Introduction

When employment is under threat, national identities tend to consolidate around their traditional certainties, to defend what was achieved in the past and contain it within national borders. This attitude, which is not without reasons, is in contrast to the awareness that, in a globalised economy, raising barriers does not help growth and does not favour economic development.

The International Labour Organisation (ILO) – the tripartite specialised agency of the United Nations based in Geneva, where workers, employers and national governments are represented – promoted research on the social dimension of globalisation and on the effects caused by the delocalisation of productive activities towards countries with a lower cost of labour. The intention was to address the risk of imbalances among different countries and inside each of them.[1] This study, supported by very specific examples even inside the European Union (EU), has, over the years, strengthened the aspiration towards global governance, in order to promote reconciliation among social institutions and the enhancement of growth and development.[2]

However, the economic and financial crisis harshened the asymmetries in the distribution of resources in the global order. Since their origins, the European Economic Community (EEC) and then the EU tried to correct such asymmetries, despite the fact that they were born to create a common market and to assign priority to this achievement.

[1] World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (Geneva: ILO 2004), www.ilo.org/public/english/wcsdg/docs/report.pdf; M. Delmas-Marty, 'The social dimension of globalization and changes in law', in P. Auer, G. Besse, and D. Méda (eds.), *Offshoring and Internationalization of Employment* (Geneva: ILO-IILS 2006), 187 ff.

[2] G. Gereffi, *The New Offshoring of Jobs and Global Development* (Geneva: ILO-IILS 2006) 41 ff. A broad overview of all such issues is in A. Supiot, 'What international social justice in the twenty-first century?', *Labour Law and Social Progress, Bulletin for Comparative Labour Relations*, 92 (2016), 1 ff.

The discrepancy between economic and monetary policies, on the one hand, and social policies, on the other, has been increasingly perceived by a large number of EU citizens as a gap that cannot be easily filled. Hopes vanish when the attempts to close such a gap fail. The result is widespread scepticism among European citizens, who are anxious to see how and when solidarity regimes will be reinvented in order to become more adaptable to change and suitable for reaching the aspirations of the most deprived and marginalised.

I use the word 'solidarity' in this book in order to detect ways in which collective interests emerge and are represented by organised groups at a national and transnational level. My argument implies that solidarity has been articulated, and perhaps fragmented, as a consequence of the crisis and because of changes occurring in work organisation and in the structure of the workforce. Different regimes of solidarity come into conflict with one another when social dumping is at stake. This, too, is an element for discrepancy and disillusion.

Reasons behind a generalised disaffection of citizens towards the EU are numerous and some of them will be considered in this book. A long-lasting fear addresses the fact that supranational institutions may favour the dismantling of systems of social protection at the domestic level. It is exactly for these reasons that disaffection can result in a defence of the status quo and in protectionist attitudes towards domestic orders and the rules and certitudes that they represent. In the background of this fear we can detect a system of imprecise communication between national administrations and European institutions, which has peculiar consequences for the systems of rules regulating employment relationships.

This lack of communication contradicts one of the doctrines underpinning EU law, which is intended to promote forms of mixed administration, resembling a 'cooperative federalism'.[3] A 'principle of sincere cooperation' governs the Union and Member States, according to Article 4.3 of the Treaty on European Union (TEU). Furthermore, Member States are under the obligation to adopt all measures necessary to implement legally binding Union acts, as indicated in Article 291.1 of the Treaty on the Functioning of

[3] R. Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (new) European Union', *Common Market Law Review*, 47 (2010), 1385–427; R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (Oxford University Press 2009). See also F. Fabbrini, 'From executive federalism to executive government: current problems and future prospects in the governance of EMU', in F. Fabbrini, E. Hirsch, and H. Somsen (eds.), *What Form of Government for the European Union and the Eurozone* (Oxford: Hart Publishing 2015), 289 ff.

the European Union (TFEU). In European social and employment law most sources are in fact binding and require cooperation among national administrations, in view of reaching common objectives.

The presence of collective entities – in particular the organisations representing workers and employers – makes the picture even more complex, exactly because these organisations are the expression of consolidated domestic traditions. Collective bargaining is the most relevant of these traditions because it influences the regulation of individual contracts of employment, through the production of applicable rules and standards. This also happens – and it is the case in Italy – when the dynamic process driving collective bargaining develops autonomously, with no intervention of the law.

