THE REFORM OF THE ITALIAN LABOR MARKET OVER THE PAST TEN YEARS: A PROCESS OF LIBERALIZATION?

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I. THE RECENT LABOR MARKET REFORMS IN ITALY: A BRIEF HISTORICAL OVERVIEW

Over the past decade the labor market[1] has undergone a process of far-reaching legislative change, not just in Italy.[2]

The constant evolution of the legal framework governing the labor market and the underlying economic and social structures is clearly not a recent phenomenon. Rather, it may be argued that this has been one of the characteristics of labor law since it first emerged as a scientific discipline. It is significant that Hugo Sinzheimer, universally recognized as one of the founders of modern labor law, considered this branch of juridical system as the law of the frontier, but also as a frontier of the law.[3] Little or nothing has changed since then, confirming that the essence of labor law still consists of the intrinsic need to constantly remind the jurist of the difficult task of classification and qualification of new phenomena, or phenomena undergoing continuous change.[4]

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

2. For a comparative overview, see CHANGING INDUSTRIAL RELATIONS AND MODERNISATION OF LABOUR LAW – LIBER AMICORUM IN HONOUR OF PROFESSOR MARCO BIAGI (Roger Blanpain & Manfred Weiss eds., 2003), and more recently, THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW (Roger Blanpain et al. eds., 2007). *See also* the Report of the Director General of the International Labour Office on *Changing Patterns in the World of Work* (Geneva 2006), *available at* http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.249.1.300.Statutodeil avori.html.

3. H. Sinzheimer, *Über soziologische und dogmatische Methoden in der Arbeitsrechtswissenschaft*, 9 ARBEITSRECHT 187 (1922).

4. G. GIUGNI, INTRODUZIONE ALLO STUDIO DELL'AUTONOMIA COLLETTIVA 20 (2d ed. 1977).

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

This has undoubtedly affected the internal dynamics of labor law: over the course of just a century of development, the driving force of normative innovation has been collective bargaining, and the self-regulating balance of power reflected in it.[5] At the same time, legislative provisions have been assigned a role that is subsidiary—at times even secondary[6]—in labor market regulation, with recourse to the traditional techniques of implementation, consolidation, and extension of the provisions of collective bargaining.

The progressive loss of centrality of the system of inter-trade union relations, considered in Italy as an autonomous juridical system distinct from that of the State[7] has led to profound changes in the traditional sources generating labor law[8] and in their degree of effectiveness in regulating the labor market. The gap between the abstract provisions of inderogable legal and/or collective bargaining norms on the one hand, and the economic and productive system on the other, which is another constant feature of the development of Italian labor law,[9] has never been as wide as it is today, as shown unequivocally by the alarming figures on employment in the hidden economy. It has been estimated that more than a quarter of the Italian labor market, over four million jobs amounting to 23–27% of GDP,[10] is in the shadow economy, with a consequent lack of legal regulation.[11]

5. For a general overview see M. Del Conte & M. Tiraboschi, *Italy*, 53 BULL. COMP. LAB. REL. 35, 123 (2005) (special issue *Labour Law in Motion: Diversification of the Labour Force & Terms and Conditions of Employment*); Michele Tiraboschi, *Changes in the Italian labour market and employment structure: problems confronting labour and management* (Collana ADAPT, Working Paper 2003), *at* http://www.csmb.unimo.it.

6. In this connection reference should be made to OTTO KAHN-FREUND, LABOUR AND THE LAW 1, 1–17, 2 (2d ed. 1977) (discussing the law "as a secondary force . . . in labour relations").

7. According to the classical study of GIUGNI, *supra* note 4.

8. *Cf.* L. MARIUCCI, LE FONTI DEL DIRITTO DEL LAVORO, QUINDICI ANNI DOPO (2003).

9. In this connection, see L. MARIUCCI, IL LAVORO DECENTRATO. DISCIPLINE LEGISLATIVE E CONTRATTUALI 20, 25 (1979) (putting forward the argument, still relevant today, that "the history of labour law largely coincides with the historical reconstruction of the reasons for its ineffectiveness").

10. *See* F. SCHENEIDER & D.H. ENSTE, THE SHADOW ECONOMY: AN INTERNATIONAL SURVEY (2002). More limited, but still alarming, the estimates published by ISTAT, *La misura dell'occupazione non regolare nelle stime di contabilità nazionale: un'analisi a livello nazionale, regionale e retrospettiva a partire dal 1980*, (Dec. 2004), *available at*

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

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

It has been argued[14] that the most recent normative developments will tend to undermine the power of the social partners and industrial relations, thus bringing to an end a phase characterized by the devolution of powers and competences to collective bargaining. However, this view is highly controversial, and less linear than it might appear to be from a superficial assessment. It is even possible to argue the opposite: that the significant intervention on the part of the legislature in recent years is due to the persistent inertia of the social partners, who are reluctant to come to terms with changes in the world of work,[15] together with the lack of reform of the industrial relations system and collective bargaining structures. An analysis of the main national collective agreements unequivocally shows that certain matters relating to organizational innovation and productivity

http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.436.1.50.65.html. An influential study is that of M. Dell'Olio, *Il lavoro sommerso e la lotta per il diritto*, *in* 1 ARG. DIR. LAV. 43–53 (2000), but see also M. Sala Chiri, *Il lavoro sommerso e il diritto del lavoro*, 6 DIR. LAV. 731 (2003) (special issue *Scritti in memoria di Salvatore Hernandez*) and the bibliography therein.

11. It should be pointed out that this phenomenon is by no means new, and was highlighted in the 1970s and 1980s. *See*, *e.g.*, G. Giugni, *Giuridificazione e deregolazione nel diritto del lavoro italiano*, *in* G. GIUGNI, LAVORO LEGGE CONTRATTI 350–51 (2d ed. 1989).

12. *See* F. Scheneider, *The Value Added of Underground Activities: Size and Measurement of the Shadow Economies and Shadow Economy Labor Force all over the World* (World Bank Paper), *at* http://www.lex.unict.it, under the heading *Dossier sul lavoro sommerso*. In addition extensive documentation is *available at* http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.436.1.50.65.html.

13. ITALIAN CONST. OF 1948, art. 4.

14. By way of example, see L. Bellardi, *La struttura della contrattazione collettiva e il d.lgs. n. 276 del 2003*, I DIRITTO DEL LAVORO. I NUOVI PROBLEMI – L'OMAGGIO DELL'ACCADEMIA A MATTIA PERSIANI 339–62 (2005).

15. Significantly this is the view taken by the CISL general secretary, Raffaele Bonanni. See his remarks at the General Council of the CISL, Apr. 27, 2006, 25 BOLLETTINO ADAPT (2006), *available at* http://www.csmb.unimo.it.

(working hours, contracting out and outsourcing, job descriptions and grading, training issues, etc.) are dealt with only to a marginal extent by collective bargaining.

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

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

16. The renewal of the metalworkers' national collective agreement, that is influential in terms of pattern setting in Italy, is emblematic. *See* M. Tiraboschi, *Metalmeccanici: siglata l'intesa*, 5 GUIDA LAV. 11 (2006). Ample documentation for the arguments put forward is *available at* http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.378.1.300. ContrattazioneCollettiva.html.

17. W. TOBAGI, CHE COSA CONTANO I SINDACATI (1980), *reprinted in* WALTER TOBAGI GIORNALISTA 226 (G. Baiocchi & M. Volpato eds., 2005).

18. *See* Michele Tiraboschi, *Marco Biagi: The Man and the Master*, 3 INT'L J. COMP. LAB. L. & INDUS. REL. 231 (2002). *See also* MARCO BIAGI SELECTED WRITINGS (Michele Tiraboschi ed., 2003).

19. White Paper on the Labour Market in Italy, 44 BULL. COMP. LAB. REL. 1–117 (2002). In this document see M. Biagi, M. Tiraboschi & C. Agut Garcia, *Italia: un derecho en evolución (El Libro Blanco del Gobierno sobre el mercado de trabajo. El Proyecto de Ley de Delegación para la reforma del mercato de trabajo*, 13 JUSTICIA LABORAL 5 (2003). *See also* the EU documents on the modernization of labor law that the *White Paper* explicitly mentions. In particular the Communication of the European Commission on *Modernising the Organisation of Work—A Positive Approach to Change*, COM(98)592, at 8, *available at* http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.418.1.50.65.html and the documentation therein.

after him[20]—to challenge this equilibrium based on the safety valve of employment in the hidden economy and employment contracts of dubious value affecting vast numbers of individuals who are denied protection and rights.

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

It is significant that some analysts have seen Italian labor law as mainly responding to economic crisis or transformation.[22] This approach may be said to be basically conservative, attempting to deal with emergencies[23] in a purely defensive manner, and limiting the social consequences of economic crisis[24] by means of a policy of passive measures with ever-increasing subsidies by the State to enterprises.[25]

20. With regard to the Biagi reform, reference can be made to the documentation and the bibliography on the Marco Biagi Centre for International and Comparative Studies Web site, http://www.fmb.unimore.it/on-line/Home/IndiceA-Z/articolo3378.html.

