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**LABOR LAW, ECONOMICS AND REGULATION.
ITALY AND SPAIN: COMPARING MODELS IN
THE EUROPEAN FRAMEWORK.**

CO-TUTORSHIP Ph.D THESIS

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To my parents

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Abstract and conclusions in brief

The work here presented wishes to propose a critical and reasoned reflection about the relationship between labor law and economics in a continuously changing international scenario.

The theme can certainly be inserted among the “classic” ones, because it faces one of the most fascinating issues labor law – as a subject – places when it projects itself outside its natural conceptual perimeter.

The research object is in fact based on a critical reflection around the *vexata quaestio* of the relationship between the juridical-labor law sphere and the economic dimension of reference.

More in detail, in this general framework, we carry out a research which thrusts down its roots in an organic analysis of the theoretical positions of law and labor economics, in order to develop a synergic argument which can possibly be advantageous in both research ambits.

With the present work, we wish therefore to test the holding of the relationship between the two spheres of knowledge considered, also in the perspective of the elaboration of hermeneutic contributions useful for a possible re-conceptualization of labor law, partially imposed by the morphological change of the socio-economic contexts of reference.

Following a logical sequence, the present work is structured in five conceptually autonomous chapters, which however permeate each other and are conceived in a indissoluble unitary dimension in order to guarantee systematic coherence to the research.

In detail, moving from a careful reflection about the “crisis” of labor law considered by itself and in its interaction with economics, attention is placed on the intrinsically conflictual and dualistic nature of the subject, in its being a projection of the pair “capital/work”.

After some unavoidable methodological considerations, useful for an analytical-conceptual reflection, we then highlight the elements of interest deriving from the comparison between and the balancing of economic and social rationality, economic factuality and juridical “evaluation”.

From a methodological point of view, the logical and scientific assumption of the research is the firm conviction that only through a systemic approach, characterized by a strong comparative and multidisciplinary framework, it is possible to carefully analyze the current structure and configuration of the relationship between labor law and economics in order to outline in particular the boundaries of future perspectives of development.

A clear reconstruction of a suitable method to rationalize the dialectic process between cognitive openness and juridical reconceptualization is indeed inescapable.

The use of the comparison – contextualized and teleologically addressed to give the work an appreciable hermeneutic contribution – is thus considered the privileged, functional research method.

The labor law systems compared – as shown in the body of the present work – are those of Italy and Spain, because of the proximity of the regulatory paths explored from time to time and of the convergence resulting also from recent reforms.

Hence, looking at the paradigmatic institutes of the impact of the economic sphere on juridical regulations, the concrete relationship between economics and labor law is in particular considered with specific reference to the worker’s tasks (and demotion/deskilling), also as a consequence of the recent legislative reforms, which have been introduced in the two legal systems object of comparison.

In addition, special consideration is reserved to the concept of “flexibility”, to the specular notion of “security”, and to the boundaries

of the concept of “flexicurity”, in the scenario of a European labor law undergoing a deep change in the search of a possible new balance.

Exactly the search of a new adjustment between the different interests involved in present-day labor law relationships finds in an axiological framework of values the natural landing of the research path here briefly presented.

In the conclusions of the present work, we propose some targeted reflections about the urgent need to “return” to the principles and the values which have represented the essence of the subject, yesterday as today.

Labor regulation, in relation to economic efficiency and to the requests of deregulation coming from the market, cannot leave aside the rediscovery of the table of values of reference and the balancing of the different interests involved.

Abstract e conclusioni in breve

Lo studio che qui si presenta intende proporre un percorso di riflessione critico e ragionato attorno al rapportarsi del Diritto del lavoro rispetto all'economia, in uno scenario internazionale in continua evoluzione.

Il tema è certamente ascrivibile tra quelli “classici”, affrontando una delle questioni più affascinanti che il Diritto del lavoro – quale materia di “confine” – pone, nel suo proiettarsi all'esterno del suo naturale perimetro concettuale.

L'oggetto della ricerca è invero rappresentato da una riflessione critica attorno alla *vexata quaestio* del rapporto tra la sfera giuridico-lavoristica e la dimensione economica di riferimento.

Più in particolare, in tale quadro generale, si compie uno studio che affonda le proprie radici nell'analisi organica delle posizioni teoriche del Diritto, e nello specifico del Diritto del lavoro, e di quelle proprie della *labour economics*, al fine di condurre un ragionamento sinergico, che risulti auspicabilmente proficuo per entrambi i rispettivi ambiti di ricerca.

Attraverso lo studio che si presenta, si intende quindi sottoporre a verifica la tenuta del rapporto tra le due sfere del sapere prese in considerazione, anche nell'ottica dell'elaborazione di apporti ermeneutici utili ai fini di una possibile riconcettualizzazione del Diritto del lavoro, parzialmente imposta dal mutamento morfologico dei contesti socio-economici di riferimento.

La struttura dell'elaborato si articola in una sequenza logica di cinque capitoli che, pur nella loro autonomia concettuale, sono tra loro compenetrati e concepiti in una dimensione indissolubilmente unitaria, al fine di garantire la coerenza sistematica del lavoro.

Nel dettaglio, prendendo le mosse dalla consapevole riflessione attorno alla “crisi” del Diritto del lavoro, in sé e nella sua interazione con l’economia, l’attenzione si focalizza sul dato intrinsecamente conflittuale e dualistico che connota la materia, nel suo essere proiezione del binomio “capitale/lavoro”.

Premessa un’ineludibile riflessione di natura metodologica, funzionale all’elaborazione analitico-concettuale, si evidenziano dunque i profili di interesse derivanti dal confronto e dal bilanciamento tra razionalità economica e razionalità sociale, tra fattualità economica e “valutazione” giuridica.

Proprio da un punto di vista metodologico, il presupposto logico e scientifico della ricerca, è costituito dal fermo convincimento che solamente attraverso un approccio sistemico, improntato ad una forte matrice comparatistica e multidisciplinare, sia possibile indagare con attenzione l’attuale struttura e configurazione del rapporto intercorrente tra il Diritto del lavoro e l’economia al fine, soprattutto, di delineare i contorni delle prospettive evolutive future.

Quanto mai imprescindibile appare invero la lucida ricostruzione di un metodo idoneo a razionalizzare il processo dialettico tra apertura cognitiva e ri-concettualizzazione giuridica.

Il ricorso alla comparazione – contestualizzato e teleologicamente orientato ad apportare allo studio un contributo ermeneutico apprezzabile – viene, dunque, considerato quale metodo privilegiato, funzionale all’investigazione.

Gli ordinamenti lavoristici eletti a termini di comparazione – come illustrato nel corpo dell’elaborato – sono rappresentati dall’Italia e dalla Spagna, in ragione della prossimità dei percorsi normativi tempo per tempo esplorati e della convergenza interordinamentale risultante anche dalle recenti traiettorie riformatrici.

Volgendo dunque lo sguardo ad istituti paradigmatici dell'impatto della sfera economica sulla regolamentazione giuridica, il concreto atteggiarsi della relazione tra economia e Diritto del lavoro viene più in particolare considerato con specifico riferimento alle mansioni (e al demansionamento) del lavoratore, quale istituto emblematico, anche in ragione delle recenti riforme legislative che hanno visto la luce nei due ordinamenti eletti ai fini comparatistici.

Preliminarmente, una speciale considerazione è, altresì, riservata alla nozione di "flessibilità", a quella ad essa speculare di "sicurezza", e ai contorni del concetto di *flexicurity*, nello scenario di un Diritto del lavoro europeo in profondo cambiamento e alla ricerca di possibili nuovi punti di equilibrio bilanciamento.

Ebbene, proprio la ricerca di un rinnovato temperamento tra i diversi interessi coinvolti nella relazione lavoristica contemporanea incontra nel terreno assiologico-valoriale il naturale approdo del cammino investigativo che qui si brevemente si presenta.

E invero, in sede di conclusioni del presente elaborato, si propongono alcune mirate riflessioni attorno all'urgente necessità di "ritornare" ai principi e ai valori di riferimento, che hanno informato come informano l'essenza della materia, ieri come oggi.

La considerazione della regolamentazione del lavoro, in relazione al tema dell'efficienza economica e delle istanze deregolatrici provenienti dal mercato, non può in alcun modo prescindere dalla riscoperta della tavola valoriale di riferimento e dell'equilibrato bilanciamento tra i diversi interessi coinvolti.

Resumen y conclusiones en breve

El estudio que aquí se presenta pretende proponer un camino de reflexión crítica y racional en torno a la relación entre el Derecho laboral y la economía, en un escenario internacional en constante evolución.

El tema es sin duda atribuible a aquellos “clásicos”, abordando una de las cuestiones más fascinantes que el Derecho del trabajo – como materia de “confin” – propone, proyectándose al externo de su natural perímetro conceptual.

El objeto de la investigación es en efecto representado por una reflexión crítica sobre la *vexata quaestio* de la relación entre el ámbito jurídico-laboral y la dimensión económica de referencia.

Más específicamente, en este marco general, se realiza un estudio que tiene sus raíces en el análisis orgánico de las posiciones teóricas del Derecho, y en concreto del Derecho laboral, y de aquellas propias de la *labour economics*, con el fin de llevar a cabo una discusión sinérgica, que resulte beneficiosa para ambos respectivos campos de investigación.

A través de este estudio, se desea poder comprobar la calidad de la relación entre las dos esferas del saber tomadas en consideración, también en la óptica del desarrollo de aportes hermenéuticos útiles a los efectos de una posible nueva conceptualización del Derecho laboral, parcialmente impuesta por el cambio morfológico de los contextos socioeconómicos de referencia.

La estructura de este trabajo se divide en una secuencia lógica de cinco capítulos que, teniendo una autonomía conceptual, se encuentran compenetrados entre ellos y concebidos en una dimensión indisolublemente unitaria, con el fin de garantizar la coherencia sistemática de la obra.

En detalle, sobre la base de la consciente reflexión en torno a la “crisis” del Derecho laboral, en sí mismo y en su interacción con la

economía, la atención se focaliza en el lado intrínsecamente conflictivo y dualístico que connota la materia, en el ser proyección del binomio “capital/trabajo”.

Presuponiendo una reflexión inevitable de índole metodológica, funcional en la elaboración analítico-conceptual, se destacan, por lo tanto, los perfiles de interés que surgen de la comparación y del equilibrio entre la racionalidad económica y la racionalidad social, entre realidad económica y “valoración” jurídica.

Desde un punto de vista metodológico, la premisa lógica y científica de la investigación está constituida por la firme convicción de que sólo a través de un enfoque sistemático, marcado por una fuerte matriz comparativa y multidisciplinaria, sea posible investigar cuidadosamente la estructura actual y la configuración de la relación existente entre el Derecho laboral y la economía con el fin, sobre todo, de trazar los contornos de las perspectivas futuras de evolución.

Cuanto más imprescindible parece en efecto la reconstrucción lúcida de un método adecuado para agilizar el proceso dialéctico entre apertura cognitiva y re-conceptualización jurídica.

El recurso a la comparación – contextualizado y teleológicamente orientado para aportar al estudio una contribución hermenéutica apreciable – es, por lo tanto, considerado como el método preferido, funcional a la investigación.

Los ordenamientos laborales elegidos para la comparación – como se muestra en el cuerpo de este trabajo – están representados por Italia y España, debido a la proximidad de las evoluciones normativas exploradas en el tiempo y también por la convergencia de las recientes corrientes reformadoras.

Volviendo, de esta forma, la mirada a las instituciones jurídicas más paradigmáticas de la influencia de la esfera económica en la regulación normativa, el comportamiento concreto de la relación entre

economía y Derecho del trabajo viene mayormente considerado haciendo referencia a las tareas (y al *ius variandi*) del trabajador, institución emblemática, también a la luz de las recientes reformas legislativas.

De manera preliminar, una consideración especial es, además reservada al concepto de “flexibilidad”, a aquella especular de “seguridad”, y a los contornos del concepto de *flexicurity*, en el escenario de un Derecho laboral europeo en profunda evolución y en la búsqueda de nuevos posibles puntos de equilibrio balanceados.

De esta forma, la búsqueda de una renovada reconciliación entre los distintos intereses en juego en la relación laboral contemporánea encuentra en el terreno axiológico el natural punto final de la trayectoria investigativa que aquí se presenta brevemente.

Y, en efecto, en las conclusiones del presente estudio, se propone una serie de reflexiones específicas sobre la urgente necesidad de “volver” a los principios y valores de referencia, que han caracterizado como caracterizan la esencia del argumento, en el pasado como en el presente.

La consideración del Derecho del trabajo, en relación con el tema de la eficiencia económica y de las solicitudes desreguladoras provenientes del mercado, no puede de ninguna manera prescindir del redescubrimiento de la tabla de valores de referencia y del equilibrado balance entre los diferentes intereses en juego.

Chapter 1 –

The rules of labor law in their interaction with economics

«La tutela dell'uomo che lavora all'interno dell'organizzazione produttiva è realizzata dalla disciplina legislativa che nella comparazione di tutti gli interessi coinvolti nella produzione secondo le valutazioni espresse dai principi costituzionali, ne definisce l'equilibrato bilanciamento prevedendo limiti ai poteri dell'impresa».

Mattia Persiani¹

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¹ M. PERSIANI, *Diritto del lavoro e razionalità*, in *Arg. dir. lav.*, 1995, 1, 29.

1. The crisis of labor law in its interaction with economics.

It is various decades now that labor law has been going through a prolonged period of deep crisis in a highly globalized contemporary scenario.

Such a direct statement, placed at the beginning of the present work, is not in any way the mere re-proposal of an empty *cliché*, in which to insert the many questions created by the never ending changing of the labor regulatory and organizational framework.

On the contrary, it would like to be the aware understanding of a never-ending process, which cannot be reduced to a mere evolutionary phenomenon nor to a normal change of the times.

Indeed, the “labor law crisis” we are examining is first of all a crisis of identity, which concerns the very essence and the true meaning of the subject².

Labor law is a subject born in a particular context – impossible to find in the present day productive scenario – which made it necessary to regulate the economic and social relationship at the basis of labor relations. Relations which have equally changed in depth in their concrete approach³.

² During its complex evolution and development, labor law *«ha perso la sua anima [...] segreta e fascinosa»*, intended as *«gusto della immaginazione di un diverso Governo sociale, al tempo stesso privato e pubblico»* (L. MARIUCCI, *Il diritto del lavoro della seconda Repubblica*, in *Lav. dir.*, 1997, 2, 168).

³ To this regard consider the interesting reflections of L. MARIUCCI, *op. cit.*, 165 who presents a subject which has lost its solidity in its substantial relevance, in its conceptual *vis* and in its cultural elaboration when making a “romantic” comparison – certainly precious, *in primis* for the young labor jurist – between yesterday’s and today’s labor law. Wishing to favor a debate on the topic, the author does not hesitate to state: *«non ritrovo più, nell’attuale diritto del lavoro, le ragioni per cui mi sono appassionato a questa materia e l’ho scelta come attrezzo fondamentale della mia vita intellettuale»*.

As placed in light by authoritative Italian scholars, the main reason of such a deep structural crisis in labor law has to be identified in the process of gradual “weakening” of the socio-economic relationship, which represents at the same time the substantial presupposition and the necessary object of regulation⁴.

Indeed, during the last century, the organizational paradigm of production significantly changed its profile, giving in to the model of lean production, which gradually replaced the traditional one based on the Ford’s vision of mass production⁵.

Such a radical transformation consequently determined a change in the models of labor organization, favoring the elaboration and the spreading of a significant multiplicity of relationships and of new forms of employment, which therefore brought to a generalized increase in the complexity of the labor regulation phenomenon⁶.

The natural consequence of such a change in the economic and social paradigms has been mainly the beginning of a process of relativization of the role labor law can and must perform under the pressure of globalization and delocalization⁷.

⁴ R. PESSI, *Valori e “regole” costituzionali*, Rome, 2009, 7.

⁵ P. WOMACK – D.T. JONES – D. ROOS, *La macchina che ha cambiato il mondo*, Milan, 1993, 5-12. See also: S. BHASIN – P. BURCHER, *Lean viewed as a philosophy*, in *JMTM*, 2006, 17, 1, 56-72; T. OHNO, *Lo spirito Toyota*, Turin, 2004, 19 *et seq.*; F. W. TAYLOR, *L’organizzazione scientifica del lavoro*, Milan, 1967, 143 *et seq.*

⁶ M.G. GAROFALO, *Unità e pluralità del lavoro nel sistema costituzionale*, in *Dir. lav. rel. ind.*, 2008, 22 *et seq.*

⁷ J. CLAM – G. MARTIN (edited by), *Les transformations de la régulation juridique*, Paris, 1998, 449. See also A. SUPIOT, *Critique du droit du travail*, Paris, 2011, IX: «*la “globalisation” de l’économie a conduit à relativiser la place du droit dans la maîtrise des transformations du travail et de l’emploi*».

The negative effects created by the economic-financial crisis in labor relations, and especially in the occupational sphere, have in fact significantly conditioned the very elements at the basis of labor law⁸.

In time, the massive and generalized process of modernization of the production systems, mainly determined by the technological revolution⁹, has produced important effects also on the internal legal systems of the single states. Facing the new spaces, proper of a globalized economy, these have started to show signs of weakness, appearing in all their obsolescence¹⁰.

As a consequence, constant and repeated have become the requests for a radical reform of the internal labor systems with in mind the renewal of the very structures at the basis of labor law.

For this reason, it is possible, as a consequence of such insistent requests of reform – coming from various directions and, *in primis*, from economic scholars – that the jurist’s role, and in particular the labor jurist’s role, may have seemed and may seem also today very often “limited” by the prevalent dominion of economics¹¹.

⁸ M. RODRIGUEZ-PIÑERO Y BRAVO-FERRER, *La grave crisi del diritto del lavoro*, in *Lav. dir.*, 2012, 1, 3; ID., *La difícil coyuntura del Derecho del Trabajo*, in *RL*, 2011, 20, 1.

⁹ U. CARABELLI, *Organizzazione del lavoro e professionalità: una riflessione su contratto di lavoro e post-taylorismo*, in *Dir. lav. rel. ind.*, 2004, 1, 2 *et seq.* (as well as in *CSDLE “Massimo D’Antona” Working papers*, 2003, 5, 3).

¹⁰ For a suggestive analysis about the relationship (*rectius*, collision) between the national dimension proper of the legal systems and the transnational and globalized scenarios imposed by the globalized economic frameworks, see R. PESSI, *La protezione giurisdizionale del lavoro nella dimensione nazionale e transnazionale: riforme, ipotesi, effettività*, in *Riv. it. dir. lav.*, 2010, 1, 195 *et seq.*; ID., *Ordine giuridico ed economia di mercato*, Padua, 2010, 45 *et seq.*; N. IRTI, *L’ordine giuridico del mercato*, Bari, 2009, *passim*. See also S. BINI, *Sull’effettività della tutela giurisdizionale del lavoro nell’ordinamento giuridico italiano*, in *Dereito*, 2014, 2, 1-13.

¹¹ A very suggestive and effective description of such a situation can be found in G.G. BALANDI, *Dove va il diritto del lavoro? Regole e mercato*, in *Lav. dir.*, 2002, 2, 246:

In the light of such widespread criticality, it is necessary and even indispensable to tackle the great debate about the relationship between labor law and economics.

Particularly evocative to this regards is the thought of one of the most authoritative and prestigious authors of French labor law doctrine, who stated: *«Étroitement influencé par les faits économiques, le droit du travail oblige le juriste à élargir son horizon et à rechercher, sous les institutions juridiques, le substrat économique et social. Instrument de plus en plus utilisé de la politique économique, le droit du travail est un excellent observatoire, qui permet d'apprécier l'orientation générale d'une politique. Il fait la liaison entre la science juridique et les autres sciences sociales»*¹².

2. The impossibility to overcome the “conflictual” nature of labor law: the essence of the subject.

*«“Conflitto di lavoro” è il contrasto di interessi tra chi ha forza lavoro e non ha capitale e chi ha capitale ma non ha forza di lavoro (si intende, in misura sufficiente a raggiungere un dato risultato)»*¹³.

With these simple but clear words, Francesco Carnelutti – *«il maestro, che nell'ansia inesausta della ricerca ha travolto le paratie stagne che separano i campi della scienza giuridica»*¹⁴ – places in light

«il diritto del lavoro appare straripato e spinto, talché il suo immaginabile itinerario futuro sarà solo molto parzialmente il frutto di scelte maturate al suo interno, o all'interno del mondo del quale si pretende regolatore efficiente».

¹² G. LYON-CAEN, *Manuel de droit du travail et de la sécurité social*, Paris, 1955, *passim*.

¹³ F. CARNELUTTI, *Teoria del regolamento collettivo*, Padua, 1936, 5.

¹⁴ A. SCIALOJA, *Presentazione*, in AA. VV., *Scritti giuridici in onore di Francesco Carnelutti*, Padua, 1950, 1, XII.

the intimate essence of labor law, colored of its intrinsic economic nature.

Indeed, the connection and the relation between “economic rationality” and “juridical rationality” is the essential object of the mission of the labor law jurist’s investigation¹⁵.

The entire scientific development of this particular subject moves around a specific theoretical point: the juridical balance between opposite values and interests; on one hand, the sphere of economic efficiency and, on the other hand, the interests proper of human existence.

The true essence of labor law, still deeply characterized by the tension between capital and work, resides in this balance.

Therefore, the relationship between market and law, between the “game” and its “rules” is today the center of a new theoretical elaboration¹⁶, imposed by the structural change of the economic and social parameters of reference.

To this regard, already *prima facie*, it is obvious that the issue is principally methodological: to reason about the relationship between labor law and economics implies first of all, the articulation and the development of a reflection about the methodology to choose as reference during the investigation.

¹⁵ See A. PERULLI, *Modificazioni dell’impresa e rapporti di lavoro: spunti per una riflessione*, in A. LYON-CAEN – A. PERULLI (edited by), *Trasformazioni dell’impresa e rapporti di lavoro*, Padua, 2004, 1.

¹⁶ G. ROSSI, *Il gioco delle regole*, Milan, 2006, 29: «Il rapporto fra mercato e diritto, fra il gioco e le sue regole, ripropone il paradosso di Achille e della tartaruga, col secondo (il diritto) rassegnato a inseguire il primo (il mercato) sapendo che non lo raggiungerà mai. Il punto nuovo è però che mentre per qualche secolo il diritto è parso accettare questa sua scomodissima condizione, negli ultimi anni sembra avere sostituito alla rassegnazione un iperattivissimo fine a se stesso, e a discernere senza soluzione di continuità norme sostanzialmente autoreferenziali, che non incidono sulla realtà sociale né contribuiscono a garantire una ragionevole equità o a tutelare i soggetti giuridici più deboli». See also H. KELSEN, *Teoria generale del diritto e dello Stato*, Milan, 1952, *passim*.

It is true that during the last decades the juridical sciences have been characterized by a deep ambiguity in the elaboration and the use of methodology, which has brought to an inorganic systemization of the subject.

Jurists have concentrated most of their energy investigating continuously on the heterogeneous regulations coming from different social actors, without reaching however true and full research satisfaction.

The topic (here only mentioned and, later on, organically developed) cannot but involve also the consideration of the mission of the present day jurist.

With reference to this, it is worthwhile considering the intense and evocative reflection proposed by Paolo Grossi about the true essence of the mission which should characterize the activity of the present day jurist (*rectius*, “post-modern”) in such a complex social context¹⁷.

He/she has to be a sort of translator of present day socio-economic roughness into “appropriate” technical-juridical categories¹⁸.

In his/her noble mission of interpreter of social phenomena, the labor law jurist has to promote and perform a process of deep re-conceptualization of the foundations at the basis of the subject.

¹⁷ P. GROSSI, *Introduzione al Novecento giuridico*, Bari, 2012, 117: «*Il compito del giurista è oggi indubbiamente faticoso e può darsi che lo assalga lo sgomento generato dall'incertezza, dalla fluidità, dalla complessità. È più facile nuotare in uno stagno immobile che in una corrente rapida vorticoso*».

The peculiar relationship between labor law and economics determines the continuous need of a constant rethinking of the first, in order to achieve a fruitful adaptation of juridical “rules” to the socio-economical evidences.

¹⁸ *Ivi*, 136: the jurist is considered by the author like a «*traduttore della grezza attualità socio-economica in provvedute categorie tecniche (come sta avvenendo da tempo in seno alla globalizzazione giuridica)*».

3. Labor law as «*luogo elettivo della libertà intellettuale*» and «*chiave per guardare il mondo*»¹⁹.

In the context of the identity crisis described above, as highlighted by authoritative scholars, the main feature of the interaction of the jurist with economics is a substantial sense of “sufferance”²⁰.

Indeed, the jurist assists impotent to the disappearance of the conceptual and systematic certainties which had over time become consolidated, and which are now threatened by the rapid change of the economic-productive and socio-cultural scenarios of reference.

Hence, it seems that we cannot deny that the most intimate and deepest sense of labor law is involved in the crisis, considered in its richest meaning, that of “choice”, of “decision”, according to its etymological derivation.

That «*forza misteriosa*», which colors the subject of «*straordinaria valenza e molteplicità culturale*»²¹, inspiring its very genesis, returns to be the center of renewed reflection in the contemporary juridical and social scenario.

¹⁹ L. MARIUCCI, *op. cit.*, 166.

²⁰ *Ibidem.*

²¹ *Ibidem.* In the essay (which has the declared aim to request and provoke a debate in labor law doctrine) the author proposes an interesting reflection on the “spiritual” nature, and therefore of value, which pervades and conditions labor law: «*Il tema del lavoro infatti non è solo una tecnica. Certo, esso riesce a produrre tecnicità raffinatissime, giocando sull’essere un derivato del suo ceppo giuridico fondamentale, il diritto privato. Ma solo un ingenuo può sposarsi al diritto del lavoro in nome della tecnicità giuridica. Mi pare sia stato proprio Francesco Santoro Passarelli, il tecnico per eccellenza, in occasione di una sua celebrazione in vita, a smentire i suoi epigoni, affermando che il diritto è soprattutto lo “spirito di un popolo”. Se è vero che Santoro Passarelli ha detto questa frase, credo che l’abbia pensata proprio in riferimento al diritto del lavoro*». Luigi Mariucci adds: «*il diritto del lavoro è una disciplina, in sé, libertaria e quasi-anarchica, il cui fondamento scientifico sta nel riflettere, contestualmente, di diritto privato e di diritto pubblico, della regolazione indotta dagli stessi gruppi sociali e della regolazione eteronoma e quindi politica*» (166).

Labor law has its origin in a totally particular specificity, of a cultural nature, which positions the subject along the border between the private and the public spheres: as is known, labor law represents «*una sorta di cerniera tra i grandi rami del diritto*»²².

It is true – as mentioned above – that the very identity of labor law is deeply conditioned by the statement of the primacy of economics over law, which we are presently assisting to²³.

As a consequence, the jurist reacts to the substantial hegemony of economics by adopting a “restrictive” position, with an attitude of substantial closure towards the reasoning of economics in order to defend his/her own identity, founded on a deeply rooted system of values and axiologies.

It seems without doubt that behind the labor law jurist’s attitude of closure, when called to face the economist and to make dialogical-conceptual exchanges with him/her, there is the desire to preserve the subject, attentively created and developed over time, from contaminations which could undermine and compromise the integrity of its essential axiological nucleus.

More in particular, very often the refusal to face the economist and the attitude of closure towards economics have been justified by the need to preserve the “noble” sphere, residing in the protection of the worker’s dignity.

It is therefore in such scenario that we have to consider the historical reluctance of a great part of the labor law world to make considerations which could bring to a possible reform, for instance, of the complex and delicate issue of employment dismissal.

²² *Ivi*, 165.

²³ R. PESSI, *Economia e diritto del lavoro*, in *Arg. dir. lav.*, 2006, 2, *passim*.

This attitude has been attributed by a labor law scholar particularly attentive to the relationship of labor law with economics, to «*bigottissimo politico-culturale*», which has brought to «*sacralizzare alcune zone del diritto del lavoro per sottrarle al dibattito critico*»²⁴.

Whatever is one's judgment on this specific aspect, which has been here evoked as an example, it is useful to point out how the widespread refusal to start and to maintain an advantageous dialectic with the economic sciences, is in concrete the expression of the refusal to recognize the legitimacy of economics in the dialogue with law.

As already mentioned, law finds its nature and identity on a solid axiological system of values, while economics is essentially based on the primary objective of profit maximization, through the minimization of costs, in the light of the paradigm of an efficient allocation of limited resources which regulates the market.

With reference to such structural diversity, labor law places itself, in concrete, as a subject positioned in correspondence of the uneven border between law and economics.

