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Silvana Sciarra

Trusting Judges to Deliver Changes: Italy, the EU and Labour Law

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Trusting Judges to Deliver Changes: Italy, the EU and Labour Law

Silvana Sciarra^{*}

Abstract

The paper looks into the slow and at times controversial process of ‘Europeanising’ the Italian legal system, in order to exemplify how adaptation to changes takes place within entire branches of the state administration. Three examples are selected, all within the domain of labour law: state aid illegally granted to support training and work experience contracts; fixed term labour contracts in the public sector; free movement of foreign language assistants. Multi-level regulatory techniques are at the origin of adaptation, geared by institutional and quasi-institutional actors. The main emphasis is on national judges engaging in a dialogue with the ECJ and delivering changes into the legal order as a whole.

^{*} Jean Monnet Chair of European Labour and Social Law, University of Florence, silvana.sciarra@unifi.it. This is a revised version of the Mackenzie Stuart Lecture, which I was honoured to deliver on 26 October 2006, and is dedicated to my parents, both in their 80s. Their generation represents the emblem of Italy in its post-war recovery, characterised by an active participation in European integration, as well as by openness to change. I am very grateful to the Chair of the Faculty of Law, Professor David Feldman, and to all colleagues in the Faculty for making my stay in Cambridge as Arthur Goodhart Visiting Professor in Legal Science a most rewarding professional and human experience. My very special gratitude goes to Catherine Barnard who read an early version of the paper and commented on it. Francesca Bassetti, a law student at the University of Florence, provided expert assistance with the bibliographical references. The usual disclaimers apply.

I. INTRODUCTION

The title of this paper embraces three concepts which will be used as paths to reach a destination. The destination is Italy, taken as an example of an active promoter of European integration, even when facing difficulties in complying with its obligations under the EC Treaty.

The first path leads towards judicial intervention, seen as a major tool for making changes within a national legal system. Some examples (section III) concern the scrutiny that the ECJ operates, when prompted by the Commission, acting under Article 88(2) EC. Other examples (sections IV and V) are related to the open dialogue national judges engage in with the ECJ, when they start preliminary references under Article 234 EC.

The second path almost intersects with the first one. It leads to an understanding of the notion of the adaptation of the legal system as a consequence of judicial intervention, and it pursues the idea that changes may need time to be transformed into an efficient performance of the state apparatus. The second path is therefore a slow one, and one that must be taken while paying attention to the overall evolution of legal traditions and the institutions behind them.

The third path is, because of my own prevailing expertise, a disciplinary one. It focuses on labour law and intends to use labour law as a paradigm of changes and adaptations brought about by European Community law in Italy.

II. A JOURNEY ACROSS SOME ITALIAN STEREOTYPES

Before moving along these three paths and in order to avoid getting lost in an Italian labyrinth, something must be said to support the choice of concentrating the analysis on Italy. Although Italian is not a widely spoken language within the EU, the contributions of Italian scholars have accompanied and furthered European integration over the decades. In addition, comparative lawyers have benefited from studying the Italian system. For example, in the 1960s John Henry Merryman, Professor at Stanford University, pointed to ‘The Italian Style’¹ in his

¹ First published in *Stanford Law Review* 1965 (18 *Stanford LR* 39) and 1966 (18 *Stanford LR* 396 and 583), the three essays on ‘The Italian Style’ were also translated into Italian and published in [1966] *Rivista Trimestrale di Diritto e Procedura Civile* 1169 (*Lo’ stile italiano’: la dottrina*), [1967], 709 (*Lo ‘stile italiano’: le fonti*), [1968], 373 (*Lo ‘stile italiano’ l’interpretazione*). See also Cappelletti, M, Merryman, JH and Perillo, J *The Italian Legal System: An Introduction* (Stanford, Cal, Stanford University Press, 1967) and in particular chs 5, 6 and 7. The same essays on Italy are now in Merryman, JH *The Loneliness of the Comparative Lawyer* (The Hague, Kluwer Law International, 1999) 173. His sense of modesty in dealing with the Italian legal system is well expressed in *The*

innovative comparative work. In the promotion of many and diversified scholarly enterprises, Mauro Cappelletti became a most sophisticated ambassador for Italian legal culture throughout the world.² Otto Kahn-Freund included an Italian lawyer, Gino Giugni, among a group of scholars first gathered in London in 1962 for an international colloquium. Some of them later gave rise to the Comparative Labour Law Group, which produced original comparative legal research from the late 1960s onwards.³ Bob Hepple gave significant space to Italian law in his seminal comparative work, *The Making of Labour Law in Europe*.⁴ Lord Wedderburn has filled his widespread comparative work with critical and constructive references to Italian legal developments.⁵ He has devoted energy and enthusiasm to the training of young scholars in many parts of the world, including Italy, where for many years he took part in the ‘Pontignano comparative seminars’ at the University of Siena, in collaboration with labour lawyers from other European countries.

As can be seen, comparative law proved to be a helpful methodology in understanding the different, and at times troublesome, phases of European integration. Furthermore, as I shall indicate later, the comparative work of political scientists constitutes an invaluable interdisciplinary resource, often substantiated by field research. Such analysis is of help to lawyers in the understanding of changes occurring within national legal systems as a way of complying with European law.

All these examples—but many more could be quoted—engender pride as regards the role assigned to Italian legal scholarship and Italian developments. What needs to be ascertained and brought to the fore in this paper, almost in an exercise of self-analysis, is whether the same pride is engendered by the position Italy takes when facing developments in European law. In order to

Loneliness at 11, where he wrote: ‘[i]n a way Italian law was a safe choice. If I had written about French or German law there would at least have been a community of interested and informed comparative lawyers at other US law schools, and a body of published work by which my scholarship could be judged’.

² In the Foreword by Jacob, J to Cappelletti, M *The Judicial Process in Comparative Perspective* (Oxford, Clarendon Press, 1989) it is recalled that Cappelletti was the Visiting Goodhart Professor in Legal Science in Cambridge in the academic year 1988–1989. Comparative legal research for the understanding of legal changes brought about by European law is carried on in Cappelletti, M, Seccombe, M and Weiler, J *Integration through Law. Europe and the American federal experience* (Berlin, Walter de Gruyter, 1985).

³ A short history of the Group and an illustration of the comparative methodology adopted is in Aaron, B ‘The Comparative Labor Law Group: a Personal Appraisal’ (1977) 2 *Comparative Labor Law and Policy Journal* 228 and *id.*, ‘The Comparative Labour Law Group: A Brief History and a Personal Evaluation’ (2007) 28 *Comparative Labour Law and Policy Journal* 393.

⁴ Hepple, B *The Making of Labour Law in Europe: a Comparative Study of Nine Countries up to 1945* (London, Mansell, 1986).

⁵ Wedderburn, Lord *I diritti del lavoro: saggi scelti sulla Gran Bretagna e l’Europa* (Milan, Giuffrè, 1998).

do so, one has to face yet another apparently insurmountable barrier: stereotypes about Italy's failure to comply with European law. Delays and difficulties in fulfilling the obligations arising from the Treaty can become the stereotype of a slow and disorganised country in which resistance to change is cultivated.

To combat these stereotypes, one has to start looking at both well-established tradition in Italian state bureaucracies and the development of public policies on Europe. In a book published in Italian a few years ago,⁶ Tommaso Padoa Schioppa, then a member of the European Central Bank, currently a Minister in charge of economic affairs in the Italian government, provided some examples of Italian influence on the process of European integration, due to the significant expertise of the bureaucratic *élite* engaged in foreign policy.⁷ In 1977 the Italian Prime Minister, Aldo Moro, chairing the European Council in Rome, was successful in setting a date for direct elections to the European Parliament, despite opposition from the UK and Denmark. In 1985 an Italian Presidency introduced, for the first time, majority voting to call an intergovernmental conference, the one which then led to the adoption of the SEA.⁸ In 1990, once more during an Italian presidency, the Council's conclusions incorporated the essential points dealt with in the Delors Report, thus setting in motion the economic and monetary union (EMU).

