

**‘MODERNIZATION’ OF LABOUR
LAW: A CURRENT EUROPEAN
DEBATE**

Professor Silvana Sciarra

Geneva, March 2007

**‘Modernization’ of Labour Law:
A Current European Debate**

A Public Lecture by Professor Silvana Sciarra

International Institute for Labour Studies
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Preface

The International Institute for Labour Studies regularly invites leading scholars to give public lectures on topics relevant to the ILO's agenda. These lectures serve to open up new perspectives on contemporary economic and social issues before an audience of international opinion-makers and practitioners that includes representatives of the ILO tripartite constituency of governments, business organizations and trade unions; the academic, diplomatic, and press communities of Geneva; and international officials from the ILO and other United Nations agencies.

During the March 2007 Governing Body Meeting of the ILO, a public lecture was given by Silvana Sciarra, Professor of European Labour and Social Law, Jean Monnet Chair, Faculty of Law of the University of Florence. The present paper: “‘Modernization’ of Labour Law: A Current European Debate” is a revised and expanded version of her presentation at that time.

The paper explores some comparative dimensions of the current discussion launched in the European Union on 'modernizing' labour law. The basic premise of the paper is that current trends in the evolution of labour law show elements of continuity with the past, even when previous legislation has had to be adapted to reflect new market regulations. The term 'modernization' needs in fact to be better specified and attached to specific examples in the evolution of labour law. More sophisticated and widespread comparative analysis is presented in the paper as a way ahead in the current discussion. A parallel is drawn with research promoted by the ILO, as well as with developments taking place in non-European countries.

Gerry Rodgers
Director
International Institute for Labour Studies

'Modernization' of Labour Law: A Current European Debate

Professor Silvana Sciarra

It is a great honour for me to be here today to deliver this public lecture. For somebody like me who has devoted professional and intellectual energy to labour law for many years, the ILO and the International Institute for Labour Studies embody stable institutions in which respect for different legal cultures is cultivated. Hence, my attempt today to develop a few ideas on the function of comparative legal research, separate from policy-making and yet congenial to it, especially when it is used as a tool to detect and interpret changes taking place in legal systems.

I intend to discuss some recent research outcomes in comparative labour law as an introduction to the debate prompted in the European Union (EU) by the European Commission on 'modernizing' labour law.¹ I shall also emphasize that this document is complemented by other Commission initiatives in current policy-making. This will allow me to underline the crucial character of labour law both at a national and a supranational level.

Although this debate may, at first glance, appear relevant only for Member States of the EU, it can be contextualized in a wider research agenda carried on in non-European countries. It is also most revealing to draw a parallel with the vast research and documentation produced within the ILO. The latter too is related to the necessary adaptations that labour law should undergo.

The dominating character of recent comparative research is the accurate description and interpretation of the changes that have occurred in labour law. There is neither a refusal nor a fear to accept changes. One can observe, on the contrary, a continuing effort to investigate the adjustments that are most needed for an efficient regulation of the labour market.

This attitude is corroborated by a long lasting tradition of comparative research in labour law, carried on by a vast community of scholars across the world, even at critical stages of transition. Some recent examples prove that such a tradition of engaged scholarship is not lost.

To take one first example: in Australia a large research project investigates how reforms of labour law are intertwined with regulations of the labour market. The result is to sketch a new 'paradigm' and a new 'platform' for labour law, as well as acknowledging its 'historical legacy'. In addressing the overall notion of 'worker' irrespective of a specific employment contract or employment relationship, the research demonstrates that traditional protective measures create links with the market. Historical analysis shows that even in market-based approaches to relationships between management and labour, protection of workers is a well accepted theory and practice. This is so even when, as happens at the present stage in the evolution of labour law, its 'paradigm' becomes broader, so to include social security, training, immigration and even tax law.²

¹ Commission of the EC: *Green Paper, Modernizing labour law to meet the challenges of the 21st century*, 22.11.2006, Brussels, COM(2006) 708 final.