Social partners, similarly to governments and state administrations, can easily acquire a defensive attitude to protect their own autonomy in issuing economic and normative standards. The danger is that such equilibrium could be disrupted, if competition between strong and weak systems of collective bargaining should be favoured. In all such cases, particularly when wage competition is at stake, the phantom of social dumping appears on the horizon of the internal market. This, too, is an example of imperfect communication among national administrations.

However, the opening of domestic markets should be considered as the necessary premise to the integration and mobility of undertakings and workers and as a resource for growth and competitiveness. These assumptions are not always present in the culture and practice of collective bargaining. In the same vein, it is not obvious that national bureaucratic apparatuses should support the simplification of processes of mobility and integration.

The reality is that in European discussions mixed results have been achieved with regard to the themes concerning employment and social law. The latter have not been placed at the centre of strong strategies, supported by specific budget allocations. At the crossroad of crucial choices there is an unsolved dilemma on whether to replace or adapt the numerous regulatory resources contributing to the creation of guarantees for workers. Protective measures – be they related to stability in employment, working conditions, health and safety regulation, trade union rights and the like – display the traditional function of labour and social law in the European tradition.

If we transfer this dilemma to the EU legal order, we detect a tension about an alleged subservience of social law to the rules of market integration. Hence, the question is whether the delay in the promotion of growth

and employment through incisive political choices should be seen as a consequence of too strong resistance at national level in changing labour legislation, in order to foster labour market reforms.

On the other hand, free movement of undertakings, services and labour, essential leverages for market integration, has not yet generated the right rules for growth and employment. The silence of politics, incapable of producing timely decisions in the wake of an unprecedented economic and financial crisis, can generate inertia and result in short-sighted and unconstructive attitudes of the social partners.

To the contrary, the development of synergies and the promotion of new virtuous combinations of the measures to be adopted, in order to protect workers and stimulate growth, could be the right answer. The starting point is the awareness that mobility generates, both in the European internal market and in the global market, the emergence of collective interests, despite variable and often diverging regimes of solidarity. Instruments of social protection should be modulated and adapted, in order to interpret the consequences of all such global processes of mobility. However, the immense stream of migrants, carrying with them their own tragic fears and the aspiration to survive, complicates free movement across borders. An overall coherence within the EU is still missing and actions taken in order to face recurring emergencies are needed.[4]

This book is inspired by several threads in policy-making and proposes some paths for reflection, concentrating on employment and social law in the EU.

A brief overview will be offered, with regard to the choices that legislators had to make in the wake of economic and financial emergencies. In particular, the Treaty establishing the European Stability Mechanism (ESM)[5] seeks the mobilisation of funding 'to provide stability support', which can also imply entering into 'agreements or arrangements with ESM members, financial institutions or other third parties' (Article 3). Memoranda of Understanding signed with Member States undergoing financial difficulties represent yet another critical side in the discussion on solidarity during the crisis.

[4] See, among other sources, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), currently under revision.

[5] The treaty to create a European Stability Mechanism (ESM) was signed on 2 February 2012.

There is little doubt that employment should be placed at the centre of growth policies. However, measures in support of employment must be traced among broad economic policies, which often blur into measures of containment of public expenditure, aiming to restabilise the equilibrium of domestic national budgets. In addition, employment policies are weakened by the lack of cooperation among national administrations and by the scarce motivation of bureaucratic elites, intervening without an effective continuity. This picture boosts the fears of European citizens and favours disaffection for Europe.

The coordination of employment policies, the so-called 'Open Method of Coordination' (OMC) should have been a key character of European new governance techniques at the opening of this century. That attempt largely failed. The confirmation for this is in the self-criticism of European institutions, obliged to recast this and other themes in a new programme called Europe 2020.[6]

I deal with the analysis of this programme in Chapter 2, with the caveat that proposals of the Commission and of the Council related to it must be contextualised within a scenario further complicated by the crisis. One important move to be highlighted concerns the reform of the European budget in the period 2014–2020, which prioritises the allocation of budget lines to projects linked with the objectives identified in Europe 2020.

