS*, 2012, n. 59, p. 147.

[48] Regarding the trade union disenchantment with the evolution of the 2000 Lisbon strategy, but more in general with the European policy environment, see R. Hyman, "Trade Unions, Lisbon, and Europe 2020: From Dream to Nightmare", *IJCLLIR*, 2012, p. 5.

B Inequalities and anti-discrimination measures

Despite the fact that over the last few decades anti-discrimination law has achieved everywhere, albeit with differences to do with local conditions, an appreciable increase in scope, so that now it can be used as a tool to counter the penalisations associated with a wide range of personal characteristics, gender-related inequalities continue to be the focus of the debate, as clearly revealed by the analysis of the journals belonging to the *IALLJ* [49]. Gender, which remains a key factor in the disparity problems observed in the working environment[50] (but also in other related areas)[51], and which nowadays comes under scrutiny together with other connotations "at risk" (e.g., ethnic origin, nationality, age, to mention the most common), has been in a majority of legal systems the differential factor taken into consideration by the laws subsequently used as prototypes in the construction of other anti-discrimination regimes of either a specific or a general nature. This is indubitably the process that has taken place in the EU context, where the progressive refinement of the methods employed to counter gender discrimination and to promote equality between male and female workers has deeply affected the development of all equality rules, in terms of both the fundamental concepts (first of all, the notions of direct and indirect discrimination) and the implementation tools (just think of the mitigation of the burden of proof, or the requirements concerning the effectivity of the sanctions). While European anti-discrimination rules has given rise to an appreciable convergence of the national legal systems in terms of substance, the same cannot be said of the implementation tools, where a comparison between the EU member States reveals great heterogeneity; however, this in itself should not be viewed as a limitation, but rather as a valuable opportunity for mutual learning, in view of the « transnational migration of legal ideas »[52].

In this connection, it is surprising that from the U.S., the country that has exported the foundations of anti-discrimination laws to the rest of the world, now comes an admission of weakness and a recognition of the insufficiency of the discrimination bans currently in place in combating the inequality that is the most deeply rooted and the most burdensome for working women, i.e., the discrimination associated with maternity and, in broader terms, with the role of care giver performed in the home (mostly, but not solely, by mothers). To remedy the « *workplace-workforce mismatch* », due to the failure of the rules on employment relations to take into due consideration the family life of the worker, and the negative consequences arising from it in both microeconomics and macroeconomics terms, it is believed that a decisive element is the establishment of work/family reconciliation policies, affecting in particular working time and leaves. In relation to these aspects Europe is one step ahead, on account of the traditional inclination toward social support measures that has always characterised it[53]. As is known, though, in this area there are appreciable differences between the different EU countries: just consider the enormous distance separating Italy from Sweden, or even Fin-

[49] This branch of legal studies, save for a few sporadic exceptions, continues to be the prerogative of feminine scholars: the non encouraging characteristic can be clearly observed irrespective of geographic position.

[50] Therefore it's not surprising the attention given to the advancement of gender equality by measures of corporate social responsability: see on this issue E. Saldaña Valderas, "Las acciones de responsabilidad social de las empresas como instrumentos de promoción de la igualdad de gènero en el trabajo", *TL*, 2012, vol. 113, p. 129.

[51] Regarding the importance of gender in social security systems see S. Renga, "Il principio di eguaglianza di genere nei sistemi pensionistici europei", *LD*, 2012, p. 117.

[52] See D. Schiek, "Enforcing (EU) Non-discrimination Law: Mutual Learning between British and Italian Labour Law?", *IJCLLIR*, 2012, p. 489.

[53] S. Bornstein, J.C. Williams, G.R. Painter, "Discrimination against Mothers Is the Strongest Form of Workplace Gender Discrimination: Lessons from US Caregiver Discrimination Law", *IJCLLIR*, 2012, p. 45. For a report of European Union law with regard to reconciliation see M.D.R. Palma Ramalho, "Concilier famille et travail pour les femmes et pour les hommes : normes et acquis européens", *DLM*, 2012, p. 151.

land and the Netherlands, in terms of availability of care services for children and the repercussions of such distance on the employment rate for women, in Italy still very far from the quantitative targets established by the Union[54].