² C. Arup et al. (eds.): *Labour law and labour market regulation* (Sydney, The Federation Press, 2006). In their Introduction R. Mitchell and C. Arup, frequently refer to R. Mitchell (ed.): *Redefining labour law* (Centre for employment and labour relations law, University of Melbourne, 1995), thus confirming the commitment of scholars

Different metaphors characterize another research project, which brings together a large number of scholars from different continents.³ The notions of 'boundaries and frontiers' of labour law remind us of the variety of meanings that certain concepts may acquire in developing countries. Protection of workers in the informal economy, for example, may require a different apparatus of labour law measures and a different role of the regulatory state.⁴

To move to yet another example: in Canada a recent report presented to the Minister of Labour for reviewing part III of the Canadian Labour Code⁵ adopts a very sophisticated terminology, highly indicative of an innovative theoretical approach. Labour standards for the 21st Century are structured around some broad principles. First, the fundamental principle of 'decency' is discussed as a general criterion encompassing minimum wages, working time, measures to combat discrimination. Emphasis is also put on 'strategic principles' such as the market economy, flexicurity, a level playing field - namely applying the rule of law to labour standards -, plant bargaining, inclusion and integration. Furthermore 'operational principles' are described as those having to do with the effective and efficient use of public resources. The latter also address all guarantees for a high level of compliance, adopting proactive methods as well as effective remedies and sanctions. Finally, regulated flexibility is proposed as a principle in itself.

The Green paper and other Commission documents discuss 'flexicurity' as an optimal combination of flexible measures and more traditional protective measures. Flexicurity is emerging as an encompassing notion, suitable to be adapted to current labour market reforms in view of reaching European targets, but also in policies related to company restructuring. To this we shall return later.

Comparative legal analysis across a wide spectrum of countries is behind some of the most thought-provoking proposals circulated in the ILO in recent years. Changes that occur in labour law can, under certain circumstances, amount to a lack of 'protection' within the apparently well defined territory of subordinate employment. This was proved by reading legislative reforms through the lenses of 'factors' causing such changes. Factors are essentially of an economic and organizational nature and are parallel to major restructuring within the enterprise. Factors of change are also to be found in significant phenomena of workers' mobility, both across sectors of the economic systems and across countries, through migration.⁶

To understand all such composite phenomena of change the ILO, in particular under the Decent Work Agenda, has developed legal research centered on some crucial principles. Equity, flexibility and adaptability are some of them. They are all evocative of discourses developed throughout the world in searching new values of a constitutional standing, new regulatory principles capable of conforming national and supranational legal systems. Furthermore, the

in the last decade to pursue a methodological framework for detecting changes and innovations in labour law. Mitchell and Arup intertwine their analysis with the one emerging from European research and investigate common solutions in enhancing the scope of labour law. See also on this point P. Auer: "Protected mobility for employment and decent work: labour market security in a globalized world", in *The Journal of Industrial Relations*, Vol. 48, 2006, pp. 21-40.

³ G. Davidov and B. Langille (eds.): *Boundaries and frontiers of labour law* (Oxford, Hart Publishing, 2006).

⁴ References to India are in K. Sankaran: "Protecting the worker in the informal economy: The role of labour law"; a broader perspective is offered by A. Trebilcock: "Using development approaches to address the challenge of the informal economy for labour law", both in G. Davidov and B. Langille (eds.), cit. at 3, pp. 205-220, pp. 63-86.

⁵ See H. Arthurs: *Fairness at work. Federal labour standards for the 21st Century* (Gatineau, Québec, Publications Services, 2006).

⁶ ILO: *The scope of the employment relationship*, Report V, International Labour Conference, 91st Session, Geneva, 2003, pp. 10-17; ILO: *The employment relationship*, Report V (1), International Labour Conference, 95th Session, Geneva, 2006, p. 5 ff.

Employment Relationship Recommendation addresses most of the controversial concerns that are still unresolved in the European debate.⁷

As a confirmation that words and concepts are as important for labour lawyers as numbers and statistical figures are for economists, the previously quoted Canadian Report drafted by Harry Arthurs is infused with some of the language adopted in ILO sources.

