THE GOALS AND MEANS OF LABOUR LAW: A RECONCEPTUALISATION

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1. Introductory remarks.

In the current international debate about the state of Labour Law, two main stances can be identified. According to some scholars (e.g., B. Langille), the changed external conditions have called into question the adequacy of the traditional values and scope of Labour Law, thus creating uncertainty about which goals Labour Law should pursue. Conversely, other scholars (e.g., G. Davidov) see the main problem currently faced by Labour Law as not the obsolescence of its values and general goals, but the mismatch between specific labour laws (case law included) and their aims, generated by changing labour practices and economic constraints.

In truth, there is also (at least in certain countries such as Italy) a third position, in some ways the most conservative (although its supporters usually like to present themselves as "progressive conservatives"), which has in common with the second the belief that the structural features of workers' conditions are basically unchanged, but differs from it in the implication that at most Labour Law is in need of some adjustment, certainly not a revolution. I shall not take this position into consideration in the following reflections.

Therefore, those who believe that Labour Law is going through an important process of transformation and that this needs to be harnessed through new thinking, have to address this preliminary question: do the basic foundations of Labour Law need to be revised, that is its values and general goals, or is it merely necessary to evaluate and adapt its means?

In my opinion, which I will illustrate in this paper, Labour Law should play on both fields.

On one side, I believe that it is necessary to update and revise the core values of the discipline, which determine its general goals. In this regard, I will present some reflections which are fundamentally inspired, in accordance with other scholars' positions, by Amartya Sen's Capability Approach, as recently focused in *The Idea of Justice*.

On the other side, it is undeniable that all advanced Labour Law systems currently face many problems of mismatch in relation to the goals pursued by specific labour laws. I believe that if most labour lawyers are unprepared for evaluating the effectiveness of legislation, and therefore for

dealing with mismatch problems, this has also been due to a certain methodological bias – which I would summarise as the paradoxical anti-consequentialism of Labour Law – that could be corrected by a restatement of Labour Law's goals and of its relationship with other disciplines such as economics. With regard to this aspect too, which I will discuss at a very general level, I will try to take advantage of several suggestions inspired by the thought of Amartya Sen.

Therefore the two dimensions I will deal with in this paper not only do not exclude each other, but are closely and mutually interrelated, my limited purpose being to show such interrelation.

2. The crisis of the foundation of Labour Law.

As is well known, in all Labour Law systems which have spread worldwide (in direct proportion to the degree of economic development), the main purpose has been – to put it in the famous Kahn-Freund's words -, to represent a countervailing force to counteract the inequality of bargaining power which is inherent in the employment relationship, both in setting the terms of the employment contract and in the fact of subordination which is the substance of the relationship

As Brian Langille has observed, in the minds of labour lawyers this principle has been closely linked to another famous principle which holds that labour cannot be treated as a commodity and Labour Law exists in order to ensure that this never happens again.

In still broader terms, the development of Labour Law has been seen as a way of performing a redistributive action (even though not all Labour Law norms can pretend to have a redistributive effect) and thus enforcing equality, in contrast to liberal visions of economic and social life.There are many environmental reasons why this foundation has become obsolete, but here I prefer to dwell on its intrinsic weakness, deriving from its ambiguous position halfway between the empirical and the normative dimension.

To start with, as for the principle "Labour is not a commodity", its ultimate relevance is that of a noble slogan, since it has no empirical basis. In fact, labour *is* a commodity (albeit a fictive one), because a labour market does exist, and all that Labour Law can do is to ensure that labour is exchanged there on a fair basis and that certain of the worker's goods and rights are not tradable.

As for the principle – which expresses the conventional wisdom of our discipline - hinging on the necessity to compensate the inequality of bargaining power through legal and collective protection, this is partly empirical and partly normative. Undoubtedly, it arises from observation of the prevailing reality of the labour market, but then it moves away to arrive in a different dimension, in which the worker's weakness tends to become (in Popperian terms) a not-falsifiable truth which no longer needs to be verified simply because it is considered as a "structural" attribute of the worker's condition within a capitalist system.

