



UNIVERSITÀ DEGLI STUDI DI TRENTO

Facoltà di Giurisprudenza

# CONVERGENCES AND DIVERGENCES BETWEEN THE ITALIAN AND THE BRAZILIAN LEGAL SYSTEMS

Edited by  
GIUSEPPE BELLANTUONO  
FEDERICO PUPPO

2015





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Edited by  
*Giuseppe Bellantuono*  
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# DECENTRALIZATION AND RECENTRALISATION: TRENDS OF LABOUR LAW IN ITALY

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## *1. Premise*

This paper aims to analyse the current trends of Labor Law in Italy, within the dimension of European Union Law, in the logic of decentralization, regulatory and contractual, on the one hand, and the recentralization, from a judicial point of view, on the other.

The perspective on the dynamics of the “double movement” recentralisation-decentralization is borrowed from economic sociology. The opportunity to discuss the trends of Brazilian Labor Law is fruitful and interesting, because Brazilian Trade Union Law is moving from a predominantly sociological perspective, while Italian Trade Union Law is moving from a mainly positivist perspective<sup>1</sup>.

The opportunity is just as stimulating as it allows to report the results of the project which started the development of the Trentino Observatory on labour social rights<sup>2</sup>: the website that has allowed, during the two years of research, to shed light of this double movement.

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<sup>1</sup> M. HASSEMER, *Il diritto sindacale brasiliano: le più importanti differenze con quello italiano*, *Massimario di Giurisprudenza del Lavoro*, 4, 2015, p. 186.

<sup>2</sup> See: [www.dirittisocialitrentino.it](http://www.dirittisocialitrentino.it). Post-doc research on “The evolution of the European Union sources in social matters: the effects at legal-institutional national and provincial levels, with particular reference to the Autonomous Province of Trento” financed by Autonomous Province of Trento (“bando post doc 2011”). The final book is A. MATTEI (ed.), *Il diritto del lavoro tra decentramento e ricentralizzazione. Il mo-*

## *2. Starting from Trentino Observatory on the labour social rights the decentralization of legislation and contract*

First, the theme explored in the course of the research is linked to the development of the trends established at EU level and also at the regional level in the regulation of the labour market and some relevant institutions of labour law.

The work reflects the preparation of the monitoring website, which would allow a work of systematization of matter and analysis of data based on the comparison between the two areas, the supranational and national and subnational, with special reference to the legal and institutional context of the Autonomous Province of Trento.

More specifically, the identification of specific areas to be analysed follows from the attempt to clarify the process of Europeanization of Labour Law sources. It is not a one-way process, a mere adaptation of national and subnational rules to those coming from the supranational headquarters. It is instead a conditioning process of mutual interaction and multilevel cross-fertilization.

With regard to the aspect of legislative and contractual decentralization, the Trentino Observatory has identified some areas of analysis through constant monitoring of the sources of legislation, case law and contractual law.

In particular, the freely accessible website contains documents and materials related to collective bargaining agreements signed by territories; case law on Labour Law, in particular the judgments delivered by the Tribunals of Trento and Rovereto and by the Court of Appeal of Trento; the legislation on Labor Law at European, national and provincial levels; and the doctrinal contributions on Labour Law which are available in the Internet.

As a whole, the sources have continually developed, through the following steps of the research: monitoring of the topic with collection of material through the Internet; better understanding through a systematization of organic materials added from time to time in internal data

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*dello trentino nello spazio giuridico europeo*, Napoli, 2014, with presentation by S. Scarponi, premise by P. Mengozzi, and articles by A. Mattei, G. Bolego, M. Colasanto, M.V. Giovannacci, S. Vergari, C. Alessi, R. Salomone, A.L. Terzi.

sheets; finally, the analysis of individual tabs within the Trentino Observatory which, thanks to its free availability, has led to public disclosure and open access to all stakeholders.

It should be further noted that the collection was not made in purely quantitative terms, but tried to make available a pool of knowledge including hundreds of documents, available within the website through various search tools (e.g. search for keyword).

Among the materials that were monitored we can consider, adopting an empirical approach to the analysis of the sources, the proximity agreements subscribed pursuant to Article 8 of Law 148/11.

