THE MAJOR THEMES OF LABOUR LAW BETWEEN LEGAL CATEGORIES AND VALUES

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This book is an open window on the major themes of labour law, viewed through the lens of a group of talented young scholars who have the merit of trying to innovate in legal analysis with important and original contributions.

In this brief introduction, I do not intend to present and comment on the individual chapters, but rather to provide a glimpse of some aspects of method (law, categories, values) on some of the topics addressed, which reflect the most salient aspects of contemporary research in the field of labour law.

1. *Labour law, categories and values*

Aristotle and Kant taught us that categories are important intellectual tools that enable us to know reality. We cannot know without categories with which to interpret reality, be it a natural datum or an ideal-normative entity. This is why the 'genius' of legal construction has rationally constructed the categories of law, placing its actions under the domain of abstractions. Legal categories make it possible to conceptualise normative ideas (*facti species*, *Tatbestand*) that express the ought-to-be of the norm and that underlie the processes of law interpretation and application.

Categories are thus essential both for a 'science' of labour law, aimed at knowledge of what labour law is, i.e. of its identity and qualities in relation to other areas of legal experience, and for the interpretation and application of labour law norms. But categories are not only necessary tools for knowledge of normative reality (and for the interpretation and application of law), they are also powerful technical means for constructing the object of legal science and guiding application practice. The categories are like the bricks of the building and at the same time represent the architectural design necessary for its construction.

Many of the issues addressed in this book call into question the adequacy of traditional labour law categories. For example, the category of 'employee' in binary opposition to the category of 'self-employment', both of which are being challenged by the newly emerging category of 'personal labour', which seems to be a synthesis that surpasses them both. Or the category of the enterprise, which from being a category based on the economic nature in view of profit, according to the theory of shareholders values, is evolving towards new categories in which other interests and values are structured. Or the category of the collective interest, historically in decline and today increasingly subject to erosion due to forms of disintermediation of labour, as in the case of labour intermediated by digital platforms.

It is therefore necessary, on the one hand, to revise the old categories and, on the other hand, to think of new ones that are better suited to grasp the changes taking place and the challenges facing labour law. Categories, in fact, are necessary for law, because they orient thought and help stabilise normative expectations, but they must not become the nexus shirt that prevents the evolution of concepts, the adaptation of normative rationality to social processes and the reforms that a progressive labour law needs.

Categories are related to values, which represent the axiological sense content of the legal matter. On values and political philosophies influencing labour law, the discourse is even more complex than on categories. Even the term values, when referring to the legal sphere, is very problematic. The values we often refer to when we mean the fundamental normative principles of labour law – freedom, democracy, social justice, solidarity, equality, human dignity – what is their nature? Are they legal or moral values? Are they part of law or do they belong to the sphere of ethics?

A positivist jurist would probably object that when we speak of values we are referring to something that lies outside the sphere of law, and that moreover belongs to the irrational sphere of subjective preferences. This traditional position of legal positivism still prevails today in general legal theory and is accompanied in moral philosophy by non-cognitivist and sceptical positions that deny the objectivity and rational knowability of values. But legal formalism, which expunges values from law and embraces axiological relativism, is ill-suited to a post-positivist normative system, inspired by the idea of social justice and the values of equality, solidarity, freedom and the dignity of the person that still inspire labour legislation, labour policies and labour utopias, which are also necessary in the jurist's project work. The road that leads to the relativism of values and legal nihilism, in which law is understood as a merely formal structure, ready to accept any content, and therefore to justify any arrangement of interests, even the most socially unjust, cannot be taken by a labour law still hinged on the category of values for the protection of the human person and on the idea of work as a prerequisite for social citizenship.

Labour law, due to its natural porosity towards the values and principles of social justice, has much to say on this point and can be considered the emblem of an anti-formalist law, which is not based on the mere formal-procedural recognition of what is law (the positive norm), but is founded on

an axiological-material system that aims to achieve substantial results for the protection of the worker. Thus, labour law actually translates values into its normative fabric, in a material and non-formal sense. Often these values coincide with human rights: if a person is entitled to receive a fair wage in return for work done, in this demand for social justice there is an appeal to a material, non-formal value, which is translated into a universal right. In labour law, it is not just a matter of affirming the equivalence or equality of the parties in the sense of private contract law: instead, there is an instance of distributive justice that has an ethical rather than logical, moral-rational rather than legal-positive foundation, something that makes labour law an inalienable instance of human dignity and freedom.