A dangerous reversal, with respect to the crucial issue of working time and the measures designed to reconcile professional and family responsibilities, was triggered by the labour reforms adopted in a number of European countries in response to the economic-financial crisis (as discussed in detail above, § II): besides the cuts, oftentimes imposed directly, to the rights that facilitate the performance of the dual work/family role, the internal flexibility forms granted to the employers – in terms of changes to and extension of working hours, even for part-timers – have not spared the workers bearing the burden of care giving tasks, thereby accentuating the social Darwinism dynamics at play in the labour market today[55].

Though by and large it is the women who bear the cost of these legislative choices, the problem of work/family reconciliation policies affects men too: some of them, in fact, already cover the role of care-givers[56]; furthermore, in the long run, the involvement of men in care giving tasks is indispensable to alleviate the burden of such tasks on women, as well as to reach the objective of placing a higher social value on care giving, as can be seen from the conclusions reached by a study on the transnational chain that currently sees the women from the southern countries of the world make an essential contribution to the lives of the women from economically more advanced countries[57].

The need to tackle the existing inequalities from a global perspective, as opposed to a merely national or local one, and to widen further the horizons of anti-discrimination law by taking into account structural inequalities, the black economy and domestic work, is acknowledged as a path that international labour law must embark on, without fear of flanking the fight against discrimination with other struggles, starting with the one conducted in support of decent work[58].

[54] On the need to strengthen Italian child care structures for purposes of the attainment of the female employment rate indicated in the *Europa 2020* strategy, see F. Bergamante, "Female Participation in the Labour Market in Europe", *BCLR*, 2012, n. 80, p. 79; but a progressive decline of gender issues in the evolution of the European employment strategy is pointed out by P. Villa, M. Smith, "Gender Equality and the Evolution of the Europe 2020 Strategy", *ibid.*, p. 3. As it concerns the innovations brought in Italy by law no. 92/2012 (already mentioned in § II) with the declared aim of increasing female employment see, with a very critical eye, G. De Simone, "Tra il dire e il fare. Obiettivi e tecniche delle politiche per il lavoro femminile nella riforma Fornero", *LD*, 2012, p. 589; on the rules introduced by the same law in order to facilitate the reconciliation between professional and parental roles see, again critically, D. Gottardi, "La condivisione delle responsabilità genitorali in salsa italiana", *ibid.*, p. 609.

[55] For the most severe disapproval of these choices, with specific regard to the Spanish law no. 3/2012, see M.A. Ballester Pastor, "De cómo la reforma operada por el RD Ley 3/2012 ha degradado el derecho fundamental a la conciliación de responsabilidades", *RDS*, 2012, n. 57, p. 99. The problems deriving to employees with care-giving responsibilities (especially women) from the increase of regulatory flexibility are anyhow underlined in other countries: see e.g. A. Zbyszewska, "Regulating Working Time in Times of Crisis: Flexibility, Gender and the Case of Long Hours in Poland", *IJCLLIR*, 2012, p. 421.

[56] On the positive situation of Canadian workers see L. Cloutier-Villeneuve, "Job quality in Quebec and the United Kingdom: Trends by sex and family status, 1998–2008", *ILR*, 2012, p. 61.

[57] J. Fudge, "Global Care Chains: Transnational Migrant Care Workers", *IJCLLIR*, 2012, p. 63.

[58] C. Sheppard, "Mapping anti-discrimination law onto inequality at work: Expanding the meaning of equality in international labour law", *ILR*, 2012, p. 1. For the importance of the chapter concerning gender equality in the ILO Decent Work Agenda see J.E. López Ahumada, "Principios jurídicos y promoción de la igualdad de género como garantía del trabajo decente: problemas y experiencias en el seno de la OIT", *RL*, 2012, n. 15-18, p. 195.

IV Labour issues of the new century

The issue of precarious employment should be certainly mentioned among the labour topics that have taken on ever greater importance in the global context in the new century, with new developments and new figures compared to those produced in previous years and thereby arousing the interest of commentators. Precarious employment will be construed, for our purposes, not only in the acceptation widely shared in the European countries as non standard work – whether due to its predetermined time duration, seasonal character, or nature of a relationship «bordering on subordination» (with the ensuing reduction in worker rights and guarantees compared with standard employment) –, but also in its variants as work of an indefinite duration characterised all the same by elements of precariousness, which may consist of low salary levels, working modalities (*in primis*, working time, in case of involuntary reduction of working hours), the context where the employment relationship takes place, the impossibility of withdrawing freely from the job, the lack of appropriate protection against occupational diseases and injuries in the workplace, as well as deficiencies in the social security area[59]. In response to the most extreme forms of precarious employment, besides – and before – black or informal work forms, in the new century we have witnessed an intensification of international law instruments designed to promote the concept of «fair globalization based on Decent Work»[60], whose enhanced visibility at global level has been matched by a progressive increase in interest on the part of legal theorists, as borne out by the sample of journals taken into consideration.