21. With reference to emergency labor law reforms adopted in the absence of an overall plan, see U. Romagnoli, *Il diritto del lavoro tra disincanto e riforme senza progetto*, 20 RIV. TRIM. DIR. PROC. Civ. 11 (1983).

22. *See* G. Giugni, *Il diritto del lavoro negli anni '80'*, *in* G. GIUGNI, LAVORO LEGGE CONTRATTI 319 (2d ed. 1989).

23. The dubious results of the period of emergency labor law are examined in IL DIRITTO DEL LAVORO NELL'EMERGENZA (R. De Luca Tamajo & L. Ventura eds., 1979).

24. On this topic see the papers in 1–2 IL DIRITTO DEL LAVORO NEGLI ANNI 80 (M. D'Antona et al. eds., 1988).

25. On this point see *id.* at 309. For a more incisive analysis, see G.F. MANCINI, DEMOCRAZIA E COSTITUZIONALISMO NELL'UNIONE EUROPEA 18 (2006). For an analysis of economic policies adopted solely with a view to neutralizing or offsetting, in the short term but also in the long term, normative constraints, in the form of the protection laid down by the traditional system of labor law, reference may be made to the study by the present author,

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

Particularly emblematic, in this connection, is the failure on the part of labor law to provide a strong response to the hidden economy,[26] in which the main intention is to avoid normative provisions and evade social contributions, while paying due regard to the development of modern forms of work organization. As a result of the traditional approach, certain management techniques and employment models have been considered to be illegal, solely due to the inadequacy of the Italian legal framework, and its failure to modernize, when compared to provisions adopted in other countries. Emblematic, in this connection, is the legitimization of agency work, regulated in France and Germany as long ago as 1972, but introduced in the Italian system only by the Treu measures of 1997.[27]

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

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

INCENTIVI ALLA OCCUPAZIONE, AIUTI DI STATO, DIRITTO COMUNITARIO DELLA CONCORRENZA ch. 1 (2002).

26. See the authoritative comments by Giugni, *supra* note 22, at 329.

27. *See* Marco Biagi & Tiziano Treu, *Italy's New Law on Promotion of Employment: An Explanation and Summary*, 19 COMP. LAB. L. & POL'Y J. 97 (1998). For an historical and comparative survey, reference may be made to the work of the present author, MICHELE TIRABOSCHI, LAVORO TEMPORANEO E SOMMINISTRAZIONE DI MANODOPERA (1999).

28. See Giugni, *supra* note 22, at 304, 322, 331. Reference should also be made to Romagnoli, *supra* note 21, at 11–23, and MARIUCCI, *supra* note 8, at 135–68.

29. For this view see, among others, M.G. Garofalo, *Il diritto del lavoro e la sua funzione economico-sociale*, *in* PERCORSI DI DIRITTO DEL LAVORO 127–44 (D. Garofalo & M. Ricci eds., 2006).

30. On this point, with reference to the Italian debate on deregulation and the search for alternatives to a legalistic approach to employment relations based on inderogable norms, reference may be made to the study of the present author, TIRABOSCHI, *supra* note 27, ch. I, § 2. In the international literature, comparable arguments are put forward by. F. Gaudu, *Libéralisation des marchés et droit du travail*, 5 DROIT SOCIAL 505, 506 (2005), where the process of reform of French labor law is placed at the beginning of the 1980s.

It should also be noted that, in normative terms, legislative intervention has not resulted in a significant amount of deregulation or the promotion of free market policies, but has intensified in recent years, to the point that some scholars have made ironic comments on the amount of space dedicated to labor market reform in the *Gazzetta Ufficiale* (the Italian Official Journal).[31]

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

The aim of safeguarding the effectiveness of legal norms would appear to be the main focus for an analysis, albeit problematic, of recent developments in Italian labor law. The system of labor law needs to embrace the values of industrial (and post-industrial) society,[32] pursuing modernization as an alternative to pure and simple deregulation,[33] while conciliating the traditional objectives of social justice with efficiency and productivity imposed by the transformations taking place in the economy and society, as in the early days of labor law.[34]

31. Comment on the Biagi reform of the labor law by A. VALLEBONA, LA RIFORMA DEL LAVORO (2004).

32. As advocated in the early 1980s by Giugni, *supra* note 22, at 334–35. This position, for many years neglected or at least supported only by a minority of Italian labor law scholars. *See* L. Mariucci, *Il diritto del lavoro e il suo ambiente*, *in* SCRITTI IN ONORE DI GIUSEPPE FEDERICO MANCINI 346–48 (1998), was advocated again, in a perspective of constitutional recognition of the freedom of private economic initiative, by M. Persiani, *Radici storiche e nuovi scenari del diritto del lavoro*, *in* M. PERSIANI, DIRITTO DEL LAVORO 91 (2d ed. 2004). For a highly critical comment, see Garofalo, *supra* note 29, at 140, who speaks of the "hegemony of the so-called business culture" (our translation).

33. A strategy for the "modernization of labor law" as an alternative to a neoliberal approach was proposed in the international literature by B. Hepple, *Economic Efficiency and Social Rights*, *in* LAW IN MOTION 857, 867 (R. Blanpain ed., 1997), and advocated in Italy by M. Biagi, *Competitività e risorse umane: modernizzare la regolazione dei rapporto di lavoro*, *in* MARCO BIAGI: UN GIURISTA PROGETTUALE 149 (L. Montuschi, M. Tiraboschi & T. Treu eds., 2003).

34. *See* M. Tiraboschi, *Deregulation and Labour Law in Italy*, 38 BULL. COMP. LAB. REL. 69 (R. Blanpain ed., 2000) (special issue, Deregulation and Labour Law – In search of a labour concept for the 21st Century). For an attempt to demonstrate that labor law is not solely a unilateral system for the protection of the weaker party, but that since its origins it has also performed other functions, such as the protection of competition among undertakings, the resolution of social conflict, etc., reference may be made once again to the work of the present author, *supra* note 27, at ch. III.

II. THE INNOVATIONS INTRODUCED BY THE TREU MEASURES AND THE BIAGI REFORM OF THE LABOR MARKET

The reforms in the 1990s, with the "privatization" of public-sector employment, the restructuring of employment services, and the Treu measures for promoting employment[35] were carried forward with a considerable degree of continuity from one government to the next, though at times there were elements of incongruence[36] and even of discontinuity.[37]

Above all the most recent measures[38] were intended to favor the modernization of the system of labor law as a whole, in an attempt to balance the system of safeguards with the pressure exerted by international competition, in a dimension that transcends national sovereignty.

However, the turning point, the introduction of the Treu measures in 1997, was only a partial step, as shown by the significant changes to the initial government proposals introduced by the agreement with the unions and the Act approved by Parliament.[39] Also the ambitious reform proposals announced by the Berlusconi government, with the publication of the *White Paper on the Labour Market* in October 2001,[40] were only partially embodied in legislation with the approval of Act No. 30, February 14, 2003, and the relative implementation decrees.[41]

35. *See in particular*, Act no. 196/1997. For a detailed analysis, see MERCATI E RAPPORTI DI LAVORO ETC. (Marco Biagi ed., 1997), and in the same volume, in particular, the introduction by Tiziano Treu & Marco Biagi. *See also* Tiraboschi, *supra* note 5.

36. The most significant of which is undoubtedly the exclusion of the public administration and public-sector workers from the field of application of the Biagi Law, except for a generic reference to subsequent harmonization, that has not led to further measures of any substance.

37. In particular, reference should be made in this connection to Constitutional Law no. 3, 18 October 2001, reforming Title V of the Constitution. In spite of the ambiguous formulation regarding the division of competences relating to the "protection and security of employment" between the State and the Regions, this measure had a significant impact on the regulation of the labor market during the fourteenth legislature (2001–2006). But also in this case the paradigm shift was more apparent than real, as recently confirmed by judgment no. 50/2005 of the Constitutional Court. See 1 DIR. REL. IND. 182 (2006).

38. For an overall assessment, which is beyond the scope of the present study, see B. Veneziani, *Le trasformazioni del diritto del lavoro in Italia*, 6 DIR. LAV. 901 (2003) (special issue *Scritti in memoria di Salvatore Hernandez*).

39. *See* T. TREU, POLITICHE DEL LAVORO—INSEGNAMENTI DI UN DECENNIO 26 (2001).

40. *Supra* note 19. *See also* http://www.fmb.unimore.it/on-line/Home/IndiceA-Z/articolo3378.html.

41. In addition to the legislation to be cited below, for an analysis of the reform set in motion by Act no. 30/2003, known as the Biagi Law, reference may be made to the extensive documentation is *available at* http://www.fmb.unimore.it/on-line/Home/IndiceA-Z/articolo3378.html. *See also* M. Tiraboschi, *The Italian Labour Market after the Biagi Reform*, 21 INT'L J. COMP. LAB. L. & INDUS. REL. 149 (2005).