Another example is offered by the value of solidarity: what would labour law be without the many solidarities that bind people together, that create a collective fabric and fuse different interests into a common instance, at the local level (the community, the enterprise) but also at the national and transnational level? The fight against the commodification of labour passes through the affirmation of democratic values and fundamental rights, in a complex interplay of sources and normative levels where solidarity is 'inscribed' in the forms of regulation [1]. Other examples of new emerging values germinated by the general value of solidarity are offered by intergenerational solidarity, which underpins the paradigm of sustainable development, and by ecological solidarity between human beings and Nature, which underpins a new relationship of labour law with the environment [2].

In short: there is a world of human and humanistic values pulsating at the heart of labour law. Scholars like Hugh Collins and Virginia Mantovalou invite us to think of labour law in terms of human rights (Bogg, Collins, Davies, Mantouvalou, *Human Rights at Work – Reimagining Employment Law,* Hart Publishing, 2024*).* In civil law systems this reference to labour rights as human rights is rather expressed in the form of 'fundamental rights'. This theme is taken up by Tonia Novitz in a work revisiting international labour standards in the light of the sustainability paradigm [3]. Consequently, the challenge is to align sustainability and human rights in order to strengthen, also on the jurisprudential front and in the work of the Courts, the universality and significance of labour rights.

2. *Composing values*

But how can law compose conflicting values? How can the legal system ensure that the ought-to-be of the norm expresses a value that is neither mere-

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[1] J. LOPEZ (ed.), *Inscribing Solidarity*, Cambridge University Press, CA, Mass., 2022.

[2] A. LYON-CAEN, A. PERULLI, *Vers un droit du travail écologiques*, in *RDT*, 2022, p. 429 ff.

[3] T. NOVITZ, *Trade, Labour and Sustainable Development*, Edward Elgar, 2024; see also A. PERULLI, V. BRINO, *A Global Labour Law: Towards a New International Framework for Rights and Justice*, Routledge-Giappichelli Studies in Law, Torino, 2024.

ly 'formal' (and thus open to accepting any content, according to an avowedly nihilistic view of law) nor absolute (since no right, not even the fundamental one, can stand as a tyrant over others)? All the values that live in the legal system cannot, in fact, be 'tyrannical' values: the thesis of the tyranny of values [4] can and must be avoided thanks to 'axiological syntheses', based on balances between values [5]. Since the antitheticality of values extends by degrees throughout the realm of value, the consequence is that there are no isolated values, and that each value only reaches its full meaning in synthesis with others, and finally, ideally, in synthesis with all [6].

Contemporary constitutionalism deals precisely with the synthesis and balancing of values. Through balancing, which is concretely realised through the principle of proportionality, what Robert Alexy calls the 'optimisation' of principles is implemented, i.e. a maximisation of the ultimate ends of the system [7]. In recent times, however, labour legislation has often been unbalanced: the Italian Constitutional Court, for example, in a 2018 judgment, found that the Jobs Act, the law on dismissals introduced in 2015, had not achieved a fair balancing between the interests of the company and the protection of the interest of labour. In other cases, the balancing has been wrongly invoked: thus, for example, the Supreme Court of Belgium in 2021 ruled out that the balancing between the interests of the company and the interests of the employee can be used to justify the employer's act of unilaterally modifying an essential element of the employment contract. Balancing cannot therefore be invoked to legitimise a unilaterally implemented substantive modification of the employment contract. It could be said that the balancing, in certain cases, must be 'unbalanced' because the interest of protecting the weaker party in the relationship must prevail. For example, in the case of reasonable accommodation for the protection of persons with disabilities, the protection of the stability of the employment relationship must prevail over the interest in the termination of the relationship for exceeding the sick leave period, as the Court of Cassation in Italy has recently ruled.