These recollections show the active role played by Italian diplomacy in European integration, which stands in sharp contrast to the subtle prejudice of some observers. However, the stereotype does have some weight in respect of Italy's slow and incomplete compliance with the obligations inherent in its membership of the EU. Nonetheless, it will be argued that a much more important indicator of convinced participation in the EU is the Italian capacity to absorb changes and to accept that Europe provokes beneficial internal adaptations of the economic system as a whole.⁹

It is not by coincidence that Padoa Schioppa—an Italian intellectual who has devoted so much of his scholarship to supporting the European cause—wrote the Preface to a new edition of the *Manifesto di Ventotene*, the well-known 1941 Manifesto for a united and free European

⁶ Padoa Schioppa, T *Europa, forza gentile* (Bologna, Il Mulino, 2001).

⁷ *Ibid.*, 6. After the Second World War, the main source of currency reserves was money sent from Italian workers who had emigrated abroad, as well as from funding provided for by the Marshall Plan. The Italian 'founding fathers' were fully aware of the poor state of the Italian economy and of the need to support the project of a European economic community.

⁸ The decisions adopted during the Italian presidency in 1985 and the diplomatic interest they created are also reported by Olivi, B *L'Europa difficile: storia politica della Comunità europea* (Bologna, Il Mulino, 1993) 279.

⁹ Padoa Schioppa, T, above n 6, 118–19; Dastoli, PV and Vilella, G *La nuova Europa* (Bologna, Il Mulino, 1992).

Union by Altiero Spinelli and Ernesto Rossi.¹⁰ This icon of federalist literature, written while both authors were exiled because of their opposition to the fascist regime, still offers very powerful insights into the tragedies of European history and into the search for peace as the only answer to nationalism. In an autobiographical account of his work, Spinelli proudly acknowledges having been captivated by the writings of British federalists from the 1930s. He translated these writings himself during his long exile on the island of Ventotene.¹¹ Such an early cultural interchange, notwithstanding all the difficulties inherent in the political situation of the time, is encouraging as a confirmation that academic research may cross national frontiers and sustain hope. It also allows us to draw a line of continuity from the early days of federalist thinking to the current state of European integration.

One of the lessons we learn from these Italians who, while being deprived of their freedom on the island of exile, proposed the idea of a federalist Europe is that national identities must be preserved, even in an advanced phase of political integration. This reflection is still relevant in the current European debate.

Empirical research into public policies reveals that, over the decades, Italy has been ‘Europeanised’ because of a predisposition of the technocratic *élite*, ‘socialised’ in European institutional settings. This has been the case from the beginning of the European Community in the arena of foreign policy, and more recently in social policy, particularly in the setting up of anti-poverty programmes to combat social exclusion.¹² The 1990s is the period when Italy was ‘rescued’ by Europe, because of the urgent need to adapt public spending to the criteria agreed at Maastricht, with a view to entering EMU.¹³ Even before that, in the 1980s, the Bank of Italy cultivated its own enlightened technocracy and prepared the ground for the reforms then carried

¹⁰ Spinelli, A and Rossi, E *Il manifesto di Ventotene* (Milan, Oscar Mondadori, 2006). In his Introduction Padoa Schioppa underlines that the choice made by the publisher to include a classic in a widely circulated and accessible book series is in itself a demonstration of the strength of ideas, going beyond the debate promoted by the writers among their contemporaries.

¹¹ Spinelli, A *Come ho tentato di diventare saggio* (Bologna, Il Mulino, 1999). A book that particularly impressed Spinelli and that he translated was Robbins, L *The Economic Causes of War* (*Le cause economiche della guerra*, Torino Einaudi, 1944). Books were sent by Luigi Einaudi and allowed into the place of exile only because E Rossi was a professor of economics and had been corresponding with Einaudi. See Levi, L ‘Altiero Spinelli, fondatore del movimento per l’unità europea’ in Spinelli, A and Rossi, E, above n 10, 170–1.

¹² Fabbrini, S (ed) *L’europeizzazione dell’Italia* (Rome–Bari, Laterza, 2003) 199 and 220 ff.

¹³ Ferrera, M and Gualmini, E *Rescued by Europe: Labour and Social Policies Reforms from Maastricht to Berlusconi* (Amsterdam, Amsterdam University Press, 2004).

on by so-called ‘technical’ governments.¹⁴

Further, in 1992 the Amato government took the lead in pursuing a courageous economic manoeuvre, by cutting public spending and giving way to a reform of the pension system as part of a wider reform of the state administration. The government, presided over by Carlo Azeglio Ciampi, former governor of the Italian central bank and the emblem of a fortunate combination of institutional roles, led in 1993 to a wide agreement with the social partners which marked the return to consensus-building techniques by the government.

In the second half of the 1990s a significant transformation took place in the Italian approach towards the European structural funds. Europe was, once more, the catalyst to bring about innovation, both in the use of public financial resources and in the relationship between the centre and the periphery of the state administration. Not only did this imply breaking the circles of local clientele in the managing of public finances; it also meant introducing elements of efficiency in the way regions and other local authorities applied for these funds.¹⁵

These examples show a willingness by Italy to adapt to the demands made by the European Union. However, a different story must be told with regard to compliance indicators. Italy’s performance has not been good, mainly for reasons related to delays in transposing Directives and for the high number of infringement proceedings.¹⁶ There are grounds to believe that Italy has improved its standards from a diachronic perspective, at least with regard to the transposition of Directives in the late 1980s and early 1990s, 1995 being the year in which the best performance is recorded.¹⁷

All these phenomena give rise to complex interpretations as regards measuring Italy’s level of compliance with European law and comparing it with its overall and more comprehensive political performance in European matters. One conclusion is that, although the

¹⁴ Radaelli, C ‘The Italian State and the Euro: Institutions, Discourse, and Policy Regimes’ in Dyson, K (ed) *European States and the Euro* (Oxford, OUP, 2002) 212 ff; Ferrera, M and Gualmini, E, above n 13, also value the contributions given by experts working in the Ministero del Tesoro and in the Bank of Italy.

¹⁵ Di Quirico, R ‘I fondi strutturali fra centro e periferia’ in Fargion, V, Morlino, L and Profeti, S (eds) *Europeizzazione e rappresentanza territoriale. Il caso italiano* (Bologna, Il Mulino, 2006) 93 ff. This issue is also covered, with a reference to his personal experience as a Minister of Labour, by Treu, T *Politiche del lavoro. Insegnamenti di un decennio* (Bologna, Il Mulino, 2001) 86 ff.

¹⁶ Figures are reported by Börzel, T ‘Non-compliance in the European Union. Pathology or Statistical Artefact?’ (2001) 8 *JEPP* 803, who claims that there are no data proving a generalised level of non-compliance in the EU, although a few countries—Italy being the worst—hold a negative record (at 819).

¹⁷ Giuliani, M *Le relazioni fra Italia e Unione Europea come questione di policy* (2006) URGE Working Paper 11/2006, available at www.urge.it/files/papers/4_wpurge11_2006.pdf, 8–9. Giuliani reports that a ‘macroscopic phenomenon’ in failing to transpose is no longer visible, although inaccurate transposition still seems to characterise Italy’s compliance indicators. See also Giuliani, M *La politica europea* (Bologna, Il Mulino, 2006) 215 ff.

stereotype of an inadequate and disorganised country is now less correct, the issue of modifying a slow state apparatus is still a central one.

In order further to investigate the origin of Italian stereotypes, an additional and most appealing perspective can be found in the evolution of the Constitutional Court's case law. In the 1980s and 1990s the Constitutional Court was an important agent of transformation. In the leading case, *Granital*,¹⁸ decided in 1984 following the ECJ's 1978 judgment in *Simmenthal*,¹⁹ the Court clearly argued for the direct enforceability of European law by national judges, disregarding previous or subsequent laws conflicting with EC law. The Constitutional Court reached this conclusion by putting forward the idea of 'autonomous' and yet 'coordinated' legal orders as a precondition for granting European law its own power to become enforceable within the national legal system. The concept of coordination is a substitute for hierarchy in the structure of legal sources and is thought to be innovative. Rather than suggesting a formal abrogation of domestic law, *Granital* indicated the principle of non-enforceability. The weakness of the approach in *Granital*, however, consisted in the fact that it would only apply to preliminary references, not to other cases in which procedures among regions and the state were at stake.