From the very beginning, its identity has been characterized by a continuous and constant balance between the different constitutional values called to coexist in the ambit of the work relationship.

As highlighted by authoritative scholars, the role of labor law in the new millennium must be identified with the achievement of a balance

²⁴ P. ICHINO, *Il diritto del lavoro e i modelli economici*, in *Lav. dir.*, 1998, 2, 319. Among all the "areas" with reference to which significant is the sensitivity aroused in doctrine by possible considerations of reform – which have recently seen light – there is undoubtedly employment dismissal. The argumentation, which for decades has been presented by the part of the doctrine that has opposed with convinced resistance any kind of revision "to bring up to date" the system of guarantees in case of illegitimate dismissal, is the one based on the need to protect the dignity of the worker, on the basis of the fundamental assumption that the reintegration of the worker represents the best guarantee for the worker and his/her dignity.

between the values of the individual and the needs of economic efficiency²⁵.

4. The natural inclination of the subject to project itself towards the outside world.

In the light of what has been discussed so far, it seems possible to say that the crucial mission labor law is today called to measure itself with, cannot be advantageously carried out without considering the fundamental projection of the subject towards the outside world.

To this regard it is essential to underline the peculiarity of labor law, distinguishing it from the other branches of the juridical system, that is its exceptional concreteness, which goes beyond the dimension of mere «*astratta fascinosa scientifica*», to become «*strumento potentissimo della organizzazione materiale della società*»²⁶.

Thus, it is fundamental to privilege – especially in a historical and socio-economic phase like the present one – a careful dialogical-interdisciplinary approach, *in primis* with the economic sciences, in reason of their special *propinquitat* with labor law itself.

²⁵ R. PESSI, *Economia e diritto del lavoro*, cit., 452: «*Vi è insomma ancora una ragione per immaginare che il dialogo con l'economia non possa arrestarsi, perché la funzione del diritto del lavoro nel nuovo millennio è, oramai, quella di realizzare un equilibrato temperamento tra i valori dell'uomo e le esigenze di efficienza del sistema produttivo che genera le risorse necessarie per soddisfare quei valori*». See M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Derecho del Trabajo y racionalidad*, in *RL*, 2006, 5, 10: «*El Derecho del Trabajo es un presupuesto necesario de una sociedad democrática avanzada y de una economía y un sistema de empresas dinámico y competitivo, pero para ello debe seguir siendo un derecho protector de los trabajadores, promotor de relaciones colectivas fundadas en la libertad y autonomía sindicales y garantizador de los derechos fundamentales en las relaciones de trabajo*».

²⁶ L. MARIUCCI, *op. cit.*, 163.

Indeed, in the light of the natural inclination of the subject – intrinsically projected towards the ethical rationalization of «*valori prodotti dalla società e dalle scienze che ne elaborano il processo genetico*»²⁷ – it seems possible to affirm that only a similar systemic vision will be able to implement the conditions for an effective re-conceptualization of what an authoritative jurist has in recent years defined as the “new course of labor law”²⁸.

On the other hand, it is this peculiarity of labor law to impose on the scholar a continuous and constant “monitoring” activity as to its regulatory paradigms and, therefore, to render indispensable the permanent activity of considering – and especially, of “reconsidering” – the subject according to the context it is inserted in.

This natural predisposition of the doctrinal debate to openness to novelties, both conceptual and methodological, places its roots in the need of the subject to “follow”, also at different levels, the incidence of its rules on the economic and social system.

The continuous and constant dialectics between the axiological dimension on one hand and the normative-regulatory one on the other, which animates and pervades the entire identity of labor law, cannot in any way exclude a cognitive openness towards economics, and more in general, towards the social sciences and society²⁹.

²⁷ R. PESSI, *Economia e diritto del lavoro*, cit., 435.

²⁸ G. PROIA, *Manuale del nuovo corso del diritto del lavoro*, Padua, 2013, *passim*.

²⁹ To this regard extremely precious seems the contribution offered by the constitutional doctrine, and in particular, by those authors who have made reflections and elaborations addressed to consider constitutional norms – and those of reference for labor law in particular – in their natural conceptual riverbed, that is the dialectic dimension between law and society. It is in this dialogue with society that law becomes “live”, giving juridical shape and physiognomy to social values, considered in their evolution and development. See, in particular, A. BALDASSARRE, *Costituzione e teoria dei valori*, in *Pol. dir.*, 1991, 655 *et seq.*; P.A. CAPOTOSTI – G. DI GASPARE, *Per una filologia della legge*, in *www.amministrazioneincammino.luiss.it*, 6; A. PACE,

Hence, maintaining the foundational values of its true essence, labor law is characterized by a particular need to be constantly “revised” over time.

It consequently seems possible to recognize that the castling in positions of closure, based on a consideration of oneself in terms of mere “positivistic self-sufficiency”, would bring to a substantial regression and to an anachronistic step-back towards the formal law of the 1800s, closed to any kind of dialogue with the social sciences.

As stressed decades ago by Pietro Ichino, the main danger of «*inaridimento della dottrina giuslavoristica*»³⁰ is in the insensitivity to the economic sciences.

In this picture the very regulation of work therefore cannot but be conceived as the balance between the value of the economic efficiency of the enterprise with that of the individual worker³¹, and advantageous for both spheres of opposite interests³².

As a Spanish scholar has highlighted with authority, the valorization of the economic dimension of the subject presupposes also,

Le sfide del costituzionalismo nel XXI secolo, in ID., *I limiti del potere*, Naples, 2008, 1-22; ID., *Interpretazione costituzionale e interpretazione per valori*, in G. AZZARITI (edited by), *Interpretazione costituzionale*, Turin, 2007, 83 et seq.; ID., *Metodi interpretativi e costituzionalismo*, in *Quad. cost.*, 2001, 35 et seq.

³⁰ P. ICHINO, *Il diritto del lavoro e i modelli economici*, cit., 309 et seq.

³¹ See R. BALDWIN – M. CAVE, *Understanding regulation: theory, strategy and practice*, Oxford, 1999, 329 and following, in which the authors make reference in particular to the concept of balancing economic efficiency with social objectives. See also S. DEAKIN – G. SEEGERS – R. VAN DEN BERGH (edited by), *Law and economics in the labor market*, Cheltenham, 1999, *passim*.

³² To this regard see the warning of the Former President of the Italian Republic Giorgio Napolitano, the 30th of April 2011, in his speech in occasion of the Labor Day celebrations: «*lo sviluppo economico e la sua qualità sociale, la stessa tenuta civile e democratica del nostro paese, passano attraverso un deciso elevamento dei tassi di attività e di occupazione, un accresciuto impegno per la formazione e la salvaguardia del capitale umano, un'ulteriore valorizzazione del lavoro, in tutti i sensi*» (www.quirinale.it).

and especially, the reconsideration of the ethical sphere of values on which labor law has founded itself, conceiving its mission of service³³.

Indeed, becoming aware of the serious crisis of identity which affects labor law in the present day global scenario, means first of all to be fully aware of the seriousness and the danger for the labor law system of the emphasized vagueness of the rules laid out as a garrison of employment³⁴.

As a consequence, the labor law crisis of identity, which has been efficaciously and interestingly presented in terms of «*disintegrazione produttiva del Diritto del lavoro*»³⁵ by an authoritative Anglo-Saxon scholar, can be for the labor law jurist an occasion to rethink and re-elaborate the regulations of reference.

A work of re-conceptualization of this kind cannot in any way exclude the fundamental question about the nature of economic effects that labor regulations produce³⁶.

The term re-conceptualization has not been used casually. Indeed, it presupposes an intrinsic and fundamental openness to dialogue,

³³ M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Derecho del Trabajo y racionalidad*, cit., 10.

³⁴ As highlighted by authoritative doctrine (U. ROMAGNOLI, *Il Diritto del lavoro nell'età della globalizzazione*, in *Lav. dir.*, 2003, 4 569 et seq.): «*l'indeterminatezza delle fonti regolative e delle prassi applicative finirà per accelerare la formazione di un diritto del lavoro globale ad opera, in prevalenza, degli stessi attori del mercato e della vita economica*».

³⁵ H. COLLINS, *The productive disintegration of labour law*, in *The industrial law journal*, 1997, 295 et seq.

³⁶ With reference to this, see, M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Derecho del Trabajo y racionalidad*, cit., 10: «*el Derecho del Trabajo está obligado a transformarse y a redimensionarse, a un proceso de revisión, aún no terminado, hacia un diseño menos legalista, más flexible, más abierto a influencias externas, y, sobre todo, más sensible a la repercusión de sus reglas en el sistema económico y en el mercado de trabajo*».

together with the predisposition to re-discuss the entire conceptual structure which has so far supported the entire framework of the subject.

5. An organic reflection about the method and rationality of labor law.

As suggested by an authoritative Italian labor law jurist, the period of crisis – it is decades now – that labor law has been going through, should be the occasion for a reconsideration of the chart of founding values of the discipline, in the light of the essential parameter represented by rationality³⁷.

Indeed, it is known that in the concept of rationality is contained the particular element of evaluation, teleologically addressed, of congruence and adequateness of means to purposes.

To this regards it is worthwhile specifying how the evaluation of rationality must necessarily take place assuming as paradigms of reference criteria and parameters not only of an ethical nature, but also and especially of an economic one.

Important to this regard is the distinction made by Max Weber between instrumental rationality and axiological rationality. It is necessary, in fact, to underline that, in its first meaning, this concept can be understood as «*criterio strumentale e pratico che serve a perseguire gli obiettivi mediante mezzi adeguati*», while in its axiological dimension, it takes the form of a «*razionalità irrazionale*», because it «*eleva a valore assoluto il valore in vista del quale è orientato l'agire*»³⁸.

³⁷ R. PESSI, *Economia e diritto del lavoro*, cit., *passim*.

³⁸ M. WEBER, *Economia e società. Teoria delle categorie sociologiche*, Milan, 1981, 1, 22 *et seq.*

Always to this regards, particularly precious seems the hermeneutic contribution offered by an authoritative Italian scholar about the possible meanings to recognize and attribute to the concept of rationality. Adalberto Perulli makes a tripartition of the conceptual category considered, distinguishing between (at least) three distinct meanings³⁹.

According to a first meaning, which recalls and re-uses Kant's categories of "order of knowledge" and "order of action", rationality has to be understood considering the concepts «*uso teorico*» and «*uso pratico*» of reason. According to a further meaning, rationality consists of the idea of "verifiability", revealing in this a positivist and empirical conception of rationality itself (placed in antagonism with the sphere of faith)⁴⁰.

Finally, the third meaning is the one which presents without doubt the greatest points of contact with the economic dimension and with «*il modello di razionalità espressa dall'homo oeconomicus*»⁴¹; according to this meaning, rationality is a parameter of evaluation, based on the adequateness of the means to reach a certain purpose.

It is exactly rationality, considered in the last mentioned meaning, to be the parameter of reference, to use as informing criteria and on the basis of which articulate the dialogue with economics. A dialogue that

³⁹ A. PERULLI, *Razionalità e proporzionalità nel diritto del lavoro*, in *Dir. lav. rel. ind.*, 2005, 1 *et seq.*

⁴⁰ The second conception of rationality is conditioned by a strong philosophical inspiration connected to Hegel's thought and which can be summed up in the philosopher's famous aphorism: «*tutto ciò che è razionale è reale e ciò che è reale è razionale*» (G.W.F. HEGEL, *Lineamenti di filosofia del diritto*, Milan, 2006, 59). As is known, Hegel identifies reason – and, therefore, the rational sphere – with reality: everything that exists (and therefore is) is rational (and so, as it should be). This way Hegel's philosophical thought goes beyond Kant's traditional contrast between being and having to be.

⁴¹ A. PERULLI, *Razionalità e proporzionalità nel diritto del lavoro*, *cit.*, 1 *et seq.*

labor law has to necessarily interweave and constantly feed⁴², as preferred area of confrontation⁴³.

Hence, if we consider rationality in its dimension of adequateness of means to reach certain purposes, it will be clear that the identification and selection of the purposes is of crucial importance.

We gradually reach the moment to reflect on how we move from the normative being of labor law to an area where the subject has to be ethical and economic.

In other words, we need to analyze the normative framework in force in the light of the criteria of rationality, as described in the reflections so far expressed.

6. The resistance of the labor law system beyond the case of subordinate employment: a recentralization of the forms of protection?

A reflection aimed at verifying the resistance of national labor law systems in the light of the criteria of rationality illustrated above, cannot but begin from the core of the entire labor law system, that is the case subordinate employment.

⁴² To this regards see R. PESSI, *Persona e impresa nel diritto del lavoro*, in AA. VV., *Diritto e libertà: studi in memoria di Matteo Dell'Olio*, Turin, 2008, 2, 1238 et seq.: «Sottoporre a verifica la razionalità regolativa del diritto del lavoro vuol dire, anzitutto, saggiare la compatibilità del suo sistema regolativo con l'efficienza del sistema economico, perché quest'ultima è precondizione per la tutela di quei diritti che comportano un effetto redistributivo di ricchezza e il suo dimensionarsi».

⁴³ R.A. POSNER, *Some Economics of Labor Law*, in *U. Chi. L. Rev.*, 1984, 988 et seq.: «labor law is as natural a field for the application of economics to law as one could imagine. It regulates explicit markets that have been a subject of continuous and fruitful economic study since Adam Smith's day».

Indeed, all labor law is based on the aim of protecting subordinate employment, considered in its dualist-dichotomic contrast with independent employment. In reality, this setting has been certainly overcome by the spreading of new forms of self-employment, defined in doctrines «*di nuova generazione*»⁴⁴.

Therefore, we can only take note of the inadequateness of this normative system in the light of an evaluation which is both instrumental and axiological.

The traditional category of subordination, once the real core of the labor law discipline, is today sided by other types of independent or para-subordinate employment, involving workers in weak positions, who are economically dependent and who deserve protection exactly as subordinate workers⁴⁵.

Thus, it seems possible to say that the concept of subordination, as originally elaborated in the codes, has today been partially overcome, or rather inserted in an economic-productive scenario which has gradually determined significant changes in the paradigms of labor organization.

As a consequence, the system of guarantees offered by labor law, based only on subordinate employment, has become unsuitable to efficaciously regulate, and especially protect the new forms of

⁴⁴ A. PERULLI, *Razionalità e proporzionalità nel diritto del lavoro*, cit., 4.

⁴⁵ See: M. BIAGI – M. TIRABOSCHI, *Lavoratori “parasubordinati” e rappresentanza sindacale. Le proposte legislative in materia di lavoro parasubordinato: tipizzazione di un “tertium genus” o codificazione di uno “Statuto dei lavori”?*, in *Lav. dir.*, 1999, 571 *et seq.*; M. MAGNANI, *Quale “Statuto” per il lavoro autonomo?*, in *Dir. rel. ind.*, 2010, 597 *et seq.*; M. PERSIANI, *Considerazioni sulla nozione e sulla funzione del contratto di lavoro subordinato*, in *Riv. it. dir. lav.*, 2010, 455 *et seq.*; T. TREU, *Uno Statuto per un lavoro autonomo*, in *Dir. rel. ind.*, 2010, 603 *et seq.*

employment, which are the result of the development of the organizational models already mentioned⁴⁶.

We reach such a conclusion also if we refer to the evaluation of rationality, considered in its proper axiological dimension, because the values expressed in the Constitutional Chart point out the existence of an area of employment “uncovered” by the weighty forms of protection offered to subordinate employment.

To this regard it is useful to stress that the reasons of this “gap” between regulations and the social dimension to regulate have been found in part in the attitude of «*chiusura culturale*», created and maintained by part of the labor law academic world towards a social reality in continuous change⁴⁷.

The consequence is that an organic reasoning on this aspect requires necessarily to consider with particular attention the qualitative dimension of the regulation, considering the latter’s ability to condition advantageously the situations which need to be disciplined.

⁴⁶ This evolution, in its historical dimension, is well described in L. GAETA, *Contratto e rapporto, organizzazione e istituzione. Rileggendo Franco Liso*, in *Dir. lav. rel. ind.*, 2014, 4, 662. The author, referring to the intellectual fertility of labor law in the 1980s, has described very well the gradual break down of dependent employment, which started in those years: «*La propensione quasi fisiologica del giurista italiano verso le teorizzazioni generali si coniugò, allora, felicemente con il momento particolare nel quale il “prototipo” del lavoro subordinato si stava letteralmente sgretolando sotto la spinta di diversi fattori, tra cui la previsione legislativa di nuove articolazioni della prestazione tradizionale, la diffusione di nuovi mestieri indotti soprattutto dall’enorme allargamento del settore terziario, la comparsa di modelli lavorativi “diffusi”, prodotti dall’innovazione tecnologica*».

⁴⁷ With reference to this, see L. MARIUCCI, *op. cit.*, 163 *et seq.* The author efficaciously asks labor law jurists to “come out of their shell”, opening to interdisciplinary comparisons, and especially opening to the reasons of economics, with which a renewed and certainly more intense synergic link is considered necessary. See also U. CARABELLI, *Libertà e immunità del sindacato*, Naples, 1986, 41: «*il giurista positivo [...] non deve chiudersi nel guscio monolitico e dogmatico del diritto statuale*».

Considering that the article n. 35 of the Italian Constitution states that «*La Repubblica tutela il lavoro in tutte le sue forme ed applicazioni*», it is necessary to review the system of guarantees, used so far as garrison only of subordinate employment, foreseeing its extension to the area of employment, not subordinate from the juridical point of view, but economically dependent⁴⁸.

In order to successfully reach such a result, it is indispensable to promote with conviction an opening to interdisciplinarity, both internal and external to law.

It is, therefore, useful to stress the necessity to proceed to the work of re-conceptualization of labor law – which can no longer be postponed – to an attentive evaluation of the rationality of the labor “rules”, in their instrumental projection, towards the concrete and effective coherence of the normative system with reference to the many and heterogeneous forms of employment present today and widespread in the contemporary world of production.

We need to reason – in a constant, continuous and mutually advantageous dialectic with the socio-economic sciences – in a mainly substantial dimension, placing attention to the effects produced in concrete by the choices made in matters of regulation.

Only through this evaluation, with the goal of measuring the congruity of the regulations to the purposes they aim at reaching, can labor law renew its own legitimacy, “waking up” from the «*lungo sonno*», in which it seems to have fallen⁴⁹.

⁴⁸ With reference to this, see M. PERSIANI, *Diritto del lavoro*, Padua, 2006, 97 *et seq.*

⁴⁹ L. MARIUCCI, *op. cit.*, 167.

To this regard it is always useful to keep in mind that the legitimacy of labor law is based on its effective determination of social consequences and effects⁵⁰.

In this reflection particularly important are the most vivacious and crucial issues discussed by labor law such as, *in primis*, the controversial relationship (and its balance) between rigidity and flexibility in employment relationships.

It is only through a mature and critical interpretative analysis of the results of economic research that we can consider with more awareness, and then apply labor law.

This way, exactly through a constant and constructive dialogue with the economic sciences, it is possible to reason with success on the adequateness and the coherence of the regulations in comparison with their objectives, proceeding thus to a re-conceptualization of the philosophical and speculative dimension of the subject, by reconsidering the entire system of values of reference, in the light of the unstoppable dynamism typical of historical development⁵¹.

⁵⁰ G. TEUBNER, *Juridification, concept, aspects, limits, solutions*, in ID., *Juridification of social spheres*, Berlin – New York, 1987, *passim*. On this regard, see the reflection proposed by R. PESSI, *Economia e diritto del lavoro*, cit., 438: «*per sottoporre ad un adeguato vaglio di razionalità il diritto del lavoro dobbiamo necessariamente verificare se l'attuale assetto regolativo tiene rispetto alle esigenze dell'efficienza economica; o, se si preferisce, da altra angolazione, se il miglior modo per tutelare la persona che è implicata nel rapporto di lavoro e per garantire il valore costituzionale primario del diritto all'occupazione sia rappresentato dall'assetto regolativo esistente*».

⁵¹ Think, for instance, about fundamental social rights, which ask the jurist to make a constant reflection on economics, in order to verify and highlight the possible pathologies which can undermine the efficacy of employment protection regulations and on which it is therefore necessary to intervene.

7. Economic rationality and social rationality: the search of a new balance.

New and more and more complex challenges are opening up for the jurist, who identifies in the paradigm of rationality a reference point and a precious parameter to carry out the indispensable work of re-conceptualization of traditional normative categories (bringing them up to date with the changing times).

Miguel Rodríguez-Piñero y Bravo-Ferrer, father of the Andalusian School of Labor Law, clarifies that in addition to economic rationality there is also a social rationality, always conditioned by the evolution of economic rationality, but distinct from it⁵².

Having reached this point in our reflection, it is necessary to ask ourselves the reasons which in concrete prevent an advantageous dialogical exchange between the economic sciences and labor law.

It is true that to the scarce propensity of some labor law scholars to establish a dialogue with economics, corresponds a “closure” of some economic scholars, in particular those coming from the so called *labor economics*.

According to liberalist economic thought, the labor market is only one of the different types of market one can find and it does not distinguish itself from the other markets.

⁵² Cfr. M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Derecho del Trabajo y racionalidad*, cit., 1 *et seq.*: «Al lado de la racionalidad económica y de las reglas del libre mercado, el Derecho del Trabajo ha introducido una racionalidad social, aunque condicionada por la viabilidad económica de las medidas laborales, que no pueden poner en peligro la subsistencia de las empresas ni del empleo». And moreover: «La clara asimetría entre el pensamiento económico y el pensamiento jurídico ha condicionado el diseño de la política del Derecho del Trabajo y, en particular, las reformas laborales, en cuyo diseño los juristas hemos sufrido una considerable pérdida del papel».

Such vision results particularly significant because, as is known, the liberalist economic school considers the market an «*ordine spontaneo*»⁵³ capable of searching for and finding autonomously its own internal balance.

The natural logical *pendant* of such vision is therefore the consideration that any kind of regulation introduced *ab externo* is an alteration of a self-established internal balance and generates rigidity, and as a consequence, inefficiency.

In the perspective of this systematic vision of economy, also the labor market (as other different markets) is capable of finding its own order and its own internal balance autonomously – without “normative interferences” from outside – making exclusive reference to retribution variations, which have the function of determining the balance between labor demand and offer.

From what we have so far briefly mentioned, simplifying, it is possible to say that the refusal of labor law to dialogue is matched by the equal propensity of economics to refuse a mutual constructive exchange of ideas.

In any case, it seems evident how a purely liberalist economic model cannot be concretely and efficaciously translated in and adopted by contemporary regulatory systems, such as the Italian and the Spanish ones, which have been chosen as terms of comparison in the present work.

In addition, the economic models elaborated with reference to the labor market need concrete adaptation and balanced reflection in the light of the specific aspects of the single systems considered⁵⁴.

⁵³ F. HAYEK, *Law, Legislation and Liberty*, Chiacago, 1975, 3, 5 *et seq.*

⁵⁴ See P. ICHINO, *I giuslavoristi e la scienza economica: istruzioni per l'uso*, in *Arg. dir. lav.*, 2006, 2, 454 *et seq.*: «Occorre dunque diffidare non soltanto della pretesa assoluta di spiegare tutto in base ai modelli teorici di scuola neoclassica, ma anche

In order to understand the various regulatory systems, precious seems the contribution provided by an authoritative Greek jurist, which has stressed the need of comparisons based on a mature and profound knowledge of the social and economic *substratum* of reference, conceived in its natural historical-developmental dimension⁵⁵.

The specific characteristics of each system must be considered in the widest scenario of penetrating globalization. With reference to labor law, these are generally examined considering their effects on the sphere of social rationality: *in primis*, we should think about equality and poverty⁵⁶.

8. Labor law capabilities and challenges: new and old dualisms.

We here introduce the complex topic of the so called capabilities, defined as «*la conquista da parte del singolo della libertà sostanziale di valorizzare la propria dotazione di risorse per garantirsi l'autosufficienza come agente economico, e quindi come persona*»⁵⁷.

Indeed, the concept of poverty cannot be understood only and exclusively in terms of income levels inferior to certain standards,

della pretesa altrettanto assoluta di negare l'utilità di quei modelli: essi non spiegano mai tutto, ma spiegano sempre qualche cosa nel tutto» (455).

⁵⁵ S. SIMITIS, *Diritto privato e disegualianza sociale: il caso del rapporto di lavoro*, in *Dir. lav. rel. ind.*, 2001, 63 et seq.

⁵⁶ As stressed in doctrine, R. PESSI, *Economia e diritto del lavoro*, cit., 441: «*l'etica del diritto del lavoro è appunto quella dell'eguaglianza*».

⁵⁷ R. PESSI, *Il mercato del lavoro: profili economici e normativi. Le prospettive di sviluppo*, in *Arg. dir. lav.*, 2011, 4-5, 830.

because it is necessary to use a wider and deeper conception, which expresses the inadequacy of essential capabilities⁵⁸.

The lack of such capabilities has a central role in the definition of the freedom of each individual, because when we intervene on the professionalism, and therefore, on the employability of a person, we condition also his/her social inclusion or exclusion⁵⁹.

Indeed, equality is measured first of all with capabilities since it cannot be reduced to income parameters or to economic resources. Equality, and as a consequence inequality, have to be appreciated as a concrete and effective possibility to freely follow professional roads according to one's choices and preferences.

In other words, taking up Amartya Sen, equality finds its foundation in the effectiveness of one's capabilities, described as the expression and manifestation of the freedom of man⁶⁰.

Here labor law clearly reveals a new physiognomy with a profile completely different from the one outlined decades ago.

Hence, it seems reductive to "force" the subject within the rigid limits of the relationship *stricto sensu* between employee and employer. To present day labor law belongs, in fact, also the complex (and very topical) phenomenon of unemployment, together with the phenomenon

⁵⁸ A. SEN, *Lo sviluppo è libertà*, Milan, 2000, 20 *et seq.* See also F. CASAZZA, *Sviluppo e libertà in Amartya Sen: provocazioni per la teologia morale*, Rome, 2007, 155 *et seq.*, in which an interesting representation of the «capacità come rappresentazioni della libertà» in the perspective of «libertà, meta per lo sviluppo» is provided.

⁵⁹ LORD WEDDERBURN OF CHARLTON, *Common law, labour law, global law*, in *Dir. lav. rel. ind.*, 2002, 9 *et seq.*

⁶⁰ A. SEN, *Commodities and capabilities*, Oxford, 1987, *passim*.

of the so called working poor (that is the workers with low retributions)⁶¹.

In other words, the labor law of the new millennium is intrinsically marked and pervaded by an apparently irrepressible dualism containing in itself other dualist-dialectic contrapositions.

First of all, there is the contraposition between *insiders* and *outsiders*, based on the concept of retribution rigidity, which is conceived as an aetiological “linchpin” of the dualism itself⁶².

The nucleus of the model can be summarized as follows: the insiders, that is the workers who are already inserted in the labor market, are able to get and maintain higher retributions than the ones the outsiders would be willing to accept to insert themselves in the same market.

The reason of such rigidity of positions resides mainly in the expensive transaction costs the employer would be called to sustain in order to replace insider workers with outsider ones.

Let's think, for example, about the rescission of contract costs of “departing” employees, and in a specular way, about the expenses associated to the creation of employment relationships with the new “arrivals” (*ex multiis*, personnel selection and training)⁶³.

⁶¹ Cfr. B. HEPPLÉ, *Diritto del lavoro, disuguaglianza e commercio globale*, in *Dir. lav. rel. ind.*, 2003, 1, 32 *et seq.*

⁶² Cfr. A. LINDBECK – D. J. SNOWER, *The insider-outsider theory of employment and unemployment*, London, 1988, *passim*. The model developed by the authors is an interesting theoretical representation with the aim of outlining how the labor market works and the role played in such ambit by labor law. The model has been defined as «un atto d'accusa assai preoccupante per la nostra materia e per tutti noi che con dedizione la coltiviamo» (P. ICHINO, *Il diritto del lavoro e i modelli economici*, cit., 310).