A Flexibility and precarious work

From the so-called «EU flexicurity discourse»[61], whose traces may be found – in the various versions of hiring/firing and functional flexibility – in many essays published on the journals considered in the course of 2012 (as partly seen above, in § II, when discussing the reforms passed "under the effect" of the crisis), we want to stress first of all a number of flexibility measures observed on the side of access to employment, which, so far, have not been counterbalanced by the much awaited security instruments, especially in favour of the non standard, and increasingly precarious, workers most severely affected by the crisis.

Among the classical forms of non standard employment that have attracted some attention among the scholars, we should mention first of all temporary agency work: this form is discussed in Europe as well as outside Europe, as born out by the discussion underway in Australia concerning the possibility of applying the U.S. doctrine of «joint employment» to overcome the current restrictions on the protection against unfair dismissal that temporarily hired workers are exposed to[62], or by the studies conducted in Japan on the figure of temporary agency workers hired for a very short period of time, within the framework of the more general issue of the escalating difficulties in the transition for fixed term to permanent employment[63]. Still underway in Europe is a debate that started in the wake of the transposition into national laws of European directive 2008/104, when several member states modified

[59] For a wide meaning of the concept of precarious work see the essays published in the monographic issue (entitled *Precarious Work and Human Rights*) of *Comp. Lab. LPJ*, 2012, vol. 34, no. 1: see E. Albin, "Introduction", *ibid.*, p. 1. and J. Fudge, "Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers", *ibid.*, p. 95.

[60] See the ILO *Declaration on Social Justice for a Fair Globalization*, unanimously adopted on 10 June 2008.

[61] See M. Rönnmar, A. Numhausser-Henning, "Swedish Employment protection in Times of Flexicurity Policies and Economic Crisis", *IJCLLIR*, 2012, p. 443.

[62] See P. Thai, "Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia", *AJLL*, 2012, p. 152. Regarding the different but connected issue of the workers' protection in case of subcontracting in Canada, see B. Kates, "The Supply Chain Gang; Enforcing the Employment Rights or Subcontracted Labour in Ontario", *CLELJ*, 2012, vol. 16, p. 449.

[63] See the essays published in issue no. 3/2012 of the *JLR*, entitled *Non-Regular Employment and Vocational Career*.

their previous regulations on these matters, providing even greater incentives to the use of «renting» workers, as well as on the figure of transnational temporary agency workers[64]. In particular, the debate is heated in Germany: more specifically, the ongoing debate concerns the role played the Christian Trade Unions for Temporary Work and Manpower Agencies in bargaining – and bringing down – pay levels for temporary agency workers by derogation from the principle of equal treatment with comparable employees regularly hired by the employer, which led to the sentence whereby, in December 2010, the *Bundesarbeitsgericht* negated the representative and bargaining capacity of this union and declared the collective labour contracts stipulated by it null and void[65].

Another controversial legislative product that has attracted the attention of scholars is the *contrato de trabajo indefinido de apoyo a los emprendedores*, adopted in Spain in response to a labour market that, to an even greater extent, and everywhere, is taking on a dual nature, as precarious employment keeps growing, as attested in particular by Spanish labour force data: passed in 2012 to replace the previous *contrato de fomento de la contratación indefinida*, this measure – that brings to mind similar, but now revoked, French measures – has not met with the commentators' favour, in that, although it provides for an open-ended contract, it may be freely rescinded during the first mandatory trial period of one year, and hence it poses serious risks of abuse - such as, for instance, worker rotation in the same workplace before the end of the year-long trial period -, and in actual fact is unable to create stable employment[66].

In the large container of precarious work there is ample room for domestic workers, including the so-called care workers, in ever greater demand in our current and aging western societies, whose *status* "made the headlines" on the journals following the approval by the ILO of the *Convention Concerning Decent Work for Domestic Workers* (no. 189/2011), supplemented by recommendation no. 201/2011[67]: for this worker category, the ILO combined the so-called human rights approach, of universal validity, with a sector-specific regulatory approach, which deals with domestic work in terms of the peculiarities that set it apart from other types of employment, the aim being to give visibility to a professional role mostly covered by women and migrant workers, with obvious implications of further disadvantages and vulnerability of the workers.

