"Introduction. Legal and Normative Perspectives on Quality of Employment in Europe"

Vielle, Pascale; Borelli, Silvia

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I. Introduction

Since 2001, “quality of employment” is at the core of the political, academic and practical agenda, and feeds a wide-ranging debate. This collective work is an attempt to bring to this discussion an original normative and legal enlightenment. It is the result of a process of reflection carried out over two years within the “RECWOWE” (Reconciling work and welfare) international network of excellence.

Financed by the European Union within the sixth framework programme, RECWOWE (“Reconciling work and welfare”) gathers together researchers from thirty research organisations in Europe, and aims at integrating the scientific activities devoted to the tensions that characterise relations between employment and social protection. One of the four main concerns of RECWOWE is the tension between quantity and quality of employment in Europe, which had led to a first work on quality of employment, already published by PIE Peter Lang\(^1\). Edited by A.-M. Guillen and S.A. Dahl, this first collective volume analysed a series of conceptual, methodological and substantial questions related to

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\(^1\) We are grateful to Gian Guido Balandi, Maria Jepsen, Marie-Ange Moreau, Jean-Jacques Paris and Greet Vermeylen for their stimulating and constructive discussion and comments at the Recwowe Final Conference, Brussels 15-17 June 2011.

the quality of employment from sociological, economic and political angles.

This led to the proposal for a second work dedicated to the quality of employment. This concept had been approached in the European Union under the European Employment Strategy – emblematic of soft law –, but echoed the long European and national legal traditions of labour law. From the lawyers’ point of view, the concept of quality of employment is embedded in the roots of social law (labour and social security law) emerging from the industrial revolution. It covers a range of fundamental aspects of employment relations, recognised in international, European and national social law. It consequently appeared necessary to confront the political concept of “quality of employment” with the “idea of social law”, in order to evaluate its normative relevance.

Treated in an interdisciplinary and international context, the project has a three-fold ambition. For the first time in a contemporary debate, a scientific work takes stock of the legal and normative understanding of the quality of employment in Europe. To this end, and through several topics, the authors try to grasp the relevance of the political concept of “quality” of employment compared to the concept of “social law”, and question the way international, European and comparative law frame the concept of quality of employment. Moreover, this work aims to provide the conditions for an interdisciplinary dialogue enriched by a legal approach. Essentially this is a matter of making it possible for readers who are not lawyers to determine the importance of the law in the debate on quality of employment – which until now has paid little attention to a legal and normative approach – and to adapt the concepts and tools likely to advance scientific reflection. Lastly, the work proposes concrete and realistic paths for the improvement of European social law in order to fit in better with international and legal standards.

This study of the legal characteristics of quality of employment is not expected to be exhaustive. We have chosen some essential aspects (such as collective labour rights, equality and non-discrimination), but we had to omit others (such as health and safety at work). The research endorses a qualitative and normative standpoint. It aims to point out the cultural, historical, and legal contexts into which the quality of employment fits, and to formulate concrete tracks to reinforce the European social law in line with the concepts contained within the framework of the European Employment Strategy, but with respect to national and international legal traditions.

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In the following lines (and chapters), the authors will use the word “work” for whatever form of economic activity, including self-employment and undeclared work, performed by people. “Economic activity” is defined as an activity that aims at production, processing, packaging, selling, distribution, the purchase and consumption of goods and services (including intellectual property), as well as money or wealth, with a view to fulfilling some wants/needs on a commercial or self-reliant basis. “Employment” is meant to be an economic activity that is remunerated, undertaken for and/or under the direction and/or supervision of an employer. It also includes false self-employment such as undeclared work, since conditions of employment are *de facto* fulfilled. “Job” indicates a specific individual economic activity performed by an employee for an employer, under an employment contract (= a specific individual employment contract).

II. Taking Law Seriously

Also called the “Luxembourg Process”, the European employment strategy (EES) was created in November 1997 at the European Council in Luxembourg. The aim was to reduce growing unemployment through an ambitious coordination process of national employment policies. This agreement led to the adoption of the “Employment Chapter” in the Treaty of Amsterdam. Based on well-known private and public management concepts (guidelines, best practices, benchmarking, action plans, recommendations etc.), the method endowed EU Commission and Member States with the possibility of a multilateral monitoring of employment policies.

The original Lisbon Strategy, launched in 2000 as a response to the challenges of globalisation and ageing, extended the main features to new policy domains – the so-called “open method of coordination” (OMC). The European Council defined the objective of the strategy for the EU in the following terms: “*to become the most dynamic and competitive knowledge-based economy in the world by 2010 capable of sustainable economic growth with more and better jobs and greater social cohesion and respect for the environment*”.

At the Laeken Summit in 2001, Member States agreed on a multidimensional definition of “quality of employment”, with a set of indicators, allowing the assessment of ten dimensions of employment quality (see Caillaud, Ghalani and Pena-Casas in this book). However the attention given to quality of employment waned with time, leaving more and more room for the objective of “quantity of jobs”, partly viewed as contradictory with strong legal protection for employment. This longstanding trend was recently reinforced by the EU Commission in its Communication “EU 2020” (see hereafter).
At the same time, the Treaty of Lisbon signed in 2009 clearly expressed the aims of the European Union in art. 3, par. 3 TEU, specifying that the establishment of an internal market shall be pursued together with “the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”. In addition, the European Union shall “combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child”. Moreover, art. 9 TFEU echoes art. 3 TEU and requires that “in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”. The common values of the European Union are nowadays listed in the European Charter of Fundamental Rights, considered as part of the Treaty. Art. 6 also provides for the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Negotiations for accession were carried out with the Council of Europe in July 2010. As the Preamble to the European Charter of Fundamental Rights specifies, the preservation and the development of these common values need “to strengthen the protection of fundamental rights”.