Contemporary legal systems, in which constitutions and supranational and international sources represent tables of values that are intertwined and require increasingly complex and difficult balancing and reconciliation, give priority to the human person and his inestimable value that asks to be protected, that claims its own normative status. Labour law is perhaps the highest expression of the coexistence of different 'greatnesses', the civic and the industrial, the social and the mercantile, in the search for axiological syntheses adequate to guarantee what is man's own, his right, which I do not hesitate to define as 'natural', not because it is not positive (and therefore concretely operative and enforceable) but because it has roots that go well be-

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[4] C. SCHMITT, *The Tyranny of Values and Other Texts*, Telos, Candor, NY, 2018.

[5] N. HARTMANN, *Ontologia dei valori*, Morcelliana, Brescia, 2011.

[6] N. HARTMANN, *Etica*, vol. II, Guida, Napoli, 1969, p. 40.

[7] R. ALEXY, *On the concept and the nature of law*, in *Ratio Juris*, 21 (3), 2008, p. 281.

yond the positivity of law and are rooted in the Kantian conception of man as noumenon, as an end in itself.

Among these values is work, which is the means of self-realisation of the person, what Hegel calls the self-consciousness of the subject that is realised in work and recognition, that is, in the reciprocal relationship of individuals towards one another[8]. Among these values is health, which the Constitutions define as a fundamental right of the individual and an interest of the community. Among these values is the enterprise and its activity, which, however, must not be carried out in conflict with social utility or in such a way as to harm health, as well as the environment, security, freedom and human dignity. Enterprise is undoubtedly a positive value in our society, but it cannot become a tyrant value, capable of orienting labour law towards the values of the economy, such as efficiency and competitiveness, to the detriment of the values of the person. On the contrary, this economic value must always be reconciled with personalistic values (work, health, and other inviolable human rights) to the point that the Italian Constitution states that the law determines the programmes and controls so that economic activity can be 'directed and coordinated for social and environmental purposes' (Art. 41, para. 3, Const.).

If enterprise must be directed to social ends – and this appears consistent with the social market economy also advocated by the European Union – there is no doubt that these economic and competitive ends, these typically mercantile interests, cannot prevail over other values but must be coordinated with the welfare state, they must have a 'social utility' and not be merely the expression of the selfish tension to maximise private profit.

An example of labour law's ability to realise antinomian syntheses of values, without imposing any tyrant values, concerns the more recent dynamic between work, health, and business organisation, in the face of the emergence of a new normative concept, relating to the 'fragility' of persons. Realising the protection of 'fragility', a new concept that emerged in some Covid-19 health emergency legislation to bring together the various figures of disabled and vulnerable workers, is one of the most interesting frontiers of this axiological dynamic. In favour of frail persons the company must make 'reasonable accommodations' in organisational terms to accommodate disability and unfitness.

3. *Labour law and social (in)justice*

Values are thus the rational basis of labour law. It is a question of understanding what the foundations and aims of labour law are today, which is not only confronted with the traditional problems of the polytheism of values, but is increasingly conditioned by an economic rationality that becomes a tyrant value, imposing itself in the pluralist arena and imposing its own creed. Pre-

[8] G.W.F. HEGEL, *Elements of the Philosophy of Right*, Cambridge University Press, Cambridge, 1991.

vailing values such as organisational efficiency, or economic productivity for the sake of greater profit, now more than ever undermine the issues of justice that underpin labour law, making it more difficult to strike a proper balance between conflicting interests.

The vulnerability of working people, the loss of the rights of citizenship that arise from stable and fairly paid work, the phenomenon of poor labour, but also the possible social reactions to these real pathologies of the social, as in the case of the 'great resignations', are some of the issues that arise from this progression of a 'cannibal' capitalism that no longer limits itself to exploiting labour but tends to 'expropriate' it. This means that human labour is not only a factor of production that is dominated by capital thanks to the fiction of the free labour contract, but often participates in the process of capitalist accumulation as unfree, dependent and unwaged labour, subject to domination unmediated by a wage contract [9].

In this condition, in which human values are radically challenged, phenomena such as racial oppression, job insecurity, irregular and informal work, the employment of migrant workers, and other pathological forms show how a 'structural injustice' has taken root in our social systems, which the law not only fails to undermine but even produces and legitimises [10]. It is therefore becoming increasingly difficult to combat injustice effectively with the traditional instruments of labour law, both national and international, such as trade union action and collective bargaining at national or transnational level, or such as the instruments of international labour law.