In fact, it is the most significant regulatory decentralization in the Italian system: national rules legitimize collective bargaining, also at decentralized level, to introduce a legal framework that may waive for the worse the standards adopted in the national collective agreements. The “history” of this type of bargaining is believed to be born at the instigation of the European Union, but internally stands out the FIAT case that hit the Labour Law debate: it was, in essence, the will of the company, global player around the world including Brazil, to sign a new collective agreement for the first level outside the system of national bargaining, with specific requirements for the company voted by a majority, and in fact accentuating the break in the unity among Italian trade union organizations.

This process is inserted into the thrust of the European Union that promoted the creation, as stated in the TEU, of a highly competitive social market economy (art. 3.3), with the Euro Plus Pact, in March 2011 and the letter of the European Central Bank addressed to the Italian Government, in August 2011.

In the case of the Euro Plus Pact, signed in March 2011, approved by the Heads of State and Government of the Euro Zone and other countries which have joined the European Union, aims to further strengthen the economic pillar of the Economic Union and Monetary Union, as to lead to a quantum leap in the coordination of economic policies, with the aim of “improving competitiveness and thereby leading to a higher degree of convergence reinforcing our social market economy”.

A few months later, with the letter of 5 August 2011 the European Central Bank asked the Italian Government, among other measures, “to further reform the collective wage bargaining system, allowing firm-level agreements to tailor wages and working conditions to firms’ specific needs and increasing their relevance with respect to other layer of negotiations [...]”. A few days later Article 8 came into force.

In this way, it shifted the attention and the focus of the national collective agreement of the category-level negotiation decentralized, territorial and company level, expanding the structure of collective bargaining.

The degree of application of this type of negotiation, monitored within the Trentino Observatory<sup>3</sup>, was brought to light in its various formations: in the normative source, it is structured to the norm (constraints purpose; structural constraints of the type regulated directions than National Law, European Union Law and International Labour Law and procedural constraints); and in the case law, which has finally been interpreted by the Tribunal and the constitutional jurisprudence; in forming the contract-application, with interventions which are “patchy” across the country.

### *3. The judicial recentralisation*

While it has been shown that the trend towards legislative and contractual decentralization has taken place, a reverse process of recentralisation is taking place at the judicial level.

This has led to a dialogue among courts of different levels, local, national and supranational. It is a dialogue that involved non-standard contracts, in particular those relating to flexible labour contract with public administrations, which features the school sector.

A dynamic evolution of the sources on the subject, including the European level and the national and sub-national levels was reported by the Autonomous Province of Trento. A major reason, looking at the discipline of fixed-term contract as it was changed significantly over

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<sup>3</sup> See: [www.dirittisocialitrentino.it/?p=2238](http://www.dirittisocialitrentino.it/?p=2238).

the years: the text of 2001 (legislative decree n. 368) is implementing the European directive on fixed-term work. Since 2005 it has been changed almost every year, so it was a test case for legislative action or the Constitutional Court.

In the judicial sphere, a considerable dispute emerged at both the national and local levels. It regards the fixed-term contract in the school sector, under review by the Court of Justice of the European Union from a series of appeals : 1) a reference for preliminary ruling of Naples Tribunal, asking the Court of Luxembourg to clarify if employees linked to the public administrations with private law relationships are entitled to the permanent transformation of the employment contract; 2) but also during the trial of constitutionality, through the ordinance n. 207 of 2013, with which the Italian Constitutional Court has referred to the judge of the European Union some issues of interpretation related to the compatibility of national legislation with EU law (Law no. 124 of 1999 on the subject of school personnel)<sup>4</sup>.

In this regard, the Trentino Observatory has been able to analyze this evolutionary process: from the case law of the Italian courts that between 2010, 2011 and 2012 have had the chance to rule on the issue of recurrence of fixed-term contract with different results; the conversion into permanent contract to the recognition of indemnity; how the case law of the Courts of Trento and Rovereto ruled; and how the judges of the Supreme Court, the Constitutional Court and the Court of Justice of the European Union ruled (the latter at the end of November 2014: Joined Cases C-22/13, C-61/13 to C-63/13 and C-318/13 *Mascolo c. Ministry of Education*)<sup>5</sup>.