The Constitutional Court still had to deliver changes, in order to establish its own authoritative role as an adjudicator, when dealing with European law. It did so in 1989,²⁰ in a case which significantly contributed to the evolution of a most original approach to European law. The Court argued that an ECJ ruling condemning a Member State for non-compliance with

¹⁸ *Corte Costituzionale* 8 June 1984 no 170, [1984] I *Foro Italiano* 2062, annotated by A Tizzano. An English translation of this leading case is in Oppenheimer, A (ed) *The Relationship between European Community Law and National Law: The Cases* (Cambridge, CUP 1994) 643. A commentary on the case by G Gaja is in (1984) 21 *CML Rev* 756. See also the analysis developed by Cartabia, M 'Relationship between the Italian Legal System and the EU' in Slaughter, AM, Stone Sweet, A and Weiler, JHH (eds) *The European Court and National Courts—Doctrine and Jurisprudence* (Oxford, Hart Publishing, 1998) 137 and La Pergola, A and Del Duca, P 'Community Law, International Law and the Italian Constitution' (1985) 79 *American Journal Of International Law* 598.

¹⁹ Case C-106/77, *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629. On the dialogue between the ECJ and the Italian Constitutional Court see Tesaurò, G 'Community Law and National Courts—an Italian Perspective' in O'Keefe, D and Bavasso, A (eds) *Judicial Review in European Union Law. Liber Amicorum Lord Slynn of Hadley* (The Hague, Kluwer Law International), i, 393.

²⁰ *Corte Costituzionale* 11 July 1989 no 389, [1999] I *Foro Italiano* 1076. This case was decided a few weeks after the ECJ's ruling in Case 103/88, *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 1839 and drafted by a judge, A Baldassarre, professor of constitutional law. It is regarded as a most sophisticated analysis of the previously mentioned notions of 'autonomy' and 'coordination' of the national and European legal systems. Further to urging national judges as well as other branches of the state administration not to enforce legislation incompatible with European law, the Court stresses the point that Member States are also required to intervene in modifying or abrogating national laws, thus observing the principle of 'legal certainty' and furthering the primacy of European law.

European law had the authoritative role of a ‘declaratory judgment’, equal in its enforceability to the Treaty Articles interpreted, as well as to interpretative judgments given in preliminary references.

In 1994 the Constitutional Court clarified that the state can challenge the constitutionality of a regional law still in the process of being adopted on the basis that such a regional law breaches EC law. In 1996 it also indicated the state’s obligation to enforce Community law via repressive or subsidiary measures with respect to the regions, despite the fact that the regions are granted legislative autonomy by the Constitution.²¹

From the evolution of the Italian Constitutional Court’s case law, we learn that a rich and fertile dialogue with the ECJ developed out of an initial reluctance by the Constitutional Court to accept changes. The delivery of judicial changes prompted institutional developments. For example, in 2001 a reform of Title V of the Italian Constitution was adopted with a view to clarifying legislative competences between the state and the regions. It brought about a new principle, whereby legislation can be adopted at both state and regional level, within the limits set by the Constitution, by European law and by international treaties.²²

Further changes were expected from the enforcement of the so-called *legge comunitaria*, the act approved every year in order to comply with European law, to facilitate the adoption of the necessary implementing measures. First enacted in 1989, the *legge comunitaria* aimed at simplifying legislative procedures and concentrating in one Act all the European sources to be transposed. However, over the years the changes that such a new law should have brought about have not proved satisfactory in terms of improving Italy’s performances when complying with its obligations as a Member State of the EC. Particularly in the transposition of European Directives, delays in the lengthy process of compliance became the practice, rather than the exception.

²¹ See Judgment of *Corte Costituzionale* 10 Nov 1994 n 384. An English translation is in Oppenheimer, A (ed), *The Relationship between European Community Law and National Law: the Cases* (Cambridge, CUP, 2003), ii, 366; Judgment of *Corte Costituzionale* 24 Apr 1996 n 126 (1996) 79 *Rivista di Diritto Internazionale*. 803. This latter judgment, too, was drafted by a professor of constitutional law, judge Zagrebelsky. The contribution of constitutional legal culture must be underlined as an original development of an Italian ‘style’ when approaching European law.

²² Constitutional law of 18 Oct 2001, no 3 modifying Art 117 of the Italian Constitution. Further clarifications were introduced by Law 5 June 2003 no 131. Art 8.2 deals with ‘substitutive powers’ that the government can exercise in cases of infringement of Community law perpetrated by the regions or other branches of the state administration. References to the 2001 constitutional reform are in Del Duca, L and Del Duca, P ‘An Italian Federalism?—The State, its Institutions and National Culture as Rule of Law Guarantor’ (2006) 54 *American Journal of Comparative Law* 810.

Because of widespread and well-founded criticism about Italy's transposition level, the *legge comunitaria* was amended and improved in 2005.²³ The main goal pursued by the latest reform was to maximise the efficiency of the legislative machinery by directly modifying or abrogating norms conflicting with European law, or by delegating legislative powers to government for the specific scope of transposing Directives. The 2005 law also took into account the new legislative competences of the regions in complying with European law. It clarified the state's obligation to intervene, according to the principle of subsidiarity, should the regions not fulfil their obligations.²⁴

The attention paid by political scientists to the slow and, at times, subtle transformation taking place inside the state administration alerts lawyers to the fact that the impact of European law on national legal systems must be understood as a multi-faceted process. It is closely intertwined with practices of mutual learning and with exchanges of expertise between groups, as well as between public institutions. In this context labour law offers a significant insight. In addition, the Italian tradition of building consensus between policy-makers and representatives of management and labour favours the openness of the legal and economic systems, making it more receptive to change.²⁵ Furthermore, constitutional reforms aim at a balanced collaboration between the centre and the periphery. Their rationale is to establish an institutional equilibrium in exercising state powers, while furthering new ways of boosting an efficient participation in the EU.

However, the pride of an Italian lawyer must now give way to a recognition of some of the difficulties faced by Italy in absorbing European law. Recent ECJ rulings in key areas of labour law disclose a tension in maintaining intact certain characteristics of the national legal system, while pursuing market integration. Such a tension underlines the urgency of 'Europeanising' Italy even further.

In furthering Member States' compliance with market integration, judges deliver changes

²³ Law of 4 Feb 2005, no 11. Giuliani, M, above n 17, is very critical of the 2005 law, judging on the first year of its implementation. The suggestion is to move to a parliamentary session every 6 months, in order to be ready to discuss the agenda of each Council's presidency.

²⁴ Adam, R 'Il diritto comunitario nell'ordinamento giuridico italiano' in Tizzano, A (ed) *Il diritto privato dell'Unione Europea* (Turin, Giappichelli, 2006) 3 ff. and 88–91 on this last point; Contaldi, G 'La disciplina della partecipazione italiana ai processi normativi comunitari alla luce della riforma della legge "La Pergola"' (2005) 10 *Diritto dell'Unione europea* 515.

²⁵ Sciarra, S 'Employment Policies and Labour Law. The Italian Response to the Open Method of Co-ordination' in Holand, A and Hohmann-Dennhardt, C (eds) *Arbeitnehmermitwirkung in einer sich globalisierenden Arbeitswelt, Liber Amicorum M Weiss* (Berlin, BWV—Berliner Wissenschafts-Verlag, 2005) 319.

similarly to the way in which other exogenous economic or institutional factors do. It is indeed difficult to say whether we are discussing exogenous or endogenous forces, when we examine the way courts operate in the EU. National judges may choose to act as community judges,²⁶ when they directly apply European law, or refer cases to the ECJ in preliminary ruling procedures. They may otherwise be compelled to do so by the ECJ, when the ECJ imposes on them the duty to interpret national law in conformity with European law.