These important changes within the institutional and legal framework at EU level shed a new light on the debate of quality of employment. As the book clearly shows, if the Union intends to ensure full implementation of the Treaty of Lisbon, it will have to review the notion of “quality of employment” in line with common legal principles, well established at national as well as at international level. In this brief introduction, we would like to draw attention to two important aspects, dealing with the governance of quality of employment, that from now on will have to be taken seriously by EU authorities when establishing social policies. The first concerns the articulation between fundamental social rights, labour hard law, and soft law. The second concerns the articulation between economic and social governance.

A. Constructing Quality of Employment on Soft Law?

In the fields of employment and social protection, encouragement by the Treaty of Amsterdam to implement the convergence process (soft law) was initially interpreted as a welcome rebalancing of EU competences. Indeed, the economic dimension of the Treaty had partly been strengthened by the Single European Act and the Treaty of Maastricht
that had paved the way to economic and monetary union based on criteria arising from orthodox economic concepts (inflation, public deficit, public debt), on the one hand, and by the same Treaty of Amsterdam that introduced the “subsidiarity principle” which made it even more unlikely to develop autonomous European social policies, on the other hand.

The brief history of soft law has not fulfilled the ambition of a new balance between social and economic EU policies – that was put forward by the Lisbon Declaration in 2000 and the Laeken Declaration in 2001. Within just five years, the first has become subservient to the second, both from an institutional perspective (integrating formal and procedural guidelines for employment in the Broad guidelines for economic policies – BGEPs) and a substantive perspective (reinforcement of quantitative objectives to the detriment of quality objectives, under the Economic Policy Committee’s stronger leadership on the EES and OMC). In any event, one could question from the outset the relevance of social policies governed in the same way as economic policies, and immediately cast in the form of quantifiable targets. The form seemed doomed to over-determining the substance. This trend appears to be moreover confirmed by the recent evolution of economic governance (see hereafter).

At the same time, the construction of a comprehensive corpus of social rights at work remains to be achieved in Europe. If non-discrimination emerges as an exception, being one of the rare social fields where EU provisions go beyond most of the ILO standards (see Carlson, Canazza, Garcia-Izquierdo and Ramos-Villagrasa), European social law today seems rather like a patchwork colander, where many rights have slipped away, including the most fundamental, such as freedom of association or the right to collective bargaining (see Dorssemont). A few months before the implementation of the Treaty of Lisbon, the Laval, Viking and some subsequent cases confirmed what many European social lawyers had feared: in the absence of recognition and guarantee of fundamental social rights by the European Treaties (still recognised as among the most fundamental by the International Labor Organization and all Member States), the Court of Justice, according to its teleological approach, tackles the right to collective bargaining or the right to strike as restrictions to economic freedoms guaranteed by the Treaty. It therefore submits these expressions of fundamental social rights to a test of compliance with the Treaty, and even assesses whether they are necessary, proportionate and adequate to achieve the goals they seek. The legal order that henceforth applies to citizens of Member States subordinates their more fundamental social rights to the economic objectives of the Treaty. This shows that, as long as it is not translated
Quality of Employment in Europe

into hard law, “quality of employment” will go unheeded in the European Union.

At ILO level, the governance of “Decent work agenda” seems to have taken the opposite direction. We may recall that all EU Member States are also members of the ILO and, for this reason, have adhered to this ILO concept. In an attempt to understand why the EU mostly failed to implement concrete quality of employment, it may be interesting to turn to the way the ILO determined the notion of “decent work” and its governance.

The Decent Work concept was formulated by the ILO’s constituent members – governments, employers and workers – and is conceived as an agenda for the working community. It provides support through integrated Decent Work Country Programs developed in coordination with its constituent members. Putting the Decent Work Agenda into practice is achieved through the implementation of the ILO’s four “inseparable, interrelated and mutually supportive” strategic objectives\(^4\), where gender equality is a crosscutting objective:

- Creating Jobs – an economy that generates opportunities for investment, entrepreneurship, skills’ development, job creation and sustainable livelihoods.
- Guaranteeing rights at work – to obtain recognition and respect for the rights of workers. All workers, in particular disadvantaged or poor workers, need representation, participation, and laws that work in their interest.
- Extending social protection – to promote both inclusion and productivity by ensuring that women and men enjoy working conditions that are safe, allow adequate free time and rest, take into account family and social values, provide for adequate compensation in case of loss of or reduced income and permit access to adequate healthcare.
- Promoting social dialogue – the involvement of strong and independent workers’ and employers’ organisations is central to increasing productivity, avoiding disputes at work, and building a cohesive society.