⁶³ Numerous theories have been developed – in contexts different from one another – following the model *insider-outsider*: among all of them, Pietro Ichino has made a contribution of significant value, transposing in Italy Lindbeck's and Snower's model. In particular, the author focused on the restrictive and limitative discipline of

The insider-outsider model represents labor law as a system which aims to protect the interests of a certain category of workers, already employed, in dualistic contraposition with those of who is instead “out” of the labor market, being jobless, unemployed or irregularly employed.

dismissals, considering it a “dysfunctional” element which slows up the spontaneous movement towards a market order. *Contra*, we have to however explain how economic scholars (v., *in primis*, U. PAGANO, *Property rights, asset specificity and the division of labour under alternative capitalist relations*, in *Cambridge J. econ.*, 1991, 315 *et seq.*) have substantially denied the existence – in contemporary society – of a correlation between a limitation of regulatory protection tools (the so called “standard protection machine”) and the increase of market efficiency. It is necessary to explain how scholars have stressed the absence of «*correlación directa y segura, como variables dependientes, entre niveles de empleo y niveles de protección o tutela de los trabajadores, de modo que la manipulación de éstos no asegura el incremento de aquéllos*» (M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Derecho del Trabajo y racionalidad*, cit., 1 *et seq.*). With particular reference to the Spanish normative context, the authoritative scholar adds that the «*objetivos perseguidos por las reformas laborales se descontrolan en el mercado de trabajo y han generado no tanto una dinámica de creación de empleo sino de sustitución de empleos estables por empleos precarios*».

In A. ICHINO – P. ICHINO, *A chi serve il diritto del lavoro*, in *Riv. it. dir. lav.*, 1994, 1, 459 *et seq.*, we can find in particular an interesting reflection on the *insider-outsider* theory, considered with special reference to the structural issue of real stability and compulsory stability when talking about illegitimate dismissals. The authors for over twenty years or so asked for a reform – recently, effectively introduced – considering it fundamental, if not for an increase of occupational levels in absolute terms, at least to encourage a turn over, to be considered certainly positive socially and constitutionally for its respect of articles 3 and 4 of the Italian Constitution. In doctrine significant perplexities have been expressed about the “heavy” social implications of such turn over between insiders and outsiders, which is substantially conflictual: see U. ROMAGNOLI, *Il diritto del lavoro nel prisma del principio di uguaglianza*, in *Riv. trim. dir. proc. civ.*, 1997, 533 *et seq.* However, we need to highlight how this thesis reveals the necessity to re-balance the system of guarantees between the two categories of employees – “real” and “potential” – because the solidity of the insiders’ system of guarantees determines a reduction of the outsiders’ chances. For this reason the latter are forced to accept flexible or even irregular forms of work to enter the labor market. Thus, the need for insiders and outsiders to share positions and interests is certainly essential for what concerns the introduction of a regulatory framework suitable to favor the coordination of their market behaviors.

Labor law is therefore conceived as a *corpus* of protection tools, placed as exclusive garrison and guarantee of a category of employees already inserted in the labor market.

As said before, it is a representation of the labor market which has gathered the exclusive interest of the economic doctrine, obtaining instead the widespread and generalized indifference of labor law scholars, at least until the 1990s.

In any case, it seems impossible to deny that the model offers an hermeneutic contribution of great importance to the labor market phenomenal reality.

Indeed, it stresses the intrinsic complexity of the natural dualism of labor law, which is traditionally expressed by the contraposition of interests between capital and work.

These dual values have inside them a heterogeneous and complex multiplicity of declinations, among which particular importance is attributed to the contraposition insiders-outsiders.

In other words, the historical contrast (traditionally conflictual) between employers and employees, in the complexity of the present day labor market, is sided by the dialectics between workers regularly employed and workers unemployed or employed irregularly.

The roots of labor law – which as known «*affondano nel terreno del conflitto industriale, determinato dal modello di produzione capitalistica che contrappone, inevitabilmente, chi detiene i mezzi di produzione a chi vive della produzione*»⁶⁴ – are therefore more complex than they once were.

The labor law scholar cannot, therefore, remain indifferent to such a theoretical-economic model, which requires a critical and

⁶⁴ M. PERSIANI, *Radici storiche e nuovi scenari del Diritto del lavoro*, in AA. VV., *Interessi e tecniche nella disciplina del lavoro flessibile*, Milan 2003, 629 *et seq.*, now also in ID., *Diritto del lavoro*, cit., 88 *et seq.*

reasoned analysis on its effective adherence to the reality of reference. If he/she were to reason differently, he/she would lose contact with the real dimension under investigation and would remain anchored to an outdated social, economic and labor context.

On the other hand, the material constitutions of national systems have changed and, with them, also the formal Constitutions have been reformed (or are going to be).

Hence, the labor law scholar is called to verify the adherence of an economic model based on the contraposition insider-outsider with the real and concrete dynamics of the labor market.

The issue clearly touches the capabilities we analyzed in the previous pages⁶⁵.

Indeed, evident is the importance of a regulatory framework capable of guaranteeing a real improvement of the overall conditions of the employee in his/her interaction with the labor market.

9. The re-conceptualization of labor law beyond subordinate employment: what “rules”?

From what has been analyzed so far, we understand the importance and, if possible, the urgency to proceed to a radical re-conceptualization of labor law, with a rethinking and a repositioning of the typical case of reference, which we briefly recall here.

Indeed, there seems to be no doubt that subordinate employment, the case in point, is no longer fully suitable to be the basic shared

⁶⁵ S. DEAKIN – F. WILKINSON, “*Capabilities*”, *ordine spontaneo del mercato e diritti sociali*, in *Dir. merc. lav.*, 2000, 2, 49 *et seq.*

regulatory language for the interpretation of a renewed economic complexity which has changed over time.

From the dimension of subordinate employment it seems reasonable to move towards a new and wider dimension, more inclusive and certainly more meaningful with reference to the economic reality object of interpretation, study and regulation.

The concept of “economic dependence”, for its openness towards a multiplicity and heterogeneity of relationships, could indeed play a crucial role, also in the light of its already high consideration in the EU⁶⁶.

In any case, the issue cannot be advantageously considered without a reflection about the balance of powers and interests in the ambit of labor relationships, a core topic in labor law.

The essence itself of labor law resides in the intrinsic unrest which characterizes labor relationships, conceived as an extension of the natural industrial unrest, which is typical of the productive paradigm in capitalist economies⁶⁷. In this scenario, two profiles opposite to one another emerge: on one hand, the employers who control the means of

⁶⁶ See P. ICHINO, *I giuslavoristi e la scienza economica: istruzioni per l'uso*, cit., 456 *et seq.*: the concept of economic dependence «può svolgere un ruolo importantissimo negli sviluppi prossimi della nostra materia, aiutandoci a definire la nuova fattispecie di riferimento dell'intero diritto del lavoro [...]; sul piano del diritto comunitario, del resto, a mio avviso questa può già oggi essere considerata come la fattispecie di riferimento fondamentale». With reference to this, see also B. HEPPLÉ, *Diritto del lavoro, disuguaglianza e commercio globale*, cit., 27 *et seq.*, who suggests to «cercare un nuovo concetto di lavoro non ristretto al lavoro subordinato, ma ricomprendente anche quello autonomo retribuito».

⁶⁷ See L. MARIUCCI, *op. cit.*, 166: «la regolazione del conflitto, sul piano individuale e collettivo [costituisce] il punto cruciale della riflessione giuslavoristica», whose conceptual essence resides in the «tentativo di trasporre le virtù negative del conflitto, in termini di sottrazione di energie reciproche, in strumenti positivi di regolazione sociale».

production and, on the other hand, the employees, who live instead of the production itself⁶⁸.

Considering this dualistic contraposition, intrinsically characterized by a disparity of positions, the essential role held by “rules” in the attainment of an overall equilibrium between such imbalance of powers, is evident.

It seems therefore impossible to have doubts about the necessity to reconsider the role of economy. In fact, it cannot base itself only on the axiological dimension of an efficient allocation of resources, because the confrontation with society and its values is unavoidable⁶⁹.

As a consequence, the effects produced by the normative regulation of the labor market cannot be considered *a priori* as negative or as a clear expression of inefficiency⁷⁰.

Indeed, it is the market itself that needs rules, forms of organization and government!

As clearly highlighted in the famous theorem of Coase, the transactions which take place in a market context are characterized by a certain onerosness: they have costs which impose, as a consequence, the

⁶⁸ As highlighted by the most authoritative labor law scholars in Italy – M. PERSIANI, *Diritto del lavoro*, cit., 89 *et seq.*, and recalled in R. PESSI, *Economia e diritto del lavoro*, cit., 445 – the roots of labor law «affondano nel terreno del conflitto industriale determinato dal modello di produzione capitalista che contrappone inevitabilmente chi detiene i mezzi di produzione a chi vive della produzione».

⁶⁹ With reference to this, see R. DEL PUNTA, *L'economia e le ragioni del diritto del lavoro*, in *Dir. lav. rel. ind.*, 2001, 1, 3 *et seq.*: «Il compito dell'economia, in altre parole, è quello di interagire con la società per aiutarla a realizzare al meglio le sue decisioni allocative democraticamente assunte».

⁷⁰ See R.H. COASE, *Impresa, mercato e diritto*, Bologna, 1995, 221: «non c'è ragione perché, in certe occasioni, la regolazione governativa non debba portare ad incrementi di efficienza del sistema economico».

creation and the maintenance of forms of organization and government, without which the functioning of the market would be compromised⁷¹.

In such vision, the role of the regulatory intervention is to reduce the cost of transactions and, therefore, to re-balance rights. In order to effectively reduce the cost of transactions, it is essential (always according to Coase's model) to prevent opportunistic behaviors in the ambit of contractual relationships.

An effect of this kind is obviously achievable only by making adequate and efficacious regulatory interventions.

Hence, in the dialogue between law and economics, desired from the very beginning of the present work, it is possible to see clearly the physiognomy of a normative sphere capable of determining the government of economy and giving it a direction to follow⁷².

This way labor law, as the "bordering" discipline par excellence of economics, finds itself exercising a particular and crucial role in reducing the cost of transactions.

Only through appropriate labor law regulations, it is possible to reach an advantageous labor protection (also by preventing abusive behaviors *ex parte datoris*) and at the same time a greater efficiency of the production system.

Regarding this, it seems impossible to deny that labor law has today an essentially and intrinsically economic function, based on the principles – typical of economics – of efficaciousness and efficiency⁷³.

⁷¹ *Ibidem*. According to the scholar, the enterprise is considered a structure for the government of all production factors and not just a function of the production itself.

⁷² *Ivi*, 339: «*il sistema giuridico ha un profondo effetto sul funzionamento del sistema economico e, per certi versi, si può dire che lo controlla*».

⁷³ About the content of the concepts of efficaciousness and efficiency, with reference to the economic results of the regulations and to the distribution of the resources, see M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Derecho del Trabajo y racionalidad*, cit., 10.

And this is one of the missions of contemporary labor law, called to rethink its role, in what an authoritative scholar has defined as its «*nuova stagione*»⁷⁴.

Never as in the current historical and socio-economic context has labor law been presented as a «*Derecho dinámico, evolutivo, cuestionado, objeto de una permanente redefinición*»⁷⁵.

In any case, it is useful to specify that the natural pre-condition for such objective to be effectively and advantageously reached, is an open dialogue and a synergic and constructive confrontation between labor law and economics.

This «*sincretismo teorico*»⁷⁶ has to necessarily place its conceptual foundations on the mature awareness that the correct functioning of the market cannot in any way disregard the existence of a regulatory framework (and consequently, of a ruling organization), called as garrison also of its efficiency.

Being the market itself a generator of imbalance and inequality, a regulation – intrinsically connoted by a profound sense of equilibrium in its function of balancing the opposite interests involved – represents

⁷⁴ Fundamental point of reference of the “new season” of labor law is, according to M. PERSIANI, *Diritto del lavoro*, cit., 91 *et seq.*, the valorization of the confrontation of the enterprise with the market, in order to reach the objectives of efficiency and productivity, in the unwavering conviction that the «*efficienza del sistema produttivo*» is also a “public” economic interest. This systemic approach is totally coherent with the constitutionalization of the principle of free economic initiative, which postulates therefore «*l'accettazione di un sistema di economia di mercato con la conseguenza che anche l'impresa è un valore costituzionale, sebbene è un valore economico*». See R. PESSI, *Economia e diritto del lavoro*, cit., 447: «*L'impresa non è soltanto luogo di produzione del profitto capitalistico, ma è anche oggetto di attese sociali (tra cui creare e garantire occupazione), divenendo così strumento per la realizzazione dei valori della persona*».

⁷⁵ M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Derecho del Trabajo y racionalidad*, cit., 2.

⁷⁶ R. PESSI, *Economia e diritto del lavoro*, cit., 447.

rather a fundamental and unavoidable tool of efficiency, capable of eliminating market distortions and of re-establishing a correct form of competition among the parties involved.

10. Definition and taxonomic contributions... the concrete dialogue between conceptual dimensions.

In the light of the considerations made so far, it is now worthwhile addressing our attention to important definitions of the terms at stake in the present work.

Authoritative French scholars consider economics as the sum of various social practices, concerning the production and the exchange of goods and services, gathered in their individuality and made part of the system thanks to their understanding and explanation *via* different paradigms.

On the contrary, law is a social phenomenon characterized by a materiality of its own, separate and independent from the reasoning which can be elaborated on its basis. In other words, the juridical system in comparison with economics is characterized by its being independent and self-sufficient⁷⁷.

With specific reference to labor law, we can talk about a *corpus* of regulations with the peculiarity of sharing a relationship with the labor phenomenon: a sum of rules addressed to discipline – at least according to the “traditional” conceptual framework – wage-earning

⁷⁷ See A. JEAMMAUD, *Le droit du travail dans le capitalisme, question de fonctions et de fonctionnement*, in ID. (edited by), *Le droit du travail confronté à l'économie*, Paris, 2005, 15 e ss.: «Pour reprendre, sans paradoxe, la terminologie wébérienne, “l'ordre économique” doit beaucoup plus à la construction de ses observateurs savants que “l'ordre juridique” au savoir des juristes décrivant ce “cosmos de normes” socialement produites ou posées».

labor, in the overall intent to protect the subordinate employee, considered the weak component of the work relationship. Labor law does not, however, limit itself to the management of the relationship between employer and employee, because it touches the labor phenomenon in all its scale and complexity.

Made these semantic-definition specifications and identified the content and teleological objective of the research, it is now necessary to proceed to a careful reflection on the conceptual tools to select as foundation for an advantageous and constructive dialogue between labor law and labor economics.

In other words, we need to find the right «*coniugazione dello strumentario concettuale tradizionalmente proprio del giurista con quello dell'economista*»⁷⁸.

Indeed, if we were to omit this moment from our reflection, we would reason using a “silent” dialogue (and, therefore, not advantageous), because based on different languages and concepts mutually unintelligible.

To move in this direction, it is useful to start from a fundamental principle which has been so far one of the tenets of the entire regulatory system proper of labor law: “*inderogabilità*” *in peius*.

It is only through the full understanding of this institution, in the light of the economic models of reference, that we can study the phenomenon of the so-called «*fuga dal lavoro subordinato*»⁷⁹, in the perspective of the re-conceptualization of the subject.

⁷⁸ P. ICHINO, *Il diritto del lavoro e i modelli economici*, cit., 309 *et seq.*

⁷⁹ See P. MORMILE, *La competenza per materia e per territorio*, in A. VALLEBONA (edited by), *Il diritto processuale del lavoro*, in M. PERSIANI – F. CARINCI (directed by), *Trattato di Diritto del lavoro*, Padua, 2011, 9, 16: «*va rilevato che il modello centrale di riferimento del “nuovo” mercato del lavoro è ancora rappresentato dalla “vecchia” figura del lavoro subordinato, i cui confini il legislatore mira anzi ad estendere ed a puntellare, per contrastare la cosiddetta “fuga dal lavoro*

The above-mentioned principle is based on a structural vision of labor law, considered in its functional dimension of protector of the employee, the weak component of the relationship.

Hence, it is in the ambit of such systemic framework that we need to consider the concepts of *melius* and *peius*, which are intuitively easy to define when we take into account, as an example, the remuneration aspects of the work relationship. On the contrary, in the hypothesis we consider the contracts in all their aspects (and not only in their remuneration-property ones), the definition of *melius* and *peius* for the employee becomes more complex⁸⁰.

To this regard, the model elaborated in economics is the one known through the dualist relationship *principal-agent*.

The theoretical-economic model under review has been built around the idea that the subordinate worker receives a “lower” remuneration than the one he/she is entitled to, because he/she “hands over” to the employer and to the social-security organization of reference an “insurance premium” which “covers” him/her (*rectius*, insures him/her) against a wide range of possible events. In other words, the

subordinato”, dalla rigidità e dai costi che esso comporta». P. ICHINO, *Il diritto del lavoro e i modelli economici*, cit., 312 considers the concept of “escape” from subordinate employment in terms of «una delle emergenze cui il diritto del lavoro italiano oggi deve far fronte, anche attrezzandosi con un armamentario concettuale in parte nuovo». Cfr. A. ACCORNERO – B. ANASTASIA, *Realtà e prospettive del lavoro autonomo: un po’ di attenzione, please*, in *Dir. lav. rel. ind.*, 2006, 112, 743 et seq.

⁸⁰ Again P. ICHINO, *Il diritto del lavoro e i modelli economici*, cit., 312 refers to a «ripartizione del rischio tra datore e prestatore di lavoro circa le sopravvenienze che possono compromettere la redditività del rapporto». Risk propensity clearly represents the core of the author’s reflection for what concerns the institution of “*inderogabilità*”: it is conditioned by factors both “particular” (such as the income conditions of the single employee) and “systemic” (we can think, *in primis*, about the conditions of the labor market of reference). The author adds: «la ripartizione inderogabile del rischio circa le sopravvenienze si giustifica con la diversa propensione al rischio, che caratterizza normalmente le due parti del rapporto» (317).

employee is guaranteed both in the continuity of the relationship and in the income component of the relationship itself.

This mechanism makes it possible for the employer, who can count on his/her natural propensity and disposition to face risk, to give guarantees to his/her employees (in the sense of “giving them security”), obtaining in return their performance at an overall cost inferior to the one he/she would normally bear.

Vice versa, in the self-employment area, it is the worker him/herself to take on the risk of possible occurrences, obtaining in exchange – at least theoretically – a higher remuneration than that of a subordinate employee.

Thus, we can understand the core of the concept of risk for contemporary enterprises.

The employer (*rectius*, the entrepreneur) is defined by his/her ability and propensity to face the element of risk proper of “doing business”. He/she is therefore able to tackle the occurrences connected to production (considered as a combination of production factors) and to the market, as well as those of his/her employees (and clients), whom he/she consequently guarantees wellness to.

In other words, this economic model illustrates the reasons at the basis of the greater efficiency – in terms of wellness for a greater number of people – of systems in which the risks connected to possible occurrences in the work relationship are placed mainly on the entrepreneur, as the figure with the greatest capability of facing risk itself.

11. Asymmetries of information.

Worthwhile considering is also the concept of asymmetry of information.

The labor market is, in fact, intrinsically filled with situations of disparity in the “possession” of relevant information: on one hand, the employee, in his/her situation of limited and reduced contract power, is not able to know the real possibilities offered by the market; on the other hand, the employer – in his/her relationship with an employee, especially in the moment of hiring him/her – is not in the condition to really know the effective potential of the employee in terms of personal and professional qualities.

To this regard, interesting is the theoretical model developed by the economists Aghion and Hermalin, based on how the market functions with particular reference to the factors which alter its mechanisms⁸¹. They dedicate special attention to the concept of asymmetry of information.

According to their model, in a market in which there is the risk of possible occurrences (as such insuppressibly characterized by uncertainty as to their happening or not), a distribution of the risk “governed” by “unavoidable” rules, is the only solution for the best attainment of the general interest and of the single specific interests, typical of the contractual party most incline to take on the risk itself.

On the contrary, the absence of “unavoidable” rules can be a causal factor of disadvantageous results for all the parties involved.

As a consequence, with this concept we declare the centrality of the inevitable spreading of risk – *ex lege*, that is *ex* collective contract –

⁸¹ P. AGHION – B. HERMALIN, *Legal restrictions on private contracts can enhance efficiency*, in *J. L. Econ. & Org.*, 1990, 2, 381-409; P. ICHINO, *Il Diritto del lavoro e i modelli economici*, cit., 309-322.

placing on the employer a *lato sensu* obligation of “insurance” towards his/her employees.

According to this economic theory, a “liberalist” approach, which leaves to the single person the choice of the most suitable contract and, therefore, the regulation of the distribution of risk connected to possible occurrences, would not be a positive solution⁸².

Such a framework, based on the free negotiation *inter partes* of the distribution of risk, would be little advantageous for both parties, because each party, being the only one to know its propensity, would offer the other side a “distorted” vision in order to appear more “convenient” to the other party.

It is chiefly the employee, as the “weak” component of the relationship and characterized therefore by a lower risk propensity, to suffer the risk more. As a consequence, also the employer (*rectius*, the entrepreneur) has a “disadvantage”, because he/she sees little used his/her capability of taking on risks deriving from occurrences, such as, for example, illnesses and states of disability of the employee. These are events in which the employee can count on a position of greater “informational advantage”, being more informed about the entity of such risk.

All in all, in reason of and as a consequence of the structural asymmetry of information of the labor market, the principle of “unavoidability” which “traditionally” characterizes labor law, coloring its core identity, reveals itself in its centrality in the economic theory here considered.

⁸² Ivi, 314: «la domanda di sicurezza dei lavoratori resterebbe tendenzialmente inespresa; col risultato che tutto il rischio finirebbe coll'essere collocato sulla parte che, in generale, è meno capace di sopportarlo e di trarne profitto, e l'impresa trarrebbe minor profitto dalla propria capacità di produrre e offrire sicurezza. Tutti, così, starebbero un po' peggio».

Only with an “unavoidable” regulation it is possible indeed to obtain an advantageous (and, possibly, ideal) distribution of risk related to occurrences, and to reach the aim of a full satisfaction of the common interests of the parties.

Making a deeper and more reasoned consideration, is it possible to find in Aghion’s and Hermalin’s model the essence of a more general principle for a correct functioning of the market?

The answer cannot be totally affirmative because the essential message launched by the economic theory under consideration can be summed up in its rebuttal of liberalist economic models which, as stated above, think that the market is able by itself to find its own internal equilibrium.

The correct functioning of the market depends on the existence of a framework of rules and tools with “corrective” purposes, thanks to which the enterprise can advantageously and efficiently perform its socio-economic function, while the employee can see him/herself protected from risks he/she is inadequately predisposed to⁸³.

With specific regard to the last point expressed, it is possible to affirm that the economic model we have here considered highlights an aspect not to underestimated, in addition to the need of unavoidable rules to garrison the market.

⁸³ To confirm the indispensable presence of rules in order to guarantee the correct functioning of the market, authoritative and already mentioned scholars have made reference to the phenomenon of the so-called “*Employment Handbooks*”, as significant representation of the spontaneous research enterprises are able to perform in order to regulate the complex system of risk deriving from occurrences. See R. EDWARDS, *Rights at work. Employment Relations in the Post-Union Era*, Washington, 1993, *passim*, as quoted in P. ICHINO, *Il diritto del lavoro e i modelli economici*, cit., 315. The great *corporations* of the United States of America, in the absence of legislative or collective contract regulations about risk “allocation” and its insurance, have adopted spontaneous forms of “self-commitment” towards their employees.

The theory developed by Aghion and Harmalin points out, in fact, how the weakness of the employee – revealed by his/her inferior disposition to tolerate the risks connected to negative occurrences – is not only a juridical characteristic of subordinate situations.

The employee's vulnerability is the natural consequence of his/her economic-income dependence on only one labor relationship and, therefore, on only one employer.

Hence, what is essential is the economic dependence, not just the subordination itself.

The asymmetry of information around which the model under consideration has been conceived and developed, is important also in the ambit of what is commonly defined – in Italy – as “para-subordination”, in other words, coordinated and continuative independent collaborations (recently reformed by the Legislator with the so-called *Job's Act*, legislative decree n. 81/2015). In these collaborations, in fact, the worker performs an activity in a coordinated and continuative way, mainly to the benefit of one employing party.

It seems therefore possible to find a first legislative incoherence in the Italian juridical system, which establishes an unavoidable obligation to “insurance” coverage only for the employer in the ambit of subordinate employment.

It is also possible to notice how any reflection on the economic models with a greater impact on labor law cannot ignore the economic context of reference. We previously recalled the traditional vision of the employee considered as the “weak” component of the employment relationship.

This representation follows the traditional canons of the subject, which conceive labor law in the context of a market structured according to monopsony.

Reference is made to a context in which the entrepreneur – the “potential” employer – has a wide range of employment offers he/she can choose from; on the other hand, the “potential” employee – who “offers” his/her performance, placing at disposal his/her working energy – has a much more reduced possibility of choice. In addition, in this model there is only one entrepreneur.

It is obvious that this paradigm can be adapted with difficulty to the concrete reality of the present-day labor market, where we can count on the presence of a multiplicity of entrepreneurs, with peculiarities of their own, who operate in conditions of open competition.

The reference to this market model seems, therefore, the product of a certain mentality, typical of previous industrial and organizational models which are now outdated.

The natural consequence of such vision of the market and its structure is the concept of the employee as the necessarily weak component of the labor contract relationship.

At a careful analysis, we can say that the issue has important and significant effects on the relationship between labor law and private law. The latter is based on the substantial contractual equality of the parties of the juridical relationship. This does not take place in the former⁸⁴.

With reference to this, significant is the correction to the above mentioned monopsony model, better known as the dynamic monopsony.

⁸⁴ See N. IRTI, *Introduzione allo studio del Diritto privato*, Padua, 1990, 49: «*Obbligo e diritto si presentano, in linea di massima, come termini di una relazione, nel senso che il soggetto del diritto sta di fronte al soggetto dell'obbligo. A questa relazione viene dato il nome di rapporto giuridico*». See also F.B. CICALA, *Il rapporto giuridico*, Milan, 1959, *passim*. In doctrine, P. ICHINO, *Il diritto del lavoro e i modelli economici*, cit., 320 makes reference to «*denuncia dell'“ipocrisia” civilistica della parità contrattuale fra datore e prestatore di lavoro, ma si dà solitamente per scontata la disparità senza interrogarsi sui suoi perché e come economici*». Fundamental is V. ROPPO, *Il contratto*, Milan, 2011, *passim* and, in particular, 37 *et seq.*

According to this economic theory, the labor market is truly characterized by a substantial lack of choice for the person who “offers” work, but this position of greater “weakness” is due not to the uncompetitive structure of labor demand, but to the lack of information for what concerns the employment offer.

Thus, the general lack of information about the different employment alternatives renders the employee “vulnerable”, and in this sense, “weak” in his/her relationship with the employer, because the latter benefits from this situation at the birth of the employment relationship (during the initial negotiation phase) and during the performance of the relationship itself.

The asymmetry of information, and more in general, the absence of an adequate tool of «*servizi di informazione, formazione professionale mirata e assistenza alla mobilità dei lavoratori*», have to be necessarily considered as causal factors of a position of contractual weakness for the employee also in the present-day labor market⁸⁵.

⁸⁵ P. ICHINO, *Il diritto del lavoro e i modelli economici*, cit., 321 also highlights: «*tutto quanto amplia e perfeziona la facoltà di scelta del lavoratore – aumentando la quantità e la qualità dell’informazione di cui egli può disporre circa le alternative effettivamente offerte dal mercato, nonché allargando la fascia di professionalità e la zona geografica nelle quali egli può estendere la propria ricerca – ha l’effetto di rafforzare il suo potere contrattuale nel mercato e nel rapporto di lavoro*». In the light of the economic models of “dynamic monopsony” and of “asymmetry of information”, the author asks for «*un intervento pubblico e sindacale volto per un verso a determinare, mediante disposizioni legislative o collettive inderogabili, quella ripartizione ottimale del rischio tra imprenditori e lavoratori che, come si è visto, il mercato lasciato a se stesso non sarebbe in grado di produrre, per altro verso a eliminare ogni distorsione monopsonistica nella determinazione dei livelli di trattamento retributivo, coll’assicurare a ogni lavoratore – occupato o disoccupato, subordinato o autonomo – servizi efficienti e capillari di informazione e assistenza alla mobilità professionale e geografica*» (321-322).

12. New labor market scenarios.

In the light of what has been described so far, there can be no doubt about the fundamental influence that the growth of an economic-productive system generally has on the course of the labor market.

The employment rate (and especially the unemployment rate), together with the quality of the employment position, are strongly conditioned by the economic dynamics of the market⁸⁶.

Regulations can therefore only be inserted in a highly complex economic context with repercussions on the employment and labor dimension.

The increase of the employment rate is directly proportional to the growth of a certain economic-productive system and the constancy of the growth in the mid-long term determines as further consequence, employment stability and the quality of the employment itself.

The regulation of the labor market is therefore connected to the natural development of the economic profiles of the market itself, in a highly global and transnational context.

To reason in purely national terms, with exclusive reference to single systems, is indeed a short-sighted and anachronistic approach in our contemporary global dimension.