In line with reforms taking place in other sectors, the substantial changes in the legal framework were adopted with the objective, in line with the European Employment Strategy to which the reforms make express reference,[42] to increase the level of regular employment, to overcome inefficiencies in the labor market, to promote employment of good quality and labor productivity.[43] This was to be achieved also by means of research and experimentation[44]—which was hotly contested by part of the trade union movement[45]—with new normative techniques that were considered to be more effective, in an economic and social framework that had undergone profound change, with a view to conciliating in a pragmatic manner the need for efficiency and competitiveness of the enterprise with the protection of the workers.[46]

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

On close examination, both the Treu measures and the Biagi Law are part of a complex transition in which, as in any significant reform process,[47] the influence may be seen of political programs, political cultures, and legal traditions that are quite different from each other, and that at times may even be difficult or impossible to reconcile.[48] As

42. For the fundamental influence of EU employment and competition policy on the reform of the labor market in recent years, reference may be made to the paper by the present author *Riforma Biagi e Strategia Europea per la occupazione*, *in* LA RIFORMA BIAGI DEL MERCATO DEL LAVORO – PRIME INTERPRETAZIONI E PROPOSTE DI LETTURA DEL D.LGS. 10 SETTEMBRE 2003, N. 276, 40 (M. Tiraboschi ed., 2004). With reference to Act no. 196/1997, see Tiziano Treu, *Politiche del lavoro e strumenti di promozione dell'occupazione: il caso italiano in una prospettiva europea*, *in* MERCATI E RAPPORTI DI LAVORO ETC. 3 (Marco Biagi ed., 1997). On the connection between the regulation of national labour markets and the Lisbon strategy, see D. ASHIAGBOR, THE EUROPEAN EMPLOYMENT STRATEGY: LABOUR MARKET REGULATION AND NEW GOVERNANCE 242–300 (2005).

43. In this connection, see the provisions of Article 1 (1) of Legislative Decree no. 276/2003, implementing the Biagi Law.

44. Above all the Biagi Law was characterized, at least in the intention of the legislature, by the fact that it made provision for experimentation with the measures introduced. In this connection, see Article 86 (12), Legislative Decree no. 276/2003.

45. This matter is dealt with by M.R. Iorio, *Riforma Biagi e conflitto*, *in* LA RIFORMA BIAGI DEL MERCATO DEL LAVORO – PRIME INTERPRETAZIONI E PROPOSTE DI LETTURA DEL D.LGS. 10 SETTEMBRE 2003, N. 276, 731–45 (M. Tiraboschi ed., 2004).

46. This overall plan is dealt with in a systematic manner in Biagi, *supra* note 33, at 149–82.

47. See in this connection, and with reference to the reform of labor law, G. Giugni, *I tecnici del diritto e la legge 'malfatta'*, 479 POL. DIR. 479 (1970).

48. This point, with reference to the Treu measures by E. Montecchi, *La legge n. 196/1997: una nuova fase dell'intervento pubblico sui mercati del lavoro*, *in* MERCATI E RAPPORTI DI LAVORO ETC. 53 (Marco Biagi ed., 1997), is made, with reference to the Biagi Law, also in R. De Luca Tamajo, *Dietro le righe del d.lgs. n. 276 del 2003: tendenze e ideologie*, *in* DIRITTO DEL LAVORO. I NUOVI PROBLEMI – L'OMAGGIO DELL'ACCADEMIA A MATTIA PERSIANI 953 (2005).

a result, any attempt to identify an abstract structural homogeneity in these substantial provisions is destined to failure. But an even more significant point is that the reform process cannot be said to be complete either at present or in the near future.

Even without taking into consideration the ambitious proposal for structural reform of the labor market—put forward during the thirteenth legislature[49] and then again with the tripartite pact on July 5, 2002—aimed at introducing a Work Statute or *Statuto dei lavori*, [50] the completion of the plan set out in the Biagi Law would require the reform of safety-net measures and the legal framework for employment incentives.[51] Not to mention the implementation at a practical level of the innovations introduced into the legal framework to facilitate company-level bargaining, that at present is held back by the power of veto exercised at the bargaining table both at sectoral and company level.[52]

Evidently it is by no means easy to identify a unified policy and inspiration in the legislative interventions considered, i.e., the Treu measures and the Biagi Law, but at the same time it is even more problematic to provide an overall appraisal of these measures. Apart from any other consideration, such an appraisal would be possible only by means of an interpretation—that has been put forward by the present author elsewhere—aimed at placing value on and identifying the systematic aspects of the numerous elements of continuity between the thirteenth and the fourteenth legislatures,[53] which may be considered to be a natural progression from the rather confused legislative measures adopted between the end of the 1960s and the end of the 1980s.[54]

49. *See* TREU, *supra* note 39, at 11.

50. *See* section V of this article.

51. Reference may be made here to the contribution of the present author, *Il sistema degli ammortizzatori sociali: spunti per un progetto di riforma*, *in* LA RIFORMA BIAGI DEL MERCATO DEL LAVORO 1105–21 (M. Tiraboschi ed., 2004).

52. For an overview of the implementation of the Biagi Law in collective bargaining, see http://www.fmb.unimore.it/on-line/Home/IndiceA-Z/articolo3378.html.

53. In terms of continuity, see P. Ichino, *La 'Legge Biagi' sul lavoro: continuità o rottura col passato?*, 12 COR. GIUR. 1545–49 (2003); VALLEBONA, *supra* note 31; M. MAGNANI, IL DIRITTO DEL LAVORO E LE SUE CATEGORIE – VALORI E TECNICHE NEL DIRITTO DEL LAVORO 35 (2006); M. Napoli, *Autonomia individuale e autonomia collettiva alla luce delle più recenti riforme*, *in* AUTONOMIA INDIVIDUALE E AUTONOMIA COLLETTIVA ALLA LUCE DELLE PIÙ RECENTI RIFORME 10 (Atti delle giornate di studio di diritto del lavoro, Abano Terme-Padua, May 21–22, 2004); G. Perone, *Incertezze applicative . . . e interpretazioni ragionevoli*, *in* TUTELE DEL LAVORO E NUOVI SCHEMI ORGANIZZATIVI NELL'IMPRESA 107 (L. Ficari ed., 2005); P. SESTITO & S. PIRRONE, DISOCCUPATI IN ITALIA – TRA STATO, REGIONI E CACCIATORI DI TESTE 10 (2006).

54. However, this view is not universally supported by legal scholars. Among the many scholars who consider the elements of discontinuity to be prevalent, see G. Ghezzi, *Mercato del*

III. THE AMBIGUOUS NATURE OF "LIBERALIZATION POLICIES" IN LABOR MARKET REGULATION

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

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

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

However, on closer examination, even if the aim is to carry out an abstract appraisal of the measures laid down in the most recent and controversial legislative intervention, the Biagi reform of the labor market, there does not appear to be any evidence to support the argument—of an ideological nature[57]—that it is part of an overall

lavoro, tipologie negoziali e definizioni, 5 DIR. LAV. 322 (2003) (special issue *Scritti in memoria di Salvatore Hernandez*).

55. Mention should be made of the argument that the recent labor market reforms have given rise to an uncontrolled proliferation of flexible and precarious types of employment contract. According to a recent study by the De Benedetti Foundation (*Il Sole-24 Ore,* 24 February 2006) there are at least forty-four types (and more considering certification) of atypical employment introduced by the Biagi Law. As argued elsewhere (M. Tiraboschi, *Precarietà e tipologie di lavoro: la moltiplicazione dei pani e dei pesci*, BOLLETTINO ADAPT NO. 13 (2006), *available at* http://www.csmb.unimo.it), the types of employment contract in the entire system, including open-ended salaried employment, amount to just over a dozen.

56. The characterization of the law as "defective" is by no means original and in fact practically every legislative reform of any substance is subject to the same criticism. On this point, see Giugni, *supra* note 47, at 479–80, who rightly notes that every "new law, that has a high degree of technical and juridical content, is by its very nature subject to critical comment" (our translation). There are various reasons for this, even though "it is often and perhaps always the case that the critical comments conceal an underlying political opposition" (our translation) as may be said to be the case with the Biagi reform of the labor market.

57. The Biagi reform of 2003 was roundly criticized even before the legislation actually appeared. In this connection, see M. Del Conte, *Il ruolo della contrattazione collettiva e l'impatto sul sistema di relazioni industriali*, *in* LA RIFORMA BIAGI DEL MERCATO DEL LAVORO – PRIME INTERPRETAZIONI E PROPOSTE DI LETTURA DEL D.LGS. 10 SETTEMBRE 2003, N. 276, 636 (M. Tiraboschi ed., 2004), that, on the basis of a presumed (or presumable) political will underlying the reform outlined in the *White Paper on the Labour Market* of 2001, describes the "preventive

design based on neoliberalism inspired by classical macroeconomics.[58] As if to say that today, as in the early days of the industrial revolution, the Italian labor market is left entirely to the free play of market forces, subject only to the common law of contract.

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

A comparison may be made, with a minimum of scientific rigor, between the Italian legislation enacted under the five years of government by Silvio Berlusconi (2001–2006) and the neoliberal policies adopted in the United Kingdom by the Thatcher and Major governments, and substantially continued by the Blair administration after 1997.[62] Such a comparison shows that even after the Biagi reform Italy is not characterized by an individualistic ideology based on the self-regulation of the market, hostile to the intervention of

commentary" of a significant number of legal scholars on a legislative text that had not yet been drafted and even less approved by Parliament.