Therefore, from a labour lawyer's viewpoint, it is not a problem that the "inequality of power" cannot be empirically measured, and that mainstream economics actually ignores it (at most

speaking of information asymmetries). Rather this is seen by some scholars as the confirmation that Labour Law and Economics live in different worlds and have nothing to say to each other.

A fragile check-and-balance equilibrium (between power and counter-power) is thus created, but one with the peculiar feature that rules out any possible evolution over time. In fact, when the "inequality of power" is seen as a permanent implication of the employment relationship, any attempt to take into consideration empirical evolutions which could, to some extent, strengthen the worker's position (e.g., the post-Fordist transformation of work organisations, which call for a change in the role of individual workers role, although the category of post-Fordism is not generally accepted) tends to be attacked as a neo-liberal manipulation, or as a challenge to the identity of the discipline. On such premises there appears to be no escape from a paternalistic concept of the action of Labour Law.

The problem is that in a liberal and democratic society, sooner or later all paternalism should come to an end, since the life choices ought to be entrusted to the individual's sovereignty. A protective guardianship which excludes any other perspective is hard to justify in the long haul.

In short, the "inequality of power" narrative seems to lead the discipline down a blind alley, since it aims to insulate it from economic and social transformations, whatever they may be.

Nor is the situation improved by an overarching reference to the glorious equality principle since, apart from repeating that its task is to continue a generic redistributive action, on a conceptual basis it is plain to see that Labour Law is not able to give a definite answer to Sen's famous question: "Equality of what?".

For instance – forgive me for this short Italian tale - Article 3, Paragraph 2, of the Italian Constitution proclaims the so-called principle of "substantive equality", which gives a formal consecration to the concept of the social duty of the State: "It is the duty of the Republic to remove the social and economic obstacles which, by restricting the freedom and equality of citizens, prevent the full development of the individual and the effective participation of all workers in the political, social and economic organization of the country".

This is the point where the Italian Constitution departs more sharply from classical liberalism. The principle of substantive equality has been regarded as the great pillar of labour law within the concept of the social commitment of the State. It is generally accepted among Italian scholars that all labour legislation serves as a tool to implement Article 3, Paragraph 2 (even though certain groups, such as women, have then called for special attention).

The problem is that the principle of substantive equality is largely undetermined and various interpretations of it have been proposed. Once I raised this objection to Umberto Romagnoli, a master of Italian Labour Law, and he told me that the beauty of Article 3, Paragraph 2, derives from precisely this vagueness, that is from the fact that it evokes a sort of promised land. Unfortunately this is not sufficient to point out a clear course of development for Labour Law.

Labour Law's conventional "theory of justice", as Langille has defined it, is therefore not able, in my opinion, to offer an adequate foundational basis for Labour Law.

Nor is it, strictly speaking, a "theory" of justice, but merely the conceptualisation of the way in which Labour Law has historically operated from the 19th century onwards, up to the era of globalisation.

This leaves room for the quest for new foundations.

3. Capability Theory and Labour Law: a success story?

According to many scholars, myself included, Amartya Sen's Capability Theory can furnish a fresher and more fruitful foundation for Labour Law.

The main reason for this derives, in my opinion, from the fact that Capability Theory does not require a complete revision of Labour Law, and hence an abandoning of its protective mission on behalf of the workers, but merely offers a new way of conceiving and directing it.

In his last outstanding contribution, *The Idea of Justice*, Sen does not devote particular attention to the work dimension, but of course that does not prevent Capability Theory from variously interfering with it.

First of all, it is almost self-evident to observe that labour is an essential pre-requisite of capabilities, since, due to its *exchange value* (labour as a means), it represents perhaps the most important tool that each individual can dispose of to acquire those goods or resources which permit an increase in his/her capabilities.

