The labour law and the welfare systems shaped during the last century in many market economy countries are facing a major challenge. The great economic and social transformations driven by two main factors, globalization and technological innovations, have altered the very basis on which these systems were founded. The power of the nation states and of the national legislators to control the labour market and labour conditions is being challenged. Fordist large companies and the industrial unions are weakened and are less capable of or interested in concluding centralized collective agreements regulating the employment of their constituents. Stable subordinate employment, which was the central object of labour law, has given way to diversified non-standard work arrangements, often casual and economically dependent in spite of being formally autonomous. The impact of these challenges, however, varies considerably across countries.

While spreading its effects horizontally in the ‘flat-word’ by enhancing the interconnections between national and regional systems, globalization is at the same time increasing differences, fostering under a new perspective the debate on the ‘variety of capitalism’. The so called BRICS countries do not face, at least at the moment and for very different reasons, many of the challenges that are incumbent upon the Western and especially the European worlds of capitalism. While Fordist structures of a new-type (with highly hierarchal and even authoritarian characters) are rapidly developing in the Chinese communist-market-economy, the role of the nation-State varies greatly in the national economies. China is, yet again, a prominent example of the powerful tools still enjoyable by an active-interventionist State. But even within the Western world the crisis of the nation-State in the wake of globalization spreads very unevenly among countries, reaching its peak in the European Union context.

In many newly developed countries, the legislators are searching the best way to build, often from scratch, their labour law and welfare system, not necessarily following the path and categories prevailing in the old welfare states. They have to take into account their different traditions and starting point and to combine the task of laying down the basic elements of these systems with the urgency to respond to the new and diversified needs of a rapidly grown and modernizing economy. An open question is how and to what extent international relations and practices will influence the evolution of the various national systems, towards a convergence or in diverging directions. (see below paragraph 8)

If it is true that the changed environment has eroded the foundations of labour law, no minor adjustment is sufficient, both for the old and new legislators, to restore its role as a key instrument of social protection and of social progress. A revision is needed both of the objective and of the techniques of our discipline. This is an arduous task to which all social and political actors, but also intellectuals and practitioners, should contribute.
The financial and economic crisis which exploded in 2008 has made the need for changes more urgent, even in the economically most robust national context.

Herewith, I will submit some tentative ideas for discussion and for common research.

1) New directions of policy and of regulation should be researched both at national and supranational levels, because the challenge is global but most areas of labor law and welfare remain national. Social policies and regulations eventually need to be projected on a global scale, at least for those who envisage a democratic development of globalization. But the globalization of labour law and social rights can hardly proceed if it is not promoted successfully by national governments and social actors, particularly in the most powerful States, also because they are important members of international organizations, such as the ILO. A major role can be played to the same end by regional institutions and governments such as the European Union, and those which are being formed in other regions, with the aim of compensating for decreasing national authority and resources in the areas of labor law and welfare.

2) A first area of labour law which needs revision is that devoted to the traditional function of employment protection. If we agree that employment has greatly diversified, the forms of protection should also diversify, according to the different types and needs of employees. To keep using the standard protective regulations for all types of employees in order to resist the diversification of employment is self-defeating. It would increase the segmentation of labour markets and the distance between non-standard workers and the core labor force while it would hardly save the latter from outside economic pressures. This does not imply adopting a policy of deregulation or reducing all labour law to soft law. Indeed, the objective is to tailor legal protections to the different needs and positions of employees: not only of the legally dependent workers but also of those employees not legally subordinate but who are in a position of economic dependence vis-à-vis one or few principals.

Not all the norms which compose the traditional core of imperative labor law can be extended to this grey area of employment: some protections are unnecessary; others may apply only partially or with adaptations. On the other hand, some traditional norms may lose importance for employees who have acquired great operational independence, even if hired under a contract of dependent employment. This diversification of labor standards should be tested on the ground to suit the actual characters of each type of employment and avoid both excessive rigidity and lack of protection.