58. In these terms, see on the other hand De Luca Tamajo, *supra* note 48, at 152.

59. On dismissal law and the principle of justification, see S. Liebman, *Dispute Settlement procedures and Flexibilisation of Employment Relations: Remedies Against Unfair Dismissal Under Italian law*, *in* CHANGING INDUSTRIAL RELATIONS AND MODERNISATION OF LABOUR LAW: LIBER AMICORUM IN HONOUR OF PROFESSOR MARCO BIAGI 269–76 (R. Blanpain & M. Weiss eds., 2003).

60. Initially this aspect of the Biagi reform did not attract much critical attention either in terms of Act no. 39/2003 or the later implementation decrees. Among the few legal scholars commenting on this aspect, see P. Ichino, *L'anima laburista della legge Biagi – Subordinazione e "dipendenza" nella definizione della fattispecie di riferimento del diritto del lavoro*, 2 GIUST. CIV. 131 (2005).

61. For an analytical account of the matters not dealt with by the Biagi reform, see VALLEBONA, *supra* note 31. The reform is considered to be in a minor key, compared to the plans laid down in the *White Paper on the Labour Market*, also by P. Alleva, *La ricerca e la analisi dei punti critici del decreto legislativo n. 276/2003 in materia di occupazione e mercato del lavoro*, 54 RIV. GIUR. LAV. 887 (2003), who recognizes that in an analytical framework that is strongly critical, the reform may by no means be compared to the vision "of a sociologist or economist espousing neo-conservative theories" (our translation).

62. In this connection, see the powerful analysis by S. Fredman, *The Ideology of New Labour Law*, *in* C. BARNARD, S. DEAKIN & G. MORRIS, THE FUTURE OF LABOUR LAW – LIBER AMICORUM BOB HEPPLE 9, 10 (2004), where it is argued that "as New Labour labour law demonstrates all too dishearteningly, behind the Third Way rhetoric, neoliberalism has, by stealth, become the dominant ideology, relegating social democracy to the minor partner." *See also* S. DEAKIN & F. WILKINSON, THE LAW OF THE LABOUR MARKET: INDUSTRIALIZATION, EMPLOYMENT AND LEGAL EVOLUTION (2005).

labor law and the State in the regulation of employment relations, with the ultimate objective of dismantling the power and prerogatives of the unions.

When considering the Italian labor market it makes little sense to speak of liberalization in the proper sense of the term. First, because such an expression takes on a specific meaning in this particular area of law, with a negative connotation since it is in contrast with the fundamental rationale for the emergence and development of a special and autonomous area of law, labor law, aimed at striking a balance between the bargaining power of the individual worker and market pressures in the negotiation of, in the course of, and on termination of employment. Second, because, if it is possible to speak of liberalization, at least in the experience so far in Italy, these measures should be seen as interventions for modernizing and updating the legal framework. In other words, as measures for the rethinking of certain rigid features (often arising from case-law interpretation) in the employment of the workforce—that may be seen as part of a policy of deregulation only improperly speaking.[63] These rigid features cannot be justified in terms of the protection of the fundamental rights of the weaker party in the employment relationship[64] but have a negative impact on the competitiveness of the Italian economy.

The trend toward a scaling back of normative restrictions and the introduction of greater elasticity in the labor market, though now decidedly more evident, should not be confused in a superficial manner with a neoliberal policy based on a return to free bargaining and the self-regulation of the market. Rather, the recent legislative measures, regardless of their technical and political limitations, may be seen as an attempt to deal with certain developments in the labor market and industrial relations that can be traced back to the period

63. In this connection, see Giugni, *supra* note 11, at 349, 353, where he argues that in the Italian tradition deregulation cannot be seen as "the abolition of norms and hence the return to the individual contract, but the introduction of flexibility into the normative process external to it" (our translation). For the view that these policies are tantamount to pure and simple liberalization, that in our opinion is unfounded and not based on a scientific approach, see Garofalo, *supra* note 29, at 139–41.

64. In this connection, see, for example, the use of the term "liberalization" by G. Giugni, *Il diritto del lavoro: ieri, oggi e domani*, *in* I SCRITTI IN ONORE DI GIUSEPPE FEDERICO MANCINI 291 (1998), with regard to the initial cautious measures for deregulating the rigidities of the labor market. In the same vein see TREU, *supra* note 39, at 26–27, which, with reference to the substantial watering down, during the parliamentary proceedings and the negotiations with the social partners, of a number of innovative proposals in the first draft of the Treu measures, speaks of "the resistance of an ideological kind and on the part of vested interests encountered by deregulation in our country" (our translation).

in which labor law had to respond to a situation of emergency and crisis.

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

As evidence of a degree of continuity with the past, reference may be made to the tripartite agreement on the regulation of the labor market concluded in January 1983,[67] that was an initial attempt to shake up the outdated public employment services, making provision for more extensive use of fixed-term employment contracts and certain new types of employment such as work training contracts and part-time work. Reference could also be made to the structural measures on employment policy contained in the protocol of July 1993,[68] in favor of the employment of young people, the revival of the labor market, and the management of the crisis in employment. More extensive provisions were implemented with the agreement of September 1996,[69] paving the way for the Treu measures, introducing temporary agency work in the face of a certain amount of opposition. The 1996 agreement provided for the introduction of training and career guidance placements, a reorganization of training contracts, new forms of employment with reduced and flexible working hours, a reform of the sanctions relating to fixed-term employment, the

65. *See in particular*, L. Montuschi, *Tecniche sperimentali deregolative del mercato del lavoro: un'intesa contrastata*, *in* SCRITTI IN ONORE DI GIUSEPPE SUPPIEY 717 (2005), where he pointed out, in connection with the fact that the CGIL did not sign the agreement, that "the Pact for Italy cannot count on a high degree of social cohesion" (our translation).

66. See the highly critical comments by G. GIUGNI, LA LUNGA MARCIA DELLA CONCERTAZIONE 112–18 (2003).

67. With regard to the Scotti protocol, reference may be made to GIUGNI, *id.* at 39–55.

68. On the labor measures contained in the Giugni protocol, see M. D'Antona, *Il protocollo sul costo del lavoro e l''autunno freddo' dell'occupazione*, I RIV. IT. DIR. LAV. 426–27 (1993), where he highlights the limits of a reform project that followed a well-trodden path, starting from the "proliferation of employment contracts of dubious value" (our translation). This criticism is now leveled at the Biagi Law, but with a line of reasoning, as we can see, that is not new.

69. On the 1986 labor agreement see M. Antonello, *Note sulla genesi della legge n. 196/1997*, *in* MERCATI E RAPPORTI DI LAVORO ETC. 55–57 (Marco Biagi ed., 1997).

abolition of the public monopoly on employment services, and the recognition of the legitimacy of private employment agencies.[70]

If these measures, representing a clear break with the traditional paradigm of labor law, are not considered to be representative of a neoliberal approach,[71] the same may be said of the recent reform of the legal framework,[72] which responds to the same need for rationalization of employment safeguards in response to changes that are under way, in particular, the expansion of the hidden economy and irregular employment, the transformation of productive processes and organizational innovation due to the use of new technology, the globalization and internationalization of markets, the growth of the tertiary sector, the increasing importance in the labor market of workers (especially women and young people) who require flexible working arrangements, particularly in terms of working hours and re-entering the labor market after a period away from paid employment.[73]

IV. DEREGULATION, REREGULATION, AND DECENTRALIZATION.

The reform cannot then be seen as a process of liberalization at least in the strict sense, with the negative connotation that the term takes on in relation to the original *raison d'être* of labor law. And it cannot be argued that there has been a destructuring of labor law or of the fundamental values laid down in the Italian Constitution. In the disciplinary area that studies labor market developments and regulation, it is clearly useful to analyze the evolution of legal provisions in an interpretative framework that makes a distinction between the reregulation (or reformulation) and/or decentralization (or devolution) of the normative sources on the one hand, and deregulation properly speaking.[74]

70. An extensive analysis is provided in MERCATI E RAPPORTI DI LAVORO ETC. 55–57 (Marco Biagi ed., 1997).

71. This view is expressed by Giugni, *supra* note 11, at 349–50. Along similar lines, see TREU, *supra* note 39, at 3.

72. It is by no means easy to understand why the measures introduced by Treu are for certain legal scholars the "continuation of a long period of reform of traditional practices, of a long-standing commitment to reforms which has the support of the large trade union confederations in person." MARIUCCI, *supra* note 8, at 151. On the other hand, the Biagi Law, that does not go any further toward a break with traditional labor law practices, is seen as a neoliberal plan for the deregulation of the labor market.