Another simple observation immediately derives from this. Labour can be an effective instrument for increasing individual capabilities if and when the worker is fairly compensated for it. According to the traditional explanation, the right to a fair wage, as stated by many Constitutions and international declarations, is the right to enjoy that primary good which comprises the income needed to survive and to live a dignified existence. In Sen's terms, a fair wage is one of the means for obtaining a greater amount of capabilities and enjoying those functionings which are valuable for the individual. Other rights comprised comprised in the traditional *acquis* of Labour Law can also be easily justified in the light of the Capability Theory. Up to this point, the adoption of Sen's viewpoint does not appear to make any substantial difference with the classical approach. A first problem with Labour Law could instead arise from the fact that the dimension of "power" does not have a specific place within the Capability Theory, whereas the substance of Labour Law, as said above, cannot be appraised outside such dimension in view both of the contents of single norms, which are aimed at limiting the employer's power within the workplace, and of the imperative force normally attributed to Labour Law norms.

It is then very interesting what Sen, in *The Idea of Justice*, acknowledges with regard to the expediency of integrating his theory, adopting not only the classical concept of liberty as non-interference (negative liberty), but also a concept of liberty as non-domination, as proposed by Philippe Pettit in his essay on *Republicanism*. Within the concept of liberty as non-domination the

defence of liberty must include those measures which are aimed at counteracting all the conditions of subjection which may affect people due to their economic and social condition.

In fact the suggested integration of Capability Theory is conceptually coherent, as the worker's lack of power is in inverse proportion to the amount of capabilities he/she possesses. For instance, if the employer has the power to terminate the employment relationship abruptly, without a valid reason, the most important source of employee's capability is arbitrarily put at risk, justifying the establishment of a right to protection against unfair dismissal, now recognised as a fundamental right by the Charter of Fundamental Rights of the European Union (Article 30).

Moreover, Labour has a *use value* (labour as an end), since it represents an essential dimension of personal life and fulfilment. Therefore a programme of promotion of workers' capabilities entails each worker having the right to working conditions which respect his/her health, safety and dignity (Article 31, Paragraph 2, of the aforementioned European Charter).

But it also implies, as a more ambitious objective, that the quality of work is constantly improved and workers' professional development is promoted, as far as possible, by the Labour Law system, e.g. through the adoption of organisation models which enhance the value of the individual worker and his/her knowledge and skill.

At this stage, one might observe that there is nothing new in all this. The Capability Theory could merely represent a different way of saying the same thing-, that is justifying in updated terms the dear old protective mission of Labour Law.

So must everything change in order to stay the same? The Capability Theory just like Tomasi di Lampedusa's Leopard? I do not think so.

Not only do the contents of protective programme matter, but also the framework of value within which they are displayed: to provide a paternalistic protection, on the basis of which the worker's autonomy is an objective not even worth pursuing, since it is declared *a priori* unattainable, is not the same thing as offering a protection finalised at enhancing individual workers' capabilities.

In this different perspective, the removal of the disparity of power between employer and employee can no longer be considered the ultimate aim of the discipline, but rather as an obstacle to be overcome in order to pursue the true and final goal of Labour Law, which is the maximum development of workers' capabilities. A merely negative objective is thus transformed into a positive one, and this is a passage full of implications.

This is not to suggest that suddenly the inequality of power no longer exists and that all Labour Law has become obsolete. Subordinate workers still need traditional protection, albeit not the entire working population and perhaps not to the same degree as in the classical industrial age. However what makes the difference – firstly in terms of theory, but then potentially in terms of policy – is that such protection becomes merely an instrumental or intermediate step towards other positive goals.

Within this framework several institutes of Labour Law could be revisited, as well as experimenting ways of giving back to the employee a quota of his/her contractual autonomy, provided that he/she is adequately assisted by unions or public officials.

Even collective bargaining, while maintaining all its importance as a source of Labour Law regulation, from the viewpoint of Capability Theory has to be seen not as an end in itself or the expression of a super-individual, collective, dimension of work, as Continental literature sometimes claims, but more simply as a primary instrument for workers' empowerment (and saving on transaction costs).