The European Commission too intends to foster the action taken by the ILO within the Decent Work Agenda, both for the purpose of encouraging bilateral and regional agreements with the EU and for focusing the attention of countries of the enlargement on complying with the Community *acquis*. In its Communication on promoting decent work we see once more a most significant contamination of languages and a confirmation of the fact that regional debates taking place in the world acquire unequivocally a global dimension.⁸

For example, the expression 'Open method of coordination' (OMC) has become familiar in the ILO and in ILS research, thus confirming that international organizations are prepared to accept changes in their vocabulary and to gradually re-modulate some of the programmes in which they operate. That expression has been used in the EU to describe a sophisticated combination of hard and soft law measures in furthering employment policies under Title VIII TEC (Treaty establishing the European Community). Such a regulatory technique currently implies that Member states should respond to the Council's 'Integrated guidelines' - issued now for a period of three years - and show progress in their National Reform Programmes (NRP). This exercise ensures that to comply with the European Employment Strategy (EES), as originally stated in the Lisbon agenda, the European institutions will be pursuing monitoring, rather than sanctioning.

Whenever the need arises to establish new standards in large areas of the world, recourse must be made to a variety of methodologies. The attractiveness of the debate in labour law lies in the fact that it allows for agile exercises when combining different sources – law and collective agreements, law and customs or practices – and different means of regulation – hard and soft law, statute law and case law – thus proving that there are many valuable ways to enhance changes. This can effectively be done by tracking continuity, respecting national legal traditions and understanding the role of legal institutions.

I have been privileged to coordinate two comparative projects, both under the auspices of the European Commission, which have provided me with new fascinating insights into the evolution of labour law.⁹ My research is now focused on further improving the concept and the function of 'legal indicators' in comparative analysis. Since the establishment in 1997 of the EES, indicators have been used by the Commission as a way to assess Member States' progresses in employment policies. A working group on indicators, composed of representatives from the Member States and the Commission, assists the Employment Committee and elaborates various criteria, mainly of a statistical relevance. In 2003 indicators have been reviewed, in

⁷ Employment relationship recommendation, 2006 (No. 198). In footnote 32 of the Green paper, cit. at 1, the European Commission adhesively refers to this source. See also D. Ghai (ed.): *Decent work: Objectives and strategies* (IILS-ILO, Geneva, 2006).

⁸ Commission of the EC: *Promoting decent work for all. The EU contribution to the implementation of the decent work agenda in the world*, Communication from the Commission, 24.5.2006, Brussels, COM(2006) 249.

⁹ S. Sciarra: *The evolution of labour law (1992-2003)*, Vol. 1, General Report (Luxembourg, Office for Official Publications of the European Communities, 2005); *National reports of 15 countries*, Vol. 2 (Luxembourg, Office for Official Publications of the European Communities, 2005); S. Sciarra: General report on *The evolving structure of collective bargaining*, a project co-financed by the European Commission and the University of Florence posted, together with all national reports, 2005,

http://www.unifi.it/polo-universitario-europeo/ricerche/collective_bargaining.html. An expanded version of the General report can be found in S. Sciarra: "The evolution of collective bargaining. Observations on a comparison in the countries of the European Union", in *Comparative Labour Law and Policy Journal*, 2007 (forthcoming).

parallel with the revision of the EES and of the Council's guidelines. Although the criteria adopted in 2006 seem to put an emphasis on 'analysis indicators' as well as on 'monitoring indicators', it still remains difficult to ascertain the legal characteristics of labour market reforms and the fundamental legal values around which they develop. Legal indicators should be constructed around these lines and analyzed comparatively.

Working on the evolution of collective bargaining, for example, I have verified that certain features derived from the analysis of European legal systems allow the interpreter to better understand meanings related to the coverage of collective agreements and as a result appraise the effects they have on individual contracts of employment. The same can be said for the otherwise unspecified notion of decentralized collective agreements, changeable across different legal systems.¹⁰ All of this is not without relevance when compared to the evolution of individual labour law, mostly in areas affected by the transposition of EU Directives. One example is the regulation of working time, which relies heavily on collective agreements as a parallel source for the definition of standards.

Let me summarize the first two points I have dealt with so far.

1) *Debates on changes and factors of changes in labour law are global debates, even when they originate in one region of the world. They are grounded in independent and solid comparative research throughout the world.*

2) *Within the EU changes are frequently occurring in continuity with major traditions inside labour law; the word 'evolution' epitomizes all of this. Deviations from regulations – be it law or other sources – that are perceived as too rigid, give rise to valid and better implementation when accompanied or preceded by the action of consensus-building institutions, such as collective bargaining, information and consultation, or of bilateral or trilateral bodies enshrined in national legislation or set up autonomously.*

I shall now move to an analysis of the current debate on 'modernizing' labour law, which is taking place in the EU.