73. In this regard, see Biagi, *supra* note 33, at 151.

74. On this point, see Giugni, *supra* note 11, at 352–61.

A. The Organization and Regulation of the Labor Market and Support for Bilateral Bodies

An instance of genuine deregulation did undoubtedly take place in relation to the organization and governance of the labor market.[75] But this occurred from the 1980s on,[76] with measures paving the way for the abolition of the principle of the state monopoly on employment services, formally introduced only in the late 1990s.[77] It should be noted that the plan for a public system for matching the supply and demand for labor was never fully implemented, and as a result the subsequent normative changes took the form of a reorganization of employment services, made necessary by EU policies on employment and competition, and by the reassignment of powers between the State and the regions arising from the reform of Title V of the Constitution.[78]

There seems to be little reason to speak of indiscriminate liberalization and policy deregulation[79] with regard to a system for matching the supply and demand for labor that, unlike the system in many other European countries,[80] still prohibits private companies from operating on the market unless they have an administrative authorization that is issued only on the basis of rigorous formal and substantial requisites. Rather, it is the case that the measures taken to improve the fluidity of the labor market, with the transition from the concept of a public function to that of a service, are aimed solely at achieving social objectives by means of private economic initiative, in a far more effective manner than the previous system based on prohibitions that was rigorous in formal terms but largely ineffective in practical terms. The primary aim of this chapter of the reform[81] is to create a properly functioning labor market, so that the

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

76. For a brief comment, see Giugni, *supra* note 11, at 353. For an in-depth analysis, P. Ichino, *Politiche del lavoro e strategia di deregulation*, I RIV. IT. DIR. LAV. 590–98 (1984).

77. As one of many authors, see E. Ales, *La nuova disciplina del mercato del lavoro tra 'decentramento controllato' e 'liberalizzazione accentrata'*, 2 ARG. DIR. LAV. 527 (1998).

78. On this point, see P. Olivelli, *Pubblico e privato nella riforma dei servizi per l'impiego*, *in* IL DIRITTO DEL MERCATO DEL LAVORO DOPO LA RIFORMA BIAGI 7 (P. Olivelli & M. Tiraboschi ed., 2005).

79. But on this point, see V. Angiolini, *Le agenzie del lavoro tra pubblico e privato*, *in* IL LAVORO TRA PROGRESSO E MERCIFICAZIONE ETC. 36 (G. Ghezzi ed., 2004), and MARIUCCI, *supra* note 8. For a more complete and convincing analysis of the Biagi reform of the labor market, highlighting the elements of continuity with the past, see Napoli, *supra* note 53, at 9.

80. See the comparative study by S. SPATTINI, IL GOVERNO DEL MERCATO DEL LAVORO TRA CONTROLLO PUBBLICO E NEO-CONTRATTUALISMO (2007).

81. For a description of this part of the reform, see Tiraboschi, *supra* note 41, at 176–82.

constitutional right to work becomes effective in keeping with the constitutional principles of subsidiary, transparency, and efficiency,[82] and certainly not liberalization without rules governing the matching of the supply and demand for labor.

Together with the scheme for the authorization of private operators,[83] particular importance is given in the context of the reregulation and reformulation of the labor market to regional accreditation schemes.[84] The aim is to facilitate the development of an integrated and decentralized network of employment services at territorial level (placement services, the prevention of long-term unemployment, the promotion of access to work for disadvantaged groups, support for the geographic mobility of workers, and so on) based on cooperation and links between public bodies and private operators.

In connection with the territorial level, mention should be made of the legislative provisions for bilateral bodies[85] as a privileged channel for the regulation and shared governance of the labor market.[86] Comparative experience shows that active labor market and income support policies are particularly efficient and effective when jointly managed, in whole or in part, with the social partners.[87] In addition, the bilateral approach is associated with an industrial relations model of a collaborative and cooperative type promoting territorial development and regular employment of good quality. Bilateralism does not eliminate conflict, nor does it alter the function of the trade union with a shift toward a liberal approach to labor market regulation, but may be useful for implementing the terms and conditions negotiated during collective bargaining. The underlying aim is to promote human capital, to improve the matching of the supply and demand for labor, and to strengthen vocational training,

82. For an in-depth study, reference may be made to the paper by the author, *Riforma del mercato del lavoro e modello organizzativo tra vincoli costituzionali ed esigenze di unitarietà del sistema*, *in* IL DIRITTO DEL MERCATO DEL LAVORO DOPO LA RIFORMA BIAGI 40 (P. Olivelli & M. Tiraboschi ed., 2005).

83. In this connection see S. Spattini & M. Tiraboschi, *Le agenzie per il lavoro: tipologie, requisiti giuridico-finanziari e procedure di autorizzazione*, *in* IL DIRITTO DEL MERCATO DEL LAVORO DOPO LA RIFORMA BIAGI 127–68 (P. Olivelli & M. Tiraboschi ed., 2005), and the bibliography therein.

84. On the system of regional accreditation, see S. Rosato, *I regimi di accreditamento: profili generali e prospettive regionali di sviluppo*, *in* IL DIRITTO DEL MERCATO DEL LAVORO DOPO LA RIFORMA BIAGI 127–68 (P. Olivelli & M. Tiraboschi ed., 2005)

85. *Cf.* Giovanna De Lucia & Silvia Ciuffini, *The System of Bilateral Bodies in the Artisan Sector: The Italian Experienze in the context of European Social Dialogue*, 20 INT'L J. COMP. LAB. L. & INDUS. REL. 133 (2004). *See also* the documentation available at http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.394.1.300.Entibilaterali.html.

86. *See* Article 2 (1) (h), Legislative Decree no. 276/2003.

87. *See* the articles collected in JOB CREATION AND LABOUR LAW (M. Biagi ed., 2001).

the certification of employment contracts and income support, that are well suited to modes of production that are increasingly fragmented.

B. Outsourcing and the Recourse to External Labor Markets

A similar argument can be put forward with regard to the regulation of the outsourcing of labor. The repeal of Act No. 1369/1960 (followed by the formal abrogation of Articles 1–11 of Act No. 196/1997 on temporary agency work), was an attempt, at least in the intention of the legislature,[88] to reform an area characterized by antiquated and inderogable legal provisions that over the years had become increasingly inadequate for regulating the new models of production and labor organization.

In Italy the attempt to facilitate the movement of labor between companies and the possibility, within an increasingly complex productive system, to assign the employees of a company to work to be carried out externally has been strongly criticized by a number of legal scholars.[89] Once again, reference has been made to a model of organization of the productive system that is unequivocally neoliberal in character, aimed at dismantling the existing legal restrictions on decentralization and contract labor, in order to protect the organizational choices and economic interests of the employers, while considering illicit only those processes consisting of fraudulent and anti-labor practices.

However, as rightly noted by legal scholars adopting a less ideological stance and paying greater attention to the actual provisions of the law,[90] the abrogation of the outdated legislation that had failed to effectively govern labor outsourcing and insourcing was not an act of deregulation but simply the condition for a normative reform of the entire question.

In place of the drastic prohibition of every form of agency work, even when not accompanied by intentions of a fraudulent nature or when detrimental (or potentially detrimental) for the workers,

88. For an in-depth analysis of the rationale of the Biagi Law in relation to outsourcing and insourcing, see Tiraboschi, *supra* note 41, at 189–91.

89. Among others, see P. Alleva, *La nuova disciplina degli appalti di lavoro*, in IL LAVORO TRA PROGRESSO E MERCIFICAZIONE – COMMENTO CRITICO AL DECRETO LEGISLATIVO N. 276/2003, 166 (G. Ghezzi ed., 2004) and L. Mariucci, *I molti dubbi sulla c.d. riforma del mercato del lavoro*, 1 LAV. DIR. 11 (2004).

90. *See* M. Magnani, *Le esternalizzazioni e il nuovo diritto del lavoro*, *in* ORGANIZZAZIONE DEL MERCATO DEL LAVORO E TIPOLOGIE CONTRATTUALI 283–97 (M. Magnani & P.A. Varesi ed., 2005).

attenuated only by the derogations and exceptions laid down by Act No. 196/1997, the recent reform introduced a normative framework, in line with a number of case-law rulings,[91] that provides a more effective response to the needs of the enterprise.

However, workers continue to be protected by a general prohibition on intermediation in employment,[92] and this prohibition has now been made more effective by bringing to light irregular and fraudulent forms of contract labor.[93]

At the same time the regulation of service contracts and the transfer of undertakings has been reformed, with a view to improving company performance and providing greater safeguards in terms of stability of employment. In this way there is greater flexibility for undertakings wishing to make use of external human resources, while rethinking their models of work organization in the belief—shared by the EU institutions[94]—that only by governing change is it possible to maintain and develop the human capital of a given system of production.

In light of variations in transaction costs in each company and productive sector, regarding the costs arising from decision-making and acquiring experience, management (concerning contracts and labor relations), and change (arising from the transfer from one type of contract to another), agency work cannot simply be considered as equivalent to open-ended salaried employment. Rather, in the provisions laid down by Legislative Decree No. 276/2003, it is seen as a specific organizational and management resource operating in favor of flexibility in employment. It also works in favor of the modernization of the productive system and the public

91. See, among others, M. Luzzana, *Outsourcing/insourcing: vincoli e opportunità alla luce dei più recenti orientamenti della giurisprudenza*, *in* LO SVILUPPO DEL 'CAPITALE UMANO' TRA INNOVAZIONE ORGANIZZATIVA E TECNICHE DI FIDELIZZAZIONE 95–110 (S. Malandrini & A. Russo ed., 2005).