There are several differences between the ILO strategy of “decent work” and the EU approach to “quality of employment”. One major distinction lies in the fundamental aims of the strategy (general objectives count! See Caillaud and Bonvin et al.): where in the context of the Lisbon Strategy, the OMC and EES (and even “quality of employment”)

\(^4\) *ILO Declaration on Social Justice for a Fair Globalization*, adopted by the Conference at its 97\(^{th}\) session, 2008.
were supposed to serve ultimate economic objectives, “decent work”, on the contrary, “is based on the understanding that work is a source of personal dignity, family stability, peace in the community, democracies that deliver for people, and economic growth that expands opportunities for productive jobs and enterprise development”.5

In terms of governance, the main distinction concerns the significance attached to legal rights at work. The Decent Work Agenda is based on a full range of conventions and recommendations defining minimal common standards in labour law (see Caillaud, Ghailani and Peña-Casas). This corpus of legal instruments and its implementation constitutes the second axis of the strategy (after the “jobs creation” axis). Although embedding all the conventions and recommendations adopted since the ILO’s foundation, this priority must be considered in line with the Declaration for the Universal Protection of Workers’ Rights. Indeed, confronted to a crisis of ratifications and effectiveness, the ILO adopted in 1998 a Declaration committing Member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions. These categories are:

- freedom of association and the effective recognition of the right to collective bargaining,
- the elimination of forced or compulsory labour,
- the abolition of child labour and
- the elimination of discrimination in respect of employment and occupation.

In the Decent Work Agenda, social protection – embedded in a series of conventions, but not incorporated in the 1998 Declaration – is considered as the third axis of the strategy. Although proclaimed as one of the fundamental rights in the 1998 Declaration, social dialogue is conceived as another major axis, whereas non-discrimination – also recognised in several conventions and recommendations – is recalled as a transversal dimension – following the “double trail approach” recommended by feminist literature, for instance.

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Hierarchy of social rights in the decent work agenda

<table>
<thead>
<tr>
<th>1. Freedom of association + collective bargaining</th>
<th>1998 Declaration + Axis 4 DWA</th>
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</thead>
<tbody>
<tr>
<td>2. Gender equality</td>
<td>1998 Declaration + transversal Axis DWA</td>
</tr>
<tr>
<td>3a. Elimination of forced or compulsory labour</td>
<td>1998 Declaration</td>
</tr>
<tr>
<td>3b. Abolition of child labour</td>
<td>1998 Declaration</td>
</tr>
<tr>
<td>3c. Non Discrimination</td>
<td>1998 Declaration</td>
</tr>
<tr>
<td>4. Extension of social protection</td>
<td>Axis 3 + Axis 2 DWA (Conv. 102)</td>
</tr>
<tr>
<td>5. Other rights at work</td>
<td>Axe 2 DWA (all conventions)</td>
</tr>
</tbody>
</table>

In other words, the Decent Work Agenda places fundamental social rights at the core of the strategy, giving ultimate priority to collective social rights and to non-discrimination. Among other rights at work, the right to social protection has a particular importance, with a whole axis dedicated to it.

To summarise, the whole Decent Work strategy aims to improve the effectiveness of social rights at work, through the reinforcement of control mechanisms and soft law.

In the absence of a clear and compulsory fundamental rights’ framework, on the one hand, and of sufficient institutional competences in the field of labour law on the other, EU could have built on the experience of the 1989 Community Charter of Fundamental Social Rights for Workers that establishes the major principles on which the European labour law model is based. In fact, whereas the Charter only had a symbolic significance, the Delors Commission took this opportunity to draw up an action plan that led to the adoption of several directives in the field of labour law. Along the same lines, with a stronger European and national will, the EES and OMC could have led to a social agenda conducive to the adoption of hard law. Today, the Treaty of Lisbon opens avenues for a renewed articulation between fundamental social rights, labour law and soft law in the EU. While the Treaty henceforth integrates fundamental rights (including a range of social rights) and requires the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, it also reformulates the Union main objectives (art. 3 TEU) and instruments (i.a. the horizontal social clause: art. 9 TFEU), redirecting the European policies and actions towards social goals. Within this new framework, the EU institutions could propose an architecture for social policies, rooted in fundamental social rights, supplemented by a hard law comprehensive range of instruments providing workers with rights at work, substantiated with soft law techniques.

16
B. Employment Strategy in the Context of European Economic Governance: Encompassing Labour Law while Developing Employment Policies

Adopted after the Treaty of Lisbon, in response to the economic and financial crisis, the new EU Economic Governance, as defined in the Europe 2020 strategy, comprises a range of policy initiatives.

- First of all, the Commission proposed to create a European Semester to coordinate ex ante the EU and euro zone budgetary and economic policies. The European Council endorsed the priorities for fiscal consolidation and structural reform, which means “restoring sound budgets and fiscal sustainability, reducing unemployment through labour market reforms and making new efforts to enhance growth”. The EU Semester starts with the Annual Growth Survey (published in January), in which the Commission provides an analysis on the basis of the progress towards the Europe 2020 targets. At the Spring European Council meeting, Member States adopt conclusions providing EU guidance on the Stability and Convergence Programs (SCPs) and on the National Reform Programs (NRPs). These two documents should be sent in April to the European Commission for assessment. Based on recommendations from the Commission, the European Council conveys, in June/July, its opinion on Stability and Convergence Programs and Countries’ specific policy guidance. The conclusion of the first European Semester marks the opening of a “national semester”. In the second semester of the year, the Member States should discuss how to incorporate European Guidance into their budgets and national decision-making.