To conclude, in trying to understand Italy's attitude to the requirements of European law the image is one of slowness. However, it is argued in this paper, slowness can, in certain circumstances, be viewed as a resource. We turn now to consider labour law and the Italian response to the issues that arose in three areas: state aid legislation, enforcement of the European principle of equality in the public sector, and freedom of movement for foreign language assistants. The slow and imprecise responses of the Italian legislature in all these three areas are nevertheless capable of prompting a process of adaptation within the state administration. The assumption is that, notwithstanding the urgency to comply with European law, significant changes intervene only when a national legal system is mature enough to respond with its own answers.

The cases considered in the above mentioned three sectors revolve around contracts of employment of a fixed duration. In most current reforms of national labour markets, fixed-term contracts are a good example of the persisting tension legislators have to face when they aim at introducing more flexible labour law measures. In all three areas of European Community law taken into account, the recourse to fixed-term contracts is controversial, albeit for different reasons. One conclusion to anticipate is that contracts with a fixed duration do not provide a predictable solution to labour market demands; neither do they represent an easy managerial resource. The ECJ rulings analysed in the next sections indicate that, regardless of the national peculiarities invoked, fixed-term contracts must comply with fundamental rights and fundamental market freedoms.

²⁶ Kilpatrick, C 'Community or Communities of Courts in European Integration' (1998) 4 *ELJ* 121; Sciarra, S 'Integration through Courts: Article 177 as a Pre-federal Device' in Sciarra, S (ed) *Labour Law in the Courts: National Judges and the European Court of Justice* (Oxford, Hart Publishing, 2001).

III. STATE AID GRANTED FOR TRAINING AND WORK EXPERIENCE CONTRACTS

Italy has been condemned by the ECJ for granting state aid for promoting employment incompatible with the common market and for not adopting all measures necessary for the recovery from the recipients of aid granted within the time limit prescribed.²⁷ To understand this case, we need to consider some background. Training and work experience contracts have been the object of several interventions by the Italian legislature. Ever since 1984 the aim has been to favour the employment of certain categories of workers, in particular young workers, by reducing the employers' social security contributions. Over the years the law on this subject matter has become very fragmented, because of the need to adapt measures in support of employment to different contingent needs of the labour market. This has resulted in law-making deteriorating under economic pressure and the legislature losing track of the initial aims of legislation, due to frequent amendments and adaptations.

With this background in mind, the role of European institutions is to adopt a functional approach in the field of state aid, examining the effects pursued by national authorities, rather than their proclaimed aims.²⁸ In such a context labour law can become a contested terrain, since the social purposes of national regulations do not automatically exclude selective advantages for enterprises or sectors of domestic economic systems.

Of course Italy is not alone in attempting to strike a balance between social law and market integration. Other countries have struggled too. For example, in *France v Commission* the discussion concerns a 1996 law that permitted framework collective agreements to reduce social security contributions in some sectors faced with serious restructuring measures, in an attempt to avoid reducing the workforce as a whole. The Court classed collective agreements as a primary part of state intervention and therefore condemned France for granting unlawful state aid.²⁹

²⁷ Case C-310/99, *Italy v Commission* [2002] ECR I-2289; Case C-99/02, *Commission v Italy* [2004] ECR I-3353. Relevant information is in Lo Faro, A *Aiuti di stato e occupazione*, available at www.lex.unict.it/eurolabor/ricerca/dossier.htm. Italy has also been recently condemned by the ECJ for granting state aid incompatible with the common market in cases related to banks (Case C-148/04, *Unicredito Italiano* [2005] ECR I-11137) and to foundations linked to banks (Case C-222/04, *Cassa di Risparmio di Firenze and others* [2006] ECR I-289).

²⁸ Plender, R 'Definition of Aid' in Biondi, A, Eeckhout, P and Flynn, J (eds) *The Law of State Aid in the European Union* (Oxford, OUP, 2004) 6-7; Biondi, A and Rubini, L 'Aims, Effects and Justifications: EC State Aid Law and its Impact on National Social Policies' in Spaventa, E and Dougan, M (eds) *Social Welfare and EU Law* (Oxford, Hart Publishing, 2005) 79.

²⁹ A thorough analysis of the ECJ's case law is in Biondi, A and Rubini, L, above n 28, 83-5.

The Court's case law on such matters is, however, carefully balanced. For example, Member States' discretionary powers are lawfully exercised when, as in *Viscido*,³⁰ advantages granted to one enterprise in the public sector do not imply the transfer of state resources, thus not constituting state aid.³¹ Furthermore, the employment of Philippine seamen under Philippine salaries by a shipping company based in Germany does not constitute state aid, since no advantage was granted from state finances.³²

In the Italian cases on training and work experience contracts, the Commission acts as a very attentive controller, making sure that aid is used for the purposes indicated in the relevant guidelines, namely for creating new jobs or for helping workers who experience difficulties in entering or re-entering the labour market.³³ In enforcing Article 88 EC, the Commission also has to act as a reviewer of state aid programmes, in order to verify their compatibility with the common market. This reviewing exercise should occur 'in cooperation with Member States', while leaving to the Commission the power to intervene in order to avoid distortions in competition and safeguard the efficient functioning of the common market. Article 226 EC, granting the Commission the power to bring the case before the ECJ, relies in the first place on administrative phases, whereby the Commission tries to avoid litigation by bringing evidence and information. The purpose is to convince the reluctant Member State of its failure to comply with its obligations and to urge it to do so. Statistical data show that only a small number of cases reach the Court stage and that, when they do, the Court ratifies the Commission's decision.³⁴

³⁰ Joined Cases C-52/97, *Epifanio Viscido*, C-53/97, *Mauro Scandella and Others* and C-54/97, *Massimiliano Terragnolo and Others v Ente Poste Italiane* [1998] ECR I-2629. A concurring reference with *Viscido* is in *Corte Costituzionale* 9 Oct 2000 no 419, [2001 I *Foro Italiano* 1087.

³¹ See the comments by Alaimo, A 'Deleghe alle tutele del lavoro e diritto comunitario della concorrenza' (1999) 1 *Diritto del Mercato del lavoro* 126 and 138 in particular.

³² Joined Cases C-72 and 73/91, *Sloman Neptun* [1993] ECR I-887, annotated by X Lewis in (1993) 22 *Industrial Law Journal* 235.

³³ The current relevant source on training aids is Commission Regulation 68/2001/EC on the application of Arts 87 and 88 of the EC Treaty to training aid, *OJ 2001 L 10/20*, as amended by Commission Regulation. 363/2004/EC, *OJ 2004 L 63/20*; on aid for employment; reference is to Commission Regulation 2204/2002/EC on the application of Arts 87 and 88 of the EC Treaty to state aid for employment, *OJ 2002 L 337/3*. This more specialised approach was followed by the Commission when the number of state aid notifications grew tremendously in the early 2000s. In its *State Aid Action Plan*, COM(2005)107 final, of 7 June 2005, the Commission adopts the language of law and economics to link new state aid policies with the Lisbon strategy, favouring horizontal objectives such as research and innovation. Given the emphasis put on market failures as a pre-condition for the use of state aid, measures relating to employment may more frequently become the object of block exemptions and become less used.

³⁴ As reported in Chalmers, D *et al*, *European Union Law* (Cambridge, CUP, 2006) 350, quoting the Commission's documents. In 2003 the Commission estimated that over 89% of cases were settled before being sent to the ECJ. Studies on the enforcement of state aid law at national level in 2006 show an increasing number of cases brought before national courts, thus proving a more widespread understanding at a decentralised level of state aid rules,

In the cases dealing with training and work experience contracts, the Commission did not succeed in convincing the Italian Republic that an illegal use of state aid had been made. As a consequence of this unsuccessful dialogue, Italy confirmed the stereotype of a country in which delays are unavoidable and the administrative machinery is unable to keep control over its own functioning. This stereotype is probably accurate, if one examines the various passages of a long controversy, such as the one that is here examined.