Protective legislations are still necessary to provide basic guarantees for many employees. To grant these protections is a priority particularly in developing countries which have not completed the establishment of essential standards held necessary by the international organizations such as the ILO. But here too some differentiation of protective measures is necessary insofar as the workforce operating in these countries is influenced by the variety of employment and work organization which is spreading throughout the world economies.

3) The diversifications of employment and of the legal norms applicable may increase the importance of minimum standards, national and eventually supranational. These standards are to be adaptable to the different economic and social conditions of the various countries, as indicated by the ILO (see below paragraph 8). But the essential core of them should be universally respected. This core would include some basic collective rights, e.g. freedom of association and right of collective action, and fundamental individual rights, e.g. to personal privacy, to free access to education and to professional training, right to information about the opportunities existing in the labour market, to
adequate protection of health and safety. Some of these standards are explicitly included in much national legislation and in the European Charter of fundamental social rights. Minimum wages have acquired great importance, even more than in the past, in the present state of economic crisis. One reason is the reduced capacity of collective agreements and of the social parties, even in countries where they are traditionally established, to guarantee adequate standards to an increasing number of non-standard workers and even to many standard workers, particularly low-skilled. The working poor, who were almost unknown in the golden age of industrial relations, are becoming common even in rich countries.

4) The pressure for flexibility cannot be simply resisted. It needs to be regulated in order to avoid the pitfalls of precariousness. Some basic standards indicated above must be respected also in flexible employment. Moreover, a socially acceptable use of flexibility can be favored through a combined use of incentives and disincentives, again to be geared to the specific type of employment and to the different conditions of each country.

Internal or functional flexibility, related to working time, to the organization of work, to job and functional mobility, deserves attention, often more than numerical flexibility, because it may contribute to organizational innovation, to a better use of human resources and to the quality of production (while not increasing or possibly reducing costs).

Above minimum standards, flexibility may be regulated by collective agreements, in particular decentralized ones, which can take into account, better than the law, the changing conditions of employment and the needs of both the employees and the enterprise. This implies that collective bargaining be accepted as a major source of regulation of employment; which does not occur ‘spontaneously’, but requires specific social policies directed to recognize and promote free and dynamic labor relations.

5) A major challenge for labour law in this area is to find a balance between the protection of employees in their job and their security in the labor market when moving from one job to another. A satisfactory balance such as that advocated by the European principles on flexicurity requires on one side some regulation of flexibility, as indicated above, and on the other an effective and universal safety net capable of protecting employees’ income in case of suspension of work and of unemployment combined with active labor policies and efficient training measures.

Keeping this balance is difficult particularly in periods of economic crisis and in less developed areas of the world. Here the prior policy commitment is to provide security in the labour market, particularly in case of unemployment so as to avoid that the pressure towards flexibility prevails over the need of employees security. Public intervention is particularly important in order to ensure that individual employees are effectively supported in the case of economic downturns and in the job changes which characterize the present turbulent economies: the support should include guarantees of income, personalized assistance in the search for work opportunities and by the opportunity to enrich and update their skills according to their personal capacities and the trends of the labour market.

Education and services on the labour market are public goods necessary for both economic competitiveness and for personal and social wellbeing. This does not imply that the provision of these services must be reserved to the public administrations. Forms of public-private participation in this area can be and have been positively implemented. Indeed, active labour policies are more likely to be successful if supported by tripartite efforts: those of local and central governments which are responsible for setting the institutional framework, those of the social parties which can collaborate in the implementation of these policies in the specific workplace and labour markets.
Simplification of procedures and local empowerment are further conditions of success because they favour access to the services and promote innovation.