In essence, and paradoxically, labour law itself (or part of it) can be regarded as one of the 'state-mediated structures of exploitation' at work, i.e. as a system of rules that systematically increases people's vulnerability to private actors, first and foremost companies, that exploit workers (think of migrant workers, prison workers, precarious workers), but also as part of legal and administrative procedures that unfairly regulate specific situations of vulnerability, as in the case of state rules on the entry of migrants. These laws have an appearance of fairness and legitimacy, but are in fact based on morally wrong assumptions; they are therefore positive law rules, formally valid, that nevertheless do not pass a test of social justice according to parameters of reasonableness, or that can be challenged from the point of view of constitutional law because they are contrary to principles of justice and the protection of human dignity, or because they do not achieve a fair balancing of the values and interests at stake.

It therefore becomes crucial for labour law not to lose sight of the profound transformations of capitalism and the drift of our legal systems towards structural injustice, in order to demand that legal systems do not abandon their necessary claim to fairness. This awareness, which connects legal

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[9] N. FRASER, *Cannibal Capitalism*, Verso, London-New York, 2023, p. 33.

[10] V. MANTOUVALOU, *Structural Injustice and Workers' Rights*, Oxford University Press, Oxford, 2023.

categories, norms and values, makes it possible to design, and hopefully realise, all possible correctives in terms of legal devices and the activation of political processes for the constitution of spaces of democracy and social freedom. In this perspective, labour law should abandon the sirens of neo-liberalism, which have led to exploitation, precariousness and expropriation of labour widely experienced in the era of hyper-globalised capitalism according to the analyses of Law & Economics.

We must ensure that labour policies and regulatory determinations on the labour market, employment, and the regulation of social vulnerabilities take place according to deliberative criteria suited to the purposes of social justice, the values of dignity, freedom, equality, and solidarity, which still represent the dividing line between sustainable economic development and unsustainable development, because it is guided exclusively by the selfish logic of *homo oeconomicus*. In the end, it is a matter, in the face of this disturbing scenario, of taking labour law back to its origins, that is, making it a component of collective democratic decision-making processes. The problem is that today's collective subjects are weakened, and the welfare state in difficulty, if not in crisis or even waning (depending on the different latitudes in which one stands).

The effort of labour law must then be to recompose its priorities around a series of categorical imperatives to be entrusted to those who are capable of acting in a transformative sense: not necessarily the traditional actors of labour law but also new actors of civil society who, through new legal instruments and with a broader and more internormative regulatory basis, can reactivate new paths of recognition. I am thinking, for example, of the fruitful prospect of looking at labour law from the side of human rights, in order to gain in regulatory breadth and to raise the level of protection, also thanks to specialised jurisdictions (such as the ECHR) precisely where capitalist strategies of exploitation turn into oppression and expropriation of human labour, as is the case with migrant labour. I am thinking, again, of a labour law that, also thanks to more complex regulatory networks involving the market and hierarchy, the economy of exchanges and corporate behaviour, aims to reconfigure the purpose of the economic actor, revealing its political and social as well as legal nature, in order to make it a socially responsible subject.

4. *The sustainable enterprise*

The enterprise, as a centre of interests irreducible to profit alone, must evolve with the other civil and social 'worth', becoming itself the motor of a change in its nature: enterprise as a common good, enterprise as a place of social citizenship, enterprise as a place of economic democracy. This urgently requires a new design of legal policy, of which we can now see a few fragments, which will have to develop and then be recomposed into a coherent framework. Social Europe could once again become a laboratory, even if it lacks a precise project to relaunch it, and the context of growing geopolitical tensions triggered by the Russian invasion of Ukraine and the difficulties of

many industrial sectors (think of the automotive industry) are not factors that facilitate social policies.

Some important positive signs to reconfigure the enterprise category have not been lacking in recent years. One thinks, for example, of the recent Corporate Sustainability Due Diligence Directive (CSDDD) – Directive (EU) 2024/1760, which aims to develop the control of legality along the entire value chain; of the related Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting; but also of the Directive (EU) 2024/2831 on improving working conditions in platform work, which aims to improve the condition of millions of European workers in the platform economy.