However, it can be argued that time is needed when institutions are undergoing far-reaching transformations affecting the way they operate. National administrations must be urged towards adaptations, as long as the final solution comes from inside them, in a process of self-reform. As for the role of European Community law on state aid, one can maintain, even in relation to Italy, that it serves the purpose of introducing into domestic legal systems ways of scrutinising the organisation of economic activities, rather than attempting to give positive indications about economic choices.³⁵ With this in mind, the Commission should issue very precise and uncontroversial messages. The criticism, otherwise, is that of invading state competences with unspecified indications, relying on undefined criteria.

Some of the facts behind the disagreement between Italy and the Commission are instructive. In 1997 the Commission started to investigate the inaccurate enforcement of previous state aid measures, following a notification of state aid dealt with in a Bill—which became a law, known as *Pacchetto Treu*,³⁶ after the leading Italian labour lawyer and then Minister in charge of labour and social security.

Virtuous behaviour by the administration in notifying the Commission about the new law neither hid nor justified previous mistakes. The Commission intended to verify the consistency of the whole complex apparatus of subsidising employment with state aid rules. It made it clear that the aid granted for the conversion of training and work experience contracts into open-ended ones was compatible with the common market only if it gave rise to a net rise in job creation, as specified in the guidelines.

The Commission subsequently brought proceedings against Italy for not adopting the necessary measures to recover the aid granted to promote employment. However, Italy argued

although ‘obstacles in the national legal arena to effective enjoyment of the protection afforded by Art 88(3)’ remain, as indicated by Arnall, A *et al*, *Wyatt and Dashwood’s European Union Law* 5th edn (London, Sweet & Maxwell, 2006) 1190.

³⁵ As correctly stated by Biondi, A and Rubini, L above n 28, 80, n 3.

³⁶ Law of 24 June 1997, no 196 *Norme di promozione dell’occupazione*.

that there were difficulties in identifying the recipients of the unlawful aid and doubts about the exact amounts to be recovered. It also argued, in an attempt to find an extreme escape route, that the Commission was attacking ‘labour law measures’, the social impact of which should never be called into question and was not in conflict with market rules.

However, in its 2002 ruling the ECJ confirmed the discretionary powers the Commission must exercise in accordance with Article 87 EC. The ECJ confined itself to looking at possible manifest mistakes or abuse of powers by the Commission. Condemnation of Italy was inevitable. The Court stated—this is familiar music to the ears of labour lawyers—that labour law is not a field exempted by the limits placed on state aid. Social measures are not, by definition, compatible with market regulation.³⁷ Therefore, the mechanism of repayment is the only one that can avoid distortions in competition.

In a later ruling the Court confirmed that sanctions aimed at getting back what had unlawfully been granted were the only possible response to combating unlawful practices. The Court rejected arguments such as protection of the legitimate expectations of recipients,³⁸ and did not accept the plea made by Italy that time after the notification would be too short to recover the aid. With regard to the latter point, it was necessary further to specify that Article 88(2) does not provide for a pre-litigation phase, and therefore the Commission is not required to issue a reasoned opinion in order to allow Member States the time to comply with its decision.³⁹

The story of Italian training and work experience contracts has an interesting postscript. The highly controversial labour market reform approved in 2003⁴⁰ by the Berlusconi government swept away pre-existing legislation and introduced new forms of employment contracts aimed at training groups of workers in need of special support due to their marginal and weak position in the labour market (*contratti di inserimento*). These are fixed-term contracts with limited potential to be transformed into permanent contracts of employment, therefore not fulfilling one of the objectives of the reform.⁴¹ The Berlusconi government also introduced new forms of

³⁷ Case C-310/99, *Italy v Commission* [2002] ECR I-2289, para 101.

³⁸ Case C-99/02, *Commission v Italy* [2004] ECR I-3353, para 21. In Case C-207/05, *Commission v Italy* [2006] ECR I-70, para 42, the ECJ once more ruled that a Member State cannot plead as a defence the unlawfulness of a decision addressed to it, in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision.

³⁹ Case C-99/02, above n 38, para 24.

⁴⁰ Legislative Decree of 10 Sept 2003 no 276, arts 47–53, subsequently amended by Decree of 6 Oct 2004 no 251 and by Law of 14 May 2005 no 80.

⁴¹ The economic incentive is not to be considered state aid, because it applies uniformly to all categories of workers in question. Critical remarks on the 2003 Italian reform in Borrelli, S ‘Riforma del mercato del lavoro e diritto

apprenticeship contracts (*contratti di apprendistato*), trying to balance with extreme caution the exercise of exclusive or concurrent state and regional competences in the field of training linked to contracts of employment, as described in the Italian Constitution.⁴²

An early intervention from the social partners by way of two nationwide collective agreements⁴³ filled in a gap—left dangerously empty by the legislature—in the transition from the old training contracts to the new ones. Nonetheless, the enforcement of the 2003 Decree and of subsequent legislation⁴⁴ showed the marginal standing of *contratti di inserimento* in overall labour market reforms. By reducing the training to a limited component of the contractual obligations, merely aimed at bringing certain disadvantaged workers into an occupation, the impact of the new contract on the creation of new employment was minimal. Within the vast available range of fixed-term contracts, they do not offer significant opportunities for training with a view to creating permanent employment.

As for the apprenticeship contracts, which were supposed to provide better opportunities even for highly skilled and professional workers, a large number of appeals lodged with the Constitutional Court by several Italian regions contended that some of the articles in the 2003 Decree were unconstitutional and interfered with regional legislative competences. In a long and complex decision, the Court⁴⁵ held constitutional most of the articles in question and interpreted in detail what the function of training and apprenticeship should be. Whereas training is seen as a contractual obligation, falling as such within the competence of national law when regulating contracts between private parties, training programmes and their regulation fall within regional legislative competence. The combined private and public nature of apprenticeship, aimed at acquiring professional qualifications inside a contractual scheme, was explained by the Court. In recalling the principle of fair collaboration that should guide regions when tackling state

europeo: normativa antidiscriminatoria e sugli aiuti di stato' (2005) 27 *Giornale di diritto del lavoro e di relazioni industriali* 291, in particular 312 ff. for references to *contratti di inserimento*.

⁴² See in this regard the innovations brought about by the 2001 constitutional reform, quoted at n 22.

⁴³ Accordo interconfederale of 13 Nov 2003, followed by another nationwide agreement signed on 11 Feb 2004. The latter agreement specifies the working conditions and the normative consequences following the transformation of a fixed-term contract into a permanent one.

⁴⁴ Decree of 6 Oct 2004 no 251, Art 13 amending the previous 2003 Decree, carries a specific and unequivocal reference to Commission Regulation 2204/2002 on employment aid, above n 33.

⁴⁵ *Corte Costituzionale* 28 Jan 2005 no 50, [2006] I *Foro Italiano* 365., in particular paras 15–17 of the decision. Critical remarks are in Caruso, B 'Occupabilità, formazione e "capability" nei modelli giuridici di regolazione del mercato del lavoro' (2007) 29 *Giornale di diritto del lavoro e di relazioni industriali* 1. The author underlines the peculiarities in the regulation of training contracts, with regard to the hierarchy of sources and the multiplicity of actors involved. See at 1 ff. and in particular 86–95.

prerogatives, the Court attempted to bring different actors closer together, in an attempt to maintain intact a coherent role for labour law measures at a national level.

Subsequent legislation correcting the 2003 reform⁴⁶ has opened up further space for collective agreements to regulate apprenticeship contracts, while waiting for the complete enforcement of regional laws. Broad conventions signed by several regions under the auspices of the Ministry for Employment deal with various kinds of apprenticeship contracts.

As can be seen, the 2003 labour market reforms have given rise to unexpected consequences. All sorts of actors have come to play a role, including the social partners, who were not entirely sympathetic to the legislature to begin with, but adopted a pragmatic approach and became involved. The Constitutional Court, despite widespread criticism among commentators of some inconsistencies hidden in its lengthy judgment, acted as a wise high-level mediator in ruling on appeals lodged by regions. In this way it protected general interests by allocating to the sphere of state competence the regulation of apprenticeship contracts, and opened up significant room for regional laws.