This allows us, finally, to highlight the genuine and profound cultural novelty that a Labour Law reviewed in the light of the Capability Approach could entail. It has to do with the complex connections between Labour Law and the two great principles which have dominated the Western scenario since the French Revolution: freedom and equality.

Namely, the novelty resides in the fact that, with the Capability Theory, freedom would make its official entrance into the *pantheon* of core values of Labour Law, but without having to expel equality in any way.

However, the freedom which is involved in the Capability Theory is not the "formal" freedom in contrast to which Labour Law has built its identity over the 19th and 20th centuries, but rather– as Sen stresses in many parts of *The Idea of Justice* – a "substantial" freedom, which requires that the individuals have a real possibility of choosing the functionings they prefer in order to fulfil their existential desires (although it must be reminded that the concepts of negative and positive/substantial freedom are highly debated, and controversial, in political philosophy). This implies, as a consequence (even though Sen is very cautious about deducing specific policy implications from his assumptions), that the State should actively intervene to maximise (and to equalise?) everyone's capabilities (or at least to guarantee fundamental capabilities, as they have been listed, albeit within a somehow different approach, by Martha Nussbaum).

In other words, Sen's liberalism is definitely a social liberalism which – unlike more classical versions of liberalism - stands up for the removal of economic and social obstacles that restrict what might be called a free exercise of freedom.

Finally this appears to cast light on why the encounter with Capability Theory could turn out to be a success story: Capability Theory could allow Labour Law to become reconciled with the socially-oriented strand of liberal thought without abandoning the egalitarian tradition which has long been Labour Law's natural environment, but merely specifying and refocusing the latter on the parameter of individual capabilities.

The result could be a well-tempered mixture of new and old, discontinuity and conservatism, which could modernise the cultural foundations of Labour Law.

This is not to say that the parameter of capabilities should be the only one Labour Law needs to take into account. From this perspective it could be argued, for instance, that it is the same if the quantity of capabilities is incremented by improving workers' treatment, or favouring their access

to the market of goods and services, since people usually belong to both groups. This could worsen the conflict between citizens as workers and citizens as consumers, which has been brilliantly analysed in Robert K. Reich's *Supercapitalism*.

However, in order to safeguard workers' dignity, Labour Law can't accept that workers' treatment is compressed beyond a certain threshold, and this requires that other values, in addition to capabilities, are taken into consideration.

Therefore, the Capability Approach too must not be conceived as an absolute truth, as Amartya Sen insists over and over again in his book.

4. The paradoxical anti-consequentialism of Labour Law.

The assumption that Labour Law discourse is basically anti-consequentialist could be contested and found paradoxical. One could say that, more than any other legal discipline, Labour Law has come to life and developed with the deliberate and precise intention of changing economic and social reality, that is, bringing about tangible consequences, certainly not circumscribed to the rarefied atmosphere of the legal system.

However, the transformation of the protective principle from an empirically-based principle to a prevailingly normative one has been paid at great cost by Labour Law discourse: that is, the cost of leading the discipline into an anti-consequentialist perspective, which is in conflict with its profound nature.

In fact, as a matter of principle the *value-oriented* rationale of which Labour Law is an instrument should also imply evaluations based on a *goal-oriented* rationale, in order to verify whether the means used have genuinely achieved the intended goals (which should be more expressly articulated, as Guy Davidov has recently remarked), and also whether any unintended consequence to the detriment of other individuals or groups has been produced.

This is why Labour Law culture ought to be basically consequentialist.

However, what has happened is that the protective mission of Labour Law has acquired an absolute value, irrespective of its consequences. All too often this has led to the increase of the number of rights assigned to employed workers being taken as the only yardstick to measure the advancement of Labour Law.