92. Among legal scholars, see Magnani, *supra* note 90, at 284. Case law of "Corte di Cassazone" (Italian Supreme Court): Cass. 21 Nov. 2005, n.41701, Cass. 26 Apr. 2005, n.15579; Cass., pen., 3 Feb. 2005, n.3714; Cass., pen., 26 Jan. 2004, n.2583; Cass., pen., 24 Feb. 2004, n.7762; Cass., pen., 25 Aug. 2004, n.34922, all of which are *available at* http://www.fmb.unimore.it/on-line/Home/IndiceA-Z/articolo2701.html.

93. For an overview of the problem, and an in-depth treatment that is beyond the scope of this paper, reference may be made to the work of the present author, *Esternalizzazioni del lavoro e valorizzazione del capitale umano: due modelli inconciliabili?*, *in* LE ESTERNALIZZAZIONI DOPO LA RIFORMA BIAGI 1 (M. Tiraboschi ed., 2006).

94. EUROPEAN COMMISSION, ANTICIPATING AND MANAGING CHANGE: A DYNAMIC APPROACH TO THE SOCIAL ASPECTS OF CORPORATE RESTRUCTURING 2 (2002), *available at* http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.418.1.50.65.html.

administration[95] by providing models of contractual integration between companies coordinated by actors offering a range of services with a high degree of specialization, as is the case with employment agencies today.

C. Human Capital, Flexibility in Employment Contracts, Organisational Innovation, and the Power of the Employer

Human resource development and organizational innovation also give rise to the need for the reform of the various types of training contracts, atypical work, and the organization of working hours. In this perspective, the reform of the regulation of fixed-term employment is of central importance[96] in the modernization of the Italian labor market, following the Treu measures of 1997. In effect, setting aside the controversy surrounding the "strange case" of Legislative Decree No. 368/2001 implementing EU Directive No. 99/70/EC,[97] the measures taken by the legislature reregulate a fragmentary and contradictory legislative framework in which over the years the exception (to the rigorous provisions of Act No. 230/1962) had become the rule. The result was that fixed-term contracts had become "not a subordinate but an alternative (and rival) model compared to open-ended employment" (our translation).[98]

The regulatory technique in the case of the legitimate use of fixed-term employment adopted in Legislative Decree No. 368/2001 is undoubtedly innovative. The explanatory memorandum appended to the Decree provides evidence of this,[99] stating that, compared to the previous regulations, "the approach adopted . . . is undoubtedly

95. *See* F. Verbaro, *Il fenomeno delle esternalizzazioni nella pubblica amministrazione*, *in* LA RIFORMA BIAGI DEL MERCATO DEL LAVORO – PRIME INTERPRETAZIONI E PROPOSTE DI LETTURA DEL D.LGS. 10 SETTEMBRE 2003, N. 276, 489–512 (M. Tiraboschi ed., 2004).

96. *Cf.* Legislative Decree No. 368/2003 and the papers in IL LAVORO A TERMINE IN ITALIA E IN EUROPA (A. Garilli & M. Napoli ed., 2002).

97. The matter is examined by M. Pera, *La strana storia dell'attuazione della Direttiva CE sui contratti a termine*, 4 LAV. GIUR. 306 (2001), with reference to the complex social dialogue leading to a joint agreement (without the signature of the CGIL) and the intention of the Italian legislature concerning the obligations laid down in the Directive. For an overview of this issue see also M. Biagi, *La nuova disciplina del lavoro a termine: prima (controversa) tappa del processo di modernizzazione del mercato del lavoro italiano*, *in* IL NUOVO LAVORO A TERMINE 3 (M. Biagi ed., 2002) and M. Tiraboschi, *Glancing at the Past: An Agreement for the Markets of the Twenty-First Century*, 15 INT'L J. COMP. LAB. L. & INDUS. REL. (1999).

98. *See* L. Montuschi, *L'evoluzione del contratto a termine. Dalla subalternità all'alternatività: un modello per il lavoro, in Il lavoro a termine*, 23 QUADERNI DIR. LAV. REL. IND. 10 (2000).

99. *Available at* http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.315.1.50.65.html.

innovative, simpler and, at the same time, less likely to be subject to evasion by means of fraudulent practices." Rather than stating that fixed-term employment is forbidden, except in the cases explicitly laid down by the law and/or by collective agreements (often subject to specious interpretation), it has been decided to adopt a clear formulation as found in other European systems: the employer may hire employees on fixed-term contracts, on condition that at the same time written motivation is provided of a technical, productive, or organizational nature, or for the substitution of personnel" (our translation).

However, at least with regard to the implementation in practical terms of fixed-term contracts, it is difficult to speak of a reversal of previous provisions, resulting in a radical and indiscriminate liberalization of such contracts.[100] The formal innovations introduced by Article 1(1) of Legislative Decree No. 368/2001, though appearing to be radical on the basis of a purely textual comparison with the wording of Act No. 230/1962, are not actually radical if considered in light of recent developments in the use of fixed-term contracts.[101]

Evidence in support of this argument is to be found in case law interpretation, but also in the measures adopted by collective bargaining. A considerable degree of continuity with the past may be seen, in spite of the innovations and perhaps mainly to counteract the changes considered to be more apparent than real.[102] As a result even legal scholars who in response to earlier changes in the law had spoken of fixed-term contracts as a factor likely to polarize labor law[103] defined the process of reform set in motion by Legislative Decree No. 368/2001 as "the negation of liberalization" (our translation).[104]

It may be argued that with the regulatory technique introduced by Legislative Decree No. 368/2001 the Italian system has once more adopted the antifraudulent approach of the early regulation of fixed-

100. On the other hand, see V. Angiolini, *Sullo "schema" di decreto legislativo in materia di lavoro a tempo determinato (nel testo conosciuto al 6 luglio 2001)*, *available at* http://www.cgil.lombardia.it/giuridico/lg30_2003.htm and M. Roccella, *Prime osservazioni sullo schema di decreto legislativo sul lavoro a termine*, *available at* http://www.cgil.lombardia.it/giuridico/lg30_2003.htm.

101. For an attempt to provide an analysis, see the paper by the present author, *L'apposizione del termine nel contratto di lavoro dopo il decreto legislativo 6 settembre 2001, n. 368*, *in* COMPENDIO CRITICO PER LA CERTIFICAZIONE DEI CONTRATTI DI LAVORO – I NUOVI CONTRATTI: LAVORO PUBBLICO E LAVORO PRIVATO § 1 (C. Enrico & M. Tiraboschi eds., 2005).

102. *See* L. Montuschi, *Il contratto a termine e la liberalizzazione negata*, *in* 1 DIR. REL. IND. 109 (2006).

103. Montuschi, *supra* note 98, at 9.

104. *See* Montuschi, *supra* note 102.

term contracts,[105] moving away from the extremely rigid practices that had emerged from certain interpretations of Act No. 230/1962 that tended to impose restrictions reducing the flexibility of workforce management, while failing to safeguard the fundamental rights of the worker.

The reform of 2001, that prefigures the contents and methods of the Biagi Law, had the objective of curtailing the power of the employer, that would otherwise be discretionary, to place a limit on the duration of the employment contract, while setting aside the traditional prejudice toward temporary work.[106] At the same time it must be pointed out that the use of fixed-term contracts has not been liberalized but must be justified by technical, organizational, or productive reasons, or for the substitution of personnel.

As a result, in terms of safeguards for the employee, the burden of proof concerning the legitimacy of certain organizational and managerial decisions falls on the employer. Along similar lines, with regard to the controversial area of parasubordinate employment *(collaborazioni coordinate e continuative)*, the Biagi Law takes measures to combat the fraudulent use of these contracts by requiring the negotiating parties to specify in advance how the work is to be organized, in order to ensure that the contract is not used to mask salaried employment.[107] As confirmed by the first court ruling on this matter, "project work" is not a new type of employment contract, but a way to manage parasubordinate employment in compliance with Article 409(3) of the Code of Civil Procedure. However, certain restrictions are introduced, with definitions and sanctions to limit the use of such employment contracts to genuine self-employment, in which work is aimed at producing a predetermined result which characterizes it and limits its duration.

Also in this instance, as in the case of fixed-term contracts, project work places the burden of proof on the principal, in derogation of the provision of Article 2607 of the Civil Code. Thus there is a requirement on the part of the parties to the contract to

105. On the original antifraudulent aims of the 1962 law, see G. Giugni, *Intervento*, *in* IL LAVORO A TERMINE 15 (Atti delle giornate di studio di Sorrento, Apr. 14–15, 1978, 1979), which makes reference in this connection to G. BALZARINI, LA DISCIPLINA DEL CONTRATTO A TEMPO DETERMINATO (1966).

106. This may be seen also from the abolition of the presumption of the open-ended nature of employment contracts, pursuant to Article 1(1), Act no. 230/1962, save for the (limited) exceptions permitted by the same law. A presumption that, as pointed out in Giugni, *supra* note 105, at 126, resulted in Italy being "basically the only country where fixed-term contracts (were) seen as detrimental, as an exception to be allowed only in limited circumstances).