In this respect, it must be remembered that the role of public policy in promoting employment goes beyond the area of labor law. At present the absolute priority is to create the economic conditions necessary to overcome the present crisis and to foster a new period of growth. This is particularly urgent in the less developed areas and also in many European countries which have experienced a period of slow growth and even of economic recession. A further challenge to economic and social policy is to avoid the pitfalls of jobless growth which has been experienced recently in quite a few countries. Innovative policies are necessary to pursue the objective of a ‘smart, sustainable and inclusive growth’, as indicated in the European document Europe 2020. This is an essential condition also to create more and better jobs.

6) A redefinition of scope and content is necessary not only for the law on employment but also for the law on social protection and of welfare. In many European countries, strong financial constraints are reducing the resources to be devoted to welfare measures. In the newly developed countries which are undergoing a period of growth, public policy is called to develop a welfare system capable of meeting the essential needs of the population, health and safety, old age pensions, protection from unemployment possibly avoiding the pitfalls and the uncontrolled increase of costs which have burdened some national welfare systems. In all cases, even taking into account the different level of economic and institutional development of the various countries, the new global context requires a ‘recalibration’ of the structures and content of the traditional welfare. A more active set of policies is necessary both to reduce the increasing costs of social benefits and to mobilize the capacities of users, in order to promote their personal development and not simply to assist them in case of need. At the same time welfare provisions must be extended in scope and objective. They need to be extended to non-standard workers and immigrants, which have so far been mostly excluded from protection; to respond to the needs of the employees and their families which are variable in the cycle of life, from early childhood to active ageing and retirement. They need to be directed to fight poverty and social exclusion and also to enhance social inclusion. In this respect the traditional function of protection is being enriched so as to promote equal opportunities of people in working life and personal development; whereby welfare measures come to be seen as form of social investment. This recalibration implies difficult choices, some restrictions and a new set of priorities: fewer resources on passive income support and assistance, more support of education and activation policies, postponement of retirement age in line with increasing life expectancy combined with policies for promoting an active ageing; development of new private initiatives supplementing public welfare.

7) The changes in the economic context which stimulate the need for labour law and welfare reform require a reappraisal of collective bargaining and industrial relations. How to do it is a controversial issue which has received different solutions also by those, governments and social parties, who consider collective bargaining and industrial relations an important form of social participation and of employees protection and not an obstacle to the better functioning of the economy. The role of collective bargaining as a major source of regulation and of promotion of employment is being threatened by many adverse factors, which are weakening its functioning where it is well established and are hindering its development where it is at an early stage. Public policies are called to redress the balance of power which globalization and the crisis have made unfavorable for the labor side and the unions. Public support for collective action is important, even more than in the past. Now it has some major testing grounds: a) recognition and support of basic individual and collective rights, beginning with full recognition of freedom of association and of collective action;
at company level support of workers’ participation in the organization of work and in enterprise life; b) recognition of the right of employee representatives to participate in the public institutions which provide employment and welfare services. The experience of countries where this participation is widely adopted has shown positive results in employment relations, worker welfare and productivity. This approach however requires a major change of attitude in the culture and practice of the social parties, particularly of the unions most dedicated to conflict and often alien to participation. Moreover, unions are required to be more sensitive to the new needs of the different types of employee, not only to the traditional core of insiders and to become not only wage negotiators but welfare and service organizations, acting as intermediaries between public institutions and employees for full access to the opportunities of the current society; c) creation of a universal safety net to support the collective participation of employees and citizens in local institutions which are still decisive even in time of globalization.

8) The international dimension of labor policies and legislation requires more extensive analysis and policy initiatives. Projecting on a global scale the basic social standards and some rights is a long-standing commitment of international institutions, beginning with the ILO, which requires greater and consistent support by national governments. A major controversial issue concerns the ways and means best fit to pursue this objective. Wide support but also strong criticism is directed to the so called social clauses which recognize preferential treatment in international commerce to countries which abide by basic social standards and/or provide sanctions for those which violate them. Probably a one fits all solution is unfeasible and unrealistic. Social clauses should be tailored to the very different socio-economic contexts to be addressed, taking into account that new prominent economic players have been emerging during the last ten years within the global scene. The strategic objective is to re-balance asymmetry between the globalization of the market-sphere and the operational mechanisms of the systems of labor and social protection, still essentially anchored to the national level, by introducing a stronger coordination ‘entre le commerce et le droits sociaux’ (Delmas-Marty).