We are living a particular phenomenon which could be considered *prima facie* “aporistic”: the market’s dimension today is global and transnational, but at the same time, it is divided into an

⁸⁶ R. PESSI, *Il mercato del lavoro: profili economici e normativi. Le prospettive di sviluppo*, cit., 830 highlights an aspect of crucial importance: «*il diritto del lavoro può consolidare l’occupazione esistente, difenderla dalle crisi, stabilizzare la precarietà; ma non può garantire la crescita, necessariamente indotta da variabili economiche che sono al di fuori della sua area di intervento*».

heterogeneity of further markets, each of which with peculiarities and specific aspects of their own⁸⁷.

Any organic reasoning about labor market regulations can therefore only be contextualized in a global scenario of wider breadth.

Any regulatory intervention cannot exclude the awareness of the existence of a hiatus between the wide (and supranational) space of economics and the circumscribed (and national) territoriality of law.

On the contrary, it does not seem possible to imagine a regulation capable of conditioning global competitive dynamics.

It is in this scenario that we need to highlight some important aspects about the labor market. It is clearly characterized by an intrinsic difficulty to get employment demand and offer to meet; with reference to this, significant on one hand is the absence of professionals widely requested by the market⁸⁸, while on the other hand, there is the non-negligible presence of the work factor, represented by employees who are the product of massive migratory phenomena (regular and irregular).

Particularly important are then the repercussions on the labor market of the phenomena of the so-called production de-localization, which are a paradigmatic consequence of the free circulation of capital⁸⁹.

A further aspect which deserves to be considered concerns the adoption of suitable regulation tools to protect labor statutes, in a context of reference which is no longer the original national one.

⁸⁷ *Ivi*, 825.

⁸⁸ Significant with reference to this is the *«crescente discrasia tra percorsi formativi ed opportunità occupazionali; e quindi l'esigenza, piuttosto, di una riconsiderazione del valore sociale del lavoro "professionale", nonché di un'integrazione operativa tra il mondo della scuola ed i servizi per l'impiego, al fine non solo di programmare percorsi di vita ad effettiva potenzialità realizzativa, ma anche di contestualizzare la fase di apprendimento e quella del lavoro effettivo» (Ibidem).*

⁸⁹ We must think about the gradual purchase of medium and large national enterprises by big foreign corporations. Such events, which in some cases have touched entire production sectors, clearly determine effects on the dynamics of the labor market.

As is known, the free circulation of capital is accompanied by the free circulation of services, and consequently, by the flourishing of transnational phenomena which are today particularly significant. It is therefore necessary more than ever to proceed to an updating of the employment safeguard tools, also in the light of the rich E.U. jurisprudence about the adaptation of the freedom of economic competition to the protection of workers' rights.

Thus, we understand the need to readjust the system of guarantees proposed to protect the employee's interests, as a consequence of its insertion in a new global economic-productive context, which is deeply different⁹⁰.

Only by updating itself, labor law will be able to continue its fundamental mission of *«sensore delle tendenze»*, proper of the *«ramo del diritto più sensibile alle trasformazioni sociali e istituzionali»*⁹¹.

In other words, we need to return to the founding method of labor law and its concepts, in the perspective of a deep and effective understanding. As suggested by an authoritative jurist: *«altro è vedere, altro è conoscere. Ciò che si vede è l'esterno, non l'interno delle cose. Conoscere è penetrare»*⁹².

⁹⁰ The need to *«modulare lo statuto protettivo alle dinamiche dell'organizzazione»* has been by authoritative scholars presented with the auspice of a *«contesto normativo che si prospetta come semplificato a seguito dell'eliminazione di precetti inutili o ripetitivi»*, in order to *«consentire all'autonomia collettiva di derogare a specifiche previsioni regolative sin qui assistite dall'inderogabilità»*. R. PESSI, *Il mercato del lavoro: profili economici e normativi. Le prospettive di sviluppo*, cit., 828. The author reflects on the perspective of a *«tecnica che favorirebbe indubbiamente le dinamiche del mercato, perché consentirebbe un uso più proficuo del fattore lavoro in coerenza alle esigenze organizzative dettate dal mercato stesso, senza arretramenti dello statuto protettivo complessivo»*.

⁹¹ L. MARIUCCI, *op. cit.*, 168.

⁹² F. CARNELUTTI, *Il discorso della libertà (sul Vangelo di Giovanni)*, Florence, 1960, 61.

It is the very mission of the labor law jurist to require a new and in depth understanding. In the opinion of who writes, this can only take place through the re-reading and the rediscovery of the great classics of the subject.

As highlighted by an authoritative Spanish author, when making comparisons with other branches of the juridical system, the profile of the labor law jurist has been *ab initio* characterized by totally particular specificities⁹³.

The labor law jurist identifies his/her activity with the constant *«búsqueda de una racionalidad económica y social que responda a las exigencias de los sistemas económicos, pero evitando ser absorbido por una lógica puramente económica»*⁹⁴.

In the indispensable work of re-conceptualization and re-definition of labor law, we need to proceed starting from a foothold: what is (and what should be) the mission of the labor law jurist? And as a consequence: what is the essential purpose of his/her investigation?

In order to be able to provide credible answers to such fundamental and unavoidable questions, it is necessary to bring labor law back to its origins and help it rediscover its social dimension.

Only this way, thanks to the rediscovery of its function and natural orientation, can the subject find in itself new lymph for a renewed role in law and in society.

⁹³Extraordinarily interesting is the message of M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Derecho del Trabajo y racionalidad*, cit., 1 *et seq.*: *«Junto al papel de jurista positivo clásico, de mera exposición sistemática de la legislación vigente a la luz de la jurisprudencia, el laboralista ha tratado de profundizar en la naturaleza del sistema del Derecho del Trabajo, poniéndolo en relación con el sistema de relaciones laborales y la evolución del mercado de trabajo, y ha tratado de insertar el sistema jurídico laboral en los sistemas político y económico, examinando la contribución que hace el Derecho del Trabajo al bienestar de la gente y a la vitalidad de la sociedad y de la economía»*.

⁹⁴ *Ibidem*.

In the present research we cannot, indeed, fail to examine the original aim of labor law, that is to redistribute guarantees. This was pursued through the creation of a social public order addressed to avoid that the regulation of the employment relationship could take place in the ambit of civil law.

From its first elaborations, both legislative and doctrinal, which date back to the last century, labor law was conceived as a tool of protection for the employee, considered as a person who deserved special protection. This as a consequence of the particular vulnerability connected to the circumstance for which he/she lived (as lives) of his/her work in a socio-economic ambit, which naturally exposed him/her (as he/she is exposed today) to a high risk.

The sense of labor law was therefore to re-balance the employment relationship and the protection of the employee when facing the risks caused by the application of the principle of contractual independence of the parties, typical of civil law.

Subject to protection were not only the economic-property interests of the employee, but also the intimate sphere of the employee's personality, connected therefore to his/her dignity.

With reference to this, vivid and vibrant resound the words written by Hugo Sinzheimer in 1984: «*El trabajo es el hombre mismo en situación de actuar*»⁹⁵.

In such vision, labor law was given the eschatological mission to “protect” the worker against and “free” him/her from any form of “commercialization” of his/her work.

Production times and contexts have radically changed since then; in any case, we can say that the employee is inserted also today in a

⁹⁵ H. SINZHEIMER, *La esencia del Derecho del Trabajo*, in ID., *Crisis económica y Derecho del Trabajo*, Madrid, 1984, 69-73.

contractual relationship with the employer characterized by an insuppressible asymmetry, both informational (as seen above) and contractual.

The research on so-called “decent” employment, with reference both to the conditions in which the work is performed and to its remuneration, remains topical especially in international regulations and for international scholars⁹⁶.

In the natural inclination to reformism typical of labor law’s identity, the juridical labor regulations are placed in a particular position which requires a work of continuous revision and constant updating in their adaptation to newer and newer contexts.

The technological, economic and social transformations that the present-day world of production has known and is getting to know, impose on the labor law jurist to open up to the constant dialogue with other disciplines.

Indeed, we need a constant and permanent work of renewal of the normative paradigms which make up labor law in its totality.

As mentioned above, it is the function and the role labor law is called to perform that has been interested by the evolutionary events determined by changing economic scenarios.

As highlighted by an authoritative Spanish jurist, we are talking about deep changes, and not just technical ones⁹⁷. Indeed, it would be extremely improper to propose an interpretative hermeneutic approach of the most recent developments of the subject, inserted in the ambit of a simple reform of single institutes or specific disciplines.

⁹⁶ D. GHAI, *Decent work: concept and indicators*, in *Intern. lab. rev.*, 2003, 2, 113 *et seq.*; AA. VV., *The ILO at work*, Geneva, 2014, *passim*; see also ILO Decent Work Agenda, <http://www.ilo.org/global/about-the-ilo/decent-work-agenda>.

⁹⁷ M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Derecho del Trabajo y racionalidad*, cit., 1 *et seq.*

What are today called to a rethinking are the very principles, the founding rules and perhaps even the values of reference of this branch of law. This as a consequence of the greater “conditioning” economic logic places on regulations⁹⁸.

To contemporary labor law has been attributed a totally new function, and in reality, extraneous to it: scholars have efficaciously spoken of a «*catalizador del amplio impacto de la crisis de 2008*», considered as a true «*instrumento de política económica*»⁹⁹.

A particularly indicative element of this resides in the fact that the reform perspectives of labor law have been outlined very frequently by economists without an advantageous dialogue with law and often without an attentive analysis of the impact that a regulation can have from the economic point of view.

There seems, however, to be no doubt about the particularity of the directions the subject is taking.

They are not and cannot be inspired by purely economic purposes because, as said before, labor law was born with the aim of correcting the intrinsic distortions of the market.

Otherwise, “anti-social” effects would be favored (for example, in the ambit of the natural dependence of the employee towards the power of the employer). Labor law contributes (*rectius*, should contribute) to

⁹⁸ With regard to this, see the interesting reflection in M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Derecho del Trabajo y racionalidad*, cit., 1 *et seq.*: such change is «*en buena parte consecuencia del creciente condicionamiento de la regulación jurídica del trabajo por el pensamiento económico, la lógica de empresa y los imperativos del mercado, que reflejan nuevas ponderaciones de valores e intereses y nuevos equilibrios de poder que están llegando a afectar a la propia identidad cuando no a la subsistencia de esta rama del Derecho*».

⁹⁹ F.J. CALVO GALLEGO – M.C. RODRÍGUEZ-PIÑERO ROYO, *Las reformas laborales como instrumento de política económica y su impacto sobre el dialogo social en España. A propósito del reciente informe de la OIT “España: Crecimiento con Empleo”*, in *Rel. Lab. Y der. Empleo*, 2014, 4, 4 *et seq.*

the overcoming of these effects, facilitating the balance between the interests expressed by contractual parties in objectively unequal positions.

The interests involved in this search of equilibrium – an equilibrium labor law teleologically tends to – are expressed on one hand by the request of tools capable of guaranteeing the competitiveness of the enterprises, and on the other hand, by the need to protect employment conditions and employee employment levels.

As a consequence, the great challenge contemporary labor law is called to face, is the development of new and efficacious tools, suitable to achieve the fundamental balancing between values that traditionally characterizes the subject: the protection of employment (and of the job itself) and the protection of the economic efficiency and the competitiveness of the enterprise.

It is clearly a difficult regulatory challenge, made complex by epochal socio-economic transformations, by the unstoppable globalization of markets and economies with effects of extraordinary impact on the production system¹⁰⁰.

¹⁰⁰ M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Derecho del Trabajo y racionalidad*, cit., 1 *et seq.*: «Las regulaciones jurídicas, y en especial el Derecho del Trabajo, difícilmente pueden gobernar las actuales transformaciones económicas y sociales y los cambios en los sistemas de producción derivados de las innovaciones tecnológicas y organizativas, de la apertura de los mercados y de la globalización. Sin embargo, el Derecho del Trabajo se ve forzado a tenerlas en cuenta, a la búsqueda de un nuevo equilibrio entre la tutela del trabajo, la tutela del empleo y la tutela de la empresa, que refleja también una revisión de los términos del conflicto industrial, cuya canalización y pacificación había justificado el nacimiento de la disciplina».

Chapter 2 –

From labor to labor regulations: economic factuality, juridical evaluation and comparative studies. Methodological premises to an analytical-conceptual elaboration.

«Junto al papel de jurista positivo clásico, de mera exposición sistemática de la legislación vigente a la luz de la jurisprudencia, el laboralista ha tratado de profundizar en la naturaleza del sistema del Derecho del Trabajo, poniéndolo en relación con el sistema de relaciones laborales y la evolución del mercado de trabajo, y ha tratado de insertar el sistema jurídico laboral en los sistemas político y económico, examinando la contribución que hace el Derecho del Trabajo al bienestar de la gente y a la vitalidad de la sociedad y de la economía».

Miguel Rodríguez-Piñero y Bravo-Ferrer¹⁰¹

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¹⁰¹ M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Derecho del trabajo y racionalidad*, cit., 55.

1. Economic factuality in the perspective of labor law.

On the basis of the considerations made so far about the relationship between labor law and its economic dimension, it is now useful to study in depth the identity of economics.

Moving from a general reflection, we can say that from the juridical point of view – which connotes the present research – economics is inserted in the sphere of so-called factuality.

Indeed, economics is characterized by the particular features of evidence and neutrality, which are part of its identity, conferring it a really factual profile¹⁰².

There can be no doubt about the insuppressible and intrinsic tie that “binds” economics to reality.

The “economic fact”, considered in abstract and in general, is characterized by its “evidence”, that is its expression and manifestation of reality; constant is the presence of references to the economic dimension of things, since economic events are immediately perceivable and visible¹⁰³.

This because economics aims at understanding, describing and explaining facts (economic ones, precisely).

¹⁰² Particular rich on this aspect is the contribution of French authors: *ex multis*, v. J.P. LABORDE, *La considération du fait par le droit du travail*, in AA. VV., *Mélanges en l'honneur de Henry Blaise*, Paris, 1995, 278 *et seq.* See T. SACHS, *La raison économique en droit du travail. Contribution à l'étude des rapports entre le droit et l'économie*, Paris, 2013, 29.

¹⁰³ An authoritative French labor jurist – T. SACHS, *op. cit.*, 33 – has clearly pointed out: «*Omniprésent dans les écrits doctrinaux, le fait économique ne fait que très rarement l'objet d'une définition, comme si cette dernière était inutile; inutile parce qu'évidente. La qualité "économique" d'un fait s'offrirait à l'observateur de façon immédiate, sans qu'il soit nécessaire de fournir un effort pour la définir au préalable. Si les faits économiques sont parfois discutés, leur nature économique même ne l'est que très rarement. Elle se trouve en réalité implicitement admise*».

The very sense of economics resides in its being a conceptual elaboration which provides interpretations and readings of “real” facts and phenomena of intrinsic complexity, in their elusiveness for the absence of solid hermeneutic tools.

We can grasp, therefore, the instrumental nature of economics in front of a phenomenal dimension of intrinsic complexity.

In such perspective, also with reference to labor law, economics can be considered and conceived according to a “realistic” vision, based on a model which refers to economic events as exclusively natural facts. The “human” dimension of economics, considered as a consequence of human action, is confined to a totally marginal and secondary role.

Hence, according to a similar systemic vision, economics is a factual reality governed by the principle of causality, in which the role and the contribution of human action are totally relativized by economic causality itself.

It is in the light of this fundamental principle of reference that the decisions taken by the parties involved in the employment relationship are considered and interpreted.

In other words, we can say that the principle of economic causality, real cornerstone of the economic system, becomes a true hermeneutic-aetiological reading of the choices and events which characterize the natural development of the labor and employment relationship¹⁰⁴.

¹⁰⁴ The most indicative example which can certainly be cited to this regard is employment dismissal for economic reasons. There is nobody who cannot see how in a similar concrete case the principle of economic causality is able to provide a convincing reading to the employer’s choice to rescind the employment relationship, exactly for an economic reason. The employer’s choice is only indirectly the product of human action: in concrete, it is “imposed” by economic events which have determined the situation of crisis.

The reasoning at the bottom of the economic method is, in fact, intimately characterized by a logical consequentiality. Regulations are considered only in an objective and “aseptic” logic, without connotations of value.

Let’s think about the very function of labor law (which we have approximately spoken about previously and which we will recall *amplius* in the continuation of the present work): the majority of labor law scholars consider it teleologically addressed to the protection of employment. However, in the economic analysis of law, such teleological connotation, expression of values, is totally neglected to the benefit of an exclusively “economic” approach, structured in terms of labor “cost”¹⁰⁵.

What is then the role labor law can “play” in its interaction with economics?

As highlighted by an attentive French jurist, labor law interacts with economics in the attempt of “taming” the principle of economic causality previously mentioned, giving it «*une coloration éminemment juridique*»¹⁰⁶.

Indeed, labor law interacts with economic causality not so much in the descriptive terms of the functioning of the intimate mechanisms of economic causality itself, as according to a justificative approach which aims at legitimizing the juridical choices made.

¹⁰⁵ With reference to this, see: J.-F. CESARO, *L'analyse économique du droit et le droit du travail*, in B. TEYSSIE (edited by), *Standards, principes et méthodes en droit du travail*, Paris, 2011, 191: «*Le droit du travail est généralement présenté par les juristes comme un droit de protection du travailleur, un droit de faveur et de progrès. La protection de l'emploi, dans ces classements [économiques], n'est pas présentée sous un angle moralement positif, elle est perçue différemment: il s'agit un des éléments qui contribue à la détermination du coût du travail*».

¹⁰⁶ T. SACHS, *op. cit.*, 389.

Simplifying the reflection here proposed, we can refer to a descriptive dimension, typical of economics, and to a “legitimizing” dimension, typical of the interaction between labor law and the principle of economic causality.

It is evident how the foundations of the juridical subject are based on radically different concepts from those of economics.

Making once again a conceptual simplification, we can say that law “thrusts down its roots” into the earth of “responsibility”, anchored to the logic of “imputation” of factual consequences to responsibilities and human actions.

Law considers man, “contaminating” the immanent determinism of economics with the mentality of making him aware of his responsibilities. We can say, therefore, that at the core of law there are more “human” facts than “natural” ones.

On the contrary, economic causality, structured according to the paradigm cause-effect, is placed in an ambit of immateriality, considered deterministic and naturalistically descriptive of realities “exterior” and “external” to the human dimension of things¹⁰⁷.

Using a schematization, this dialectic could be represented in terms of a dualist contraposition between economics, exclusively addressed towards natural factuality, and law, attentive to the human value dimension of phenomenal reality.

In labor law, these two spheres of knowledge permeate one another with mutual advantage. Economic causality, normally addressed towards a descriptive function, has in labor law a particular justifying purpose.

¹⁰⁷ C. ATIAS, *Proprement juridique: de la description aux raisons*, in *Rép. Defrénois*, 2004, 15, 1045.

Remaining anchored to the problematic relationship between law and economics, labor law is suitable to be represented as the privileged discipline capable of appreciating the specificity of the juridical experience in its totality, that is in its “tridimensional structure”.

As highlighted by an authoritative Brazilian scholar: «*Hecho, valor y norma están siempre presentes y correlacionados en cualquier expresión de la vida jurídica, ya sea estudiada por el filósofo, el sociólogo del derecho, o por el jurista como tal. Mientras que, en el tridimensionalismo genérico o abstracto, correspondería al filósofo el estudio del valor, al sociólogo el del hecho y al jurista el de la norma (tridimensionalismo como requisito esencial al derecho)*»¹⁰⁸.

2. Employment dismissal as a paradigmatic institute of the economic impact on law.

As highlighted by an authoritative Spanish labor law jurist, in employment dismissal we can find what could be correctly defined as the keystone of the entire labor law system, considered in its balancing of opposite positions and ideas, condensable in the dualism capital-work¹⁰⁹.

It is, therefore, interesting to reflect, even if briefly, on the effects produced by economic dynamics on the equilibrium of the work relationship, with reference to both its internal and external dimensions.

¹⁰⁸ M. REALE, *Teoría tridimensional del derecho. Una visión integral del derecho*, Madrid, 1997, 72.

¹⁰⁹ J. CRUZ VILLALÓN, *Presentación*, in ID. (edited by), *La regulación del despido en Europa. Régimen formal y efectividad práctica*, Valencia, 2012, 13: the «*regulación del despido constituye una pieza clave en el entramado institucional de la legislación laboral, marcando el equilibrio de posiciones de las partes en el contrato de trabajo*».

With reference to this, it is useful to move from the most recent reforms in labor law, introduced in particular by the Italian legislator, exactly in the field of employment dismissals. These are the paradigmatic representation not only of the ongoing trend, but also and especially of a global vision of labor law in its interaction with economics¹¹⁰.

Indeed, we have reached a regulation of employment dismissal which – by using mainly a form of compensatory protection (pre-determined according to the length of service, following the so-called model of “increasing protection” – “*tutele crescenti*”), instead of a “real”-reintegration one¹¹¹ – allows the employer to know *ex ante* the “cost” he/she will have to take on in the case a form of illegitimate dismissal were to be juridically ascertained and declared¹¹².

The profile of a “new” labor law, which conceives its own identity in presenting itself as a means to reduce the costs of the enterprise, cannot but seem clear¹¹³.

¹¹⁰ C. PISANI, *Il nuovo regime di tutele per il licenziamento ingiustificato*, in R. PESSI – C. PISANI – G. PROIA – A. VALLEBONA, *Jobs act e licenziamento*, Turin, 2015, 22: «sarebbe riduttivo vedere l’incentivo solo nell’abbassamento delle tutele; mediante la tecnica delle indennità in cifra fissa il decreto ha introdotto un altro importante incentivo per il datore di lavoro, che va sotto il nome di certezza del diritto, troppo a lungo trascurata se non sbeffeggiata, in materia di licenziamenti. Infatti, con tale tecnica si è voluto dare certezza all’impresa circa il costo di un licenziamento che potesse risultare ingiustificato, sottraendolo a qualsiasi valutazione discrezionale del giudice».

¹¹¹ F. CARINCI, *Un contratto alla ricerca di una sua identità: il contratto a tempo indeterminato a tutele crescenti (‘a sensi della bozza del decreto legislativo 24 dicembre 2014)*, in F. CARINCI – M. TIRABOSCHI (edited by), *I decreti attuativi del Jobs Act: prima lettura e interpretazioni*, Modena, 2015, 66.

¹¹² On this aspect see S. BINI, *Les licenciements disciplinaires après le Job’s act. Le Droit du travail à l’épreuve d’une nouvelle modernisation*, in *RDT*, 2015, 6, 420-425.

¹¹³ T. PASQUIER, *Le contrat “nouvelles embauches” ou l’ambition illusoire d’un droit du licenciement sans intervention judiciaire*, in A. LYON-CAEN – A. PERULLI (edited by), *Efficacia e diritto del lavoro*, Padua, 2008, 353: «Le droit du travail devient peu à peu l’instrument de la réduction des coûts de l’entreprise, notamment de ceux liés à la

Labor law becomes more and more a tool of political economy, exercising the particular role of «*catalizador del amplio impacto de la crisis de 2008*»¹¹⁴.

In Italy's most recent experience – which we make brief reference to here – economics is once again the central subject, for it is placed at the center of the ongoing reforms in labor law¹¹⁵.

3. The rediscovery of labor law axiology.

A substantial and profound question, ontologically crucial for the drawing of the identity of the new labor law – previously mentioned – cannot be silenced.

Considering the centrality that economics has pressingly assumed conditioning labor law, even in the development of its identity, do we still need to use a table of values to place in a certain way as a natural, conceptual counterweight?

In the formulation of the question we have in a certain sense anticipated the answer, which is naturally positive.

Labor law intrinsically needs a *substratum* of values to define its identity. Values which give the subject its teleological-functional orientation, without which its role would be demeaned to a mere ancillary regulation of economic dynamics.

With regard to this, precious is the warning given by an authoritative French labor law jurist: «*Il n'est pas de réforme ou de*

rupture du contrat de travail»; see also P. GIMENO DIAZ DE ATAURI, *El coste del despido*, Madrid, 2014, *passim*.

¹¹⁴ F. J. CALVO GALLEGO – M. C. RODRÍGUEZ-PIÑERO ROYO, *op. cit.*, 4 *et seq.*

¹¹⁵ R. PESSI, *Il mercato del lavoro: profili economici e normativi. Le prospettive di sviluppo*, *cit.*, 824-832.

*projet de réforme qui ne fasse l'objet d'une évaluation économique. Aussi utiles, voire indispensables, soient-ils, les calculs d'efficience ne doivent pas devenir les seuls moteurs d'évolution du droit*¹¹⁶.

Hence, the evolution of the subject's structural paradigms imposes us to proceed to a rediscovery of the values of reference of the juridical relationship under regulation¹¹⁷.

Labor law would otherwise surely lose its «*funcionalidad permanente*», which makes the subject an «*instrumento de racionalización jurídico-política del sistema de relaciones laborales en el cuadro del orden económico vigente*»¹¹⁸.

As a general consequence of what has been said so far, we can propose to reread the classics of law which provide us with a particular vision of values, in line with what has been highlighted by an authoritative French scholar: «*la pratique du droit est un art, et non pas une science*»¹¹⁹.

¹¹⁶ P. LOKIEC, *Avis de tempête sur le droit du travail*, in *RDT*, 2013, 12, 738.

¹¹⁷ Particularly interesting is the definition proposed by the Spanish scholar J.L. MONEREO PÉREZ, *Algunas reflexiones sobre la caracterización técnico jurídica del Derecho del trabajo*, Madrid, 1996, 15 *et seq.*: «*Desde el punto de vista estrictamente funcional el Derecho del trabajo tiene por objeto la regulación institucional de las relaciones sociales de producción capitalista, es decir, todos los problemas relacionados con la "adquisición" y el "uso" de la fuerza de trabajo en el mundo del trabajo asalariado. Desde esta perspectiva se puede comprender fácilmente que el ordenamiento laboral asume una tarea de gestión racionalizadora de la fuerza de trabajo en el mundo de las relaciones de tipo económico cuyo objeto es el trabajo*». The author adds: «*En realidad, el objeto del Derecho del Trabajo es la regulación de las relaciones (individuales y colectivas) entre empleadores y trabajadores, es decir, de todas las cuestiones atinentes a la adquisición y a la utilización de la fuerza de trabajo*».

¹¹⁸ *Ivi*, 18-19.

¹¹⁹ A. SUPIOT, *Critique du droit du travail*, cit., 262: «*La notion d'art rend donc exactement compte de cette frontière entre le monde des faits et le monde des valeurs sur laquelle travaille le juriste*».

Differently, a particular characteristic of economics – considered in its “realistic” dimension – is its being in concrete “neutral” from the axiological point of view: presenting itself as observation, analysis and description of facts belonging to the phenomenal sphere of reality, economics does not have a vision based on values.

According to this interpretation, economics is related to the «*contemplation de l'événement réel*», while law to the «*norme idéale*», and therefore, to values¹²⁰.

4. On the concept of power in labor law and economics.

In addition to the considerations made so far, it is interesting to stress a further significant point.

The debate which has livened labor law research in Italy and in Spain, after the recent reforms of the subject, seems to move around the profile that the concept of power assumes in the identification of a point of equilibrium between the power of the employer and the rights of the employee.

For example, let's think about the debate caused by the reform of the labor market, which has taken place from time to time in various nations and how this debate has concerned fundamentally the very essence of the concept of power, considered in the ambit of work relationships¹²¹.

With reference to this, we can say that the Italian reform of disciplinary dismissals offers an interesting representation of the

¹²⁰ J.-F. CESARO, *op. cit.*, 186.

¹²¹ R. PESSI, *Il notevole inadempimento tra fatto materiale e fatto giuridico*, in *Arg. dir. lav.*, 2015, 1, 29.

strengthening of the contrast between contract and power, in particular for what concerns the work relationship, (*rectius*, la «*relation de travail*»¹²²), which as a form of subordination is par excellence a power relationship¹²³.

As stressed by an authoritative Italian jurist, the birth of labor law thrusts down its roots into the earth of the conflictual dimension between two spheres of values: work and enterprise, considered as paradigmatic concepts of an axiological tension between values¹²⁴.

The recent reform on disciplinary dismissals, introduced in Italy thanks to the so-called *Job's act*, is without doubt an important moment in the construction of a new Italian labor law, based on a different vision of the same equilibrium in the ambit of the relationship between employer and employee¹²⁵.

¹²² Directive 2001/23/CE, 12 March 2001.