107. For a description on this part of the reform, see Tiraboschi, *supra* note 41, at 182–89.

specify in advance—by identifying a project or program of work or a particular phase of the project—the result to be achieved in a manner that safeguards the effective autonomy of the worker. In the absence of such a provision, the relation is classified as open-ended salaried employment from its inception.[108]

The aim of dealing with the vast area of irregular or grey labor that is often concealed behind parasubordinate employment contracts, that limits the use of organizational models providing an alternative to policies aimed merely at the containment of labor costs, gives rise to the need for an intervention in the area of subordinate employment in order to provide employers with a valid alternative to the improper use of flexible arrangements in the form of self-employment that result in a form of unfair competition. This explains the regulation of working time, the redefinition of short-time working, modular and flexible working hours, the introduction of certification for ascertaining the consent of both parties to the contractual provisions, the reform of the labor inspectorate and labor inspection procedures,[109] and the reform of various kinds of training contract (apprenticeships, work training contracts, and access to employment contracts),[110] in order to provide effective training programs for lifelong learning. At the same time measures are taken to combat the practice, quite widespread in Italy, of making improper use of employment training contracts and training funds to provide covert subsidies for the undertaking.[111]

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

In this way it becomes clear, or at least clearer than in the past, that management power is not subject solely to internal limits, but also to external limits arising from formal and/or substantial

108. As confirmed by initial case law rulings, *available at* http://www.fmb.unimore.it/on-line/Home/IndiceA-Z/articolo3658.html.

109. For a description on this part of the reform, see Tiraboschi, *supra* note 41, at 181–92.

110. For further analysis and bibliographical references, see M. Tiraboschi, *Productive Employment and the Evolution of Training Contracts in Italy*, 22 INT'L J. COMP. LAB. L. & INDUS. REL. 635 (2006).

111. On this point, with reference to the debate on precarious employment, M. Tiraboschi, *Young People and Employment in Italy: The (Difficult) Transition from Education and Training to the Labour Market*, 22 INT'L J. COMP. LAB. L. & INDUS. REL. 81 (2006).

conditions of legitimacy and the countervailing power of the unions, while remaining free of judicial control over company decision-making. This should lead to a reduction in the level of legal uncertainty by limiting control over the legitimacy of company decision-making, while facilitating greater uniformity of judicial decisions, resulting, if not in legal certainty, at least in court rulings that are more predictable.

V. THE CONTROVERSIAL IMPLEMENTATION OF THE BIAGI LAW

A systematic assessment of the Biagi Law and the recent reforms of the labor market is beyond the scope of this study[112] as it is still too early to attempt such a task. As in the case of the Treu measures adopted in 1997, such far-reaching reforms can only be properly assessed in the medium- to long-term. Moreover, it must be pointed out that the concrete implementation of certain essential measures has been hindered by the lack of a clear division of powers between the State and the Regions, and between legislative provisions and collective bargaining. In addition, in collective bargaining a cautious approach has been adopted to the implementation of the Biagi reform, with the measures laid down or modified by the law being adopted only in part and only in certain sectors.

One provision in the reform that has encountered particular difficulty, in spite of its potential contribution to productivity and access to the labor market for young people, is that of vocational apprenticeships. In particular there is a lack of consensus about how to make these contracts more effective in terms of training. Another problematic issue is that of the regional laws to improve the matching of the supply and demand for labor by means of the accreditation and authorization of private employment services: so far only a few such laws have been enacted, consisting mainly of a statement of principle. Apart from a few small-scale local projects,[113] limited attention has been paid to the transition from education to employment, with the setting up of career guidance and placement services in schools and universities, and the national employment information system.[114] With regard to bilateral bodies, even in the sectors where they have traditionally played a significant role (construction, artisan trades,

112. In this perspective see M. Tiraboschi, *A due anni dalla Riforma Biagi del mercato del lavoro: quale bilancio?*, *in* DOPO LA FLESSIBILITÀ, COSA? – LE NUOVE POLITICHE DEL LAVORO 357 (L. Mariucci ed., 2006), and Tiraboschi, *supra* note 41.

113. *See* P. GELMINI REGGIANI & M. TIRABOSCHI, SCUOLA, UNIVERSITÀ, MERCATO DEL LAVORO DOPO LA RIFORMA BIAGI (2006).

114. *See* Tiraboschi, *supra* note 111.

tertiary sector), they have not been given sufficient support for their new strategic function in the active governance and regulation of the labor market. The intention was for them to play a key role in training programs, the certification of employment contracts, the matching of the supply and demand for labor, and the design and implementation of new programs providing apprenticeships and combining schooling and on-the-job training. The most innovative forms of employment contract such as staff leasing, zero hours contracts, and occasional employment, that were supposed to increase the flexibility of the labor market to reduce the extent of the hidden economy, have met with a veto on the part of the trade unions. Considering the high level of employment in the Italian shadow economy, this response appears to reflect a form of prejudice, but the result is that today it is not possible to carry out an assessment of the impact on the labor market of these measures.

These undeniable shortcomings make all the more serious the lack of implementation of the public monitoring system envisaged in the Biagi Law (Article 17, Legislative Decree No. 276/2003). A system of monitoring is needed particularly at a political and trade-union level in order to move forward from the highly ideological perspective that fails to take account of achievements at a practical level. This has had a negative effect on the experimental nature of the Biagi Law, which provided for an initial phase of experimentation to be followed by an assessment based on reliable data that had previously been examined by the Regions and the social partners, in order to ascertain the need to introduce corrective measures.

One clear outcome, however, is that there has been no unjustifiable increase in precarious employment, the level of which compares favorably with other EU countries. It should be borne in mind that in August 2001, when Marco Biagi was drafting the *White Paper on the Labour Market*, unemployment was running in double figures (at more than 11%), whereas the rate of regular employment was only 53.5%, some 10% points below the European average. In terms of competitiveness and social inclusion, the figures show that only half the adult population of working age (between the ages of 15 and 64) was actively involved in the labor market on a regular basis.

Three years after the adoption of the Biagi Law, the unemployment rate has fallen to 7%, which is below the European average and a better performance than comparable countries such as France, Germany, and Spain, that are struggling to keep

unemployment below 10%.[115] The figures published by the National Statistics Institute (ISTAT) for the period since 1992 reveal a positive trend in relation to all the main labor market indicators (see Table 1).

Table 1
Labor Market Parameters (1992–2006)

Parameters	1992–1997	1997–2000	2000–2003	2003–2006
1. Activity rate: average annual variation in %	0.1	0.7	0.8	0.4
2. Employment rate: average annual variation in %	- 0.2	0.8	1.2	0.5
3. Unemployment rate: average annual variation in %	0.4	- 0.4	- 0.6	- 0.3
4. Employment (head count): average annual variation in %	- 0.5	1.3	1.6	0.8
5. Employment (full-time equivalent): average annual varation in %	- 0.1	1.1	1.1	0.7
6. GDP: average annual variation in %	2.1	2.2	0.8	1.7
7. Employment elasticity/GDP: average annual figures	- 0.1	0.5	1.4	0.4
8. Productivity: average annual variation in %	2.2	1.0	- 0.3	1.0

Source: Isae based on Istat figures

For the reasons outlined above, there is still a lack of conclusive data to support the view that the objective of an increase in the rate of regular employment of good quality, and in the effectiveness of the rules governing the supply and demand for labor, laid down in the Biagi Law, Article 1 of Legislative Decree No. 276/2003, has been achieved. Clearly a positive impact on the performance indicators was made by the legalization of a significant number of illegal immigrants.[116] However, in spite of this fact, it is possible to respond to the fierce criticism of the Biagi Law on the part of certain legal scholars who forecast that it would lead to the destructuring of

115. *See* EUROSTAT, *Eurostat Yearbook 2005*, available in *Bollettino ADAPT* no. 47/2005, *available at* http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1334,49092079,1334_49092421&_dad=portal&_schema=PORTAL.

116. The legalization launched in 2002 with the Bossi-Fini law resulted in the approval of a total of 650,000 applications, out of 700,000 submitted. Reference may be made to ISTAT, Gli stranieri in Italia: gli effetti dell'ultima regolarizzazione, *available at* http://www.istat.it/salastampa/comunicati/non_calendario/20051215_00.

employment. The most reliable empirical data and econometric studies show that this forecast was mistaken.

The leading international studies and the date supplied by the Social Insurance Institute (INPS) and ISTAT, covering the period from 1992 to 2004, show that temporary and atypical employment has remained largely stable since 1995. As shown in Table 2, just under two million workers fall into the category (including full-time and part-time temporary workers), and a significant proportion of them (more than 500,000) are employed on some kind of training contract. This compares with a total of 23 million workers overall. It is therefore difficult to sustain, even if wishing to adopt an ideological reading, that the Biagi Law could have radically changed, in such negative terms, a labor market that even today continues to be for the most part highly structured and based on stable employment of an open-ended nature.