- The Economic and Financial Affairs Council and the Employment, Social Policy, Health and Consumer Affairs Council adopt, respectively, the broad guidelines for the economic policies and the guidelines for the employment policies of the Member States. These integrated guidelines are one of the main tools of the Europe 2020 strategy.

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6 European Council Conclusion, 24/25 March 2011, EUCO 10/11, p. 3.
7 The Annual Growth Survey 2012 (COM(2011) 815 final) has been adopted the 23rd of November 2011 in order to ensure ample time for it to be considered by the Member States and EU Institutions.
9 The Employment guidelines for 2010 were adopted in October 2010, in principle, for a duration of four years. The guidelines for 2011 have been maintained unchanged.
• A third process, activated by the Member States in line with and to strengthen existing EU economic governance, concerns the reform of the Stability and Growth Pact. The new Euro-plus Pact will cover “priority policy areas that are essential for fostering competitiveness and convergence”, avoiding harmful imbalances. In these areas, “common objectives will be agreed upon at the Heads of State or Government level”. Each Member State should decide its own policy-mix and undertake specific measures to reach these goals. The implementation of commitments and progress toward the common policy objectives will be indicated in the Stability and Convergence Programs and in the National Reform Programs and will be monitored politically by the Heads of State or Government, “on the basis of a series of indicators covering competitiveness, employment, fiscal sustainability and financial stability”.

• In April 2011, the European Commission adopted the “Single Market Act. Twelve levers to boost growth and strengthen confidence. Working together to create new growth”. Like other policies included in the EU Economic Governance, the Single Market Act is aimed at delivering growth and employment and promoting competitiveness. The Commission has identified twelve levers and will present legislative proposals for the implementation of this key action in 2011. The Parliament and Council should adopt an initial series of priority measures to relaunch the single market by the end of 2012. At the same time, it will take stock of the progress of the Action Plan and will present a program for the next stage.

• In the wake of financial crisis, the Member States agreed on a package of economic and budgetary recommendations sets priorities and measures to reinforce financial governance and stability in the Eurozone. This includes the Six Pack that amends and strengthens the Stability and Growth Pact (SGP), introduces a new Excessive Imbalances Procedure and lays down new requirements for Member States’ national budgetary frameworks. On the basis of the Six Pack, the Commission has proposed two new Regulations aimed at further strengthening the coordination and the surveillance of budgetary processes for all euro area Member States, as well as a Green Paper on presenting op-


10 The Euro Plus Pact aims to: foster competitiveness, foster employment, contribute further to the sustainability of public finances and reinforce financial stability.

tions for euro Stability Bonds. Therefore, the surveillance tools agreed as part of the Six Pack are to be used within the framework of the European Semester. In particular, the two proposals require the Member States to publish and present to the Commission their draft budgetary plans in advance of their adoption by the national parliaments. The Commission will examine them and will address an opinion to a Member State if these plans do not appear to be in line with the obligations under the Stability and Growth Pact and the recommendations from the European semester in the budgetary area\textsuperscript{12}.

These new four instruments of EU Economic Governance assert economic objectives as the prime aim of European Integration. Consequently, European Employment Policies sustain and promote Employability by increasing labour market participation, reducing structural unemployment and promoting social inclusion\textsuperscript{13}. In this perspective, and notwithstanding the new Treaty, labour law is commonly considered by economic policies as a restriction on economic freedoms and employment protection legislation is accused of creating labour market rigidity and of preventing increased participation in the labour market\textsuperscript{14}. Moreover, all the indicators aimed at measuring social goals are quantitative\textsuperscript{15}.

\textsuperscript{12} If the Commission issues an opinion stating that the plans are not in line with the SGP and the Member State does not take corrective action, the Commission can use this when deciding whether to place the Member State in an Excessive Deficit Procedure (EDP). The new monitoring requirements allow assessments to be made about the content and direction of fiscal policy at any point while a Member State is in an EDP. If a risk of non-compliance with the deadline to correct the excessive deficit exists, the Commission can address a recommendation to the Member State. The Member States experiencing severe difficulties with regard to their financial stability or in receipt of financial assistance are submitted to even more strengthened monitoring and surveillance procedures. In these cases, the Commission may propose the Council to recommend that the Member State concerned seek financial assistance and that a macro-economic adjustment programme be prepared. The Regulation also introduces a new procedure that will apply to the preparation and adoption of any future macroeconomic adjustment procedures. It sets out how financial assistance granted outside the framework of the Union (such as through the EFSF and IMF), fits with the Treaty.

\textsuperscript{13} Council Decision on guidelines for the employment policies of the Member States, 12 October 2010.


\textsuperscript{15} The Commission has also suggested to "review the EU definition and common indicators of quality of work, and make them more operational for the evaluation and benchmarking of Member State policies" (Communication from the Commission, An Agenda for new skills and jobs: A European contribution towards full employment, COM(2010) 682 final, p. 15).
so that the performance of each State can be easily calculated (i.e. nation branding or government by indicators), which tends to favor more competition between social legal systems (i.e. normative Darwinism)\(^{16}\). The new economic governance has clearly incorporated Employment Policies\(^{17}\).