[64] See, *ex multis*, R. Zimmer, "«Vorübergehender» Einsatz von LeiharbeitnehmerInnen", *AuR*, 2012, p. 422; J.-P. Lhernould, S. Laulom, "Le détachement des travailleurs intérimaires dans l'Union européenne", *RDT*, 2012, p. 240 and p. 308; M. Schlachter, "Transnational Temporary Agency Work: How Much Equality Does the Equal Treatment Principle Provide?", *IJCLLIR*, 2012, p. 177; B. Waas, "A Quid Pro Quo in Temporary Agency Work: Abolishing Restrictions and Establishing Equal Treatment—Lessons To Be Learned from European and German Labor Law?", *Comp. Lab. LPJ*, 2012, vol. 34, p. 47. As to the european legislation on temporary work, in particular concerning fixed-term work, see, among others, S. Robin-Olivier, P. Rémy, "La protection des travailleurs «atypiques» est-elle en régression?", *RDT*, 2012, p. 645.

[65] See, among others: P. Schüren, "«Wirtschaftsweise» fordern Vertrauensschutz für CGZP-Tarifnutzer - eine kritische Analyse", *AuR*, 2012, p. 4; M. Heimann, "Leiharbeitnehmer mit Formulararbeitsvertrag - Verweisung auf die mehrgliedrigen christlichen (CGZP)-Tarifverträge 2010 - eine intransparente Überraschung!?", *AuR*, 2012, p. 50; G. Forst, "Neue Rechte für Leiharbeitnehmer", *AuR*, 2012, p. 97.

[66] See J. Baz Rodríguez, *op. cit.*, note 15; R. Roqueta Buj, "Modalidades de contratación: el contrato de trabajo indefinido de apoyo a los emprendedores", *RL*, 2012, no. 23-24, p. 27 and D. Toscani Giménez, "El fomento de la contratación indefinida: el nuevo contrato para emprendedores", *TL*, 2012, vol. 116, p. 13.

[67] See in particular E. Albin, V. Mantouvalou, "The ILO Convention on Domestic Workers: From the Shadows to the Light", *ILJ*, 2012, p. 67; V. Mantouvalou, "Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor", *Comp. Lab. LPJ*, 2012, vol. 34, 133 ss.; D. McCann, "New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Nonstandard Work Norms", *ibid.*, p. 167 ss. See also S. Charlesworth, "Decent working conditions for care workers? The intersections of employment regulation, the funding market and gender norms", *AJLL*, 2012, p. 107. For an analysis of the recent spenish legislation on domestic work, see M. Miñarro Yanini, "La nueva regulación de la relación laboral de carácter especial del servicio del hogar familiar: una mejora mejorable (I)", *RL*, 2012, no. 4, p. 49 (the second part of the study is published in issue no. 5/2012, p. 73).

B Globalization and decent work

As known, the notion of *decent work* was developed by the international community toward the end of the previous century as a means to foster the goals pursued by the ILO to «promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity»[68]. In the new century, ILO placed this concept at the centre of its policies for the attainment of its constitutional objectives, as confirmed by the *Convention on Domestic Workers* referred to in the previous paragraph. An even stronger confirmation came with the *Declaration on Social Justice for a Fair Globalization*, proclaimed in 2008, which is regarded as the deed marking the most significant renewal of ILO policies since the time of the historic Philadelphia Declaration, and which has been adopted as a means to accelerate the implementation at national level of the so-called *Decent Work Agenda*, according to programmes that needless to say vary from one country to the next, as a function of specific needs, resources and priorities. This context may explain some "editorial" choices made in 2012 both by the *Relaciones Laborales* journal, which published a monograph on decent work, underscoring in particular its function as a social "reaction" to the devastating effects of the economic-financial crisis[69], and by the *Revue internationale du travail*, which devoted an entire issue to the question of the exceedingly low salary levels in use in the emergency countries – and especially in the five countries collectively referred to with the acronym Brics, as well as in South Korea[70] –, denouncing in this connection a considerable departure from the decent work strategy; many more articles, published on other journals, bear witness to the interest generated in legal study circles by the concept of decent work and related issues[71].