¹²³ P. LOKIEC, *Contrat et pouvoir. Essai sur les transformations du droit privé des rapports contractuels*, Paris, 2004, 15 et seq.: «le droit du travail applique largement le régime du pouvoir. A la responsabilité contractuelle et à la résiliation, il préfère ainsi des mécanismes propres au pouvoir, d'un côté le régime disciplinaire, de l'autre le régime du licenciement. [...] Deux des contentieux majeurs du droit du travail que sont la discipline et le licenciement évoluent donc sur un tout autre registre que celui du contrat, ce qui ne saurait surprendre dès lors qu'ils se traduisent par des décisions unilatérales».

¹²⁴ M. PERSIANI, *Radici storiche e nuovi scenari del diritto del lavoro*, cit., 89 et seq. V. A. PERULLI, *Evaluer le droit du travail*, in A. LYON-CAEN – A. PERULLI (edited by), *Valutare il diritto del lavoro. Evaluer le droit du travail. Evaluate labour law*, Padua, 2010, 5: «L'efficacité comme valeur autour duquel le système juridique s'est construit représente donc une garantie pour continuer à concevoir le droit (notamment du travail) comme système de valeur et pour concevoir sa propre fonction – typique dans la société complexe et plurielle, fondée sur le conflit – d'arbitrage et de mise en balance d'une constellation des intérêts en jeu, d'une pluralité de rationalité, d'une multitude de justifications, et donc pour affirmer la fonction du droit de coordonner la coexistence d'un fleuve de rationalité particulière que requièrent au système juridique son propre statuts normatif».

¹²⁵ A. SUPLOT, *Critique du droit du travail*, cit., 109: «Dans tous les pays industriels où elle a prospéré, la relation de travail salarié a été, et demeure, définie comme une relation où l'un peut commander et où l'autre doit obéir».

In other words, the balancing of contrasting interests and of related values – the identity of labor law – is facing a structural and epochal change¹²⁶.

Labor law, more and more conditioned by economics, is subject to the development of fundamental economic-productive parameters and is assuming the profile of a flexible law. In its contemporary dimension, the enterprise feels the strong need to adapt its organization to the new challenges of the global market¹²⁷.

The preferred regulative option is the certainty of law and the simplification of the context of Italian labor law, which is characterized by a significant complexity¹²⁸.

It is certainly premature to make forecasts about the qualitative impact that the reform could have on the structure of labor regulation in Italy¹²⁹.

In any case, it seems necessary to pay attention to the axiological dimension of the recent reforms of the labor market – and of the *Job's*

¹²⁶ J. CRUZ VILLALÓN, *Presentación*, in ID. (edited by), *Eficacia de las normas laborales desde la perspectiva de la calidad en el empleo*, Valencia, 2011, 13: «la normativa laboral, desde sus orígenes, ha tratado de buscar soluciones equilibradas y razonables que procuren las mejores condiciones de trabajo a quienes se incluían en su ámbito de aplicación, fundamentalmente los trabajadores subordinados, sin olvidar el modelo de producción económica en el que éstos se insertan».

¹²⁷ See L. CORAZZA – O. RAZZOLINI, *Who is an Employer?*, in *C.S.D.L.E. “Massimo D’Antona” Working papers*, 2014, 110, *passim*. See also M. BARBERA, *Trasformazione della figura del datore di lavoro e flessibilizzazione delle regole del diritto*, in *Dir. lav. rel. ind.*, 2010, 126, 205.

¹²⁸ J. CRUZ VILLALÓN – P. RODRÍGUEZ-RAMOS VELASCO, *Técnicas normativas y efectividad jurídica en la calidad en el empleo*, in J. CRUZ VILLALÓN (edited by), *Eficacia de las normas laborales desde la perspectiva de la calidad en el empleo*, cit., 15 *et seq.*

¹²⁹ An authoritative French labor law jurist – A. LYON-CAEN, *Evaluer le droit du travail. Sommaire d’un programme*, in A. LYON-CAEN – A. PERULLI (edited by), *Efficacia e diritto del lavoro*, cit., 6 – clearly stated that: «*droit du travail, comme discipline, c’est-à-dire comme ensemble de savoirs, a pourtant une sensibilité historique aux effets sociaux des institutions et mécanismes juridiques*».

Act more in particular – with specific reference to the concept of “power” in the work relationship, in the ambit of a new reflection about the quality of labor regulations.

As highlighted by an authoritative French labor law jurist: «*tandis que le droit civil des obligations évolue sur un terrain solide – celui du sujet de droit, maître de son corps et de sa volonté – la subordination prive le salarié de sa liberté et le place dans une relation juridiquement inégalitaire avec l’employeur*»¹³⁰.

In the light of what has been described so far, it is therefore extremely interesting to analyze the reasons which push the labor law jurist to consider his/her subject according to the table of values it is based on and in a dimension of constant dialogue with economics.

It is exactly in the historical-economic periods of crisis that the insuppressible and intimate relationship connecting labor law to economics reveals its essence, imposing on the former the adoption of the necessary changes to adapt its system of rules to the new economic scenarios drawn by history¹³¹.

¹³⁰ A. SUIPIOT, *Critique du droit du travail*, cit., 151. The author also states: «*Le droit civil et le droit du travail ont finalement la même raison d’être, qui est de “civiliser” les relations sociales, c’est-à-dire d’y substituer des rapports de droit aux rapports de force, et d’assurer à tous le statut de sujets de droit libres et égaux*».

¹³¹ R. PESSI, *Economia e Diritto del lavoro*, cit., 448 et seq.; ID., *Persona e impresa nel Diritto del lavoro*, cit., 1238-1257; R. PESSI, *Valori e “regole”*, cit., *passim*. See also R. DEL PUNTA, *L’economia e le ragioni del diritto del lavoro*, cit., 3 et seq.; P. ICHINO, *I giuslavoristi e la scienza economica: istruzioni per l’uso*, cit., 454 et seq.; G. PROIA, *Manuale del nuovo corso del diritto del lavoro*, cit., *passim*.

5. From “measurement” to “evaluation”¹³²: the possible contribution of the economic analysis of law to the juridical sphere.

In the light of what has been described so far, the core issue is all about the search of a common ground – as balanced as possible and protected by a balancing system of the mutual interests – between the reasons of economics and the spirit of labor law.

In a certain way and for its very nature, law is open to confrontation because it is aware of being itself the composition and synthesis of different experiences and traditions¹³³.

Law is itself evaluation: «*nell’attività giuridica giocano un ruolo molto rilevante le valutazioni svolte dal giurista*»¹³⁴.

Economics presents itself as a field of knowledge capable of bringing a fruitful contribution to labor law (in particular, but not only),

¹³² On the centrality of the idea of evaluation, see T. SACHS, *op. cit., passim* and, in particular, 225 *et seq.*: «*Évaluer, ce peut être “estimer, mesurer”, ou encore juger un objet à l’aune d’un étalon de valeur. L’acte d’évaluation repose sur une mise en rapport, sur une comparaison entre deux termes bien distincts: l’objet évalué et l’étalon d’évaluation. [...] l’évaluation se distingue nettement de la description. Cette dernière a pour horizon la correspondance – pour ne pas dire la confusion – entre l’objet décrit et le produit de la description. Une description réussie doit rendre fidèlement compte de l’objet décrit. À l’inverse, l’objet évalué et le jugement de valeur porté sur cet objet ne sauraient se confondre. Un tel jugement ne se contente pas de dire ce qui est, à l’instar de la description, mais permet de placer l’objet évalué sur une échelle de valeurs, de le distinguer par rapport à d’autres objets, de le classer*». See A. LYON-CAEN, *À propos de l’adjectif “économique” dans la langue du droit*, in A. JEAMMAUD (edited by), *Le droit du travail confronté à l’économie*, cit., 137 *et seq.* See also J.-F. CESARO, *op. cit.*, 185 *et seq.*

¹³³ An authoritative French labor law jurist refers to law as a «*produit de multiples discours raisonnables qui s’influencent réciproquement*»: J.-F. CESARO, *op. cit.*, 185.

¹³⁴ L. NOGLER, *Rilettura giuslavoristica di “Problema e sistema nella controversia sul metodo giuridico”*, in C.S.D.L.E. “Massimo D’Antona” working papers, 2011, 128, 5. The author adds: «*il significato del testo normativo non è attingibile senza compiere scelte di valore*», since «*non esiste, in altre parole, un significato univoco proprio delle parole*».

in terms of debates about and concrete answers to the most difficult issues concerning the regulation of the labor system.

As already mentioned, the disposition to confrontation and to dialogue with other disciplines has known in time a significant evolution, with moments (also recent) of particular distance between the two fields of knowledge.

It is important, therefore, to focus on the contribution given by the economic analysis of law to labor law, considering an aspect of a certain relevance: «*il principale risultato dell'approccio economico al diritto consiste nel modificare – più che le conclusioni cui si perviene – gli argomenti a favore e contro le possibili risposte da dare ai problemi sul tappeto*»¹³⁵.

Hence, the contribution given by the economic analysis of law to the juridical sphere and to labor law in particular is significant, especially from the methodological and argumentative point of view.

With reference to this, we can say that this specific methodological approach to juridical elaboration – whose origin dates back the second half of the last century, to the scientific context of the University of Chicago, under the direction of the Professors Ronald Coase and Richard Posner – has its *ratio* in the intuition of applying the “filters” and the “tools” proper of economics to juridical issues¹³⁶.

¹³⁵ D.D. FRIEDMAN, *L'ordine del diritto. Perché l'analisi economica può servire al diritto*, Bologna, 2004, 36. The author adds: «*l'analisi economica del diritto è in grado di rimodellare radicalmente gli argomenti dai quali scaturiscono le risposte che il diritto fornisce ai tradizionali problemi di cui esso si occupa. Se ciò è vero, un'implicazione importante di tale ragionamento è che l'analisi economica del diritto è un valido strumento o, se si preferisce, un'utile arma nelle mani di persone che intendano perseguire un'ampia varietà di obiettivi politici*».

¹³⁶ For an historical outline of the economic analysis of law, see R.A. POSNER, *El análisis económico del derecho*, Ciudad de México, 1998, *passim* and, in particular, 55 *et seq.* See also R.H. COASE, *The problem of social cost*, in *J. Law & Econ.*, 1960, 3, 1 *et seq.*

Wishing to propose with the present work an organic reasoning about the effects of economics on labor law in an age of great crisis and of intrinsic and substantial criticality, we need to clarify a fundamental aspect, without taking for granted apparently “basic” concepts.

We need, therefore, to ask a fundamental question: how can we evaluate the contribution that the economic analysis of law is, at least potentially, capable of giving to the juridical sphere?

First of all, it is evident that economics in its interaction with law aims to provide the jurist with interpretations of the phenomena object of regulation.

This occurs *via* the analysis of statistical results, oriented towards the elaboration of regulations which take into account these findings. This analysis allows at the same time to make a forecast on the impact of the regulations.

The study of statistical data, when carried out systematically, permits to make “forecasts” on the evolution of future behavioral scenarios in the light of the ones already studied and analyzed.

By using this methodology, we aim to offer the interpreter and the legislator a tool capable of making regulations as adherent as possible to the juridical cases.

When applying this methodology, the theoretical model of reference is the one which considers man a rational agent, whose choices are oriented towards the achievement of personal wellness¹³⁷.

¹³⁷ See D.D. FRIEDMAN, *op. cit.*, 25 *et seq.*: «L'analisi economica che, per lo meno in via principale, non si occupa di variabili quali il denaro o l'economia quanto delle implicazioni derivanti dall'applicazione della teoria della scelta razionale, è uno strumento essenziale per prefigurare quali saranno i concreti effetti delle norme giuridiche. [...] Postulato fondamentale dell'approccio economico, al diritto ma non solo, è che le persone siano razionali».

The “rational” element of economic agents, who make choices oriented towards the achievement and maintenance of their wellness, is at the basis of one of the main criticisms moved against the economic analysis of law, because it is considered a

At the basis of the theories of economic analysis of law there is, therefore, an analytical behavioral study of man, as an agent who makes rational choices in reaction to the “stimulations” received from the external context in which he operates¹³⁸.

There can be no doubt whatsoever as to the importance assumed by the studies of economic analysis of law and the utility of statistical data, in terms of a more mature understanding of the impact of regulations on juridical situations.

Indeed, we can find in the economic analysis of law a *corpus* of resources which allow us not only to understand normative tools in a better way, but also to improve them in order to make them more and more adequate to the juridical issues at stake.

On the other hand, the full awareness of the utility of the tools provided by the economic analysis of law, has sometimes pushed scholars to entrench themselves in certain positions, with a closure to positions which are properly juridical¹³⁹.

*«menace de s'éloigner de la réalité» (A.-L. SIBONY, *Le juge et le raisonnement économique en droit de la concurrence*, Paris, 2008, 117). Such a reconstructive hypothesis, placed at the foundation of the majority of the theoretical models of economic analysis of law, is based on the absence of dissociation and therefore, on the convergence between the choices made by the economic agents and their aspirations. The critics of the economic analysis of law find in this a crucial element of weakness, which should be “corrected” by verifying the compatibility of the choices made by the economic agents with common sense. As highlighted by a French scholar – J.-F. CESARO, *op. cit.*, 202 – «la discussion ne conduit nullement à une disqualification de l'argument économique. Il suffit encore une fois d'avoir une distance critique suffisante et d'assimiler avec prudence l'argument économique en le confrontant à d'autres arguments».*

¹³⁸ It is necessary to stress how people «*si prefiggono particolari scopi e che esse tendono, in maniera più o meno efficace, a scegliere i mezzi idonei a raggiungerli. Questo può essere ritenuto il dato prevedibile del comportamento umano e su di esso è costruita l'analisi economica del diritto*» (See D.D. FRIEDMAN, *op. cit.*, 26-27).

¹³⁹ With reference to this, the most critical scholars of the economic analysis of law accuse juridical reasoning of being excessively subjective and sustain that juridical knowledge systematically contains in itself forms of intrinsic contradiction and

Legal regulations are considered and are “examined” with exclusive reference to their being or not “efficient” in the production of certain practical and concrete effects.

In other words, the way in which the economist interacts with a legal regulation has its *ratio* in the pure consideration of the rules, in a vision teleologically oriented to the achievement of the most economically efficient results (we repeat: in terms of practical results and concrete effects). In this approach, the values which have inspired the regulations are of no importance.

Hence, we can say that the economic analysis of law focuses on the “quantitative” aspect of regulation, that is its dimension subject to measurement and the effects it produces.

6. The dualism rigidity-flexibility.

If we extend what has been considered so far to the dimension of labor law, fundamental becomes the “comparative” analysis of the statistical findings – for example, for what concerns the unemployment rate – with the macroeconomic data of the labor market¹⁴⁰.

incoherence; see on this aspect: J.-F. CESARO, *op. cit.*, 188. The origin of this consideration lies in the difficulty economists have in understanding the logic of general interest which characterizes law.

The same scholar highlights how juridical sciences are accused of incompleteness and ambiguity: *«c'est un point important de l'argumentation économique, le droit est incomplet et ambigu. Autrement dit, on ne peut répondre à tous les problèmes pratiques avec les règles juridiques disponibles – il devient alors indispensable de trouver d'autres arguments pour traiter ces difficultés pratiques et c'est là que le raisonnement économique doit jouer son rôle. Selon Posner (et d'autres) il n'existe pas de science juridique autonome, le juriste est désarmé lorsque la réglementation n'apporte pas une réponse claire dans le conflit qu'il doit trancher»*.

¹⁴⁰ The activity of comparison we have just referred to can be performed in different ways. For instance, we can think about the “measurement”, proper of labor law, which

Only at the end of this analytical activity of comparison, carried out within the “borders” of the economic analysis of law, we can reach what can correctly be defined as a proponent synthesis addressed to legal agents.

It is exactly in this moment of the research that there is the possibility to dialogue with the juridical world of greatest importance.

Law – and in this work in particular, labor law – is the receiver of a *corpus* of proposals, directed to orientate the regulation of the socio-economic phenomena of reference.

Some of the indications coming from the world of economics refer to the most intimate dimension of the regulation as well as to the real core of law, proposing a true conceptual re-foundation of the subject, considered *lato sensu*.

In labor law, a ground where the economic analysis of law can exercise a great influence, is without doubt the *vexata quaestio* of labor market rigidity.

World Bank Group carries out using questionnaires in the report “Doing Business”: «Doing Business measures flexibility in the regulation of employment, specifically as it affects the hiring and redundancy of workers and the rigidity of working hours». Fundamental is the use of “standardized case studies”, based on the elaboration of “standard” profiles for employees, employers and business contexts, to which are applied analysis methodologies with typical labor market indexes. Let’s consider, for example, the profile developed and studied in the report 2015, which wishes to measure labor market flexibility, focusing in particular on the profile of the dependent employee, who does not belong to any union and who works full-time as cashier in a supermarket of sixty employees, organized as a limited liability company. See WORLD BANK, *Doing Business 2015: Going Beyond Efficiency*, Washington DC, 2014, 79: «The data on labor market regulations are based on a detailed survey of employment regulations that is completed by local lawyers and public officials. Employment laws and regulations as well as secondary sources are reviewed to ensure accuracy. To make the data comparable across economies, several assumptions about the worker and the business are used».

The issue of the relationship between stability and flexibility, of work as of employment, is central in contemporary labor law debates, both national and European.

The concept of rigidity is very often used not only with reference to work and employment, but also with reference to labor legislation, constantly considered in its interactions with national and, in particular, transnational economics.

“Protective” employment legislation is studied with different methodologies (we can consider the use of questionnaires or analyses based on the textual dimension of the regulations), which are however quite convergent for what concerns the research results.

In the ambit of this research the main criticism moved by the economic analysis of law to national labor law legislation is to create a substantial structural dualism in a deeply fragmented labor market.

With regard to this, a clarification is necessary. The labor market fragmentation is so relevant that it cannot be reduced to a mere representation of the dualist theory of *insiders* and *outsiders*, already analyzed in previous pages.

Indeed, it is certainly true that the contraposition in national labor markets (and for the present work, in particular in the Italian and the Spanish ones) between *insiders*, who benefit of a legislation of protection and *outsiders*, who are excluded from this protection (because of the existence of a barrier represented by the rigidity of labor law legislation), but wish to have it, is consolidated¹⁴¹.

¹⁴¹ J. FERREIRO – E. BEA – M. C. GÓMEZ – M. A. INTXAUSTI, *Teoría Insider-Outsider y temporalidad en el mercado de trabajo español*, in *Revista del Ministerio de Trabajo y Asuntos Sociales*, 2004, 51, 50-51: «El modelo insider-outsider plantea la existencia de un mercado de trabajo segmentado entre insiders, entrantes y outsiders. La existencia de costes de rotación laboral entre estos colectivos y el ejercicio del poder de mercado por parte de los insiders y los entrantes en su propio beneficio genera unos salarios reales superiores al salario real de equilibrio. El resultado final es la generación de

As already said, we need however to take into account and to reason about other dualisms, structural ones which characterize contemporary labor law scenarios and which vivify a debate concerning the very sense of the subject.

Among the workers, let's consider a particular declination of the dualism *insiders-outsiders*, the contraposition between who has a job with an open-ended contract (*insiders*) and who is employed with other contracts, intrinsically characterized by a significant flexibility and paradigmatically represented by fixed-term contract (*outsiders*)¹⁴².

The main theme is then the effective results produced by national legislations with in common the objective to “protect” the worker. The issue is widely discussed by the scholars of each single juridical system in Europe¹⁴³.

Thus, from the economic analysis of law comes the invitation to revise the structural paradigms of labor law legislation, in the perspective of a mature valorization of both the employee's empowerment in the

desempleo involuntario, cuya dimensión guarda relación directa con la cuantía de los costes de rotación laboral».

¹⁴² Therefore, it is in this dualistic reality that flexibility receives a possible different interpretation, summed up in the concept of “precariousness”; see P. CAHUC – F. KRAMARZ, *De la précarité à la mobilité: vers une Sécurité sociale professionnelle*, Paris, 2004, 12-13: «la césure CDD-CDI et la réglementation des licenciements économiques entraînent de profondes inégalités: les jeunes sont cantonnés à des emplois en CDD, et les entreprises hésitent à embaucher des seniors sur des emplois stables, car leur destruction est très coûteuse». And again: «La dualité entre CDD et CDI induit donc une répartition inégalitaire des risques liés à la conjoncture, qui sont prioritairement supportés par les jeunes, et plus généralement par les populations les plus fragiles qui occupent prioritairement les emplois à durée déterminée».

¹⁴³ Interesting is the analysis performed by some French scholars about the perception the workers have of employment protection legislation: F. POSTEL-VINAY – A. SAINT-MARTIN, *Comment les salariés perçoivent la protection de l'emploi?*, in *Economie et statistique*, 2004, 372, 41 et seq.

enterprise and the employer's investment (considered *lato sensu*) in the enterprise itself¹⁴⁴.

The scenario of theoretical elaborations developed by the economic analysis of law and by labor law is particularly heterogeneous.

The prevailing position is the one which considers employment protective legislation aetiologically connected to the substantial stagnation of the production and occupational system¹⁴⁵.

In any case, it is worth highlighting that the existence of a legislative system, conceived according to a philosophy rigidly protective of work, would be a factor capable of encouraging the workers' disposition to "adapt" to the working activity and, therefore, to make a particular "discretionary effort" when performing their tasks.

In this perspective, a particularly rigorous regime and a restrictive regulation – for example – of the complex subject of employment dismissal would be a stimulating paradigmatic element.

Instead, according to other scholars of the discipline, the topic would deserve to be considered in the light of an essential general principle: «Employment protection legislation restricts the ability of firms to dissolve labor contracts»¹⁴⁶. As a consequence, the existence of a

¹⁴⁴ See J.-F. CESARO, *op. cit.*, 193: «*La question de l'effort ou de l'investissement dans le travail apparaît à cet égard constituer un critère important du raisonnement économique. Les économistes se sont notamment demandés si la législation constituait effectivement une incitation à l'investissement tant du salarié que de l'entreprise ou si elle produisait l'effet contraire*».

¹⁴⁵ With reference to the dimension industrial relations, see the interesting research on their «*stato letargico*», presented in M. MAGNANI, *Gli effetti dell'accordo di Pomigliano sulle relazioni industriali*, in M. MAGNANI – M. FERRARESI (edited by), *Da Pomigliano a Mirafiori: viaggio nell'attualità del diritto sindacale italiano*, Pavia, 2012, 1 *et seq.*

¹⁴⁶ A. ICHINO – R.T. RIPHAHN, *The effect of employment protection on worker effort: absenteeism during and after probation*, in *Journal of the European Economic Association*, 2005, 3, 120-143. The authors add: «The European debate on the reform of employment protection is mainly focused on net employment effects, but our results

“rigid” normative system and particularly protective of the worker, especially (but not only) in the case of employment dismissal, would determine a so-called “lethargic” effect”¹⁴⁷.

The employee would be encouraged to “invest” less in terms of effort, dedication and concentration, because aware of the existence of a network protection system in the hypothesis of a possible employment dismissal¹⁴⁸.

The results of the research carried out by the scholars of the economic analysis of law bring to an overall negative evaluation of employment protection legislation.

This *pars destruens* of the economic analysis of the labor law system is sided by a *pars costruens*, which consists in the elaboration of a series of necessary regulations to improve the quality of the legislation.

The economic analysis of law proposes a simplification of the regulations and of the way these are elaborated¹⁴⁹.

suggest that a proper evaluation of this regulation requires considering such factors as the effect on worker behavior» (140).

¹⁴⁷ J.-F. CESARO, *op. cit.*, 194: the «données – avec les approximations nécessairement induites par les “proxies” utilisés- semblent confirmer que la législation protectrice de l’emploi produit un effet léthargique. Elle apparaît donc globalement négative pour les entreprises et à moyen terme pour les salariés».

¹⁴⁸ L. GOERKE – M. PANNENBERG, *Severance Pay and the Shadow of the Law: Evidence from West Germany*, in *German Institute for Economic Research discussion papers*, 541, *passim*. See also B. DEFFAINS – E. LANGLAIS (edited by), *Analyse économique du droit – Principes, méthodes, résultats*, Paris, 2009, 277 *et seq.*; C. BOURREAU-DUBOIS – B. DEFFAINS (edited by), *Économie et droit du travail: des discours concurrents mais non rivaux*, in *Travail et Emploi*, 2009, 120, 9 *et seq.*

¹⁴⁹ See on this aspect J. BARTHELEMY – G. CETTE, *Refondation du droit social: concilier protection des travailleurs et efficacité économique*, Paris, 2010, *passim* and, in particular, 7: «Le besoin d’une réflexion sur l’adaptation du droit social aux mutations économiques est donc fort. Il faut veiller à ce que sa vocation protectrice ne se traduise pas par des rigidités qui freineraient les évolutions économiques adaptées aux changements technologiques et sociaux, brideraient la croissance et fragiliseraient la situation des travailleurs, en particulier ceux dont le pouvoir de négociation est le plus réduit (les peu qualifiés...). Il faut que le droit social parvienne à concilier sa

Through a structural change of work regulations, aimed at eliminating the rigidity which presently conditions their functioning, the economic analysis of law wishes to reach a unification of the labor market, overcoming the profound dualistic segmentation present today.

More in detail, the economists have always focused on the economic inefficiency of the regulation adopted by each single national system against illegitimate dismissals. Disciplines particularly “protective” of the worker’s needs are, in fact, considered deleterious for a correct functioning of the work relationship, and more in general, of the labor market.

To this regard, in a significant number of proposals *de jure condendo*, coming from the economic analysis of law, we can find the introduction of only one work contract to “replace” the heterogeneous multiplicity of contract forms currently existent in the majority of Western labor law systems¹⁵⁰.

This contract – according to the economists – should be characterized on one hand, by a certain stability (being open-ended), and on the other hand, by specific regulations on work relationship termination. This would be accompanied by the valorization and the investment in active work policies¹⁵¹.

vocation protectrice et la capacité à s'adapter aux mutations économiques et sociales (voire à les anticiper)».

¹⁵⁰ V. P. CAHUC – F. KRAMARZ, *op. cit.*, 150: «Le contrat de travail unique présente l'avantage de créer une incitation à la stabilisation de l'emploi, puisque les entreprises sont plus taxées et doivent verser plus d'indemnités de précarité dès lors qu'elles utilisent plus intensément des emplois de courte durée. Autrement dit, les entreprises qui embauchent et qui licencient peu verront leur coût du travail diminuer [...]. En outre, le problème de la transformation d'un contrat à durée déterminée en contrat à durée indéterminée ne se posera plus».

¹⁵¹ Ivi, 155: «Cette simplification présente l'intérêt de sécuriser considérablement l'environnement juridique des salariés, à travers une prime de précarité pour tous, un reclassement de qualité, un traitement moins inégalitaire, et des employeurs. Cette sécurisation juridique présente un avantage important pour l'ensemble de la société

A contract of this kind has been recently introduced in the Italian labor law system. It is the so-called “employment contract with increasing protection” (“*contratto di lavoro a tempo indeterminato a tutele crescenti*”), on which it is the case to make some reflections.

It is sufficient here to anticipate that the essence of the reform introduced with the legislative decree 4 March 2015, n. 23 (executive of the delegation law 10 December 2014, n. 183), with specific reference to the discipline of dismissals, can be recognized in the substantial inversion of a founding paradigm of Italian labor law, which moved around the principle of reintegration of the dismissed employee, as main (“normal”) sanction in the hypothesis of illegitimate dismissal.

In the recent Italian reform, compensation is contemplated as the main sanction in the case of illegitimate dismissals, confining reintegration to a limited number of situations.

Compensation is fixed according to the length of service of the employee, whose dismissal has been declared illegitimate by the judiciary: for this reason the new contract is called “employment contract with increasing protection” (“*tutele crescenti*”).

7. Overcoming interdisciplinary diffidence. The foundations for an advantageous dialogue between labor law and economics: the sharing of a mutually understandable and easy to use language.

On the attitude of closure between labor law and economics we have written in previous pages, making a reflection oriented towards a

par rapport à la réglementation actuelle, puisque le coût supporté par l'entreprise n'est plus la conséquence de lourdes procédures, contrôlées par l'autorité de l'administration et du juge sur la base de critères flous, mais bien d'un transfert qui abonde un fonds de solidarité».

substantial truth: mistrust characterizes the two fields of knowledge, which are called to a necessary confrontation.

This relational dimension is now considered in its problemativeness, summed up at times in the contraposition between economic rationality and juridical values.

A step towards a mutual understanding of the subjects, fruitful for both of them, is more than necessary¹⁵².

As a consequence, it is indispensable to overcome a markedly rigid economic approach, based on the consideration that labor law legislation is a “cost” and not an unavoidable regulatory tool.

What appears clearly is the natural projection of the economic analysis of law towards the creative activity of the legislator¹⁵³: indeed, it is to this that the scholars of economics can give a significant contribution¹⁵⁴.