The Green Paper recently issued by the Commission¹¹ rotates around the view of 'modernization', a non-legal concept which leaves space to different approaches and proposals. The ambivalence of this terminology – as opposed to, for example, changes, adaptations, evolution – may cause some interpretative doubts. How is a legal system to be defined as more modern than another one? More modern compared to what standards?

The title and indeed the whole structure of the Green Paper have been conceived with the aim of opening up in Europe a process of consultation which is as wide as possible, addressed to the social partners, the national and European institutions and all *stakeholders*. This in itself is a positive element to underline. Some of the vagueness of the questions presented in this document may very well hide a genuine intention to encourage innovative and rich replies from a virtual community, as in a re-visitation of *ars maieutica* via the Internet. The Commission has announced a Communication to be published in the summer of 2007, following the end of the consultation in March.

In parallel to developing the narrative on 'modernization' of labour law, the Commission is active on other fronts. In October 2006 consultation with the social partners began (art. 138 TEC) concerning further action on work-life balance. Monitoring on the enforcement at national level of the 2002 Framework Agreement on telework is also being pursued. These two examples show that significant areas of 'modern' labour law are on the Commission's agenda, although not in the Green Paper. The selective method chosen by the Commission implied to leave outside of the Green Paper most collective labour law, a choice that may cause some

¹⁰ Specific references in S. Sciarra: *The evolution of collective bargaining*, quoted at 9.

¹¹ Green Paper, cit. at 1.

disconcertion and even criticism. This may induce the Commission to reconsider in future documents an overall notion of a 'modern' labour law.

There is more to add to this list of subject matters that, although not included in the Green Paper, are part of current policy-making within the Commission.

In a Communication addressed to the Spring European Council¹² – a specialized meeting of the Council devoted to social and employment matters – the Commission acknowledges that the revised EES is making progress and national parliaments are now more involved in the preparation of NRP. This is due to more stable macro-economic conditions and to national Research and Development investment targets and other measures consistent with the micro-economic level, such as actions for small and medium enterprises. A Communication on flexicurity has been announced for the summer of 2007, relying on the – by now acquired – certainty that this 'concept is one of the most promising ways' of facing global competition and that 'rather than protecting jobs, the aim is to protect the worker'.¹³ Furthermore, an expert group is working on the key components of flexicurity and will soon deliver a Report.

Flexicurity is also being pursued by the Commission as a response to globalization and company restructuring. Such a 'policy approach' is discussed under a different and yet strictly connected heading of EES and is supported by a European Taskforce on Restructuring.¹⁴ The newly established 'European Globalization Adjustment Fund' should serve the purpose of intervening when major job losses are expected as a consequence of global restructuring. The labour law implications inherent in all of the initiatives undertaken by the Commission are self-evident and yet at risk of being dispersed along different lines of policies and of subsequent actions.

If we go back to the fascinating open process of policy-making set in motion by the Green Paper and by the consequent consultation addressed to all stakeholders, we soon discover that secrets are hard to be kept in safe and sound filing cabinets. There is a widespread and documented – although not thoroughly official – knowledge of the changes that the Green Paper underwent in the preparation of various drafts. This adds to the mystery of why that happened but also to the flattering idea that labour law may play such a delicate and sensitive role at the present stage of European integration.

There may also be space in the future for a philological and historical interpretation of this process. For example, it will be interesting to understand the different interpretations given to labour law concepts by policy-makers engaged in different Directorates of the Commission and to establish the role played by the President of the Commission as an authoritative mediator. Information provided on the web is not accompanied by numerous footnotes, as in an academic piece of work. It simply provides an immediate insight into the event at stake. This is part of its beauty, as we all know.

Relying on the information available – mainly press-releases and short declarations – the first reactions to the Green Paper specify that employers' associations fear the recourse to new harmonization, namely to hard law, and therefore require that modernization should only

¹² Commission of the EC: *Implementing the renewed Lisbon strategy for growth and jobs. A year of delivery*, Communication from the Commission to the Spring European Council, 12.12.2006, Brussels, COM(2006) 816 final.