In addition to the considerations mentioned above, there are people wondering about the future of the « vieille dame OIT »[72], now that its first centennial is approaching – the International Labour Organisation will be 100 years old in 2019 – and while fully aware of the objections raised over the years to the organisation, they express a hope for the strengthening of its fundamental role as warrantor of the universal values of social justice, which have always inspired its operations and now more than ever must be forcefully advocated.

[68] See the Report *Decent work* presented by the ILO Director-General at the 87th Session International Labour Conference in June 1999 (http://www.ilo.org/public/english/10ilc/ilc87/reports.htm).

[69] See issue no. 15-18, entitled *La promoción del trabajo decente como respuesta de la OIT ante la crisis económica y financiera*.

[70] See issue no. 3, entitled *Low-paid work in emerging economies*, with an opening essay written by S. Lee, K. Sobeck, *Low-wage work: A global perspective*, p. 153.

[71] Besides the essays quoted above, note 67, see: V. Yanpelda, "Travail decent et diversité des rapports de travail", *CLELJ*, 2012, vol. 16, p. 115; K. Sankaran, "The Human Right to Livelihood: Recognizing the Right to Be Human", *Comp. Lab. LPJ*, 2012, vol. 34, p. 81; C. Woolfson, C. Thörnqvist, P. Herzfeld Olsson, "Forced Labour in Sweden? The Case of Migrant Berry Pickers", *IJCLLIR*, 2012, p. 147.

[72] See M. A. Moreau, "Vers un nouveau souffle pour une vieille dame, l'OIT", *RDT*, 2012, p. 533; C. Wolmark, "Quel avenir pour l'OIT ?", *ibid.*, p. 530.

V Focus points from around the world

The unique or unexpected character of the issues addressed by journals published in different countries is the reason why we have decided to dedicate the final part of this article to a non systematic examination of legal cases that seem worthy of attention, both in order to foster a wider knowledge of such cases outside their specialised contexts and to enable "distant" labour lawyers to consider the implications entailed or the interesting prospects that they open up.

A The Canadian Fraser case and the constitutional boundaries of freedom of association

The extension of the protection ensured to the freedom of association by the Canadian Constitutional Charter was the core issue of the decision handed down by the Supreme Court of Canada on the *Fraser* case on 29 April 2011[73]: this decision seized the attention of the journals, both national and foreign, published the following year, where we can follow the heated debated triggered among labour law scholars by the last act of the «new Labour Trilogy of Canadian constitutional law»[74]. This case law trilogy, dealing with the controversial issue of whether or not collective bargaining comes under the confines of the constitutional protection of the freedom of association, as outlined in section 2(d) of the *Canadian Charter of Rights and Freedom*, had begun before the Supreme Court of Canada ten years before, triggered precisely by the specific problem raised by Ontario farm workers, which was then addressed again in the *Fraser* case.

The target of an unconstitutionality claim, which had led, in 2001, to the *Dunmore* ruling[75], had been the abrogation, one year after its approval, of a 1994 law by which the Province of Ontario had recognised the farm workers' rights of freedom of association and collective bargaining, after they had been excluded for half a century from the general employment relations regime and therefore had suffered from a persistent lack or protection. In *Dunmore* the Supreme Court had judged the lack of legislative measures for the protection of the collective rights of the farm workers as prejudicial to the freedom of association enshrined in the *Charter of Rights and Freedom*, but had also stated very clearly that the *Charter* offered no protection to collective bargaining. In reply to the constitutional censure, the Province of Ontario had passed in 2002 a law (the *Agricultural Employees Protection Act*) that, while it confirmed the exclusion of farm workers from the general regulatory system, introduced a dedicated set of rules, of a lesser scope of the one previous abrogated, as it did not establish any collective bargaining right for these workers.

The recognition of collective bargaining as «the most significant collective activities through which freedom of association finds expression, in the context of labour» is the basis for the extensive interpretation of section 2(d) of the *Charter of Rights and Freedom* embraced by the Supreme Court of Canada in 2007, with its ground breaking decision in *Health Services*[76], which claimed that the constitutionally guaranteed freedom of association

[73] *Fraser v. Ontario (Attorney General)*, [2011] 2 SCR 3.

[74] The expression used by A. Bogg, K. Ewing, "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada", *Comp. Lab. LPJ*, 2012, vol. 33, p. 380, can be understood with reference to an earlier "trilogy" consisting of the three 1987 decisions with which the Supreme Court of Canada has ruled out the right to strike from the scope of the constitutional protection of the freedom of association.