This research activity is also oriented (though secondarily) towards the activity of the legal experts in the dialectics of the courthouse, for they are an interesting source of hermeneutic-interpretative orientations.

¹⁵² The framework in which we need to move is based on an assumption of particular importance: *«Il pensiero epistemologico moderno ha mostrato l'esistenza di un rapporto circolare fra cultura complessiva e sapere scientifico»*; A. CERRI, *Diritto-scienza: indifferenza, protezione, promozione, limitazione*, in G. COMANDÉ – G. PONZANELLI (edited by), *Scienza e diritto nel prisma del diritto comparato*, Turin, 2004, 365.

¹⁵³ As stressed in D.D. FRIEDMAN, *op. cit.*, 25: *«Conoscere le conseguenze prodotte dalle norme è di fondamentale importanza non solo per la comprensione di quelle in vigore, ma anche per decidere quali norme sarebbe opportuno adottare in futuro»*.

¹⁵⁴ J.-F. CESARO, *op. cit.*, 204: *«L'économie peut participer à l'amélioration du droit comme les autres disciplines [...]. Il est donc important que les économistes soient non seulement audibles mais aussi compréhensibles pour permettre que leurs promesses soient mieux entendues et que leurs propositions soient discutées»*.

For economics to bring its important contribution to law, it is indispensable for the two fields to share first of all a common language, in order to interact fruitfully with one another.

Cases in which economic research presents results difficult for the jurist with his hermeneutic-argumentative tools to understand, are particularly frequent.

Hence, we can critically affirm that a greater effort to open up to areas of knowledge and of study different from economics (among these, first of all, law), cannot be separated from a greater usability of the results of economic scientific production.

The jurist's argumentative paradigm is naturally deeply different and distant from the scientific-investigative models of the economist¹⁵⁵.

In any case, the confrontation between labor law and economics requires shared communicative tools capable of guaranteeing a continuous and fruitful dialogue.

¹⁵⁵ It is interesting here to recall the thought of an authoritative Spanish jurist, C. RODRIGUEZ-AGUILERA, *El lenguaje jurídico*, Barcelona, 1969, 9-10: «*El jurista ha de tener presente estas nociones. Tiene que poseer, como afirma el autor citado, una adecuada información de hecho sobre ciertos aspectos básicos de la vida de la comunidad a que pertenece, un conocimiento serio de las consecuencias probables de sus actuaciones y una inteligencia alerta para clarificar cuestiones valorativas y dar buenas razones en apoyo de las pautas no específicamente jurídicas en que, muchas veces, tiene que buscar fundamento. De lo contrario no estará en condiciones de cumplir una función social verdaderamente útil*». The author refers to the equally authoritative contribution of G.R. CARRIÓ, *Notas sobre Derecho y lenguaje*, Buenos Aires, 1965, *passim*. See L.M. CAZORLA PRIETO, *El lenguaje jurídico actual*, Navarra, 2007, *passim*.

8. For a new reflection on the juridical method in general. From the economic analysis of law to “positive” labor law: *est modus in rebus*.

In 1976 Luigi Mengoni affirms in a famous reflection on juridical activity: *«la scienza giuridica non è una scienza pratica nello stesso senso in cui lo sono la politica, l'economia o l'etica (quando non sia fondata su base teologiche). Essa fa riferimento a comportamenti umani, ma il suo compito non è di spiegare o elaborare criteri di agire corretto, bensì di comprendere il significato di testi normativi autoritativamente predisposti per dettare regola ai rapporti sociali. La scienza giuridica è essenzialmente una scienza ermeneutica come tale dominata dal primato del testo»*¹⁵⁶.

In this quotation we can easily find a substantial methodological contraposition, which is particularly interesting in the light of what has been said so far, about the role of the economic analysis of law in labor law.

Widespread is, in fact, the criticism moved against economics (as against the economic analysis of law) of being inductive and characterized by mainly factual reasoning¹⁵⁷.

¹⁵⁶ L. NOGLER, *op. cit.*, 3: *«Luigi Mengoni appartiene alla ristrettissima cerchia dei giuristi italiani del Novecento che effettivamente si prestano ad essere costantemente riletti per la profondità d'analisi che caratterizza i suoi scritti»*. See also M. NAPOLI, *Ricordo di Luigi Mengoni, maestro di diritto e d'umanità, cultore di diritto del lavoro*, in *Dir. lav. rel. ind.*, 2002, 94, 163: *«noi siamo soltanto giuslavoristi. Egli è stato anche cultore del diritto del lavoro»*.

¹⁵⁷ J.-F. CESARO, *op. cit.*, 203, with a cross-reference to B. OPPETIT, *Droit et économie*, in *Arch. phil. droit*, 1992, 25: *«il est fait grief à l'analyse économique d'être essentiellement inductive et de produire “des raisonnements factualistes”, guidées par l'opportunité: “on sait à quel arbitraire, à quelle subjectivité, aboutit cette casuistique générée par un droit plus institutionnel que matériel»*.

It is in any case reductive to describe the methodological differences objectively existent between law and economics to a mere dualistic contraposition between induction and deduction.

It is certainly true that economics bases its reasoning on an intrinsically inductive methodological *substratum*, which moves from human behaviors, external phenomenological realities and their related causes, to develop theories and models.

Well, it does not seem possible to deny that also juridical reasoning is based on human behavior, considered through the lens of the values which sustain the juridical system.

Before proceeding and in order to be better prepared for the conceptual and analytical elaboration which will be presented in the continuation of this work, some methodological premises are deemed necessary.

«Il metodo consiste nel percorso che lo studioso deve seguire per affrontare e portare a termine una ricerca di carattere scientifico»¹⁵⁸.

The methodological issue – with reference to the juridical science in general and to labor law in particular – is an aspect of extraordinary importance in order to define the object under investigation because of law's substantially conventional nature, as a *corpus* of rules disciplining the civil coexistence of a certain community and structuring its collective life¹⁵⁹.

¹⁵⁸ R. SCOGNAMIGLIO, *Una riflessione sul metodo giuridico*, in *Riv. it. dir. lav.*, 2008, 477 *et seq.*

¹⁵⁹ F. PÉREZ DE LOS COBOS Y ORIHUEL, *Algunas reflexiones metodológicas sobre la investigación iuslaboralista*, in *Revista Española de Derecho del Trabajo*, 1994, 68, 873-886; see also M.E. CASAS BAAMONDE, *Reflexión breve sobre las preocupaciones y corrientes metodológicas en el Derecho del trabajo de la crisis*, in AA. VV., *El derecho del trabajo y de la seguridad social ante la crisis económica*, Madrid, 1984, 53 *et seq.*; J.M. RODRÍGUEZ DE LA BORBOLLA CAMOYÁN, *Algunas reflexiones sobre la metodología de la investigación en Derecho del Trabajo*, in *TL*, 1994, 31, 19 *et seq.*

As highlighted by an authoritative Spanish scholar, the first function of method is to define the boundaries of the research: «*la elección del método tendrá como primera misión la delimitación precisa del objeto de estudio*»¹⁶⁰.

With specific reference to labor law, we cannot deny that a specific aspect of the subject is in its sensitivity and disposition to feel the influence of social, political and economic ambits.

This interdisciplinary contamination, which contributes to distinguish labor law from other juridical ambits, renders the structure of the subject heterogeneous and composite, but it also exposes it to greater vulnerability and criticism.

Hence, the economic, social and political crises are reflected in labor law, which is consequently living itself an internal crisis¹⁶¹.

A crisis which – as said *supra* and as will be said *amplius infra* – concerns the conceptual foundations of the subject, with the essential institutes that have in time been the point of reference of every regulation¹⁶².

This particular situation of labor law has been attributed to a substantial frailty of the subject's dogmatic framework. More in particular, highlighted is the subject's «*debilidad como sistema jurídico*

¹⁶⁰ M. CORREA CARRASCO, *Método, función y estructura del Derecho social en España*, Madrid, 2001, 21.

¹⁶¹ H. SINZHEIMER, *op. cit.*, 87 *et seq.*

¹⁶² M. D'ANTONA, *L'anomalia post positivista del diritto del lavoro e la questione di metodo*, in *RCDP*, 1990, 1-2, 207 *et seq.* With reference to this, see the intense interpretation given by S. SCIARRA, *Post positivista e pre globale. Ancora sull'anomalia del Diritto del lavoro italiano*, in *Dir. lav. rel. ind.*, 2009, 121, 159-183. See also C. MOLINA NAVARRETE, *El status científico "post-positivista" del jurista del trabajo y el interrogante sobre la condición de "positividad" de su "nuevo" derecho*, in *REDT*, 1997, 83, 343 *et seq.*

*autónomo, consecuencia de la falta de una verdadera “teoría general” de la disciplina»*¹⁶³.

Strongly felt is therefore the need of a «*configuración racionalizada de un sistema teórico [que], lejos de costreñir el dinamismo peculiar de la realidad socioeconómica mediante una conceptualización de los instrumentos jurídicos llamados a regularla, favorecería su ordenación, al aportar puntos de referencia adecuados para situar, y resolver, los potenciales problemas teóricos y prácticos que se susciten en el devenir histórico de la disciplina*»¹⁶⁴.

Far from wanting here to present a research centered on labor law methodological issues – impossible for the lack of space and for the need to guarantee systematicity to the work – it is important to develop these methodological premises inserted in a wider perspective.

It is indeed unavoidable to anchor general and special, developed and in development considerations to a systematic ambit, in which they can be arranged and contextualized, so that they can be seen as pieces of a colorful mosaic; a mosaic which represents the identity, perhaps today a bit blurred, of labor law.

Consequently, the analysis of an institute, as is the one of the employee’s tasks (or institute of functional mobility, as it is defined in

¹⁶³ M. CORREA CARRASCO, *op. cit.*, 22. In the footnote 21 the author clarifies how, in reality, it would be more correct to talk about the lack not of a “general theory of labor law”, but of a “general part”: the first expression should refer to juridical science in its totality, that is to the «*construcción dogmática del ordenamiento jurídico globalmente considerado*». The author adds: «*Efectivamente, si la función de la parte generale es “dar cuenta de las grandes unidades de significación que, dentro de un sistema, se afirman y reiteran como elementos básicos del mismo”, siendo, en consecuencia “el resultado de un proceso de simplificación analítica y de reconducción sintética” para la obtención de conceptos generales, resultado de una “inducción de segundo grado”, el conjunto integrado de todas las partes generales formará un nivel superior en proceso inductivo*» (the verbatim quote is in A. HERNÁNDEZ GIL, *Conceptos jurídicos fundamentales*, Madrid, 1987, 1, 198 *et seq.*).

¹⁶⁴ M. CORREA CARRASCO, *op. cit.*, 23.

the Spanish system) – on which we will investigate in the following pages – will be necessarily conceived as an aspect paradigmatically expressive of a widespread and generalized regulatory trend.

As stressed by an authoritative scholar: *«In un'epoca in cui intere branche del diritto si stanno profondamente riorganizzando, è solamente alzando lo sguardo, più di quanto non siamo soliti fare, che possiamo sperare di cogliere, nel disordine, le tracce di nuove logiche ordinatrici»*¹⁶⁵.

Such specification does not seem out of place, because in front of the crisis – which is a crisis of values and of identity, as we will widely stress in the present work – that labor law has been going through for decades, the systematic approach highlighted by Giugni in 1989 seems unavoidable: *«el jurista hace doctrina (de política del derecho) y, esto es, cumple su misión, no cuando conoce casuísticamente esta o aquella cláusula, sino cuando elabora el material en función de una sistematización coherente que se establece como clave para leer e interpretar los contratos, pero también para delinear las líneas de tendencia evolutiva, y para proponer nuevas soluciones nuevas estructuras o sistemas de relaciones»*¹⁶⁶.

Fixed the brief methodological considerations here proposed, it is now necessary to focus on a specific research aspect, which deserves special attention: comparative studies.

¹⁶⁵ R. DEL PUNTA, *Diritti della persona e contratto di lavoro*, in *Dir. lav. rel. ind.*, 2006, 110, 254.

¹⁶⁶ G. GIUGNI, *Il diritto sindacale e i suoi interlocutori*, in AA. VV., *Lavoro, legge, contratti*, Bologna, 1989, 195.

9. About the renewed topicality of comparative studies in labor law.

Among the concepts considered so far, a different approach is required for the comparative method that will be used in the present research.

It is useful to start from the distinction proposed by Carnelutti, in his *Metodologia del Diritto*: on one hand, “external” comparisons, with as object the «*comparación de fenómenos pertenecientes a un determinado orden jurídico con los relativos a órdenes jurídicos diversos*» and on the other hand, “internal” comparisons, related to the «*comparación entre fenómenos pertenecientes a los varios sectores de un mismo orden jurídico*»¹⁶⁷.

Only by rediscovering the articulations of the concept of comparison, considered in its juridical meaning, it becomes possible to understand the deep sense of using a comparative method, in its projecting itself inside and outside a certain juridical system.

The comparison of systems is extremely interesting, especially in labor law, because it is a tool useful to stress a «*relativa uniformità naturale del diritto*» and a «*comunicabilità storica*» that – as recalled by an authoritative scholar more than fifty years ago – is expressed «*attraverso multiformi, scambievoli influenze fra i vari ordinamenti*»¹⁶⁸.

¹⁶⁷ F. CARNELUTTI, *Metodología del Derecho*, Ciudad de México, 1940, 37 and 70.

¹⁶⁸ U. PROSPERETTI, *Attualità della comparazione nel Diritto del lavoro*, Rome, 1953, 481. Of great interest are the classics of comparative studies, among which T. ASCARELLI, *Premesse allo studio del diritto comparato*, in ID., *Saggi giuridici*, Milan, 1949, 3 *et seq.*; R. DAVID, *Traité élémentaire de droit civil comparé*, Paris, 1950, 37 *et seq.*; G. DEL VECCHIO, *Sull'idea di una scienza del diritto universale comparato*, in *Riv. it. per le scienze giuridiche*, 1908, 188 *et seq.*; P. DURAND – R. JAUSSAUD, *Traité de droit du travail*, Paris, 1947, 1, *passim*; H.C. GUTTERIDGE, *Comparative law*, Cambridge, 1946, 9 *et seq.*; MC DOUGAL, *The comparative study of law for policy*

It is particularly in historical moments of transition, marked by the development of founding paradigms in the legal systems of numerous countries, that comparative law, considered instrumentally, is of special utility.

«Uno dei vantaggi della comparazione, quello cioè di disvelare allo stesso interprete del diritto nazionale motivi e premesse generali degli istituti, che altrimenti sarebbero inosservati, assume una peculiare rilevanza»¹⁶⁹.

In the words quoted above we can grasp the consecration of what is the typical role of comparative law in its functional and instrumental essence.

Indeed, *«la relativa uniformità naturale del diritto rivelata dalla comparazione, si incontra e si intreccia con la comunicabilità storica, suggerendo una imitazione ricettiva di esperienze fondate sugli stessi presupposti, pur con gli ovvi adattamenti alle situazioni locali»¹⁷⁰.*

The topicality of Ubaldo Prosperetti's lesson is evident in its being anchored to a conceptual *substratum* that goes beyond time-limits, adapting itself to the present-day normative scenario.

Yesterday as today, labor law is characterized by the centrality of the fact that it has been elaborated "outside the state" to then be gradually absorbed by the state system.

Hence, comparative law has a particular utility and functionality, in an elaboration that – conceptually and temporally – comes before the creative phase *stricto sensu* of the national legislator.

purposes: value clarification as an instrument of democratic world order, in Yale L. J., 1952, 915 et seq.

¹⁶⁹ U. PROSPERETTI, *Attualità della comparazione nel Diritto del lavoro*, cit., 482.

¹⁷⁰ *Ivi*, 483.

A crucial role in this is detained by juridical scholars and professional associations, who study the juridical experiences of foreign countries, verifying their possible adaptation to the national juridical system and place therefore the pre-conditions for their acceptance by the legislator.

If such an activity can be successfully carried out, it is thanks to the substantial uniformity of professional interests characterizing socio-economic realities “close” to one another.

And, with particular concern to the reality of work and employment, *«la società contemporanea, caratterizzata dalle forme della grande produzione di massa, ha, come è noto, estremamente tipizzato i soggetti dei rapporti di lavoro, uniformando al massimo le condizioni di vita dei prestatori di lavoro ed inducendoli, di conseguenza, anche per l’acquisita coscienza di tale uniformità, ad un comportamento uguale dinanzi alle medesime situazioni. Interessi collettivi uguali hanno generalmente prodotto istituti giuridici simili, perché gli strumenti giuridici dovevano servire alle stesse necessità»*¹⁷¹.

Fundamental is, therefore, the awareness of what in *«la rilevazione comparatistica di alcuni principi e di alcune tendenze comuni nella vasta esperienza del diritto del lavoro non è impossibile e può essere feconda di utili indicazioni»*¹⁷².

But in order to be able to fully appreciate the valorization of comparisons proposed by the authoritative quoted scholar, we need to make some methodological specifications.

Indeed, comparative studies have without doubt become widespread in law and their use is generalized among the interpreters of labor law.

¹⁷¹ *Ibidem.*

¹⁷² *Ivi*, 492.

The absence, however, of a “systemic” vision in the use of comparisons, risks to determine a dangerous loss of sense and of awareness in the use of such tool. The main consequence of this approach – which could rightly be considered as “acritical” – is the practice of making comparisons “without a specific purpose”, because not oriented to a pre-established result and to a goal identified *ex ante*.

There is who understands that the comparison between juridical solutions, institutes or legal tools is not in itself fruitful, there being the possibility for it to become counterproductive.

It is enough to think that the use of different juridical tools can bring to coincident effects and that different effects can be determined by the use of the same juridical institutes in different (*in primis*, economic) contexts.

We need, therefore, to express – even if in the limits of a brief preliminary reflection, before continuing with the presentation of the research – some measured considerations about the real problem that interests today the scholar of comparative law or, *rectius*, the labor law expert who wishes to make comparative studies with moderation and reason: «what are the methodological prerequisites for comparative labor law, on what can be its use in academia and in practice, and whether there are of abuse»¹⁷³.

The methodological use of comparisons requires and presupposes some preliminary clarifications about the approach to prefer.

Here it is worthwhile recalling the refined opinion of a German scholar, who has centered the issue of the methodological prerequisites of comparative law on the dualistic contraposition between a functionalist vision and an institutionalist approach.

¹⁷³ M. WEISS, *The future of comparative labor law as an academic discipline and as a practical tool*, in *Comp. Lab. Law & Pol’y Journal*, 2003-2004, 169, 172.

The starting point and at the same time the point of arrival of this contribution is in the core principle: «it is not sufficient to merely provide an analysis of the differences in the legal structure. The focus is on their intended and real effects»¹⁷⁴.

An analysis that limits itself to considering the points of convergence and divergence of juridical experiences cannot certainly be evaluated exhaustive nor sufficient.

The comparison between institutes and juridical structures has to necessarily be the research tool, the use of which has to be functional to a more mature and deep understanding of the reasons, effects and contexts that characterize and “accompany” the convergences and divergences between systems.

In such perspective, if we want this understanding to be fruitful, the labor law expert cannot remain “closed in him/herself”, in his/her comparative studies.

The openness to dialogue with non-juridical disciplines, such as the “social sciences” and *in primis*, economics, sociology, political science (but also anthropology, management, etc.) is unavoidable.

«The future of comparative labor law and the quality of this methodological approach will very much depend on whether the institutional setting for such interdisciplinary cooperation and dialogue can be improved»¹⁷⁵.

It is 1953 when one of the fathers of Italian labor law, Ubaldo Prosperetti, invites to consider carefully one of the *«vantaggi della comparazione, quello cioè di disvelare allo stesso interprete del diritto*

¹⁷⁴ *Ibidem*.

¹⁷⁵ *Ivi*, 174. The author adds: «Up to now, unfortunately, in many countries a strict segmentation of these different disciplines is maintained».

nazionale motivi e premesse generali degli istituti, che altrimenti sarebbero inosservati»¹⁷⁶.

«La rilevazione comparatistica di alcuni principi e di alcune tendenze comuni nella vasta esperienza del diritto del lavoro non è impossibile e può essere feconda di utili indicazioni»¹⁷⁷.

This reflection seems topical because it refers to and is applicable in a contemporary context of regulations where «*il diritto comparato ha [rectius: mantiene] una funzione di primo piano da assolvere nella scienza del diritto*»¹⁷⁸.

“Comparative studies” – an expression to prefer to the favored one of “comparative law”, in reality misleading¹⁷⁹ – are in fact still today a precious tool to be considered in its teleological-instrumental dimension and dedicated to the reasoned study of a certain subject (or of single institutes of a certain subject).

¹⁷⁶ U. PROSPERETTI, *Attualità della comparazione nel diritto del lavoro*, cit., 482. The author adds: «*la funzione strumentale della comparazione nel diritto del lavoro assume un particolare valore per discriminare i caratteri degli istituti giuridici dagli elementi propri delle aspre lotte politico-sociali e degli interessi contingenti dei movimenti sindacali, dato che in questa materia, più che in ogni altra, tali elementi possono intensamente irretire ed oscurare la vera funzione degli strumenti giuridici*». See T. ASCARELLI, *op. cit.*, 3 et seq.; R. DAVID, *op. cit.*, passim; F. GALGANO, *Sulla “funzione giuridica” del diritto privato comparato*, in *Riv. giur. d’Italia*, 1915, 3-5; H.C. GUTTERIDGE, *op. cit.*, passim.

¹⁷⁷ U. PROSPERETTI, *Attualità della comparazione nel diritto del lavoro*, cit., 492.

¹⁷⁸ R. DAVID – C. JAUFFRET-SPINOSI, *I grandi sistemi giuridici contemporanei*, Padua, 2004, 15. The authors continue affirming that comparative law «*tende, infatti, in primo luogo, ad illuminare il giurista sulla funzione e il significato del diritto, mettendo a profitto a questo scopo l’esperienza di tutte le nazioni. Il suo secondo obiettivo è quello di facilitare, su un piano più pratico, l’organizzazione della società internazionale mostrando le possibilità di accordo e suggerendo formule per la regolamentazione delle relazioni internazionali. Esso permette in terzo luogo ai giuristi di diverse nazioni, per quel che riguarda il loro diritto interno, di concepirne il miglioramento*».

¹⁷⁹ On this aspect, see the interesting reflections of R. DAVID, *op. cit.*, 3: «*l’expression droit comparé est une expression malheureuse, qu’il aurait mieux valu et qu’il vaudrait mieux éviter*».

The consequence is that if labor law is looking for its new identity in a socio-economic context which has deeply changed, *«la relativa uniformità naturale del diritto rivelata dalla comparazione, si incontra e intreccia con la comunicabilità storica, suggerendo una imitazione ricettiva di esperienze fondate sugli stessi presupposti, pur con gli ovvi adattamenti alle situazioni locali»*¹⁸⁰.

Indeed, globalization together with the wide use of new technologies, has certainly determined in contemporary society the strong standardization and uniformation of the labor juridical situations present in the different legal systems¹⁸¹.

Hence, the utility of a solid methodological approach to comparative studies is evident, especially in a disciplinary ambit as is labor law, characterized in Europe by reforms which are in part shared by the various state members.

Indeed, it is in a “critical” research (in the sense of “reasoned” and attentive to the aetiological dimension of things) on the points of convergence and the aspects of greater distance between the various systems that is placed the strategic essence of a comparative study.

¹⁸⁰ U. PROSPERETTI, *Attualità della comparazione nel diritto del lavoro*, cit., 483.

¹⁸¹ *Ivi*, 484. Far-seeing seems the thought of the Italian scholar, already quoted, according to whom: *«La ricerca della misura della costanza di queste uniformità da un lato, e delle differenze, dall'altro, nonché delle ragioni giustificative delle une e delle altre, sembra attribuire una particolare attualità agli studi comparatistici del diritto del lavoro per le accennate peculiarità delle condizioni in cui si manifestano tali fenomeni giuridici»*.

10. Comparisons in the dialogue between economics and labor law... what role can there be for comparative labor law?

The use of a comparative method to build new conceptual foundations for labor law capable of creating (and keeping in time) a mature and fruitful dialogue with economics, is unavoidable.

With reference to comparative studies about the relationship between labor law and economics, Ubaldo Prosperetti had affirmed with foresight: *«specialmente in questa materia, le norme sono strettamente connesse alle situazioni economico-sociali dei vari paesi non solo per l'immediata determinazione pratica, ma anche per i più profondi presupposti storici, che atteggiano diversamente la vita giuridica dei popoli»*¹⁸².

The lesson of the great international scholars of comparative labor law – especially Otto Kahn-Freund, Clyde Summers, Manfred Weiss and the late Bob Hepple – has fed the debate on the contribution of comparative studies to the reform of labor law in Europe, and not only.

More in detail, the conceptual issue on which it seems worthwhile to carry out a targeted research, is the concept and role to attribute to comparative studies in a labor law perspective, undergoing epochal and substantial changes.

The context in which the comparative method is used, is certainly characterized by the inevitable development of an international dimension, where the ongoing regulatory processes are strongly globalized.

¹⁸² *Ivi*, 492. The author highlights already in 1953 the dialectic contraposition *«fra un'economia fiduciosa nell'effetto progressivo del gioco delle proprie forze ed un'economia dubbiosa circa i propri valori e le proprie possibilità»*. See also J.-J. CHEVALLIER, *Cours de droit constitutionnel comparé*, Paris, 1949, *passim*.

The internationalization of contemporary production systems, with significant repercussions also in regulatory terms, finds in fact in globalization the phenomenon which represents its natural logical *pendant* from the “factual” point of view.

This unstoppable reality concerns heterogeneous and distinct dimensions afferent the capital, production and services markets. Indeed, the markets themselves are inter-connected thanks to the use of new technologies that bring important consequences to enterprise organization and therefore, also to work and employment because they permit the elaboration of global strategies and the exchange of information and knowledge at low cost¹⁸³.

All this certainly facilitates the use of comparative studies since the opening of a dialogue between legal systems brings to the development of regulations of greater breadth in the conviction that «it is pretty evident that national labor law can no longer remain disconnected from labor law elsewhere or from international labor law». Labor law itself cannot but be conceived as an important «factor in the competition between different countries»¹⁸⁴.

This context obliges us to reflect carefully on the role to recognize and attribute to comparative studies in their functional

¹⁸³ On this aspect see M. WEISS, *op. cit.*, 170: «Global out- and in-sourcing has become a common phenomenon. “Networking” and “virtualization” have become the catchwords to describe this new organizational pattern on trans-national scale. Even if there is, up to now, no corresponding globalization of industrial relations, the complex phenomenon of globalization evidently has significant impacts on the structure of labor markets and industrial relations. To just mention the most evident and most important ones: The regulatory capacity of national states is rapidly and significantly decreasing. This increases the factual power of the MNEs and of the capital markets. Or, to put it differently, the political actors and the national states are becoming more and more dependent of the transnational economic power. In addition, global competition leads to an increased pressure to reduce costs and to restructure (and quite often downsize) enterprises».

¹⁸⁴ *Ivi*, 171.

dimension of helping the “change” of labor law, now characterized by a new and global spatiality.

11. The construction of new labor law models.

Contemporary labor juridical culture has been called to change from a structural point of view. This effort, imposed by the overall change of the basic paradigms of reference, both economic and social, needs to be “channeled” and organized following specific methodologies and in the perspective of building new structural models¹⁸⁵.

In any case, it does not seem possible to reconsider a vision which describes labor and employment regulation in the following terms: «Employment laws are needed to protect workers from arbitrary or unfair treatment and to ensure efficient contracting between employers and workers. Many economies that changed their labor market regulation in the past 5 years did so in ways that increased labor market flexibility»¹⁸⁶.

¹⁸⁵ On this aspect see A. BAYLOS GRAU, *Modelos de derecho del trabajo y cultura jurídica del trabajo*, in ID. (edited by), *Modelos de derecho del trabajo y cultura de los juristas*, Albacete, 2013, 15: «¿Cómo se construye un modelo? La respuesta debería referirse a la manera en la que se forma la representación abstracta, conceptual, de un sistema jurídico para analizarlo, describirlo como visión global de una época determinada, o como un concepto proposicional o metodológico acerca del proceso de formación de dicho sistema jurídico-laboral. Constituido a través de la combinatoria de los diversos elementos que lo componen, según la consideración predominante de los intereses en juego, se resume en un resultado determinado, teniendo en cuenta que no hay un modelo definitivo y que el proceso de juridificación del trabajo “se rehace sobre equilibrios siempre nuevos en los que la voluntad y la acción de los sujetos sociales resultan decisivos”». The verbatim quote inserted in the citation is taken from A. BAYLOS GRAU, *Derecho del trabajo: modelo para armar*, Madrid, 1991, 148.