¹³ Communication, quoted at 12, p. 13.

¹⁴ Commission of the EC: *Restructuring and employment. Anticipating and accompanying restructuring in order to develop employment: The role of the EU*, Communication from the Commission, 31.3.2005, Brussels, COM(2005) 120 final; D. Storrie: *Restructuring and employment in the EU: Concepts, measurement and evidence* (Luxembourg, Office for Official Publications of the European Communities, 2006).

happen at the national level and should be part of the debate on flexicurity. Several social NGOs and trade unions, on the contrary, regret the Commission's lack of ambition in drafting the Green Paper. Small and medium enterprises seem, on the whole, less unhappy. They may be relying on the expectations that can be built around the introduction of more flexible national measures.

A very positive consequence related to such an open practice of consultation is that many initiatives have been taken at national level by academics, social partners, stakeholders and other institutional actors in drafting replies and comments to be addressed to the Commission. When the website dedicated to the consultation will reveal its contents, we shall be able to detect what we can call the 'virtual' state of the art in this contested discipline. This may or may not confirm that European research in labour law supports innovation; it may or may not link up current proposals to the numerous and rigorous ones elaborated by labour lawyers during the 1990s, in meeting the deadlines of institutional reforms and of policy-making.¹⁵

The reader of the Green Paper, however, could be amazed most of all not to find in it specific traces of the analysis carried on in academic research. It is particularly surprising that the Supiot Report¹⁶ should not be acknowledged, if nothing else for its – by now well established – authority in infiltrating national and comparative debates, as well as the research agenda of the ILO and the ILS.¹⁷

The points that I shall raise with regard to the Green Paper must be framed, as I tried to emphasize before, in a wider outline of analysis. My preoccupation is to find new ways ahead for innovative comparative research in labour law, even outside the EU. My approach intends to be constructive and lead to a better understanding of existing open questions in the research agenda.

1) *The Green Paper does not attempt an analysis of labour market institutions.* When de-contextualized from specific patterns of regulations, the discussion on flexicurity may be filled with the most diverse ingredients and therefore be perceived as an empty notion. For example, flexible measures have often been adopted as the result of combining law and collective bargaining.¹⁸ We can recall the illuminating notion of 'semi-mandatory law' both in some Nordic countries and in The Netherlands. We can remind ourselves of the many examples of legislation preceded by the successful enforcement of inter-sector agreements. In France it is worth mentioning the 2003 central agreement on lifelong access to vocational training, followed by a statute in 2004. In Spain, a recent reform of the labour market dealing with fixed-term work and other employment measures was preceded by central collective agreements. *Flexibility is a notion that requires elements of comparison, in order to be understood.* For example, if a national Constitution is classified as rigid, there are ways to adapt its principles to changing social relationships via legislation or through the case law of constitutional courts. If legislation is perceived as rigid, it can be adapted to specific needs via collective agreements. The national European tradition of including in the

¹⁵ References to that debate in S. Sciarra: "From Strasbourg to Amsterdam: Prospects for the convergence of European social rights policy", in P. Alston (ed.): *The European Union and human rights* (Oxford, Oxford University Press, 1999).

¹⁶ European Commission: *Transformation of labour and future of labour law* (Luxembourg, 1998), then published as a book in several languages. See, for example, the English version, A. Supiot: *Beyond employment: changes in work and the future of labour law in Europe* (Oxford, Oxford University Press, 2001).

¹⁷ See, for example, the independent project coordinated by A. Supiot on "Social protection and decent work: New prospects for international labour standards", in *Comparative Labour Law and Policy Journal*, Vol. 27, No. 2, 2006.

¹⁸ See Green Paper, cit., p. 5, for a brief reference to 'how workplace rules can be adapted to changing economic realities' and an acknowledgment that collective agreements 'serve as important tools adjusting legal principles to specific economic situations and to particular circumstances of specific sectors'.

law clauses which refer certain matters to collective agreements, thus making the two sources strictly interconnected, has been somehow adopted in certain European Directives, which include references to collective sources, albeit in a controversial way, especially in the field of working time regulations. These are all examples of flexible adaptations that have been experimented for decades in most European legal systems.