[75] *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016.

[76] *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 SCR 391. This decision is considered one of the most significant rulings for workers pronounced in common law countries over the course of a generation.

entails an obligation of the part of the employers to participate in the bargaining process in good faith, giving rise to a genuine collective negotiation. After the leap forward made by the Canadian judges in writing the second act of their trilogy, in 2002, with the *Agricultural Employees Protection Act*, a new unconstitutionality argument was raised by the Ontario farm workers who claimed it violated their freedom of association rights.

To this claim of unconstitutionality raised by the workers – in the light of *Health Services* – against the specific legislative provisions formulated for their category, the Supreme Court of Canada gave a negative reply with the *Fraser* ruling, with which they upheld the *Agricultural Employees Protection Act*, saying nothing as to the matter of collective bargaining, based on a rather tortuous interpretation of the law, whereby the constitutional protection of the freedom of association is identified in the right «to make collective representations and to have their collective representations considered in good faith» by the employers, and nothing more. This triggered harsh criticisms. According to a viewpoint held by several legal theorists (especially, it seems, outside Canada), with *Fraser* the Supreme Court judges, albeit without distancing themselves from *Health Services*, which was repeatedly referred to as a keystone, substantially reversed that decision[77], raising the bar for constitutional control over violations of the freedom of association, displaying an undue deference towards the choices of the regional legislator[78] and at the same time closing the door, at least partly, to the dialogue opened previously with international labour law, and in particular with the ILO conventions and the ensuing obligations[79]. However, in view of the ferocious attacks waged against the *Health Services* decision within the national borders, it was only logical to expect, but not wish for, a step backward by the Supreme Court.

The *Fraser* decision, with the three distinct positions assumed by the eight majority judges[80] revealing the disagreement internal to the Court concerning the extent of the protection to be given to collective bargaining, is by no means a clear-cut ruling. Thus, it is not surprising to find positive evaluations by those who underscore its consistency with the ILO recommendations, a precious guide for the jurisprudence of Canada[81]; such as discordant interpretations that either minimise or, conversely, exalt the binding character of the *Fraser* decision[82]. Lastly, we should note the harsh criticism voiced by those who view the final act of the trilogy as a leap «from the frying pan into the fire», and denounce the undue influence on Canadian case law not only of international law, but also of international "thought"[83].

[77] See, among others, J. Fudge, "Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case", *ILJ*, 2012, p. 1.

[78] See P.J.J. Cavalluzzo, "The Fog of Judicial Deference", *CLELJ*, 2012, vol. 16, p. 369, and S. Barrett, "The Supreme Court of Canada's Decision in Fraser: Stepping Forward, Backward or Sideways?", *ibid.*, p. 331.

[79] On this specific aspect see M. Choko, "The Dialogue between Canada and the ILO on Freedom of Association: What Remains after Fraser?", *IJCLLIR*, 2012, p. 397.

[80] Dissenting from the majority is the ninth and last judge of the Court, relying on the argument of the necessary neutrality of liberal States: this argument is harshly criticized by S. White, "Liberal Neutrality and Trade Unions", *Comp. Lab. LPJ*, 2012, vol. 33, p. 417.

[81] K. Banks, "The Role and Promise of International Law in Canada's New Labour Law Constitutionalism", *CLELJ*, 2012, vol. 16, p. 233 and R. J. Adams, "Bewilderment and Beyond: A Comment on the *Fraser* Case", *ibid.*, p. 313.

[82] See in the first sense R. Chaykowski, "Canadian Labour Policy in the Aftermath of *Fraser*", *CLELJ*, 2012, vol. 16, p. 291; in the second one D. MacDonald, "The Effect of Pre-Legislative Consultation after *Fraser*", *ibid.*, p. 375.

[83] B. Langille, B. Oliphant, "From the Frying Pan into the Fire: Fraser and the Shift from International Law to International "Thought" in *Charter* Cases", *CLELJ*, 2012, vol. 16, p. 181, with regard to the elaboration of the ILO Committee on Freedom of Association.