Beyond fundamental rights at work, this new governance framework will adversely affect several aspects of quality of employment, such as some essential features of labour contract, equality at work, social protection, wages, social dialogue and collective labour rights.

The Europe 2020 Strategy is aimed at directing the EU economy towards smart, sustainable and inclusive growth, intended as the achievement of some “social” targets: a 75% employment rate for women and men aged 20-64 by 2020; reduction of school drop-out rates to less than 10% and at least 40% of 30-34 year-olds completing third level education; at least 20 million fewer people in or at risk of poverty and social exclusion. In this context, two flagship initiatives are launched: the Agenda for new skills and jobs (Communication from the Commission, An Agenda for new skills and jobs: A European contribution towards full employment, COM(2010) 682 final)\(^{18}\) and the European Platform Against Poverty. The first aims at modernising labour markets in order to raise employment levels, to reduce unemployment, to raise labour productivity and to ensure the sustainability of the social model. The second intends to guarantee respect for the fundamental rights of people experiencing poverty and social exclusion.

Fundamental rights are only mentioned in the platform against poverty. Consequently, social protection is reduced to the fight against

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\(^{16}\) “Le concept de gouvernance porte à considérer le chiffre non comme un cadre, mais comme un but de l’action, ou plus exactement comme un moteur de la réaction puisque chaque acteur privé ou public est censé, non plus agir, mais rétroagir aux signaux chiffrés qui lui parviennent afin d’améliorer sa performance” (A. Supiot, L’esprit de Philadelphie, la justice sociale face au marché total, Paris, Seuil, 2010, p. 84).


\(^{18}\) The Agenda’s priorities will be revised in 2014 and adapted to the new Multiannual Financial Framework. “Till then, it will report on progress in the Annual Growth Survey with Europe 2020 strategy” (Communication from the Commission, An Agenda for new skills and jobs: A European contribution towards full employment, COM(2010) 682 final, p. 21).
poverty (i.e. social exclusion). The main imperative is a rapid reduction in unemployment: “This means first and foremost removing institutional obstacles that prevent proper functioning of Member States’ labor market.” Therefore, social protection is reduced to the sole objective of social inclusion and there is no mention of the quality of jobs created. On the contrary, flexible working arrangements and open-ended contracts are supported (see Deumer). Enhancing greater internal flexibility should ease the reconciliation of work and private life and contribute to women’s employment. There is no requirement to accommodate work-life balance to the extent feasible in the employment relationship for both parents (see Carlson, Canazza, Garcia-Izquierdo and Ramos-Villagrasa). No consideration is given to the variability and predictability of working time, both important elements for working time balance. No attention is paid to the risk of segregation that teleworking and flexitime (expressly supported by the Commission) could generate.

The use of open-ended contractual arrangements with a gradual increase in protection of rights should diminish the existing divisions between atypical and permanent contracts. It does not matter if the adaptation (alteration) of Employment Protection Legislation (EPL) increases the precariousness of labour market, transforming standard workers into unstable workers. No consideration is given to the requirement to prevent the status of employees becoming insecure, testified by the large number of cases pursued before national and European courts by atypical workers (see Borelli). The reduction of EPL is necessary to increase any form of labour market participation.

21 B. Vanhercke, “Is the ‘Social Dimension of Europe 2020’ an Oxymoron?”, op. cit.
22 On the contrary, the Report of the Director-General of ILO, A New Era of Social Justice (International Labour Conference, 100th Session 2011), underlines that “flexible labour markets” are “a crucial characteristic of inefficient growth”, being associated with “greater job precariousness, the de-linking of labour incomes and productivity developments and weaker incentives to invest in worker skills”. Moreover, “systematic deregulation has not contributed to higher levels of investment in real economy”.
Moreover, unemployment benefits are claimed to be reassessed in order to ensure that they provide incentives to work (i.e. policies to make work pay)\(^\text{27}\). By inviting Member States to reform unemployment benefit systems, the European Institutions do not take into account the definition of suitable employment as accepted by the Member States and do not consider the difficulty that the geographical mobility of labour can create. Therefore, there is a risk that Member States gradually enlarge the notion of suitable of employment, or even worse, abandon it in favor of the notion of “reinsertion in the labour market” (see Dermine and Caillaud).

The leading concept of “austerity” prescribes a rigorous fiscal consolidation. In particular, all Member States “should keep public expenditure growth firmly below the rate of medium term trend GDP growth”. Member States in excessive deficit procedure should also “set out the expenditure pact and the broad measures they intend to take in order to eliminate their excessive deficits”\(^\text{28}\). Labour market reforms should be most cost-effective and should contribute to the sustainability of social protection systems\(^\text{29}\). In that context, “further efforts to reduce early retirement schemes and increase the retirement age need to be pursued to increase the participation of older workers in employment”\(^\text{30}\). In particular, the sustainability of social protection systems will be assessed on the basis of the “sustainability gap indicators” that measure whether debt levels are sustainable based on the current policies and taking into account demographic factors\(^\text{31}\).

Moreover, Euro Plus Pact imposes a monitoring of unit labour costs in order to assess whether wages are evolving in line with productivity\(^\text{32}\).