2) *The Green Paper does not devote sufficient attention to OMC and does not analyze the synergies set in motion by the combination of hard and soft law in the so called European Employment Strategy.* An assessment of its developments would have conveyed new ideas in the discussion on adaptations of national systems, when attempting to accomplish supranational targets. Clarity and consistency in legislation may be achieved through adjusting existing institutions or branches of the administration or creating new bodies and making them responsible for drafting legislation in compliance with supranational requirements. *This criticism is also based on the fact that at least two Directives – the ones on Fixed-term work and on Part-time work – are structured in such a way as to bring together in one legal source hard and soft techniques.* Flexibility in these cases is enhanced with reference to specific targets, assigning exact tasks to national legislatures, while leaving to them the choice on ways to achieve them. For example, mention is made in clauses of the Directives to removing the obstacles which may obstruct the recourse to part-time work, or limiting abuses in the recourse to fixed-term work.

3) *The Green Paper misses the opportunity to address issues related to compliance mechanisms within national legal systems and within the EU.* Referring to this important theme would have helped in ascertaining whether in practice flexible measures bring about security. For example, national labour market reforms, produced in the framework of European employment policies, have given rise to interesting and highly controversial case law, which shows in practice the weak sides of the otherwise indefinite notion of flexicurity. Cases dealing with employment measures have also been referred to the European Court of Justice (ECJ) and have in some cases opened up spaces for a re-adaptation of national laws. This is perhaps the most valuable indication of how flexicurity may materialize into significant and lively tools for innovation.

Looking at the three points I have made, I want to emphasize once more that a comparison with ILO ongoing research as well as with the results of recent International Labour Conferences is most productive. In the report on 'The scope of the employment relationship', for example, focus is placed on issues such as social dialogue to enhance a balance between flexibility and adaptability, compliance and enforcement, migration and mobility of the workforce. The World Commission on the Social Dimension of Globalization, established by the ILO, widely addresses issues, such as migration, which are meant to expand the scope of social regulations and points to the notion of 'accountable' institutions.¹⁹

A number of other points can be made with regard to the European debate on 'modernizing' labour law in the EU. For the sake of a broader discussion and in order to establish that labour lawyers are all under the same global sky, I shall tackle the rhetorical style, rather than the contents of the questions put forward in the Green Paper, for the purpose of consulting virtual interlocutors, spread across many countries of the world. I shall therefore treat those questions as the representation of meta-principles. The observation is that all issues at stake could have been more profitably presented as a recollection of existing data and as an interpretation of existing trends in the evolution of labour law, as well as being put as open

¹⁹ ILO: *A fair globalization. Creating opportunities for all*, Report of the World Commission on the Social Dimension of Globalization (Geneva, 2004).

questions. However, as was suggested early on, the style chosen by the Commission may very well prove positive in provoking a broad and open discussion. My selection of rhetorical devices intends to be equally provocative.

1) *The presentation of dilemmas, rather than the study of legislative options and traditions*, is what one perceives in reading some questions put in the Green Paper.²⁰ An artificial dichotomy is presented between labour law reforms – improve flexibility and security, reduce labour market segmentation – and techniques to achieve the goals enshrined in such reforms – law, collective agreements –. European labour law is portrayed as if changes of this sort had never occurred. An historical evaluation of acquired transformations would have added to the depth of the analysis and, at the same time, could have produced an assessment of political disagreements within certain circles or certain governments.

2) *The formulation of rhetorical questions is pursued, instead of building on existing experiences within the EU*. For example, some countries already follow a combination of passive and active labour market policies; economic research ascertains that a mixture of both is indispensable for maximizing results. It is also surprising that the specific topic of employment services is not fully addressed; this is so despite the fact that the Council's 2005-2008 integrated guidelines (guideline No. 20) take the issue on board.²¹

3) *Understatement lies behind the questions related to the search for a definition of the grey area between employed and self-employed*. One would have expected more determination in touching upon the notion of economic dependency and in going straight to the heart of one of the most challenging phenomena under discussion.²² However, it is of great importance that this terminology should be adopted in the Green Paper and become part of a widely accepted jargon, reflecting effectively the nature of the underlying social phenomena.