In that judgment, the Court of Luxembourg ruled that the Italian legislation on fixed-term contracts in the school sector is contrary to Euro-

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<sup>4</sup> In this case, it was also asked whether the clause 5 of the EU Directive 99/70/EC must be interpreted to prevent the application of national law in the school sector, with particular reference to substitute pending completion of the proceedings for employment of permanent staff: this legislation allows to make use of fixed-term contracts without, however, indicating deadlines for the completion of the competitions without including the right to indemnity.

<sup>5</sup> See: [www.dirittisocialitrentino.it/?p=1829](http://www.dirittisocialitrentino.it/?p=1829).

pean Union Law, and in particular Directive 1999/70 on fixed term works.

At the national level, pending a ruling of the Constitutional Court, there were the first rulings of the Courts and, among others, the Labour Court of Naples has determined that workers completing more than 36 months of service have the right to the stabilization of the contract (Case 528, 529 and 530 January 21, 2015).

#### *4. Conclusions and recent trends with the Jobs Act*

From research conducted by the Trentino Observatory emerged, in summary, that the context of Trentino has some specific characteristics of government of both trends, both with regard to decentralization and with regard to the recentralisation.

The double movement of the rules of decentralization-recentralisation was prompted by the evolution of the regulatory sources of the European Union Law in social matters. At the same time, this brings about a dynamic balance with respect to the protection of labour social rights. In this frame of development, we see the weakness of the regulatory law at the state level.

In this trend, taken as a whole phenomenon, the choice of values should not be placed in the light of the Labour Law of the European Union, including the needs of supranational markets and national needs for social protections, but it is appropriate to ask how both hold together without conflicts.

For these reasons, monitoring and systematic collection of the materials and of the more varied forms examined tried to highlight the trends of the sources of the European Union in the social field, also in terms of increasing knowledgeability of the overall dynamics related to a particular local context, such as the Autonomous Province of Trento.

The dynamics of double movement is confronted today with the trends at the national level and is being developed with the reform of the labour market.

In this phase of acute economic and financial crisis not only in Italy, the regulation of internal rules on dismissal had its important harbour in

2012 by Law no. 92, aimed at addressing the problem of growth. The reform, promoted by the technical government led by Mario Monti, has sought to make it harder incoming flexibility, putting limits on the use of atypical contracts and making it easier exit flexibility, introducing a less rigid discipline of dismissal.

This equation has been considered by the doctrine extremely simplistic, since it spoke instead on the internal flexibility that could increase the labour productivity<sup>6</sup>.

Lately, since the second half of 2014, the focus of attention is the broad reform plan, the Jobs Act, which is contained in the text of the enabling law 183 of 2014.

The areas in which the Government is delegated to adopt legislative decrees are numerous and cover almost all labour law: for example, the reform of social welfare services and active policies; the reorganization of the law of non-standard contracts, protection and the requirements relating to care, life and work.

At the time of writing this paper, the legislative decrees have definitively been approved on the reorganization in the field of social safety nets in the event of involuntary unemployment and relocation of workers unemployed (n. 22) and the controversial permanent contracts with increasing protections (n. 23).

In the latter case, the approach adopted by the legislature is to have a strong impact on the idea of exceeding the protection of the workplace for new hires: through the introduction of permanent contracts with increasing protections the attention is shifted from the place of work in favour of the labour market, in the employability perspective<sup>7</sup>.

The reform raises several questions and doubts: the new rules on permanent contracts with increasing protections, which consist essentially in a change to the regulation of dismissals by making the penalty mainly indemnity in case of illegitimate dismissal, which applies only to new hires.

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<sup>6</sup> L. NOGLER, *Problema e comparazione nella controversia sulla riforma del diritto del lavoro*, *Politica del diritto*, 1, 2012, p. 71.

<sup>7</sup> See in the business newspaper A. ORIOLI, *Jobs Act, se il diritto al lavoro si chiama occupabilità*, *Il Sole 24 Ore*, 27 dicembre 2014.

The impact of the labour reform, and in particular the rules of the Labour Law, on the labour market will have to be monitored. But it is clear that, compared to this trend, much will depend on full economic recovery across Europe.