¹⁸⁶ WORLD BANK, *Doing Business 2010: Reforming through difficult times*, Washington DC, 2010, 22.

The reforms introduced by single national states can be inserted in the wider context of a European trend¹⁸⁷ that has its common factor in a shared inspiring *ratio* aimed at favoring a gradual introduction of elements of flexibility in the discipline of employment relationships, in the context of a more and more global labor market¹⁸⁸.

This flexibility is considered as a reference not only when employment relationships begin and end, but also and especially in its internal dimension during the performance of the work activity¹⁸⁹.

¹⁸⁷ On this aspect see G. LOY, *Diritto del lavoro e crisi economica. Una prospettiva comparata*, in ID. (edited by), *Diritto del lavoro e crisi economica. Misure contro l'emergenza ed evoluzione legislativa in Italia, Spagna e Francia*, Rome, 2011, 3 et seq.: «i provvedimenti adottati durante, e talvolta con esplicito riferimento alla crisi, paiono inserirsi nell'ambito della più generale tendenza ad una complessiva evoluzione del modello sotto la spinta di visioni largamente ispirate alla analisi economica del diritto e fatte proprie dall'Unione Europea. In questo contesto può dirsi che la crisi ha costituito l'occasione per accelerare quel processo di trasformazione del Diritto del lavoro suggerito dal Libro Verde sulla modernizzazione del Diritto del lavoro che interessa, allo stesso tempo, l'orientamento della dottrina, la produzione normativa e l'autonomia collettiva». See M. RODRÍGUEZ-PIÑERO y BRAVO-FERRER, *Flexiseguridad: el debate europeo en curso*, in R. ESCUDERO (edited by), *Aportaciones al debate comunitario sobre flexiseguridad*, Madrid, 2007, 3 et seq.; J. GARCÍA MURCIA, *El Libro Verde europeo sobre flexiseguridad*, in *Rev. inter. trab.*, 2007, 1-2, 121 et seq.; F. VALDÉS DAL-RÉ, *Flexiseguridad y mercado de trabajo*, in *RL*, 2010, 9, 1 et seq.

¹⁸⁸ U. PROSPERETTI, *La funzione del Diritto del lavoro nella politica economica*, in ID., *Problemi di Diritto del lavoro*, Milan, 1970, 1, 137: «la definizione strumentale del diritto del lavoro non comporta affatto per la nostra materia, come del resto per il diritto in generale, la considerazione dello strumento giuridico come forma esteriore o come mezzo inerte al servizio di sostanziali attività economiche, bensì introduce la dimensione giuridica nella politica economica, che, di conseguenza, ne risulta qualificata e condizionata, in quanto il diritto è sistema svolgentesi secondo una propria indeclinabile coerenza razionale di ordine dotato di forza formativa della vita sociale».

¹⁸⁹ J. CRUZ VILLALÓN, *Prólogo*, in ID. (edited by), *Estatuto de los trabajadores*, Madrid, 2014, 22: «En tiempos más recientes las reformas se han centrado en las preocupaciones por proporcionar a las empresas instrumentos de flexibilidad laboral, particularmente acentuando los elementos dirigidos a fomentar la flexibilidad interna de condiciones de trabajo, sin perjuicio de incidir también en la flexibilidad externa por la vía de aligerar causas, procedimientos y costes de los despidos por causas económicas y empresariales en general». See also M.N. BETTINI, *Mansioni del lavoratore e flessibilizzazione delle tutele*, Turin, 2014, 188-189: «Non v'è dubbio che,

Chapter 3 –

Flexibility and security in European labor law: adaptability, modernization and right balance.

«una cosa è ammettere l'esigenza di un adattamento dinamico del Diritto del lavoro, ma altra cosa, ben differente, è ritenere che l'obbligato orizzonte delle politiche del lavoro sia la “modernizzazione del diritto del lavoro”».

Fernando Valdés Dal-Ré¹⁹⁰

TABLE OF CONTENTS: 1. The roots of the concept of flexibility in labor law: the mitigation of opposite interests. – 2. One word, many meanings. – 3. Subordination as paradigm of rigidity? – 4. From the multiplication of contract typologies to the flexibility of the subordinate work relationship. – 5. A first conceptual approximation of the concept of labor market flexibility. – 6. “Internal” and “external” ambits of flexibility. – 7. The paradigmatic nature of flexibility. – 8. Internal flexibility in the perspective of the safeguard of occupational levels. – 9. The conceptual framework of internal flexibility. – 10. What contents for *flexicurity*? – 10.1. Ten years after the Green Paper of the European Commission (2006): the modernization of labor law. – 10.2. (*follows*) The Green Paper of the European Commission (2006): flexibility and security. – 11. The morphology of the labor market and how it has changed. Concluding remarks.

negli ultimi anni, si è assistito, attraverso le diverse vie consentite dal sistema (giurisprudenza, ccnl, circolari, interPELLI, ecc.), allo smantellamento progressivo delle rigidità e delle tutele disposte a livello normativo in materia di mansioni del lavoratore. In realtà, nel campo delle qualifiche, inquadramento e mansioni, il processo di erosione delle certezze e, soprattutto delle staticità, è in atto “da sempre”».

¹⁹⁰ F. VALDÉS DAL-RÉ, *Il dibattito sulla flessicurezza all'interno dell'Unione Europea*, in G. LOY, *op. cit.*, 41.

1. The roots of the concept of flexibility in labor law: the mitigation of opposite interests.

With the reflections made so far, we have tried – as already anticipated in the introduction to the present work – to contribute to the tracing of the boundaries of the conceptual framework of reference in order to be able to make the considerations which will be developed here.

Indeed, we now need to move from the general-theoretical dimension explored so far to a more specific and practical one, proper of positive labor law, which will allow us to explore the economic implications of the subject.

The issue concerns the controversial relationship between flexibility and security that crosses and pervades contemporary labor law. Labor law which is deeply marked by the constant need of the entrepreneur to satisfy global level requisites of competitiveness.

The widespread introduction of new technologies in the various phases of the production process, together with the exponential growth of the phenomena of production de-localization and decentralization, significantly condition in fact the occupational levels of enterprises.

As a consequence, we can notice the flourishing of a multiplicity of work relationships characterized by a high level of flexibility, in order to guarantee a greater adaptability of the work relationship to the changing organizational needs imposed by the market in the perspective of an effective efficiency of the enterprise¹⁹¹.

¹⁹¹ G. SANTORO-PASSARELLI, *Diritto del lavoro (flessibilità)*, in *Enc. giur. Treccani*, 1997, 11, 1 has highlighted on this aspect that «*l'automazione e l'accentrimento del processo produttivo hanno messo in crisi uno dei cardini del nostro sistema di lavoro e cioè la instaurazione del rapporto di lavoro per l'intero arco della vita lavorativa*». The author continues: «*Ma si può affermare che questa circostanza ha messo in crisi la forma giuridica del "monolite del rapporto di lavoro" e la conseguente necessità di sostituire la rigidità della sua normativa vincolistica con la flessibilità della disciplina del rapporto di lavoro e del mercato del lavoro? Quest'ultima, ovviamente non deve*

2. One word, many meanings.

The notion of flexibility conceptually expresses a multiplicity of heterogeneous contents.

The lowest common denominator of the different meanings provided by authoritative scholars is in any case represented by the dualistic contraposition between this concept and that of “security”.

As stressed by an authoritative scholar: «*se reciproco della flessibilità è la rigidità, a sua volta posta a tutela di certi interessi o valori, e caratterizzante certi tipi di disciplina, o modelli di rapporti, la flessibilizzazione evoca non tanto la riduzione quanto un diverso assetto ed equilibrio dei vari interessi e profili di tutela, per evitare che la rigidità di alcuni si traduca in fattore di fragilità e inaccessibilità*»¹⁹².

Accepting this concept at the basis of the very idea of flexibility in labor law, we need to point out how according to a common meaning, this concept is conceived in the perspective of a full valorization of the modulation (*rectius*, of the articulation) of the system of labor protection, following certain modalities and specific aspects of the work activity.

In other words, we can say that this widespread interpretation is based on the unhooking of certain work relationships from the system of protection and from the statute of subordinate work regulated by art. 2094 of the civil code (in the Italian legal system, of course).

essere intesa come precarizzazione del rapporto di lavoro o come smobilitazione delle garanzie previste dall'ordinamento a favore del soggetto debole».

See ID., *Misure contro la disoccupazione e tutela del lavoratore*, in *Dir. lav.*, 1995, 1, 342 *et seq.*; ID., *Flessibilità e rapporto di lavoro*, in *Arg. dir. lav.*, 1997, 1, 75 *et seq.* See also: U. CARABELLI, *Flessibilità o destrutturazione del mercato del lavoro? Il lavoro interinale in Italia e in Europa*, in AA. VV., *Studi in onore di Gino Giugni*, Bari, 1999, 186 *et seq.*; E. GHERA, *La flessibilità: variazioni sul tema*, in *Riv. giur. lav.*, 1996, 1, 126 *et seq.*

¹⁹² M. DELL'OLIO, *La privatizzazione del pubblico impiego*, in *Enc. giur. Treccani*, 1995, 24, 1 *et seq.*

Thus, the idea is to differentiate the typical case of subordinate employment into a heterogeneity of “legal situations”, characterized by a diversified range of regulations¹⁹³.

It is useful to anticipate already from now the crucial role held by collective bargaining thanks to its intrinsic “elasticity”, which allows legislation (generally considered “rigid”) to adapt to the concrete cases object of regulation.

In any case, we cannot but recognize that the core of the labor law concept of flexibility is made up of the mitigation of interests, and of values, distant from one another and in contrast¹⁹⁴.

In this trade-off perspective, flexibility has known a declination not only in the ambit of the work relationship, but also in that of the labor market, which has been touched by significant interventions (for example, active employment policies).

¹⁹³ We can say that “subordinate work”, around which is built the entire labor law regulatory framework, has known an articulation over time which has brought to a significant flexibility with the development of an heterogeneous variety of “flexible” forms of employment, characterized by a particular “articulation of protection measures”: we can think about the fixed-term subordinate contract or the part-time one.

¹⁹⁴ See on this aspect G. SANTORO-PASSARELLI, *Diritto del lavoro (flessibilità)*, cit., 2: «È bene comunque avere presente che i diversi significati del termine flessibilità della disciplina legale e collettiva del rapporto di lavoro tendono a rendere compatibili le ragioni di efficienza e produttività delle imprese con l'esigenza di tutela e di protezione dei prestatori di lavoro. In altre parole a contemperare le esigenze del mercato con la solidarietà verso i soggetti deboli».

3. Subordination as paradigm of rigidity?

When focusing on the Italian system of regulations, we can say that the deep sense of subordinate relationships, as results from the articles 2094 and following of the civil code, is in the attempt to create the right balance between labor interests on one hand, and the enterprise's interests on the other hand, *via* the concrete structuring of a system of limitations to the civil law principle of contractual freedom.

Historically, labor law has always been an intrinsically restrictionist discipline, restrictive of the employers' power, which has gradually lived an expansion of its areas of application¹⁹⁵.

This restrictionist nature of subordinate employment regulations has been exasperated because of – at least in part – the significant expansion of the areas of application.

In other words, subordination has become a paradigmatically “rigid” discipline, from which the production system has gradually distanced itself, favoring this way the surfacing of a social phenomenon, which has become the natural reaction to such rigidity.

It is the phenomenon better known in Italy with the word *parasubordinazione* (para-subordination) and in Spain as *trabajo*

¹⁹⁵ *Ivi*, 3: «la qualificazione della fattispecie come subordinazione tecnica funzionale ha favorito e continuerà a favorire la c.d. tendenza espansiva della stessa fattispecie». The author sustains that the expansion of the area occupied by subordinate employment is due not to a subsumptive approach, but to a typological one, which the interpreters of labor law (and, first of all, the judges) refer to in the legal qualification of concrete cases. The use of this qualificative-hermeneutic method determines the extension of subordinate cases, including not only the cases effectively subsumable to this abstract category, but also those «soltanto riconducibili in via di approssimazione al tipo normativo». See P. ICHINO, *Il lavoro e il mercato*, Milan, 1996, *passim*; ID., *Il lavoro subordinato: definizione e inquadramento*, in P. SCHLESINGER (directed by), *Commentario al Codice civile*, Milan, 1992, *passim*; L. MENGONI, *La questione della subordinazione in due trattazioni recenti*, in *Riv. it. dir. lav.*, 1986, 1, 3 *et seq.*; R. PESSI, *Contributo allo studio della fattispecie lavoro subordinato*, Milan, 1989, *passim*.

*autónomo económicamente dependiente*¹⁹⁶: «l'emersione nella realtà sociale di questa fattispecie è stata la prima spia dell'esigenza improcrastinabile nel nostro sistema economico di flessibilizzare la disciplina del rapporto di lavoro per renderlo più funzionale agli obiettivi dell'impresa»¹⁹⁷.

Regulation rigidity has then been accompanied by a gradual increase of labor costs, principally determined by the economic and financial crisis, which has constantly favored the search of suitable regulatory solutions to satisfy as much as possible the enterprises' need of competitiveness on a global scale.

Hence, as a functional tool in the determination of a different balance between the interests involved, the deepest sense of the conceptual dimension of flexibility in (and especially, of) labor law concerns the reduction of the rigidity of the subordinate employment protection statute.

In other words, reasoning on the topic rigidity/flexibility in labor law, we have to consider that the terms of the matter move around the substantial readjustment of the balance of the protection system¹⁹⁸.

It is in this conceptual framework that the road to reform has started with the objective of achieving greater flexibility in the employment regulation system¹⁹⁹.

¹⁹⁶ On the widespread use of this expression, see COMMISSIONE DELLE COMUNITÀ EUROPEE, *Libro Verde "Modernizzare il diritto del lavoro per rispondere alle sfide del XXI Secolo"*, Bruxelles, COM(2006), 708.

¹⁹⁷ G. SANTORO-PASSARELLI, *Diritto del lavoro (flessibilità)*, cit., 3.

¹⁹⁸ *Ivi*, 4: «non si può non prendere atto che la disciplina legale e collettiva del rapporto di lavoro privato diventa flessibile se e nella misura in cui il baricentro della tutela si sposta progressivamente dall'interesse del lavoratore alla sostanziale continuità e stabilità del rapporto di lavoro all'interesse che, nel nostro sistema economico, resta ancora prevalentemente dell'imprenditore, alla temporaneità dei vincoli contrattuali».

¹⁹⁹ We can think of the different types of contract that have been object of legislation over the last decades.

In this trend labor law has always kept the profile of a regulatory *corpus* with the task of regulating an intrinsically united phenomenon: subordinate employment.

Of extraordinary far-sightedness and exceptional topicality is the thought of Ubaldo Prosperetti, who in 1964 reflected on the «*carattere unitario del rapporto di lavoro subordinato*»²⁰⁰.

Hence, the concept of flexibility itself, “authentically” considered, should relate to a diversification of the protection measures (because of the existence or the absence of certain work performance requisites) in the ambit of the same legal contract typology and not of a multiplicity of legal contract ones.

On the contrary, the Italian legal system has gradually seen a significant proliferation of “flexible” contract typologies, which has brought to the abandonment of the traditional bipartition subordinate employment – self-employment²⁰¹, with the flourishing of a new area (in part still obscure): “para-subordinate” employment²⁰².

²⁰⁰ U. PROSPERETTI, *Il lavoro subordinato*, in G. GROSSO – F. SANTORO-PASSARELLI (directed by), *Trattato di Diritto civile*, Milan, 1964, 3: «*Il lavoro nell'impresa è l'attività produttiva svolta dal lavoratore in modo subordinato ad un fine perseguito dall'imprenditore attraverso un complesso organizzato di rapporti personali e di beni, cioè attraverso una azienda (art. 2555 cod. civ.). Tale forma di lavoro è di gran lunga la più importante nella produzione contemporanea e per questo la legge regola il rapporto di lavoro come lavoro nell'impresa muovendo dalla figura dell'imprenditore (art. 2082) e da quella dei collaboratori dell'imprenditore (artt. 2094 e 2095), mentre per i rapporti di lavoro subordinato non inerenti all'esercizio di una impresa rinvia alle stesse norme dettate per il lavoro nell'impresa in quanto compatibili con la specialità del rapporto*»; e questo, come vedremo, non comporta differenze molto notevoli, così che si può parlare di un rapporto di lavoro con carattere unitario». Among the classics, see, *ex plurimis*: L. BARASSI, *Il diritto del lavoro*, Milan, 1957, *passim*; ID., *Il contratto di lavoro nel diritto positivo italiano*, Milan, 1915-1917, *passim*; F. SANTORO-PASSARELLI, *Nozioni di diritto del lavoro*, Naples, 1963.

²⁰¹ With reference to this, the big issue which has engaged Italian scholars is well defined in G. SANTORO-PASSARELLI, *Diritto del lavoro (flessibilità)*, cit., 4: «*si può affermare che la suddetta molteplicità di tutele sia l'indice dell'inadeguatezza del tipo lavoro subordinato a regolare come fonte unica ed esclusiva la prestazione di lavoro? E conseguentemente, come da più parti si afferma, è entrata veramente in crisi la forma*

It is a phenomenal-regulatory reality that the Italian legal system has in common with the Spanish one, where a form of *trabajo autónomo económicamente dependiente* has emerged with significant and far from marginal specificities²⁰³.

The “para-subordinate” work category is a sort of *tertium genus* which – with reference to the Italian labor law system – has undoubtedly provoked a certain erosion in the area subordinate employment *ex art. 2094 c.c.*²⁰⁴.

giuridica del monolite del rapporto di lavoro o, invece, è il progressivo incremento del tasso di rigidità della disciplina del lavoro subordinato a non renderla più idonea a regolare le molteplici forme di lavoro originate anche dalle nuove forme di organizzazione del lavoro?».

²⁰² This employment contract typology placed between subordinate employment and self-employment is anchored to article 409 of the civil procedure code: «*Si osservano le disposizioni del presente capo nelle controversie relative a:*

1) rapporti di lavoro subordinato privato, anche se non inerenti all'esercizio di una impresa;

2) rapporti di mezzadria, di colonia parziaria, di compartecipazione agraria, di affitto a coltivatore diretto, nonché rapporti derivanti da altri contratti agrari, salva la competenza delle sezioni specializzate agrarie;

3) rapporti di agenzia, di rappresentanza commerciale ed altri rapporti di collaborazione che si concretino in una prestazione di opera continuativa e coordinata, prevalentemente personale, anche se non a carattere subordinato;

4) rapporti di lavoro dei dipendenti di enti pubblici che svolgono esclusivamente o prevalentemente attività economica;

5) rapporti di lavoro dei dipendenti di enti pubblici ed altri rapporti di lavoro pubblico, sempreché non siano devoluti dalla legge ad altro giudice».

²⁰³ On this aspect see J. CRUZ VILLALÓN, *El trabajo autónomo económicamente dependiente en España: breve valoración de su impacto tras algunos años de aplicación*, in *DL*, 2013, 2, 19-36; ID., *Propuestas para una regulación del trabajo autónomo*, in *DL*, 2005, 73, 9-54.

²⁰⁴ R. DE LUCA TAMAJO, *Per una revisione delle categorie qualificatorie del diritto del lavoro: l'emersione del “lavoro coordinato”*, in *Arg. dir. lav.*, 1997, 1, 41 *et seq.* The author stresses how in concrete “coordinated” employment is based on a work relationship which is “parametered” according to the length of the employer’s needs. What is valorized is therefore time-limit dimension of the contractual tie. The employer’s interest for a temporary work performance prevails over the employee’s

Indeed, it seems impossible to deny that the unity of the subordinate employment type of contract, mentioned above, has significantly suffered from the birth and the success of the new type of labor contract.

On the other hand, the reason of the spreading of para-subordinate work lies in the possibility not to apply the restrictions traditionally placed as garrison of subordinate work and which are widely considered as excessively and anachronistically “rigid”.

The introduction of “particular” disciplines to favor flexible types of contract is conceived in the perspective of helping the employer to satisfy his/her needs of economic efficiency and in the perspective of increasing the labor market’s dynamism, and therefore, its employment rate.

In any case it is impossible to deny the central role in the labor law framework of the subordinate open-ended contract.

This is confirmed also by the statements made by the Italian legislator in some of the most recent reforms on the subject²⁰⁵.

interest to obtain occupational stability by keeping his/her work position. See also G. SANTORO-PASSARELLI, *Diritto del lavoro (flessibilità)*, cit., 7: «l’interesse del dipendente alla continuità del rapporto appare ormai in contrasto con le esigenze di mobilità del sistema produttivo, se è vero che sono destinati a scomparire i rapporti di lavoro che durano per l’arco dell’intera vita lavorativa».

See also: L. MONTUSCHI, *Un “nuovo” lavoro da regolare*, in *Arg. dir. lav.*, 1998, 3, 683 et seq.; A. PERULLI, *Il lavoro autonomo. Contratto d’opera e professioni intellettuali*, in A. CICU – F. MESSINEO (directed by) – L. MENGONI (continued by), *Trattato di diritto civile e commerciale*, Milan, 1996, 27, *passim*.

²⁰⁵ We can think, *in primis*, of the art. 1, comma 1, l. 28 giugno 2012, n. 92, containing “Disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita”: «La presente legge dispone misure e interventi intesi a realizzare un mercato del lavoro inclusivo e dinamico, in grado di contribuire alla creazione di occupazione, in quantità e qualità, alla crescita sociale ed economica e alla riduzione permanente del tasso di disoccupazione, in particolare: a) favorendo l’instaurazione di rapporti di lavoro più stabili e ribadendo il rilievo prioritario del lavoro subordinato a tempo indeterminato, cosiddetto “contratto dominante”, quale forma comune di rapporto di lavoro; [...]». In this statement, which opens the reform legislative measure, is

Even with these legislative provisions, we have to be aware of the difficulty generally felt in considering subordinate contract typologies adequate to perform efficaciously – and exhaustively – their «*funzione ordinante e regolativa*»²⁰⁶.

From an aetiological point of view, the critical aspect lies – as already said – in the structural rigidity of a regulatory framework, which from an original restrictive-protective function has gradually taken on one excessively rigid.

As a consequence, the introduction of new “flexible” employment contract typologies is the effect of a bill that wishes to overcome (if not bypass) the rigidity of subordinate employment regulations²⁰⁷.

valorized the “predominant” and “common” nature of the subordinate open-ended contract, in comparison with the other contract types which are characterized by a greater flexibility.

See also art. 2, d.lgs. 15 giugno 2015, n. 81 (containing the “*Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell’articolo 1, comma 7, della legge 10 dicembre 2014, n. 183*”), indexed “*Collaborazioni organizzate dal committente*”, first paragraph: «*A far data dal 1° gennaio 2016, si applica la disciplina del rapporto di lavoro subordinato anche ai rapporti di collaborazione che si concretano in prestazioni di lavoro esclusivamente personali, continuative e le cui modalità di esecuzione sono organizzate dal committente anche con riferimento ai tempi e al luogo di lavoro*». See F. GIAMMARIA, *Le “nuove” collaborazioni coordinate e continuative*, in *Mass. giur. lav.*, 2015, 6, 379 *et seq.*; E. MASSI, *Collaborazioni coordinate e continuative: cosa cambia*, in *Dir. prat. lav.*, 2015, 31, 1866.

²⁰⁶ G. SANTORO-PASSARELLI, *Diritto del lavoro (flessibilità)*, cit., 6: «*La difficoltà del tipo lavoro subordinato a svolgere la sua funzione ordinante e regolativa dipende, adesso, dal progressivo irrigidimento della sua normativa vincolistica, che, pure, inizialmente aveva contribuito a dilatare la fattispecie, e non dalla varietà dei rapporti che sono ricondotti sotto il manto della subordinazione*».

²⁰⁷ *Ivi*, 7: «*risulta evidente che il tipo lavoro coordinato è stato concepito per realizzare obbiettivi in parte diversi da quelli ai quali era rivolto il lavoro parasubordinato. Infatti quest’ultimo a differenza del primo non serve a non applicare la disciplina della subordinazione ad alcuni rapporti di lavoro fino ad oggi considerati subordinati, ma serve ad estendere una parte della disciplina del lavoro subordinato ad alcuni prestatori deboli ma non subordinati in senso tecnico, mentre entrambi i tipi di rapporto, sia pure da versanti diversi, hanno in comune l’obbiettivo di ridimensionare*

4. From the multiplication of contract typologies to the flexibility of the subordinate work relationship.

However, a critical reflection on the topic of flexibility cannot take place without a preliminary awareness of the need to reorganize the object itself of flexibility.

In other words, we need to change perspective, passing from a flexibility which is expressed by the introduction of new legal types of contract to a flexibility which articulates the forms of protection within the same typology of subordinate employment²⁰⁸.

The privileged ambit for the application of flexibility to the subordinate employment relationship is traditionally the end of the relationship itself and, in particular, the *corpus* of protection measures offered by the system in the cases of illegitimate dismissal.

However, it is more useful here to consider with greater interest the “internal” dimension of the subordinate employment relationship, reflecting on how the introduction of elements of flexibility can bring to fruitful results in terms of balancing of interests in the dialogue between economics and labor law.

The mitigation of the sphere of values in order to guarantee a greater economic efficiency on one hand, and the axiological dimension that moves around the protection of the employee and of his/her work on the other hand, finds in the internal flexibility of the employment relationship their natural area of application.

il monolite del lavoro subordinato, flessibilizzando la disciplina del relativo rapporto, in termini di articolazione per tipi e non per tutele».

²⁰⁸ *Ibidem*: «Sorge allora spontaneo l’interrogativo se non sia più ragionevole per contemperare le esigenze della salvaguardia dell’occupazione con le esigenze del nostro sistema produttivo, continuare ad affidare al legislatore il compito di diversificare le tutele conservando l’unità del tipo, anziché procedere all’individuazione di nuovi tipi».

And indeed – also in the light of the most recent labor law reforms, especially concerning the employee’s tasks – we can affirm that the attention of national legislators seems significantly focused on *«l’esigenza, sul fronte datoriale, di individuare nuovi margini operativi al fine di accrescere l’efficienza produttiva delle aziende mediante un innalzamento della polivalenza professionale dei dipendenti e della loro capacità di adattamento»*²⁰⁹.

Flexibility, considered with reference in particular to the “internal” dimension of the work relationship, is undoubtedly the center of renewed attention²¹⁰.

The enterprise’s needs of economic efficiency on one hand and the employee’s need of occupational protection on the other hand are the factors which determine this central role of the “internal” flexibility of the work relationship, in a contemporary context of economic and productive crisis (for example, let’s think of the regulation of tasks and their changeableness, also and especially *in peius*)²¹¹.

²⁰⁹ M. BROLLO – M. VENDRAMIN, *Le mansioni del lavoratore: inquadramento e ius variandi. Mansioni, qualifiche, ius variandi*, in M. MARTONE (edited by), *Contratto di lavoro e organizzazione*, in M. PERSIANI – F. CARINCI (directed by), *Trattato di diritto del lavoro*, Padua, 2012, 4, 1, 518. The entire *«materia della disciplina delle mansioni e del suo mutamento si trova su uno dei siti più “tellurici” del diritto del lavoro, in bilico tra 1° e 2° comma dell’art. 41 Cost. (e cioè tra la libertà dell’imprenditore di decidere le modalità dell’iniziativa economica) ed i limiti agli atti datoriali di gestione del rapporto di lavoro dettati a tutela dei valori di libertà e dignità della persona del lavoratore e della sua professionalità»*, the constitutional background of which is to be found in the articles 1, 2, 4, 32 and 35 of the Italian Constitution.

²¹⁰ J. CRUZ VILLALÓN, *Compendio de derecho del trabajo*, Madrid, 2014, 331.

²¹¹ T. TREU, *Il quadro normativo ed istituzionale a sostegno della creazione di occupazione e di nuove imprese*, in *Riv. it. dir. lav.*, 1987, 1, 333 *et seq.*

5. A first conceptual approximation of the concept of labor market flexibility.

Wishing to develop the concept of flexibility in the labor market, precious is the conceptual contribution provided by the Spanish *Tribunal Constitucional*, in its sentence on collective bargaining of the 22nd of January 2015, n. 8.

The Spanish Court has clarified, in fact, the concept of “internal flexibility”, considered in the context of a serious and general economic crisis, «*como alternativa a la destrucción del empleo o al cese de una actividad productiva, atendiendo, de este modo, a un fin constitucionalmente legítimo, cual es, tanto el de garantizar el derecho al trabajo de los ciudadanos (art. 35.1 CE) mediante la adopción de una política orientada a la consecución del pleno empleo (art. 40.1 CE), como la defensa de la productividad de acuerdo con las exigencias de la economía general (art. 38 CE)*»²¹².