Table 2
Workers in Terms of Employment Position, Employment Contract and Working Hours
Second Quarter 2006

Employment position, employment contract and working hours	Total number (in thousands)	Variations compared to 2005		Percentage figures	
		Absolute	Percentage	Second quarter 2005	Second quarter 2006
Total	23,178	536	2.4	100.0	100.0
Full-time	20,085	330	1.7	87.2	86.6
Part-time	3,102	206	7.1	12.8	13.4
Salaried employees	17,015	493	3.0	72.9	73.4
Permanent	14,801	327	2.3	63.9	63.8
Full-time	12,937	172	1.3	56.4	55.8
Part-time	1,864	156	9.1	7.5	8.0
Fixed-term contacts	2,214	166	8.1	9.0	9.5
Full-time	1,748	131	8.1	7.1	7.5
Part-time	466	35	8.0	1.9	2.0
Self-employed	6,172	43	0.7	27.1	26.6
Full-time	5,400	27	0.5	23.7	23.3
Part-time	772	16	2.1	3.3	3.3

Source: ISTAT—Labor force survey for the second semester 2006

The increase on an annual basis was 2.4% (+536,000 jobs) compared to a 1.7% increase recorded in the previous survey. The number of individuals in employment amounts to 23,187,000, with a growth trend that brings Italy into line with the objectives laid down in the Lisbon Strategy. On the basis of this Strategy, Italy has the difficult task of increasing regular employment rates to 70% between now and 2010: whereas in 2001 the figure was a modest 53.5%, it is currently approaching the threshold of 60%.

VI. PROSPECTS FOR THE FUTURE

On close examination the controversy surrounding the Biagi Law, and before that the reform of the regulation of fixed-term contracts and the Treu measures, reveals the cultural difficulties that still exist

in Italy in dealing with the central issue of the modernization of labor law, which is certainly not the liberalization of the labor market, but rather, the progressive reduction of the gap that has arisen "between an area that is heavily laden with protective measures for the worker and an area that is devoid of them" (our translation).[117] The issue to be faced, without further delay, is that of an overall realignment of protective measures, only partially attempted by the Biagi Law, in such a way as to overcome the contrast between insiders and outsiders, which is both the cause and effect of the proliferation of atypical and irregular forms of employment and jobs in the shadow economy.

In any case, it is likely that over the coming years the legal framework will undergo further significant change, above all with regard to flexibility in the termination of contracts (the law on dismissals) and, hopefully, with regard to safety-net measures.[118]

Arguably the recent reforms, far from unleashing a process of unbridled liberalization of the labor market, have laid down the conditions for reformulating employee protection by means of the codification of a *Statuto dei lavori* or Work Statute,[119] i.e., a body of fundamental rights for all workers, and not only those in the public administration or in medium-sized and large enterprises, with a view to moving beyond—once and for all—the dualism between those enjoying a high level of protection on the one hand, and precarious employees on the other, resulting from an ill-conceived and short-sighted allocation of employee protection.[120]

In order to be consistent with its original principles, and at the same time to support the development strategies of Italian enterprise, labor law will inevitably need to move beyond the limits of the traditional—yet inefficient—distinction between self-employment and

117. Dell'Olio, *supra* note 10, at 46.

118. This is the matter that needs to be dealt with in order to complete the Biagi Law. Reference may be made to M. Tiraboschi, *Il sistema degli ammortizzatori sociali: spunti per un progetto di riforma*, *in* LA RIFORMA BIAGI DEL MERCATO DEL LAVORO – PRIME INTERPRETAZIONI E PROPOSTE DI LETTURA DEL D.LGS. 10 SETTEMBRE 2003, N. 276, 1105–21 (M. Tiraboschi ed., 2004).

119. On this topic see the draft proposals, the positions of the social partners, and the substantial amount of comment by legal scholars, *available at* http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.249.1.300.Statutodeilavori.html. In the international debate, in connection with the transition from the *"Statuto del diritto del lavoro"* to the *"Statut de l'actif,"* see Gaudu, *supra* note 30, at 513.

120. In this perspective see B. Hepple, *Restructuring Employment Rights*, 15 INDUS. L.J. 69 (1986). In the mid-1980s Hepple proposed the adoption of a wider and more comprehensive definition of employment, leading to the identification of a new legal criterion for the assignment of labor protection, including labor of an intermittent or casual nature, and employment relations characterized by the continuity of the work carried out.

salaried employment in order to bring within its area of application all types of employment contracts, in keeping with the most recent developments in EU rulings[121] and constitutional case law,[122] based on a broad definition of employment. The extension of the definition of employment to include all forms of work with an economic value carried out in an organizational context on behalf of others is the first step toward redesigning the system of employment protection—in compliance with the applicable provisions—on the basis of a model of concentric circles underlying certain labor law reform proposals put forward over the past decade and the idea of a *Statuto dei lavori*.[123] In short, there is a need to identify a fundamental nucleus of universal safeguards, applicable to all employment relations regardless of the classification of the contract as self-employment, salaried employment, or parasubordinate employment.

The forms of protection to be included in this area, that would be extensive and without subdivisions, would be, by way of example, freedom of opinion and protection of the dignity of the worker, trade union rights, prohibition of discrimination, health and safety at work, the right to lifelong training, the protection of privacy, access to employment services and employment information services, and the right to fair remuneration. The remaining forms of protection would be determined on the basis of the following criteria, in relation to which the subordinate nature of the employment would continue to be a significant but not an exclusive factor:

1. the degree of economic dependency (an initial indicator of which is whether a person works for one or more than one employer);
2. seniority of service on a continuous basis (for example, confirmation of the stability of employment as laid down by Article 18 of the Work Statute for all workers who

121. See in particular the Lawrie-Blum ruling of the European Court of Justice, no. 66/85, 3 July 1987, *available at* http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.249.1.300.Statutodeilavori.html, according to which the essential characteristic of the employment relationship is that the individual concerned supplies labor of economic value to another person under the direction of that person, receiving remuneration in exchange.

122. Constitutional Court, 5 Feb. 1996, no. 30, *available at* http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.249.1.300.Statutodeilavori.html, which speaks of work "intended to be carried out in the context of a productive organisation and with a view to producing a result that the owner of the organisation (and of the means of production) is immediately entitled to utilise" (our translation).

123. See the documentation, *available at* http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.249.1.300.Statutodeilavori.html and, in particular, the *Relazione Finale* (final report) of the High-Level Commission for drafting a Work Statute set up by Ministerial Decree on 4 Mar. 2004.

have completed a period of continuous service with the same employer of at least two years);

3. the type of employer (public/private, non-profit sector, etc.) and the size of the company as factors to be taken into consideration, not just in terms of the number of employees but also the volume of business);
4. the subjective or objective conditions of the worker in a perspective of positive discrimination and norms providing incentives for hiring (for example, the long-term unemployed, people with disabilities, immigrants, those in search of employment for the first time, those resident in geographic areas with particularly high levels of unemployment, or low levels of employment);
5. the manner in which work is to be carried out under the contract (for example, the type of work, the degree of management control, whether the work is merely coordinated, continuity over time) or the type of activity (for example, periods of work alternating with training, the need for a high degree of vocational skill or specialization) or the purpose of the contract (access to employment or a return to the labor market, work of public utility, etc.); and,
6. other parameters as laid down by collective bargaining or by bilateral bodies in cooperation with employment contract certification agencies.

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

Italian labor law needs to come to terms in the near future with the redesigning (and certainly not the dismantling) of employment safeguards, and this process needs to take place not just by means of abstract notions predetermined by the legislature, but also by means of the certification of provisions negotiated between the parties. This

is the proposal contained in the *White Paper on the Labour Market* of October 2001,[124] that identified a nucleus of inalienable rights (in addition to universal safeguards and those dependent on status) distinct from safeguards of a non-essential nature,[125] that is to say subject to negotiation during collective bargaining and/or individual agreements supported by certification of the employment contract. This is the challenge facing the legislature and labor law scholars but also and above all the social partners and this is probably the best way to "meet the challenges of 21st Century" according to the proposals of EU *Green Paper on* how labor law can evolve to support the Lisbon Strategy's objectives of achieving sustainable growth with more and better jobs.[126]

124. *Supra* note 19.

125. The Biagi Law provides for the certification of employment contracts by bilateral bodies, provincial labor departments and universities registered with the Minister of Labour and Social Policy (Articles 75-84) as a procedure for ascertaining whether an employment contract that is about to be signed complies with the provisions of the law. It is a voluntary procedure that can be implemented only at the request of both parties, the employer and the employee, and is intended to reduce the number of individual employment disputes. In the framework of a Work Statute this procedure could provide a level of rights and guarantees without defining the contract in legal terms as salaried or self-employment. The idea of establishing a certification procedure for employer-worker relations, as a response to the exponential growth in the number of legal cases relating to the legal definition of employment contracts, does not appear to give rise to particular problems, provided that the contractual conditions agreed upon *ex ante* by the parties are respected during the implementation of the contract. To provide an incentive for certification and to safeguard both parties, the *White Paper* of 2001 proposed a distinction between non-negotiable rights (the fundamental rights of the worker), and an area of negotiable rights, which can be examined by the parties during collective bargaining and/or by the individuals when the terms and conditions of employment are finalized. However, in the case of individual negotiation, the terms of employment require the approval of the certification body (with regard to fair pay, career prospects, terms of notice, employment stability, conditions in the event of termination, changes to work hours, etc.). On this proposal, see Tiraboschi, *supra* note 34.

126. European Commission, *Green Paper – Modernising Labour Law to meet the challenges of 21th Century,* Burxelles 22.11.2006, Com(2006) 708 final, *available at* http://www.fmb.unimore.it/on-line/Home/Prova/cardCatIndiceAZ.249.1.300.Statutodeilavori.html.