\(^{29}\) As underlined in the Joint Employment Report, adopted by the Council (EPSCO), 8 March 2011, there is a wide variety of national shares in social expenditure and a great diversity in the capacity of Member States to meet the rising demand for social protection.


\(^{31}\) Euro Plus Pact, Stronger Economic Policy Coordination for Competitiveness and Convergence.

\(^{32}\) The necessity to improve “the responsiveness of wage setting processes to market developments in conjunction with the social partners”, so that “wages properly reflect labour productivity in the medium term and ensure the EU’s competitiveness position vis-à-vis the rest of the world and inside the EU and Member States” is underlined in the Joint Employment Report, adopted by the Council (EPSCO), 8 March
To reach this objective, the Member States should “review the wage setting arrangements, and, where necessary, the degree of centralization in the bargaining process, and the indexation mechanisms”. The measures to adjust wage-setting mechanisms threaten not only the indexation systems, but also the autonomy of the social partners. Even if the Member States do respect “national traditions of social dialogue and industrial relations”, the importance given to decentralised collective agreements alters the structure of collective bargaining.

In fact, the autonomy of the social partners has already been seriously compromised by some recent decisions by the European Court of Justice (see Dorssement). In Laval33, for example, the Court has interpreted art. 56 TFUE and Directive 96/71 as preventing a trade union, from attempting, by means of collective action, to force a provider of services established in another Member State to enter into negotiations with it and to sign a collective agreement the terms of which lay down more favorable conditions than those resulting from the legislative provisions that implement art. 3 of the Directive or relate to matters not referred to in art. 3.

Moreover the incorporation of Employment Policies in the EU Economic Governance has displaced the competence to adopt or modify Labour Law. For instance, legislation aimed at improving and reinforcing the transposition, implementation and enforcement of the Posting of Workers Directive, together with legislation aimed at clarifying the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights, has been included in the key actions that the DG Internal Market and Services will enhance in 2011. This means avoiding the legislative procedure of art. 154 and 155 TFEU, and setting aside social partners.

Social dialogue is considered to be effective and important when austerity measures must be decided, as only a division of efforts will guarantee socially acceptable and successful reforms34. However, social partners are facing a Hobson’s choice: they should accept the Europe 2020 strategy and find negotiated solutions to pursue its aims, without modifying the type of economic governance that the European Union imposes.

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33 ECJ, 18 December 2007, C-341/05.
Again, the marginality of social partners in the current European Economic policies is demonstrated by their role in enhancing the Single Market Act. They have “the opportunity to present their positions on issues relating to economic and social cohesion”, but they do not figure among the institutions that are party to the development of the Single Market. Moreover, in listening the Single Market players, the Commission has mentioned “citizens and business”. In the Economic context, “citizens” more often means “consumers” than “workers”.

III. Policy Recommendations

This book illustrates the importance of restoring a precise distinction between values, objectives and means in the European Union.

In terms of values, the international approach of decent work (ILO) and a comparative perspective show that quality of employment is primarily a matter of fundamental substantial and subjective social rights. The EU has to seek a new architecture for employment quality, rooted in fundamental rights. All the new possibilities offered by the Treaty of Lisbon must be exploited to ensure the efficiency of social rights: implementation of the Charter of fundamental rights, EU adherence to the European Convention of human rights but also to the ILO – which leads to automatic adherence to fundamental social rights –, to the European social charter of the Council of Europe, and other relevant international instruments (including CEDAW and others at the UN level). As stated in the Report of the ILO Director-General, A New Era of Social Justice (International Labour Conference, 100th Session 2011), fundamental principles and rights at work “provide the basic framework for market forces to operate efficiently and fairly”.

Still, from the point of view of values, the concept of Employability should be replaced by the concept of Capability, i.e. the freedom to choose our lives (or the freedom that a person actually has to do or be things that he or she may value doing or being). Therefore, increasing

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36 See A. Supiot, L’esprit de Philadelphie, op. cit.
37 The Report mentions the Declaration concerning the aims and purposes of the International Labour Organisation, adopted in Philadelphia in 1944, that declares: “all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective”, the fundamental objective being the right of all human beings “to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.”
employment level should be considered as a positive outcome only if the jobs created improve the actual lifetime opportunities for workers (see Bonvin, Cianferoni, Widmer).

As already mentioned, the social objectives of the EU are listed in art. 3 par. 3 TEU. Art 9 TFEU echoes art 3 par. 3, giving the EU institutions and Member States more concrete guidelines to reach these objectives. It has to be fully implemented in order to assess the impact of EU policies on quality of employment. Horizontal social clause assigns social objectives to all policies and actions of the Union. It must be imposed in all fields (including the “hardest” economic fields) and to all EU institutions – the Commission and the Council, of course, but also the European Parliament and the Court of Justice. In the field of hard law, many emblematic social features of what might be called the “European social model” would be protected from the grip of economic law. In the area of soft law, operated properly, the horizontal social clause could allow an emancipation of the Lisbon process and of a “quality of employment” strategy towards economic convergence criteria, or even a compatibility assessment of economic areas in regard with the social purposes of the Treaty.