In this perspective, companies' sustainable business models begin to aggregate new values within the framework of an industrial justification that is no longer based, as in the past, solely on the typical magnitudes of the industrial world, but is open to incorporating within it (not as an external limitation, but as an endogenous component of the industrial model) a series of civic justifications, giving absolute priority to environmental protection and social rights. Such a new industrial justification, contaminated by the civic world, in order not to evaporate into mere rhetoric, must be translated into actions with a high impact on the effectiveness of labour law, on innovative profiles of the subject such as participatory and horizontal systems, professional and personal growth programmes for workers, work-life balance, corporate welfare systems, health and safety, corporate climate, transparency, human-centred spaces and technologies.

Innovative in this perspective is the Regulation on Sustainability Reporting. In fact, the Regulation (Annex A, paragraph 8) specifies that the process of assessing significance (in terms of impacts, risks and opportunities) is oriented towards dialogue with relevant stakeholders and that the company can therefore 'involve stakeholders or their representatives (such as employees or trade unions)', as well as the users of sustainability reports (among whom we have seen that there are always trade unions and social partners) and other experts, inviting them to provide feedback and contributions on the impacts, risks and opportunities relevant to the company. It is therefore a participatory model, involving all employees and their representatives both as stakeholders and as users of the report.

Another step towards corporate sustainability was taken with the duty of care directive. The central point here is the centrality of workers' rights that can be derived from the catalogue of international human rights agreements. To these rights, which represent a selection of all human and social rights, others should be added, in an open process of progressive integration of all social rights, as also seems to emerge from the directive. I refer to recital 32, which states that 'the Commission should be empowered to adopt delegated acts to amend the annex to the directive for the purposes of Article 3(2), including by adding a reference to the ILO Occupational Safety and Health

Convention, 1981 (No. 155/1981) and the ILO Promotional Framework for Occupational Safety and Health, 2006 (No. 187), which are among the fundamental instruments of the ILO'.

It is more difficult to discern any new elements at the international level, although some progress has been made, for example with the US-Mexico-Canada Free Trade Agreement (USMCA), which for the first time provides for the use of economic sanctions directly against companies that violate ILO fundamental social rights. Based on this conventional provision, corporate behaviour should become more socially responsible, more in line with sustainability goals.

5. *Beyond subordination, towards personal labour law*

An inescapable area of reflection for contemporary labour law concerns the inadequacy of the notion of employee as a criterion for defining the perimeter of social rights, in the face of capitalist strategies of labour exploitation, now no longer limited to subordinate work but extended to the multiple forms of independent work. Indeed, not only subordinate labour but also self-employment is increasingly part of the process of labour integration in capitalist valorisation processes. There is no longer a clear-cut distinction between the exploitation of labour through the instrument of the labour contract and the use of other forms of labour contracts, lacking specific legal protection, such as the self-employed or economically dependent contract. These forms of self-employment also participate in the capitalist production that develops with the platform economy, technological transition, and global value chains: forms of self-employment are also reified and integrated into the global social division of labour. It is no coincidence that, with the delegated regulation of the recent European Directive on Sustainability Reporting, a notion emerges, that of the 'workforce of the company', which includes both employees and the self-employed. More precisely, in the part of the Regulation dedicated to the European Sustainability Reporting Standards (ESRS) concerning the social sphere ESRS S1, a truly new concept appears, that of the company's *workforce*. The objective of the standard is to specify disclosure requirements that will enable users of the sustainability report to understand the material impacts of the company on its workforce and the associated material risks and opportunities.

To achieve this, the standard also requires an explanation of the company's overall approach to identifying and managing actual and potential impacts on the workforce in relation to social factors or issues, including human rights. This standard therefore covers the company's workforce. But who is the workforce composed of? According to the regulation, the company's workforce includes both persons with a subordinate employment relationship ('employees') and non-subordinate workers, who can be persons who have concluded labour supply contracts with the company ('self-employed workers') or workers provided by companies whose main activity is the 'search, selection and supply of personnel'.