We started off our journey into Italian stereotypes by giving an account of a long controversy between Italy and the Commission. The delivery of change into the Italian legal system has been carried on by the ECJ with the necessary attention to the market rationale of state aid. The goals of labour law measures had to be corrected and changes had to be absorbed. This process is a long one, not yet completed. New ways have to be found to encourage more efficient compliance mechanisms, especially in the recovery of aid unlawfully granted. The latest Italian budget law, in one of its many interminably long articles, deals with measures to prevent failure in fulfilling obligations under the EC Treaty and in complying with ECJ judgments.⁴⁷ Regions, provinces and municipalities are now held responsible for seeking all appropriate remedies in cases of non-compliance with the obligations under the Treaty, following Article 228 EC. The state can enforce its specific powers to recover all damages from those who are held responsible, following the condemnation by the ECJ. It remains to be seen whether this highly symbolic way to end a long disagreement among Italian state authorities and European institutions will concretely lead to overcoming a stereotype.

⁴⁶ Law of 14 May 2005 no 80. Regional laws adopted so far are analysed by Roccella, M 'La disciplina dell'apprendistato professionalizzante nella legislazione regionale' (2007) 21 *Lavoro e diritto* 175.

⁴⁷ Law of 27 Dec 2006 no 296, Art 1 paras 1213, 1214 and 1216. In recent years budget laws, to be approved within the calendar year, have tended to deal with the most diverse subject matters, thus becoming a broad container of norms to be applied in very different fields of law.

Further ‘Europeanisation’ in the field of state aid should imply a more attentive expertise in drafting legislation and in setting up monitoring bodies capable of preventing long and costly litigation with the Commission. On the other hand, less discretion in the exercise of the Commission’s powers to intervene could reduce the level of uncertainty in Member States’ responses. More specialised Regulations issued by the Commission seem to lead in this direction and prompt a more efficient response from the Member States.⁴⁸

I have attempted to provide a critical evaluation of the still incomplete reform of the Italian labour market. Some emphasis must be put on the action taken by employers’ associations and trade unions to invigorate collective agreements as a way of complementing some badly drafted parts of the national law and gaining some control over high-level training, with a view to creating new employment. Regional laws should gain ground in this field and guarantee sufficient flexibility in the enforcement of all such measures.

In sum, it could therefore be said that a tiresome story of non-compliance with European Community law on state aid has paved the way for a potentially dynamic example of deliberative democracy in which private and public actors have taken responsibility for finding solutions. One could argue in this regard that stereotypes may even be vehicles for change.

IV. FIXED-TERM EMPLOYMENT CONTRACTS IN THE PUBLIC SECTOR

I move now to the second stage of this Italian journey, presenting two very similar cases decided by the ECJ, following a reference for a preliminary ruling from the *Tribunale di Genova*.⁴⁹

One of the first—and highly controversial—labour law measures adopted by the 2001 Berlusconi government deals with the transposition into the Italian legal system of Directive 99/70/EC on fixed-term contracts (which in turn gave legal effect to the Framework Agreement on Fixed-Term Work).⁵⁰ The Decree⁵¹ in question amends earlier legislation by adopting a much

⁴⁸ See above n 33.

⁴⁹ Case C–180/04, *Vassallo* [2006] ECR I–7251 and Case C–53/04, *Marrosu* [2006] ECR I–7213.

⁵⁰ OJ 1999 L 175/43 (hereafter referred to as the Fixed-term Work Directive).

⁵¹ Legislative Decree of 6 Sept 2001 no 368.

broader set of reasons for concluding such contracts.⁵² It also limits the role previously assigned to collective agreements in indicating the organisational reasons leading to the stipulation of these contracts.⁵³ There has been disagreement among commentators as to whether the so-called non-regression clause (clause 8.3 of the Framework Agreement on Fixed-Term Work) has been infringed, because of the allegedly inferior conditions granted to workers. So far, however, recourse to that clause does not seem to have offered a sufficiently strong ground for claims in the courts.

A short digression: this case study shows that trusting judges, as suggested in the title of this paper, is not without limits. In a recent case, the Constitutional Court⁵⁴ had to decide whether there was unlawful differential treatment for workers in the agricultural sector as a consequence of a lack of collective agreements which previously guaranteed, under certain conditions, the conversion of fixed-term contracts into permanent ones. This implied a violation of the non-regression clause. However, the Italian *Corte Costituzionale*⁵⁵ sent the case back to the referring (national) court, quoting as *ius superveniens* the ECJ ruling in *Mangold*.⁵⁶ The highly contentious decision in *Mangold*, initiated by a reference from a German court, deals, in fact, with a completely different typology of fixed-term contracts—namely measures to keep in employment workers over a certain age who would otherwise have been at risk of being expelled from the labour market. However, the Italian Constitutional Court quoted *Mangold* out of context, choosing the passage in which the ECJ states that less favourable measures applying to fixed-term contracts are not, as such, prohibited by the Directive when they are not strictly linked to its enforcement. The quotation is so abrupt that it seems almost dismissive of the real issue at stake. The Constitutional Court does not want to engage in the very delicate exercise of comparing labour standards, which could represent an encroachment upon legislative discretion. After all, this was one of the reasons why the ECJ took its own different route in *Mangold*, referring instead to the equality principle as a general

⁵² Art 1(1) of the above-mentioned Decree states: ‘an employment contract may be concluded for a fixed term for technical reasons or for reasons related to imperative requirements of production, organisation or replacement of workers’.

⁵³ Zappalà, L ‘Flexibility and fixed-term contracts in Italy’ in Caruso, B and Fuchs, M (eds) *Flexibility in Employment and Labour Market Legislation in Europe: Comparing Italy and Germany* (Baden-Baden and Milan, Nomos – Giuffrè, 2004).

⁵⁴ *Tribunale di Rossano* 17 May 2004, [2005] II *Rivista giuridica del lavoro* 85, note by Amos Andreoni.

⁵⁵ *Ordinanza* of 28 June 2006 no 252.

⁵⁶ Case C-144/04, *Mangold v Helm* [2005] ECR I-9981.

principle of European law.

The non-regression clause in the Fixed-Term Work Directive, an ambiguous and slightly mysterious invention of the European legislature, is controversial in the field of social policies. Reference to it is tactically avoided in *Mangold* and completely ignored in *Vassallo* and in *Marrosu*.⁵⁷ The issue at stake in the latter two cases is the extensive interpretation given to the notion of objective reasons in clause 5 of the Framework Agreement. This allows an employer to enter into several fixed-term contracts and to go beyond the duration indicated. Abuses in the use of successive fixed-term employment contracts, according to clause 5 of the Framework Agreement, are to be prevented. However, Member States retain the discretion to exclude specific sectors from the obligation of having fixed-term contracts extended into permanent contracts. However, as Advocate General Poiares Maduro points out in his Opinion, such freedom must be exercised within the limits set by principles of European law and, in particular, the principle of equal treatment.⁵⁸

This principle must prevail even when taking into account, as the Advocate General does when paying apparent homage to the Italian Constitutional Court,⁵⁹ that employment in the public sector occurs by way of a *concorso*—a public competition whereby the selection of candidates is made according to certain procedures—rather than by entering into a private law contract. The constitutional principles underlying recruitment by public competition are the principle of equality and the principle of sound administration, enshrined respectively in Articles 3 and 97 of the Italian Constitution. The legitimate goal pursued in binding the public administration to these standards must be measured against the principle of proportionality, whereby different treatment must be justified in order to meet general principles of European law. However, the homage to the Constitutional Court is, as suggested, only an elegant rhetorical device, since its ruling, given in 2003, went in precisely the opposite direction, holding as constitutional the differential treatment reserved to fixed-term public employees.

The ECJ followed the Advocate General's opinion and ruled in favour of applying the Directive to fixed-term contracts in the public sector, specifying that measures to prevent abuse must be 'proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the

⁵⁷ Cited above n 49.