However, the institutions and social actors should propose and enhance institutional mechanisms capable of ensuring effectiveness of fundamental rights and social values. For instance, more improvement in the social dimension would be assured if DG Employment, Social Affairs and Inclusion, European Economic and Social Committee, national Ministers of labour and social protection, as well as social partners, were actively involved in formulating legislative proposals. It would be unreasonable to expect the European social partners to be consulted to modify, for example, the Working Time Directive (as art. 154 and 155 require), but not to regulate the right to take collective action in the context of freedom of establishment and the freedom to provide services.

With respect to means, a catalogue of rights and freedoms at work which constitute “quality of employment in Europe” should be estab-

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40 To ensure that the legislative proposals concerning the internal market include a reference to social policies and social rights, an impact assessment will accompany each proposal of the Commission (Single Market Act. Twelve levers to boost growth and strengthen confidence. “Working together to create new growth” (COM(2011) 206 final, p. 5).
lished. In fact, although the Treaty of Lisbon henceforth clearly promotes fundamental social rights, the “hard law” framework of social rights at work still remains incomplete at EU level, compared to national traditions and national commitments towards the ILO and the Council of Europe (Strasbourg). This catalogue should include the four universally acknowledged social rights listed in the ILO Declaration, and be extended to the commonly agreed corpus of social rights in the EU (on the basis of the EU “social acquis”, of the Charter of fundamental rights of EU and of the relevant instruments of the Council of Europe). It would constitute the “spinal column” of an EU strategy of quality of employment, supplemented by soft law. The decent work approach should be mainstreamed in the EU policy framework, firstly as a key element of its external dimension, but also as a component of EU internal policies, as a complementary and supportive approach towards the improvement of quality of work and also employment policies (Caillaud, Ghailani, Peña-Casas).

In so far as “the indivisible, universal values of human dignity, freedom, equality and solidarity” should be pursued, employment policies should be considered as an alternative mechanism to enhance substantial rights. To this end, they should be considered as a complement – by no means a substitute or an opponent – to “hard” labour law (Bonvin, Cianferoni, Widmer). “Decent work” at ILO level shows the efficiency of a soft law strategy built on the roots of fundamental social rights. In this perspective, EES and OMC must be reviewed in line with the rights that are or will be recognised at EU level. These rights must shape the list of criteria for “quality of employment”, but also the way they are conceived through indicators (and not the reverse).

The policies defined in the context of EU Economic Governance identify the means by which one of the objectives of the European Union may be achieved. These means must respect the values of European Union and guarantee the fulfillment of the other objectives listed in art. 3 TEU (or, at least, they must not hinder the fulfillment of the latter)\(^4\). The recent revision of economic governance in Europe shows the limits of social soft law, which from now on is going to be more and more shaped by economic considerations and objectives. If the EU still pretends to build a “European social model”, it has to protect “quality of employment” from economic governance. A catalogue of social rights at

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work and a quality of employment strategy anchored in a fundamental rights framework would contribute to the emancipation of the social arena and would fit in with art. 3 par. 3 of the Lisbon Treaty and the “capabilities” approach.

In order to promote “job quality”, regulations should not only define substantial rights, but also procedural rights and negotiation (Bonvin, Cianferoni, Widmer)\(^{42}\). Social partners’ autonomy should be respected, in line with art. 152 TFEU. Accordingly, collective agreements can never be considered as an obstacle to economic freedom, but rather as a normal consequence of the right to collective bargaining (art. 28 Charter of Fundamental Rights of the European Union)\(^{43}\). In the capability perspective, the power to do something (conferred by the right to negotiate) comes with responsibility for what we do (in this instance, the duty to respect the collective agreement). Duties emanate from the exercise of power, as a consequence of the choices we make.

Finally, the distinction between short-term and long-term reforms has to be rejected\(^{45}\). It disguises the intention to reform Labour Law now so as to promote flexible contractual arrangements and less regulated labour market, and to improve (maybe) in the future social protection for employees in flexible jobs. Up to now, this strategy only allowed an increasing so called “Matthew Effect”\(^{46}\): “les réformes conduites au nom de l’adaptation [du Droit du travail] aux besoins des marchés n’ont nullement conduit à supprimer les ‘acquis’ de l’État providence, mais bien plutôt à rogner ou supprimer les protections là où elles étaient le plus nécessaire tandis qu’elles continuaient de s’empiler en haut de l’échelle salariale”\(^{47}\).

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\(^{42}\) A. Supiot (L’esprit de Philadelphie, op. cit., p. 140) refers to “capacité collective”, that is either the individual freedom to organise and act collectively to defend our own social and economic interests (liberté syndicale et droit d’action collective), or the power of organisations to negotiate and conclude collective agreements (droit de négotiation collective).

\(^{43}\) As stated in the Report of the Director-General of the ILO, A New Era of Social Justice (International Labour Conference, 100th Session 2011), freedom of association and the right to collective bargaining are necessary in order to avoid market incomes deviating from productivity trends.


\(^{45}\) For a recent proposal to reconcile short-term and long-term considerations, see Vandenbroucke, F., Hemerijck, A. and Palier, B. The EU Needs a Social Investment Pact, OSE Paper Series, Opinion paper No. 5, May 2011, that suggest embedding the social investment strategy in budgetary policy and financial regulation, i.e. “short-term macroeconomic governance serves long-term social investment”.