B The role of labour law in countering domestic violence

The phenomenon of violence perpetrated in the home against women, and sometimes against children too, which unfortunately is seen to be growing in several countries[84], is not a theme that is normally addressed in the journals that deal with labour law and industrial relations, i.e., with subjects that at first glance seem to have no connection to the aforementioned phenomenon, which is instead relevant in terms of criminal law, for the crimes of murder, personal injuries and threats that are often committed in such contexts. But connections do exist: just think of the high percentage of victims of domestic abuse that are involved in paid labour activities; the decisive incidence of economic self-sufficiency and access to a job on a woman's capacity to shelter herself from abusive relationships; the specific needs that may arise, in the areas of employment relations and social security, for people who find themselves in such predicaments; not to mention the interest of the employer in seeing these behaviours effectively countered, in view of their negative repercussions on the working capacities of the victims.

The recognition of the violence perpetrated by men in the home as a matter of great social relevance, which has to be tackled in an integrated manner, is the starting point of the path on which they have embarked in Australia – a country where domestic violence is the primary cause of death and illness for women up to 45 years of age – with the launch of the National Plan to Reduce Violence against Women and their Children (2010-2022). The plan defines a non marginal role for the enterprise and the employer, in terms of prevention and response to domestic abuse: such a role finds confirmation in the law proposals, of a wider scope, formulated in 2012 by the *Australian Law Reform Commission*[85], a federal agency that monitors the effectivity and adequacy of Australian legislation; as well as in suggestions coming from legal theory concerning the adoption of an independent provision against discrimination at work based on the specific status of victim of domestic abuse, with a view to filling limits and gaps in the existing regulations[86].

A step ahead in the struggle against domestic violence is Spain, where constitutional law no. 1/2004 for the «integral protection of the victims of gender violence» – defined in these terms to underscore the male dominance that finds brutal expression in this behaviour – laid the foundations for a broader and stronger protection, which, in addition to criminal prosecution, offers maximum support to the victims of abuse in the different spheres of social life. In the complex and pervasive range of rules adopted to this end in the Iberian peninsula, the measures relating to the workplace grant to the victims of violence the right to change working time and location, and to profit from unpaid leaves and protections in the event of absence from work due to their specific condition. In the area of social security, interesting provisions define special terms of access to pension plans for the survivors. Such provisions have a dual purpose: they are designed to prevent the victims of "machist" violence – according to the expression popular with the Spanish media – from renouncing potentially liberatory choices, such as separation or divorce from the aggressor, in order to maintain the right to a widow's pension, and, on the other hand, to ensure that, after the death of their victims, the aggressors will not be able to profit from the social security benefits reserved for the surviving spouse[87]; a further aim is to safeguard the economic conditions of the children who are orphaned by the death of one of their parents, whether married or not, involved in gender violence[88].

[84] Including Italy, where the data supplied by the Department of Public Security for 2012 indicate a 6.5% growth in this phenomenon over the previous year (from 9,294 instances to 9,899): precisely in order to combat gender violence, in Italy, legislative decree no. 93/2013 was approved and converted into law no. 119/2013, which, however, does not contain provisions relating specifically to the workplace and social security issues.

[85] On the chapters devoted to work in the report presented by the said agency see E. Long, "Family violence and the workplace: Chapters 15-18 of the 2012 ALRC report *Family violence and CommonWealth Laws – Improving Legal Framerworks*", *AJLL*, 2012, p. 292.

[86] B. Smith, T. Orchiston, "Domestic violence victims at work: A role for anti-discrimination law?", *AJLL*, 2012, p. 209.

[87] As to the normative shortcomings that make problematic the applying of sanctions to the aggressor spouse see C. Faraldo Cabana, "La pérdida de la condición de beneficiario de la pension de viudedad del condenado por homicidio o lesiones en el contexto de la violencia doméstica y de genero", *RL*, 2012, n. 13-14, p. 43.

[88] For a detailed analysis of the whole regulation see A. Selma Penalva, "Violencia machista y prestaciones por supervivencia. Repercusiones prácticas", *RDS*, 2012, n. 60, p. 83. With specific regard to the protection from domestic violence of self-employed women see M.J. Cervilla Garzón, "Análisis crítico de la extensión de las políticas de igualdad hacia el ámbito del autoempleo", *RDS*, 2012, n. 59, pp. 126-132.

LIST OF JOURNAL'S ABBREVIATIONS

Arbeit und Recht = AuR

Australian Journal of Labour Law = AJLL

Bulletin of Comparative Labour Relations = BCLR

Canadian Labour & Employment Law Journal = CLELJ

Comparative Labor Law & Policy Journal = Comp. Lab. LPJ

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Revue Internationale de Travail = RIT

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