The ILO experience provides important indications on how to promote labour standards and diffuse them internationally taking into account the different economic and social conditions of each country and on the other hand the different content of the various standards. It suggests concentrating on the directives and controls on a core of essential standards to be strictly respected by all ILO member states, while allowing for a more flexible application of other standards, in line with the level of development and of income of the various countries. On the other hand the ILO has pointed out the scarce effectiveness and the possible negative effects of commercial sanctions, particularly on the populations of the weakest countries and has advocated a wider use of positive actions such as incentives and financial aid directed to promote respect of the same basic standards. The diffusion of these standards may be best supported by a variety of measures implemented by different actors, including civil and social organizations and multinational enterprises by codes of conduct and best practices voluntarily promoted and monitored. Moreover it has to be remembered that the international diffusion and application of social standards depends on an even wider range of measures aimed at promoting the economic and social development of each country.

9) The European Union has been a significant testing ground for experimenting labour regulations and social policies common to different countries. Outright legal harmonization of national legislations has proved to be impracticable beyond some limited areas. A different approach has therefore been adopted aimed at coordinating national employment and social policies by way of
different forms of soft law, in particular common guidelines and targets accompanied by exchange of good practices and supported by stable monitoring and peer review systems. The effectiveness of the so called open method of coordination (OMC) is uneven, but it has contributed to common social learning and to various forms of hybridization between the preexisting national models. Some proposals have been put forward in order to increase the effectiveness of the OMC: i.e. to improve the social and employment indicators and the monitoring techniques; to apply stronger incentives and disincentives beyond peer pressure in order to promote convergence in national policy making, to link the guidelines of the OMC to the implementation of the fundamental social rights sanctioned in the European Charter; to integrate different measures of soft and hard law toward the common objective of promoting employment and a gradual harmonization of working and social conditions.

This European experience may give some useful suggestions to the social parties and to the public actors willing to promote common social regulations and policies in other regional areas of the world. But the European experience provides further indications, in particular that the process of innovation and of coordination of norms and social policies is not a merely procedural exercise. Its effectiveness depends on the political commitment the governments and of the social parties involved and on the broader decisions concerning the economic and social development of the countries concerned. Monetary and market integration, decoupled from social integration, is not only insufficient, but may be disruptive for the labor conditions and policies existing in the national systems. The risk is enhanced by the “austerity minded” economic policies which prevail, not only in Europe. Fundamental changes in economic and fiscal policies are demanded from the European institutions and from the governments of member States if the construction of a social Europe is to proceed and not become a victim of the current crisis. Only under these conditions the Union will respond to the promises of progress made to its citizens and provide useful examples for other countries.

The ambitious social and economic targets set in the Europe 2020 document need to be implemented by common European initiatives aimed at combining the fiscal compact so far decided with a ‘social and growth compact’. Effective initiatives in this direction, capable of overcoming the present ‘asymmetry’ which affects the community, can hardly be promoted without a revision of the political institutions and of the very constitution of the Union; and unless this revision is supported by the concerted action of the European social parties willing to frame a social compromise like those that supported in the past the progress of employment and welfare systems in many European states.

Comparative research confirms that the history and present conditions of individual countries are still so different that social policies and regulations adopted in one country cannot be simply transplanted in others. But learning from good practices is useful both for framing the issues and for suggesting possible solutions: particularly in a globalized world which needs common guidelines and values.

The ideas presented above are a tentative contribution to such a common research. They can be tested by scholars and practitioners who believe in the role of labour law and social policy even in the current global environment. Markets are wider but should not be more powerful than intellectual ingenuity and social learning.