\(^{46}\) Dovis P. – Saraceno C., I nuovi poveri: politiche per le disuguaglianze, Turin, Codice, 2011.

\(^{47}\) Supiot, L’esprit de Philadelphie, op. cit., p. 56.
IV. Presentation of the Chapters

The book is subdivided into four parts. The first part points out the theoretical bases on which social law is founded and given legitimacy as a paramount instrument for quality of employment. It analyses the conformity of the political and legal European framework with these fundamental norms. The contribution of Pascal Caillaud, Dalila Ghailani, Ramón Peña-Casas compares the main elements in the definition of job quality within the European framework and the concept of decent work developed by the International Labor Organization (ILO), highlighting the high degree of convergence of both approaches. The second part is dedicated to the legal dimension of several areas of job quality, as reflected in European hard and soft laws and also ILO conventions, and considers the role of EU and international regulations in promoting fundamental social rights.

In his chapter, Jérôme Deumer makes a critical assessment of the definition which has been given by the European Commission to the concept of quality of work and flexicurity, and aims at assessing whether these goals could be reconciled in the same social policy. Indeed, since the beginning of the 1990s, the improvement in quality of work has been considered as the priority of social agenda of several international organisations, including the European Union. At the same time, numerous discussions have been held on the implementation of a policy of flexicurity which aims to increase the flexibility of employment relations whilst securing the professional path of workers.

Even the social doctrines of the Catholic Church have an essential place in the installation of a normative framework for quality of employment. As underlined by Pascal Caillaud, the moral and religious nature of the precepts has not prevented the Social Teaching of the Catholic Church from expanding its influence on major international organisations. Its rules on finding the “common good” can be detected in ILO policies to promote decent work in the quest for “common welfare” (Article III of the Declaration of Philadelphia) or in EU policies on “quality employment” in the quest for the “welfare of workers”.

The second part of the book returns to some of the most critical aspects of the quality of employment: the employee concepts, the development of atypical forms of work, freedom of association and the effective right to collective bargaining. The ILO Decent Work Agenda, as well as European Employment Strategy focus not only on the creation of jobs, but also on the creation of jobs of an acceptable quality. It is therefore important to consider the type of work contract. Silvia Borelli’s contribution examines the employee concepts developed by European Court of Justice and the criteria for the interpretation of these con-
cepts. The author underlines the importance of establishing a common set of transparent, coherent and objective indicators within any employment relationship.

In the next chapter, the EU’s strategies to avoid the risk of segmentation of the labour market are taken into account. On the one hand, EU law sets broad definitions for an employee, part-time worker, fixed-time worker and temporary agency worker; on the other hand, it prohibits discrimination between atypical workers and comparable standard employees. The recent proposal on economically dependent self-employment is also considered.

Filip Dorssemont examines whether the Commission’s understanding of concepts of decent work and quality in work takes sufficient recognition of freedom of association and freedom of collective bargaining, as a lever to promote better and decent jobs. Furthermore, it examines to what extent the European Court of Justice recognises and respects both freedoms, in face of the necessity to protect and promote fundamental economic freedom.

The third and the fourth parts of the volume analyse from various angles two substantial dimensions of the quality of employment: the role of social protection and the prohibition of discrimination. The contributions of Elise Dermine and Pascal Caillaud focus on the concept of suitable employment. In the first chapter, the framework incorporating the different dimensions that shape a job of quality is compared with the international framing (ILO, Council of Europe and EU) of the concept of suitable employment, to assess whether the framing includes the necessary safeguards to ensure that a suitable job plays a part as a springboard into jobs of quality. Pascal Caillaud, in his turn, examines whether the concept of a valid or reasonable offer of employment, existing in French legislation, can be considered as the informal interpretation of the concept of suitable employment. The author also underlines that a valid offer does not have the same characteristics as a reasonable offer of employment: in the second case, the job seeker’s obligation not to refuse a job, is qualified by the nature and the characteristics of the employment offered, the geographical area and the expected wage.

The fourth part further demonstrates the concern for a legal and qualitative implementation of quality of employment concept. Laura Carlson highlights the necessity of considering work-life balance as an aspect of quality of work. Moving away from a gender concept in parenting is necessary to achieve equality in the workplace between women and men. Combining family and work is the next step in this process, which entails employers considering the need to accommodate the requirements of both parents in reconciling work and family.
The contribution of Christine Canazza examines the quality of work framework as a major aspect to be taken into account within the active ageing strategy and with special regard to the principle of age discrimination. After demonstrating that the struggle against discrimination is a significant aspect of quality of work, the paper focuses on the importance of these objectives to achieve the goals of the European Employment Strategy in terms of an active ageing policy.

Antonio L. García-Izquierdo and Ramos-Villagrasa review the European equal opportunities law, stressing the wide gap existing between such legislation and job access for women. As a solution, the authors suggest following the organisational justice approach and incorporating it in the legal provisions as a mean to improve equality between women and men.

In conclusion, Jean-Michel Bonvin, Nicola Cianferoni and Frédéric Widmer explore the place of law, in a globalised context, in the regulation of the labour market, firstly identifying the main changes that are currently challenging job quality. Then, the authors focus on some actual strategies that have been developed and suggest alternative conceptions inspired by the capability and capacitás frameworks. In this context, a combination of substantial and procedural rights is needed to promote job quality.