In my opinion, this intellectual misunderstanding has been favoured by deriving all Labour Law from a single principle of protection, since this has instilled in the discipline an excess of philosophical and ethical normativism, distancing it from the empirical reality.

This is not to say that if one believes that traditional Labour Law's guiding principle are still valid must not be interested in mismatch problems (Guy Davidov is an excellent example of the contrary). What I am arguing is simply that, especially in some Labour Law cultures, a *de facto* alliance between an all-protective and an anti-consequentialist approach has took place.

As a result, when economics has placed Labour Law under attack, these labour lawyers have protested that in the pursuit of its social – or even ethical – objectives Labour Law can afford, or even ought, to ignore economics, as if *homo juridicus* should be anthropologically opposed to *homo oeconomicus*.

These approaches sound unconvincing because they contradict Labour Law's true function. A discipline which has always been open to a number of extra-legal factors, in which it has found its final justification, cannot coherently refuse to examine, say, economic arguments, provided that they are relevant for Labour Law discourse (and they are particularly so in the current historical situation, since globalisation is constraining the advanced economies to give new priority to the creation of wealth rather than – or together with – its redistribution).

In addition to this, economic goals may often coincide with important Labour Law values, or be very close to them. As an example, full employment is both a parameter of efficiency of the labour market and a primary social value. Of course, labour lawyers (see, for example, a recent manifesto - *Para proteger a todos, no es necesario desproteger a la mayoria: aspiremos a crear empleo de calidad* – by some Spanish economists and labour lawyers) promptly add – again with a normative statement - that the promotion of full employment cannot be made at the cost of reducing the standards of employed workers below a certain level (e.g., giving too much scope to temporary work contracts), as the intellectual "blackmail" of the insider-outsider scheme is rejected; nonetheless, the social value of the "employment" in itself is not doubted, so that job-creation policies are by now basically integrated into Labour policies.

Therefore, the assumption that Economics and Labour Law are two different and separate entities cannot be defended, even taking into consideration only mainstream economics (which is not the only branch of economic analysis).

Within this context, the adoption of the Capability Approach could reduce the distance which too many still see between the two worlds: on the one hand, maintaining a leading value (promotion of individual capabilities) which must inevitably be monitored in the empirical dimension and through empirical research, both economic and sociological; on the other hand, standing up for a concept of welfare which is not exclusively based on quantitative indicators such as the GNP.

It therefore comes as no surprise that, in *The Idea of Justice*, Amartya Sen also wages an intellectual battle in favour of pragmatism and consequentialism. This is where he proclaims the superiority of an approach based on patient comparisons among the impacts of different social achievements, to a transcendental one which is aimed at identifying absolutely just institutions (and of which John Rawls, whom Sen challenges throughout his book, is the latest champion).

The problem with Labour Law is that, up to now, it has followed, in Senian terms, neither a transcendental approach nor a comparative one, since it has remained halfway between a purely normative dimension and a reluctant – although sometimes unavoidable – empirical inclination. This has given rise to an ambiguous identity, which has revealed all its weakness when external circumstances have become adverse.

5. For a dual modernisation.

This paper has dealt with two topics concerning Labour Law's goals and means which are usually kept separate but are, in my opinion, closely intertwined.

On one side, I have stressed the importance of Labour Law updating its protective paradigm, passing from a paternalistic concept of protection to a positive and proactive one, which is focused on the effective needs of workers and is capable of mobilising their autonomy and responsibility.

On the other side, I have emphasised the need for Labour Law to rearticulate the relationship between the normative and the empirical dimension, giving more importance to the latter, and I have assumed that such reappraisal could be made easier by a revision of the discipline's classic normative premises.

I have then tried to show how, with regard to both aspects, Labour Law can benefit by a comparison with Amartya Sen's liberal stand, which should not be circumscribed to the best-known (and admittedly important) topic represented by Capability Theory, but should also extend to his general methodology, and namely to his pragmatic and consequentialist approach.

These could be the elements of a dual modernisation which could make for a remarkable progress in Labour Law theory and culture.