⁵⁸ Opinion of 20 Sept 2005, paras 36 ff.

⁵⁹ The ruling of the *Corte Costituzionale* extensively referred to in the Opinion of the AG is 27 Mar 2003, no 89, [2003] I *Foro Italiano* 2258.

provisions adopted pursuant to the Framework Agreement are fully effective'.⁶⁰ It is for national judges to decide which appropriate measures should apply, in line with the provisions in clause 5(1) of the Framework Agreement. However, the ECJ correctly specifies that those requirements, while leaving room for discretion for the Member States, are mandatory.

One point to highlight is that, compared to the debatable arguments brought forward in *Mangold*,⁶¹ *Vassallo* and *Marrosu* can rely on a more solid criterion of comparability across the private and public sectors. The direct enforceability of clause 5 of the Framework Agreement, notwithstanding the public nature of the employer, aims at strengthening the overall function of the Directive implementing the Agreement, otherwise criticised for being too vague, if not compromising, as regards the results to be achieved.⁶²

The ECJ indicates that the prevention of abuse represents a clear limit to state discretion. In *Adeneler*,⁶³ a recent case consistently and extensively cited in *Vassallo* and in *Marrosu*, the Court quotes as relevant precedents *Pfeiffer*,⁶⁴ as regards the duty to interpret national law in conformity with European law, and even *Francovich*,⁶⁵ when the result attained by the Directive cannot be reached by way of interpretation.⁶⁶

The centrality of fixed-term contracts in current discussions, both in national labour law and in European law, is remarkable. *Adeneler* is a case initiated by a reference from a Greek court, dealing with successive fixed-term employment contracts in the public sector. Greece waged a long battle with the European Commission as regards the widespread recourse to such a practice and even opted to request an extended period for the adoption of measures to implement the Directive.⁶⁷

⁶⁰ Case C-180/04, *Vassallo* [2006] ECR I-7251, para 36; Case C-53/04 *Marrosu* [2006] ECR I-7213, para 5, both referring to Case C-212/04, *Adeneler and Others* [2006] ECR I-6057.

⁶¹ Editorial Comments in (2006) 43 *CML Rev* 1, 7; Piccone, V and Sciarra, S 'Principi fondamentali dell'ordinamento comunitario, obbligo di interpretazione conforme, politiche occupazionali' [2006] *Foro Italiano* 342.

⁶² The AG in his Opinion very firmly rejects the argument submitted by the Italian government in *Vassallo*, whereby the Framework Agreement would not be binding on public employers, since it was signed by organisations representing private employees and confirms that the text in question 'has the normative character of a Directive adopted by the Council': at para 26.

⁶³ Above n 60.

⁶⁴ Case C-255/97, *Pfeiffer* [1999] ECR I-2835.

⁶⁵ Joined Cases C-6 and 9/90, *Francovich and Others v Italy* [1991] ECR I-5357.

⁶⁶ Case C-212/04, *Adeneler*, above n 60, paras 108-112.

⁶⁷ See on this point Yannakourou, S 'The Evolution of Labour Law in Greece 1992-2002' in European Commission *The Evolution of Labour Law* (Luxembourg, OOOPEC, 2005), ii, 221. The Report, precedent to the preliminary ruling in *Adeneler and Others*, discusses the frequent direct enforcement made by Greek judges of the Directive on fixed-term contracts.

A further comparative perspective could be added to the analysis of Italian and Greek developments, tracing changes that are occurring in the reform of national laws. In Spain a recent Royal Decree⁶⁸ intervened to reverse a trend that saw excessive recourse to fixed-term contracts.⁶⁹ The interesting solutions adopted by the legislator are twofold. Permanent employment is encouraged by reducing social security costs paid by the employers, and new legal limits are set for successive renewals of fixed-term contracts. There is also a clear indication in the law to favour certain disadvantaged groups of workers, such as women, young workers, immigrants and low-wage workers.

In some cases, national debates may suggest that deregulatory measures and the reduction of traditional labour law guarantees are an almost mechanical outcome of European Community law. The current, most lively European debate seems, on the contrary, to go in the direction of favouring, whenever possible, permanent employment contracts.

Thus, in the first two stages of this journey, two very different perspectives have emerged, one based on state aid law and one dealing with the enforcement of certain principles of European law. In the first set of cases, the correction of distortions in competition was associated with inducing changes in entire branches of the state administration as a decisive way of fully implementing European law. In the second set of cases, the state acts as an employer and is equally obliged to comply with European law. If one looks at the two cases analysed, it is the enforcement of a general principle of European law that justifies a departure from a previous ruling of the Italian Constitutional Court. The stereotype of an inefficient public sector hides itself behind these latter cases, which, nevertheless, open up an innovative style in ECJ case law.

Fixed-term employment contracts are also indirectly relevant in a completely different controversy that arose many years ago between Italy and the ECJ, which will be illustrated in the third and final stage of this journey.

⁶⁸ Royal Decree 9 June 2006, incorporating the agreement signed by the government and the social partners on the main guidelines for reforming the labour market.

⁶⁹ Valdés dal Ré, F and Lahera Forteza, J 'La nuova riforma del mercato del lavoro in Spagna' (2006) 28 *Giornale di diritto del lavoro e di relazioni industriali* 521; no author, 'Social partners agree on further labour market reform' (2006) 389 (June) *European Industrial Relations Review* 24. In 1994 Spain had 33.9% of fixed-term contracts, reaching the highest percentage in the EU, including the enlargement countries.

V. FOREIGN LANGUAGE ASSISTANTS, INDIRECT DISCRIMINATION AND FREE MOVEMENT OF WORKERS

The long controversy between foreign language assistants and Italian universities may suggest that the latter are suspicious institutions, very reluctant to accept changes delivered by judges. Starting from *Pilar Allué*,⁷⁰ dating back to 1989, the ECJ has been fighting the notion of employment in universities as an exercise of powers conferred by public law, falling within the exception to the free circulation of workers provided for in the then Article 48(4) of the Treaty (now Article 39(4)). The Court used a comparative test, trying to establish whether there was discrimination based on the grounds of nationality, and discovered that this was indeed the case. The unequal treatment had to do with not granting permanent employment to predominantly *foreign* language assistants, whereas similar tenured jobs were reserved to Italian citizens.

In the background to this controversy lies a rather interesting disagreement between the ECJ and the highest Italian judicial bodies as a result of a remarkable proliferation of cases in the Italian courts over the years. Litigation has often been supported by university trade unions, exceptionally active in defending this rather unique category of foreign employees.⁷¹ The law referred to at the origin of this controversy is a 1962 Act on fixed-term contracts of employment, subsequently amended by various other measures.⁷² The Court used that Act as a basis for comparing the treatment reserved to foreign language assistants with that applied to other similar categories of employees. The result was the discovery that conversion into a permanent contract was not granted to foreign employees, nor was the recognition of acquired rights.

Even after the adoption of a new law reforming the status of foreign language assistants to make them ‘linguistic associates’, unequal treatment continued to prevail, thus opening up a

⁷⁰ Case 33/88, *Pilar Allué and Carmel Mary Coonan v Università Degli Studi di Venezia (Allué I)* [1989] ECR -1591. In Case 225/85, *Commission v Italy* [1987] ECR 2625 the Court did not accept that research posts at CNR, the national research centre, should be reserved to Italian nationals only, arguing on the facts that only ‘duties of management or of advising the state on scientific and technical questions could be described as employment in the public service within the meaning of Article 48(4)’, now 39(4). This quotation is at para. 9 of the Court’s judgment.

⁷¹ See the ruling of the *Corte Costituzionale* 23 Feb 1989 no 55, almost contemporary with *Pilar Allué*, arguing that there had been unequal treatment and granting the renewal of the contract beyond 5 years. There followed a controversial decision of the *Corte di Cassazione* 5 Apr 1991 no 3562, arguing that the one-year limit for the contracts in question was compatible with Art 39 EC. The ECJ ruled on a new preliminary procedure in Joined Cases C-259, 331 and 332/91, *Pilar Allué and Carmel Mary Coonan and Others v Università degli studi di Venezia and Università degli studi di Parma* [1993] ECR I-04309, then followed by Case C-212/99, *Commission v Italy* [2001] ECR I-4923.