4) *In looking at multiple employment relationships the rhetorical style is such to create uncertainties in the interlocutor*.²³ Here a more beneficial contribution to the European debate would have come from looking at national systems in which employment relationships between temporary agencies and workers have already given rise to the enforcement of rights functional to an efficient performance within the user company. The right to training, for example, is an important test case for balancing flexibility and security measures. It is interesting though that the Commission should also mention in this section of the Green Paper problems arising when 'workers are involved in extended chains of sub-contracting'. Reference is made to *Wolff & Müller*²⁴, an ECJ decision dealing with the free provision of services and the posting of workers. It is correctly recalled that measures on minimum wage, a national public interest objective, must be pursued via efficient procedural arrangements, also for workers temporarily posted in host Member States. The principle of joint liability is evoked as an efficient legal device, aimed at bringing about clarity and fostering compliance of labour standards. This principle is appropriate for multilateral contractual relationships – be they agency work or subcontracting – and represents well existing legal traditions in several Member States. This legal indicator – if we follow the terminology previously proposed as a way to enhance legal comparison – serves the purpose of introducing clarity and certainty in contractual relationships.

²⁰ See questions 1 to 4.

²¹ See questions 5 and 6.

²² See questions 7 and 8.

²³ See questions 9 and 10.

²⁴ Case C – 60/03 *Wolff & Müller* 12 October 2004.

5) *An exercise in self-analysis is offered when dealing with working time. The result is an almost unconscious refusal to acknowledge the difficulties that emerged in political negotiations and to admit the faults of existing legislation.*²⁵ The Directive in question, apart from having given rise to a long and diversified series of preliminary references from national courts to the ECJ, is also at the centre of harsh political disagreement among governments concerning the amendments that should be adopted. The ECJ indicates ways of protecting the fundamental right to health and safety and offers clear indications on how to combine flexibility and security.

6) *Finally, a captatio benevolentiae, a way of attracting benevolent comments, is rhetorically hidden behind the almost disproportionate question on frontier workers and on their entitlement to 'employment rights' regardless of the Member States in which they work.*²⁶ It is now well understood that the evolution of labour law, rather than concentrating on an overall definition of worker, should favour institutions capable of bringing about consensus on core labour standards. The issue at stake is therefore how to specify a notion of trans-national standards and how to make trans-national social partners part of this new norm-setting exercise.

In presenting the rhetorical devices that characterize the style of the Green Paper, I am following the inspiration that such a style will succeed in opening up a debate and will provoke constructive comments. It is of utmost importance to select the essential legal characteristics at the heart of the flexicurity debate. A comparative legal analysis must accompany the search for core labour standards around which the two notions of flexibility and security can merge. In drawing some conclusions I want to concentrate on very general remarks.

In this lecture I tried to underline that the dialogue among ILO and EU is nothing but beneficial. I do not have in mind a formal exchange of diplomatic messages, but a serious engagement in the search for new ideas. I pointed out, for instance, how references to migrant workers are recurrent in ILO sources and how difficult it is to make this subject an integral part of the European debate on 'modernizing' labour law.

I also underlined that the notion of 'modernization', if not underpinned by reasonable and established criteria of comparisons among what is to be considered more or less modern, may give rise to dangerous dichotomies. Notions of change and adaptation, on the contrary, best reflect the current state of affairs in the evolution of labour law. There is a line of continuity between labour law reforms – how to improve flexibility and security, how to reduce labour market segmentation – and techniques to achieve the goals enshrined in such reforms – law, collective agreements. The evolution of labour law brings about a remarkable combination of means and goals.

Legal indicators may help comparative research, inasmuch as they provide solid references to national legal traditions. From the examples I have offered, and looking at comparative legal research within the ILO and in non European countries, it emerges that fundamental rights and principles best exemplify common core values around which legal comparisons can be structured. Such rights and principles bring about protection for people in need of it and should not be weakened in their adjustment to different national contexts. They moderate the rigidity of legal sources making them adaptable. They allow relevant compliance mechanisms to play their role in different institutional circumstances.

I value immensely the opportunity and the privilege given to me in delivering this lecture. My purpose has been to widen my own horizon of national and comparative research in labour law and to do so with the hope of further improving exchanges among different academic and international institutions and among different generations of researchers.

²⁵ See question 11.

²⁶ See question 12.