Highly relevant for this analysis are measures on social cohesion emerging from research carried out in the 2009 Barca Report.[7] The ideas prompted by it are among the most pragmatic ones, when they aim to link up the creation of employment with virtuous support provided by EU structural funds.

The European Council of 30 January 2012 expressly declared the intention of supporting growth and employment through incentives to be bound to specific policy targets.[8] The Commission has gone down this path, in order to create the instruments for new forms of collaboration between the centre and the periphery of the EU with the objective of solving the asymmetries between different local realities. Accordingly, social cohesion can be considered at the same time the instrument and the final objective of European integration.

[6] Communication from the Commission, *Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth*, Brussels, 3 March 2010 COM (2010) 2020.
[7] F. Barca, *An agenda for a reformed cohesion policy, prepared at the request of D. Hubner Commissioner for regional policy*, April 2009.
[8] Informal meeting of the European Council, 30 January 2012.

In this context it is imperative to endorse, as an alternative to the competition between different solidarity regimes and the race to the bottom of wages and normative standards, a participative environment, which should favour on the one hand transnational arrangements and, on the other, national and local agreements. This proposal, used as a common thread in the following chapters, is confronted with novel functions of conflict, in particular of the right to strike.

Whoever addresses the evolution of European social policies is aware of the indissoluble nexus linking social norms and legal norms, within a complex framework of collective relationships, characterised by a constant dialogue between large organisations representing employers and workers.

Such a nexus, however, has been shaken by the gravity of the consequences of the crisis. Even before such consequences were discernible and became dramatic in their evidence, the representation of conflict and of solidarity through collective bargaining was destabilised by some judgments delivered by the Court of Justice of the European Union (CJEU). This case law will be examined in Chapter 4, mainly with the intention to highlight reactions that these decisions caused among national legislators and within national trade unions. Such reactions are symptomatic of a generalised discomfort and, at the same time, of the urgency to adapt the rules of the game whenever conflict has direct consequences on the exercise of economic freedoms.

Looking beyond the European legal order, one can listen from a distance to the dialogue going on between the Luxembourg Court, the Strasbourg Court – competent in the enforcement of the European Convention on Human Rights and Fundamental Freedoms (ECHR) – and the Committee of Experts of the ILO. This latter body, which is not a proper court of adjudication of legal disputes, has the delicate task of monitoring the application of conventions and recommendations by the Member States of the ILO. The Committee is composed of *super partes* experts, independent from national governments, and plays the role of interpreting and adapting legal norms in the context of the major changes of our times. All this is discussed in Chapter 5.

In litigation connected to the burst of the crisis, an innovative role has also been played by the European Committee of Social Rights, which administers the Council of Europe's Social Charter (ESC). The unique provision on collective complaints, provided for in the 1996 Protocol added to the revised Charter, proved to be very popular among several national unions wishing to make their voices heard in reaction to EU

measures. This option was chosen, among others, by Swedish unions, in response to legislation adopted to comply with the CJEU's ruling in *Laval*, as well as by unions in bailout countries, in order to re-establish the guarantees of fundamental rights badly hit by austerity measures.

In the light of this judicial and quasi-judicial activism, I argue that the circulation of labour standards and the contamination among supranational sources is valuable and should be further pursued. The proposal for a 'European Pillar of Social Rights', put forward by President Juncker in his speech on the State of the Union, delivered on 9 September 2015 before the European Parliament (EP), drew on international sources of the Council of Europe and of the ILO and provoked positive reactions and the impulse for better synergies.[9]

With such a diverse panorama in the background, measures determining a change in social policies have to be analysed taking into account the framework and the objectives given to the process of European integration. The crisis has made it more difficult to link the threads of social law with emergency measures adopted as a consequence of austerity and budget cuts. The intense phase that has interested Europe in the aftermath of the crisis turned into an impediment to considering growth and employment in a satisfying manner. However, this project should not be abandoned. Rather, it should be a starting point in rethinking institutional changes and enhancing reforms.

[9] See ec.europa.eu/commission/publications/state-union-2015-european-commission-president-jean-claude-juncker_en.