⁷² The current source of regulation on fixed-term contracts of employment is the 2001 Decree, quoted at n 51.

new round of individual complaints to the Commission, followed by infringement proceedings against Italy. The Court ruled in 2001, condemning Italy for not fulfilling its obligations under Article 39 EC. The follow-up to this ruling is, once more, a conflict between the Italian Republic and the Commission on measures to guarantee equal treatment, particularly with regard to recognising the acquired rights of these foreign language assistants.

After many years in which the pages of learned legal journals were filled with all sorts of technicalities about the issue, keeping judges very active at all levels of the jurisdiction, the ECJ intervened once more in this never-ending saga, in response to infringement proceedings brought by the Commission.⁷³ In his Opinion, Advocate General Poiares Maduro, by now a true expert on Italian legal subtleties, highlighted that one of the arguments presented by the Italian government for justifying its behaviour had to do with the declared intention not to interfere with the private autonomy of collective parties. Collective agreements and their subsequent amendments—states the government—must be left entirely in the hands of the negotiators, with no interference from the state.⁷⁴ The Italian government claims that even the non-discrimination principle articulated in Article 39(2) EC can disrupt the function of collective agreements to regulate employment contracts. The Advocate General is effective and almost dramatic in deeming this argument ‘out of place’. He argues in favour of guaranteeing to all European citizens the fundamental right to work in any Member State, a right which is now also set out in the Charter of Fundamental Rights at Article 15(2).⁷⁵ The Court agreed and Italy was inevitably condemned for not granting all acquired rights to foreign language assistants and not complying with the Court’s rulings. This reveals once more that slowness is a suitable term to describe Italy’s adaptation to changes delivered by judges, but this time the slowness was not beneficial.

Inefficient management is possibly at the origin of the many disputes that have occurred. It is also aggravated by the economic constraints imposed on the Italian public sector, reflected in the uncertain role assigned to collective bargaining in this field. Reference to collective bargaining made by the Italian government in arguing against the Commission is, however, inaccurate, since negotiations in the public sector are not entirely left to private autonomy, but significantly dependent on the allocation of financial resources by the central administration. The tension between the centre and the periphery of the system is well exemplified by the different

⁷³ Case C-119/04, *Commission v Italy* [2006] ECR I-6884.

⁷⁴ *Ibid*, Opinion of the AG delivered on 26 Jan 2006, para 17.

⁷⁵ Respectively, *ibid*, paras 18 and 35.

solutions offered by different universities in response to the Court's 2001 ruling and by the much expected intervention of the legislature in 2004 to put forward a uniform frame of reference.⁷⁶

It is therefore crucial, as this last detour of this journey into the Italian university system shows, that all branches of the administration affected by judicial decisions be revitalised and forced into more virtuous conduct, when it comes to their having to comply with European law. The enlightened bureaucratic *élite* evoked earlier in this paper, similar to that leading Italy into full participation in the EU, should equally disseminate its expertise at lower levels of the state administration. From the cases examined, it appears, in fact, that the system of state universities may still be lacking the necessary input to introduce significant reforms.

VI. CONCLUSIONS

There may be a sense of emptiness and regret in reading between the lines of ECJ judgments, whenever they reveal inefficient compliance mechanisms in a Member State. A full trust in judges delivering changes must be accompanied in all such cases by an equal trust in the capacity of legal systems to regenerate themselves while undergoing significant reforms. The cure ought to be found in an integrated or, as we learn from the language of other disciplines, multi-level approach to the 'Europeanisation' of national legal systems. Multi-level regulatory techniques assist institutional and quasi-institutional actors in narrowing the gap between the European legal system and the rights of individual citizens. They respond to what has been described in this paper as the adaptation of entire branches of the state administration in response to the challenges of European law. Changes pursued from inside the state administration are the result of slow and yet fully developed reforms, resulting from the evolution of institutions, rather than from the contingent pressure of the market. The false contraposition between 'old' and 'new' national legal orders can thus be framed in a more consistent pattern of institutional changes.

Italy has inside its own state organisation more than one gear in which to operate in order

⁷⁶ *Ibid*, paras 30-34 of the Court's judgment, making reference to various decisions taken by individual universities and to Decree 2004/2 of 14 Jan 2004, providing the financial and legislative framework for the regulation of foreign language assistants' employment contracts. A sector collective agreement covering university employees signed in 2003, Art 22 referred back to decentralised collective agreements for the adoption of the measures necessary to implement the 2001 ECJ's ruling. Furthermore, Art 519 of the previously quoted budget law, above n 47, deals with financial measures necessary to transform some fixed-term contracts in the public sector into permanent ones. The discussion is still open on whether foreign language assistants should be covered by this law.

to increase its participation as an active Member State of the EU. The relevance of constitutional reforms dealing with joint or exclusive legislative competences of the state and the regions has been underlined. The role of the Constitutional Court in settling disputes over such issues and in keeping the dialogue with the ECJ constantly open, following a consolidated tradition of mutual respect between the two high jurisdictions, has also been highlighted.

In the cases selected and presented in this paper, judges stand out as lively and challenging figures. They are well informed about European law and they are not afraid of including it in their daily work. There are elements of imagination in their initiatives; there is often a strategy behind the choice to start preliminary ruling proceedings.

National judges and the ECJ induce transformation in national legal systems, as well as in state administrations, at times in a provocative and controversial way. In the process of integration through law, they deliver changes, thereby contributing to innovations in legal culture. The ECJ has its own relevant part in furthering changes, pursuing an inter-institutional collaboration with the Commission, particularly when it comes to avoiding distortions in competition. In doing so, it imposes coherence on domestic legal systems, involving national judges in the correct interpretation of European law.

In observing this multifaceted picture, we discover that a lot has changed since the years in which Merryman wrote about the characteristics of civil law judges: '[a] kind of expert clerk ... an operator of a machine designed and built by legislators'.⁷⁷ At the end of the 1960s it was impossible to envisage that significant transformations would be brought about by a legal order *statu nascenti*, as the European legal system then was. But things do happen which even comparative lawyers have not contemplated.

What should one expect from comparative law at this point in the history of European integration? To cure the 'loneliness' of the comparative lawyer 'starved for scholarly companionship', as Merryman once wrote with an accent of solipsism in his description of his own professional experience?⁷⁸ To overcome 'national positivism', as Tullio Ascarelli argued in 1951, awakening the conscience of labour lawyers assembled at one of their first international

⁷⁷ Merryman, JH *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 2nd edn (Stanford, Cal, Stanford University Press, 1985) 36. A different approach, based on the institutional perspective in the comparative study of courts, is now developed in Bell, J *Judiciaries within Europe: A Comparative review* (Cambridge, CUP, 2006).

⁷⁸ Merryman, JH, above n 1, 11.

conferences in Italy?⁷⁹ To be a ‘cognitive’ tool, a means to an end in understanding European developments, as Spiros Simitis has suggested?⁸⁰

One could ask comparative law to allow itself some slowness, some time to think and to understand change. Slowness is a term which recalls other images, all inspired by a less contingent approach to the constantly open process of European integration. In the words of Italo Calvino, an Italian writer who gained the privilege of being read in English, one should seek in comparative research a touch of lightness and do what he did in literature, ‘remove weight from the structure of stories and from language’.⁸¹

⁷⁹ Ascarelli, T ‘Formazione di un diritto comune del lavoro’, in *Atti del I congresso internazionale di diritto del lavoro* (Trieste, Ed Universita di Trieste, 1952) 43.

⁸⁰ See the intervention by Simitis, S, in Sciarra, S, Simitis, S, Treu, T and Weiss, M ‘Spiros Simitis giurista europeo’ (2006) 28 *Giornale di diritto del lavoro e di relazioni industriali* 301, 330.

⁸¹ Calvino, I *Six Memos for the Next Millennium* (Cambridge, Mass, Harvard University Press, 1988) 3.