²¹² STC 22 January 2015, n. 8. As mentioned already, the sentence is an important result in collective bargaining. More in detail, it is necessary to specify how with this sentence the Spanish Constitutional Court intervened on some aspects of the law n. 3/2012, containing some urgent measures to reform the labor market, concerning in particular the change of work conditions, collective dismissals and pension scheme policies. See the following contributions of authoritative Spanish scholars: J. CASTIÑEIRA FERNÁNDEZ, *Eficacia y vigencia del convenio colectivo*, in AA. VV., *Perspectivas de evolución de la negociación colectiva en el marco comparado europeo*, Madrid, 2015, 304 *et seq.*; J.J. FERNÁNDEZ DOMÍNGUEZ, *Legitimación y protagonistas de la negociación colectiva*, in AA. VV., *Perspectivas de evolución de la negociación colectiva en el marco comparado europeo*, Madrid, 2015, 15 *et seq.*; E. GARRIDO PÉREZ, *Estructura y concurrencia en la negociación colectiva*, in AA. VV., *Perspectivas de evolución de la negociación colectiva en el marco comparado europeo*, Madrid, 2015, 215 *et seq.*; A. VICENTE PALACIO, *Evolución y tendencias en el contenido de la negociación colectiva: mínimo y posible, normativo y obligacional*, in AA. VV., *Perspectivas de evolución de la negociación colectiva en el marco comparado europeo*, Madrid, 2015, 135 *et seq.*

The passage taken from the sentence can be considered a precious opportunity to reason on the centrality of flexibility in the labor market and in work relationships.

Since the 1970s the concept of flexibility has been generally looked at with special attention, considering it the solution to the structural unemployment problems, particularly frequent in the Western world labor markets (and especially in European ones).

From a conceptual and definitional point of view, it is useful to stress that in the labor market, flexibility can be considered as the «*capacidad de poder realizar, con escasas o casi nulas restricciones normativas, cambios en la cantidad, estructura, funciones y/o coste del factor trabajo utilizado en el proceso productivo*»²¹³.

This definition, elaborated in economics, moves around the concept of work adaptation, considered as a factor of production with reference to the changing needs – cyclical or structural – which characterize the economic development of an enterprise.

To this regard we have to stress the elimination or at least the reduction of the regulatory “restrictions” to increase work flexibility. In other words, an aspect of particular relevance when we talk about the flexibility of a labor market is deregulation.

Between deregulation and flexibility there is, indeed, a substantial conceptual coincidence, or *rectius*, an instrumental relationship of the deregulation, with reference to the process of flexibility.

As widely said in the previous chapters, from the economic point of view, the efficacious and efficient functioning of the labor market, and more in general, of the economic system, cannot exclude the elimination

²¹³ J.I. PALACIO MORENA – C. ÁLVAREZ ALEDO, *El mercado de trabajo: análisis y políticas*, Madrid, 2004, 219.

(or, in any case, the reduction and containment) of the regulations which alter their natural internal balance.

It is exactly when we move the labor market close to the other forms of market, that economics identifies the point of arrival of the labor market's flexibility in the perspective of a greater efficiency.

This path, oriented towards the economic values of efficiency, necessarily passes through the significant reduction of the elements of "rigidity" of the regulation system, called to protect employment²¹⁴.

In the light of what we have just said, it is evident how this conceptual model, with its positive evaluation of flexibility, is the economic philosophy at the basis of the different labor market reforms which have been introduced in many European national systems over the last decades.

What the different European national regulations have in common is, in fact, the desire to deregulate and to "overcome" restrictions and various legal institutes²¹⁵.

In any case, it is useful to study in depth the concept of flexibility, with specific reference to employment, in order to understand its real

²¹⁴ Ivi, 219-220: «Se argumenta que la eliminación de los obstáculos, fundamentalmente de tipo institucional, que impiden adoptar rápidas decisiones de ajuste del empleo y los salarios en función de las necesidades de la demanda de trabajo en cada momento, puede facilitar recuperaciones más rápidas del máximo nivel de ocupación posible y evitar ajustes posteriores más drásticos».

²¹⁵ S. BENTOLILA – G. SAINT-PAUL, *The macroeconomic impact of flexible labor contracts, with an application to Spain*, in *Eur. econ. rev.*, 1992, 36, 5, 1013 et seq.; R. BOYER (edited by), *La flexibilidad del trabajo en Europa*, Madrid, 1986, *passim*; G. BROWN, *The Conditions for High and Stable Growth and Employment*, in *The Econ. j.*, 2001, 111, 431, 30 et seq.; J.J. DOLADO – F. FELGUEROSO – J. F. JIMENO, *Mercado de trabajo y políticas de empleo en inicio del siglo XXI*, in *Moneda y Crédito*, 2001, 212, 211 et seq.; R. JACKMAN – R. LAYARD – S. NICKELL, *Combating Unemployment: is Flexibility enough?*, in *Centre for Economic Performance (London School of Economics) Discussion Papers*, 1996, 293. See also OECD, *Flexibilidad y Mercado de trabajo. El debate actual (informe técnico)*, Madrid, 1986, 23, *passim*.

breadth and the intrinsic heterogeneity of meanings which form its identity²¹⁶.

In any case, it is necessary to specify the need to adopt a cautious approach in the research about the taxonomy which has been developed and stabilized.

In fact, there can be no doubt about the intrinsic “danger” of considerations which tend to become risky conceptual generalizations. The multiplicity of aspects the concept of flexibility can have – and the effects it can determine – requires to dedicate special attention to the context. In other words, it is necessary to pay attention to the type of work, in order to be able to advantageously discuss the various aspects of the concept.

6. “Internal” and “external” ambits of flexibility.

The first macroscopic distinction generally accepted in both the legal and the economic worlds is the contraposition between “internal” and “external” flexibility, where interiority and exteriority are measured with reference to the work relationship²¹⁷.

²¹⁶ With regard to this, an authoritative Italian scholar talks about a real «*polisemanticità del termine che ha, però, come suo peculiare retrogusto, un certo sentore di ambiguità*»: v. B. CARUSO, *La flessibilità e il diritto del lavoro italiano: storia di un incontro tra politica, ideologia e prassi*, in AA.VV., *Studi in onore di Giorgio Ghezzi*, Padua, 2005, 1, 501 *et seq.*

²¹⁷ There is an heterogeneity of opinions in economics about the semantic multivalence of the essence itself of the concept of work flexibility. The economic debate about flexibility is in fact characterized by the distinction between various theoretical orientations, which share significant points of contact. J.I. PALACIO MORENA – C. ÁLVAREZ ALEDO, *op. cit.*, 224, following a first approach, stresses that the essence of work flexibility should be found in the capability of the enterprise to adapt the changes of the products and the production processes (c.d. *fábrica flexible*). A second approach valorizes instead the disposition, attitude and availability of the worker to perform

By external flexibility we generally intend not the performance of the work relationship, but the definition and the modification of the number of workers (or collaborators) involved in the production processes.

Hence, external flexibility aims at eliminating (or at least reducing) the regulation restrictions, which make the direct adaptation of labor to the frequent and rapid changes of the demand of goods and services rather uncomfortable.

This aim is pursued with different tools.

First of all, important is the use of types of contract characterized by the temporary nature of their length (see, in the Italian legal system, the fixed-term contract, and in the Spanish one, the *contrato de trabajo a duración determinada*).

Then there is the abolition of the regulation restrictions which protect work and employment, in general identifiable in those which regulate employment dismissal, and in particular, the pathological moment of illegitimate dismissal. Attention clearly goes to the complex subject of “real” protection and of compensation protection in the case of illegitimate dismissal, which has recently gone through a historical change in Italy with the reform better known with the Anglo-saxon expression of *Job’s act*²¹⁸.

different tasks (c.d. *polivalencia de la mano de obra*), or to be subject to wage variations, both cyclical and structural (c.d. *flexibilidad de los salarios*). Further approaches to the phenomenon stress the centrality of the reduction of work restrictions (c.d. *adaptabilidad de plantillas*), that is the importance of reducing the social and fiscal costs borne by the enterprise.

²¹⁸ L. 10 December 2014, n. 183 and following legislative decree 4 March 2015, n. 23, containing “*Disposizioni in materia di contratto di lavoro a tempo indeterminato a tutele crescenti, in attuazione della legge 10 dicembre 2014, n. 183*”. With the so-called *Job’s act*, the Italian legislator introduced the open-ended subordinate contract with “increasing protection” (“*a tutele crescenti*”), that modified the regulation at art. 18, l. 20 May 1970, n. 300, (the so-called “Statute of Laborers”), establishing compensation (“weak”) as a normal sanction in the case of illegitimate dismissal, and placing “real”

Finally, in this taxonomic category we have to insert the forms of labor and/or production externalization (for example, the *somministrazione di manodopera* in Italy and the *suministro de mano de obra* in Spain).

On the contrary, with the expression “internal flexibility” we refer to the internal dimension of the work relationship in the perspective of creating a system of work organization more adaptable to the changing needs of the enterprise.

The areas where this flexibility is generally applied are the work conditions (*las condiciones de trabajo*), the remuneration and the working hours.

For what concerns the first area – on which we will focus more in this research – generally indicated with the expression “functional or internal flexibility”, we refer to the change of the tasks and the activities performed in concrete by the worker.

This aspect is significantly “conditioned” by the need of an internal reorganization of both production and labor, often determined by technological innovations, which have a more and more central role today.

The competition strategies conditioning production choices are another aspect of non-secondary importance in weighing the need of internal flexibility in work relationships.

Similar needs are typical of the so-called “working hours” flexibility, that is the possibility for the employer to change the working hours of the employee according to production needs.

protection (“strong”) in the realm of exceptionality. With reference to the aspects of the reform about disciplinary dismissals, see S. BINI, *Les licenciements disciplinaires après le Job’s act. Le droit du travail italien à l’épreuve d’une nouvelle modernisation*, cit., 420-425.

Flexibility can be considered also in terms of remuneration, with wage adjustments according to the needs and conditions of the economic system. This wage “adjustment” – of the single, as of a group of workers – can be based on the results obtained by the enterprise over a certain period of time or on the productivity of each worker.

It is the case to observe that “external” flexibility has had a wider diffusion both in Spain and Italy than “internal” flexibility.

Indeed, it finds easier application because it does not require organizational changes.

Thus, we can say that external flexibility is the privileged tool to favor employment flexibility.

7. The paradigmatic nature of flexibility.

With specific reference to the complex subject of labor law, the use of the term “flexibility” has been particularly inflated and this has determined the opacity of its conceptual identity.

The debate about this is public and not only “technical” (limited to jurists and economists). It has been going on for over a decade and it has been amplified by the mass-media.

As a consequence, flexibility has gradually become a symbolic concept which identifies an ideology capable – after a first approximate evaluation – of altering in part the internal equilibrium of the concept itself. This is the result of the particular width of the conceptual scenario.

With reference to this, particularly interesting are the reflections of an attentive Italian scholar, who sees how through the concept of

flexibility it is possible to give a “kaleidoscopic” interpretation of the development of labor law²¹⁹.

We can say that both Italian and Spanish research (limiting our analysis to the national systems selected for this comparative study) consider flexibility (and its opposite, approximately identified as “rigidity”) a real paradigm of what labor law is and/or should be.

Indeed, it is when authors face this topic that they express systematic opinions convergent or different from one another about the very identity and function of labor law.

As stressed in doctrine, *«qualunque apparato regolativo ha oggi una necessità vitale di flessibilità, in modo da potersi adattare ad una realtà imprenditoriale e lavorativa sempre più diversificata, in virtù di fenomeni quali l'intensità della competizione globale, la crescente prevalenza del lavoro nei servizi su quello industriale, l'avvento del lavoro cognitivo, la trasformazione post-fordista dei modelli organizzativi, l'individuazione degli stili di vita, etc. Ciò richiede una normativa che non imponga un modello di serie, eguale per tutti, ma che sia un contenitore di soluzioni modulabili a secondo dei contesti e delle circostanze»*²²⁰.

²¹⁹ B. CARUSO, *op. cit.*, 501 *et seq.* The author warns against the abuse of using the conceptual category of flexibility, defining it as *«omeopatica: fa bene se usata nelle dosi giuste, ma guai ad esagerare! Ed, a volte, come nel caso italiano – ma questo è un anticipo della fine della storia della presente narrazione – la flessibilità gestita da un legislatore poco accorto, che tende ad esagerare, a tracimare, può produrre più problemi di quanti ne possa risolvere»*.

²²⁰ R. DEL PUNTA, *Verso l'individualizzazione dei rapporti di lavoro?*, in L. CORAZZA – R. ROMEI (edited by), *Diritto del lavoro in trasformazione*, Bologna, 2014, 33.

8. Internal flexibility in the perspective of the safeguard of occupational levels.

Internal flexibility is the common element of the labor market reforms which have been made in the European systems in crisis and especially in the two legal systems we are here considering in a comparative perspective.

Central is, indeed, the spirit the Italian and the Spanish legislators share when they try to encourage dynamism in work performance, without conditioning the dynamics of employment relationship extinction (flexibility in exit), nor those of entrance into the labor market (flexibility in entrance).

The reason why national legislators imagine forms of work flexibility – and therefore, of labor legislation – is to be found in the declared objective of avoiding the “destruction of employment” and rather, of favoring its growth. To this regard, we can consider the declarations of principle which introduce the most incisive and significant labor market reforms.

In Spain, the preamble of the law 6 July 2012, n. 3, containing “*Medidas urgentes para la reforma del mercado laboral*”, states in its second point the search of a work relationship balance, expressed by the word “*flexicurity*” and considered as the final aim of the reform: «*La reforma apuesta por el equilibrio en la regulación de nuestras relaciones de trabajo: equilibrio entre la flexibilidad interna y la externa; entre la regulación de la contratación indefinida y la temporal, la de la movilidad interna en la empresa y la de los mecanismos extintivos del*

*contrato de trabajo; entre las tutelas que operan en el contrato de trabajo y las que operan en el mercado de trabajo, etc.»*²²¹.

More in detail, the Spanish legislator recognizes in internal flexibility the tool to incentive in the perspective of reducing the destruction of occupation: *«incentivar la flexibilidad interna en la empresa como medida alternativa a la destrucción de empleo»*.

Hence, there are significant points of contact with the goals aimed at by the recent reform of the Italian labor market, better known with the Anglo-Saxon expression *Job's act*.

In fact, with specific reference to internal flexibility, paragraph 7 of art. 1 of the law 10 December 2014, n. 183 (containing: *“Deleghe al Governo in materia di riforma degli ammortizzatori sociali, dei servizi per il lavoro e delle politiche attive, nonché in materia di riordino della disciplina dei rapporti di lavoro e dell’attività ispettiva e di tutela e conciliazione delle esigenze di cura, di vita e di lavoro”*) makes an important reference in order to *«rafforzare le opportunità di ingresso nel mondo del lavoro da parte di coloro che sono in cerca di occupazione»*.

To this we can add the reference to the Document of *“Analisi di impatto della regolamentazione (AIR)”* (“Analysis of regulation impact”) – prepared by the Ministero del Lavoro e delle Politiche Sociali (Ministry of Work and Social Policies) and attached to the Report which

²²¹ Preamble, L. 6 July 2012, n. 3., in which we can read also that: *«El objetivo es la flexiseguridad. Con esta finalidad, la presente Ley recoge un conjunto coherente de medidas que pretenden fomentar la empleabilidad de los trabajadores, reformando aspectos relativos a la intermediación laboral y a la formación profesional (capítulo I); fomentar la contratación indefinida y otras formas de trabajo, con especial hincapié en promover la contratación por PYMES y de jóvenes (capítulo II); incentivar la flexibilidad interna en la empresa como medida alternativa a la destrucción de empleo (capítulo III); y, finalmente, favorecer la eficiencia del mercado de trabajo como elemento vinculado a la reducción de la dualidad laboral, con medidas que afectan principalmente a la extinción de contratos de trabajo (capítulo IV)»*.

accompanies the legislative decree framework, with the organic text containing the types of contract and the revision of labor tasks, in execution of the law 10 December 2014, n. 183. Here the «*obiettivi di medio-lungo periodo dell'intervento*» are well stressed. Among them there are: «*favorire l'instaurazione dei rapporti di lavoro e quindi la ripresa dell'occupazione*», as well as «*rendere più flessibile la gestione del rapporto di lavoro e l'esercizio del potere organizzativo del datore di lavoro anche attraverso il mutamento delle mansioni assegnate al lavoratore*»²²².

As in the Spanish legal system, also in Italy the objective is to find a “balance” between opposite interests, in a critical occupational situation.

In detail, with reference to the revision of labor tasks, the legislator specifies that the Government, in the adoption of the mandate to legislate, must act, «*contemperando l'interesse dell'impresa all'utile impiego del personale con l'interesse del lavoratore alla tutela del posto di lavoro, della professionalità e delle condizioni di vita ed economiche*»²²³.

²²² L. 10 December 2014, n. 183, *Ministero del Lavoro e delle Politiche Sociali, Documento di “Analisi di impatto della regolamentazione (AIR)”*, www.lavoro.gov.it.

²²³ Art. 1, paragraph 7, letter e), L. 10 December 2014, n. 183. We can say that such occupational aim has characterized the majority of labor law reforms in recent years, both in Italy and Spain. We can consider the so-called “Fornero labor market reform”, the law 28 June 2012, n. 92, containing “*Disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita*” (“Disposals for a labor market reform in a perspective of growth”), which establishes in art. 1: «*La presente legge dispone misure e interventi intesi a realizzare un mercato del lavoro inclusivo e dinamico, in grado di contribuire alla creazione di occupazione, in quantità e qualità, alla crescita sociale ed economica e alla riduzione permanente del tasso di disoccupazione*». In Spain, the other important labor market reform, which was introduced in 2010 (legislative decree 16 June 2010, n. 10, converted in law 17 September 2010, n. 35), dedicates great attention to the creation of employment: «*recuperar la senda de la creación de empleo y reducir el desempleo constituye en estos momentos una exigencia unánime del*

9. The conceptual framework of internal flexibility.

The conceptual framework of internal flexibility is particularly heterogeneous because with this expression we make reference to a multiplicity of juridical institutes. As mentioned in previous pages, *in primis*, we refer to the content of the work performance, that is to the tasks the worker is asked to perform, remuneration, working-time and relocation.

In any case, we have to start from a preliminary consideration of crucial importance: as stressed by an attentive Spanish labor law scholar, the significance of recent internal work relationship regulations, both in Italy and in Spain, acquires a particular importance if we consider a specific perspective²²⁴.

The changes of internal work relationship regulations are, in fact, the projection of a further structural change concerning the moment of decision-making: «*el papel de los diferentes agentes de las relaciones laborales se ve trasladado, en beneficio de unos y en perjuicio de otros*»²²⁵.

It is important to underline how the common trait of the recent regulations seems to be the convinced valorization of the directional power attributed to the employer, and therefore, the total consecration of the “unilateral” aspect of the choices made with reference to the changes taking place in work relationships²²⁶.

conjunto de la sociedad y, en consecuencia, debe constituir el objetivo último fundamental de todas las políticas públicas» (point I).

²²⁴ J. CABEZA PEREIRO, *La flexibilidad interna y su regulación en España, una reflexión en clave crítica de la Reforma Laboral del 2012*, in J. P. LANDA ZAPIRAIN (edited by), *Flexibilidad interna e innovación en la empresa*, Madrid, 2013, 331 *et seq.*

²²⁵ *Ibidem.*

²²⁶ The most authoritative Spanish labor jurists talk about an employer, who becomes more and more the «*señor de su casa*», to stress the fact that the choices made on work

The flexibility of the concrete work relationship has a particular and «*trascendente*»²²⁷ importance in its being a tool through which labor organization can adapt itself to changing economic and production needs.

10. What contents for *flexicurity*?

In the light of the considerations made so far, it seems impossible to avoid the central question that the European labor law scholar necessarily has to consider in his/her daily activity: what is the concept to prefer and to select as guidance, in order to define the content of the so-called *flexicurity*?

As stressed by an authoritative Italian scholar, it is necessary to «*spogliare di retorica e riempire di contenuti le politiche del lavoro ispirate alla flexicurity, ovvero a una combinazione ottimale fra flessibilità e sicurezza nelle tutele da riservare ai lavoratori*»²²⁸.

10.1. Ten years after the Green Paper of the European Commission (2006): the modernization of labor law.

First of all, we need to define the limits of the concept of *flexicurity*.

performance are unilateral, since the labor market reform introduced in Spain in 2012: M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER – F. VALDÉS DAL-RÉ – M.E. CASAS BAAMONDE, *La nueva reforma laboral*, in *RL*, 2012, 5, 1 *et seq.*

²²⁷ J. CABEZA PEREIRO, *op. cit.*, 332.

²²⁸ S. SCIARRA, *L'Europa e il lavoro. Solidarietà e conflitto in tempi di crisi*, Rome – Bari, 2013, 111.

A first analysis can be developed only considering the context of reference, in this case Europe, because it is in Europe that the concept of *flexicurity* was created.

As is known, European Union law is an integral part of the sources of national labor law and in particular it is inserted among the supranational ones.

Although it may seem *prima facie* pleonastic, it is the case to recall that European Union law is made of the founding Treaties of the European Community (EEC, ECSC and EURATOM), together with the changes and integrations made to the Treaty of the European Union (so-called TEU), the Treaty on the Functioning of the European Union (so-called TFEU), regulations, directives and decisions coming from the Union's Institutions²²⁹.

The influence of community sources in the development of the labor law of EU member states is particularly significant and it is evident, if we consider the social policy and occupational sectors.

The ambits of greater impact belong to the complex subject of social rights, in the important framework of a European social model, as developed in November 2006 by the so-called "Green Paper on labor law modernization".

The precise title of the Green Paper (formally a communication by the Commission) is in reality "Modernizing labor law to face the challenges of the 21st century", an efficacious synthesis of the objectives the Commission aimed at reaching through its drafting: to promote consultation, confrontation and the proposal of points of reflection in the perspective of «*modernizzare il Diritto del lavoro per sostenere gli*

²²⁹ See L. DANIELE, *Diritto dell'Unione Europea*, Milan, 2008, 123 *et seq.*

obiettivi della Strategia di Lisbona di crescita sostenibile con più e migliori occasioni di lavoro»²³⁰.

Two elements of crucial importance are at the basis of the objectives announced in the Green Paper: *in primis*, a substantial reconsideration of the role and the autonomy of labor law, brought to have an “ancillary” position in the balance of its relationship with politics and economic systems.

Significant to this regard is what affirmed by an authoritative Spanish jurist, who talks about a labor legislation, «*ridotta ad un ruolo ancillare dell'economia e, pertanto, collocata nel vagone di coda delle regole (o delle non regole) che devono reggere i mercati*»²³¹.

Secondly, there is an aspect connected to the first one from an aetiological point of view: it consists in the recognition of a substantial inefficaciousness (in economic terms) of the *corpus* of regulations which make up labor law in a perspective of growth and economic development and in the framework of a capitalist economy.

Therefore, the need – felt in Europe – to modernize labor law becomes a substantial “emptying” of the subject, as well as an overcoming «*di una logica propria e differente da quella che caratterizza il quadro macroeconomico; o, perlomeno, di una logica “mista” che possa contenere anche obiettivi di carattere sociale*»²³².

In other words, in revealing the need to modernize as said above, the Commission expressed the inadequacy and the inefficiency of labor law in its present physiognomy towards the requirements of the economic system.

²³⁰ COMMISSIONE DELLE COMUNITÀ EUROPEE, *op. cit.*, 3.

²³¹ F. VALDÉS DAL-RÉ, *Il dibattito sulla flessicurezza all'interno dell'Unione Europea*, cit., 42.

²³² *Ivi*, 39.

The regulation model “criticized” by the Green Paper is, in particular, the traditional one, typical of an open-ended employment relationship with only one employer and a tight net of guarantees for the protection of the employee.

Hence, it is the “rigidity” of the labor law «*modello tradizionale*»²³³ to be mainly criticized by Commission, with arguments which seem to be fully coherent with the economic theory considered above and according to which labor law regulations are simply external and extraneous corrective elements, capable of “altering” the internal equilibrium of the labor market.

The regulations which protect the worker would cause an increase of costs for the enterprise and would restrict free competition.

From this clearly emerges the profile of a modernized labor law which transforms its structural paradigms, considered obsolete to face the disruptive changes of the system, following the technological revolution, the process of globalization and the economic crisis.

In the analysis carried out in the Green Paper there is the awareness of the incapability of labor law to imagine, think and elaborate its development in order to adapt its structure to a society and an economy which have radically changed in time.

With reference to this we need to make a further observation: as is known, the recent history of labor law systems in Europe has been deeply characterized by intense periods of reform which have redesigned the regulatory structure of the subject.

Thus, it seems really difficult to declare that labor law has not adapted itself to the new challenges of contemporary global society.

In detail, numerous labor market reforms introduced by single national legal systems have been characterized by a gradual use of

²³³ The expression is used in the body of the Green Paper.

flexibility, with particular reference to the “numerical” data, by “loosening” legislation restrictions in the case of work relationship exits.

“Conversely”, thanks to the flexibility of incoming work relationships there has been a multiplication of contract typologies.

The effects of these reforms can be appreciated *ex post* in terms of an exponential increase of labor market segmentation²³⁴, with the radical dualism (*insiders* and *outsiders*), we have had occasion to talk about.

10.2. (follows) The Green Paper of the European Commission (2006): flexibility and security.

As already said, the essence of the European Commission’s Green Paper is the presentation of *flexicurity* as a model of reference to address labor law reforms in the single state-members towards the modernization previously mentioned.

As a model and source of inspiration, *flexicurity* identifies its *ratio* in the combination of the requests of flexibility coming from the enterprises with those of security coming from the workers.

The Green Paper presents a conceptual framework based on the loosening of regulation restrictions in “standard” work relationships, while there is an increase and a strengthening of protection measures on and in the labor market, in order to favor the increase of occupation, labor mobility and employment.

In all the Paper there is a general simplification, with a particular attention to labor law and its interaction with the economic system.

²³⁴ J. CRUZ VILLALÓN (edited by), *El impacto de la negociación colectiva sobre la segmentación laboral*, Valencia, 2015, *passim*. See also: D.M. GORDON – R. EDWARD – M. REICH, *Trabajo segmentado, trabajadores divididos*, Madrid, 1986, *passim*.

From the central theme of the Green Paper – the combination flexibility and security – derives the possibility to develop a further reflection, to be considered an efficacious representation of labor law flexibility.

The tools adopted by national legislators in past decades to follow and implement EU flexibility strategies have been numerous and heterogeneous²³⁵.

In the ambit of the heterogeneous forms flexibility has assumed, the debate has historically moved around the phenomenon of the so-called “de-standardization” of subordinate work, also through «*un polimorfismo dei tipi contrattuali*» (so-called “atypical” or “flexible”)²³⁶.

On the «*molte sfaccettature del lavoro flessibile*»²³⁷, animated has been the debate: scholars who believe in the necessity of adapting contract typologies to the needs of flexibility and de-regulation required by the economy, and scholars who criticize this process because it damages the subject, conceived as a garrison of workers’ rights.

Both theses have been accompanied with a certain insistence by economic evaluations, statistical surveys and empirical studies, in the elaboration of the flexibility of contractual typologies.

In any case – *volens nolens* – the full-time open-ended employment contract «*resta centrale ed egemone*»²³⁸.

As highlighted by an authoritative scholar, the «*temuta destrutturazione del lavoro tradizionale non c’è stata e rimane ancora*

²³⁵ P. TULLINI, *Stabilità del rapporto di lavoro e ruolo del giudice*, in *Dir. merc. lav.*, 2013, 317.

²³⁶ P. TULLINI, *Proposte di revisione della disciplina del lavoro flessibile*, in *Riv. dir. sic. soc.*, 2010, 481.

²³⁷ G. FERRARO, *Tipologie di lavoro flessibile*, Turin, 2009, 1 *et seq.*

²³⁸ G. PROIA, *Un contributo allo studio delle tipologie dei contratti di lavoro*, in *Dir. rel. ind.*, 2009, 679.

salda, nell'ordinamento giuslavoristico, la storica primazia del tipo legale»²³⁹.

And it is so, despite the determination with which many have insisted on the need to overcome the intrinsic rigidity of this type of contract.

Let's think, for example, about the gradual increase of contingent work, that is a “non-standard” highly flexible work area²⁴⁰.

More in general, we can think about the opinion movement which through the years has associated the high levels of unemployment in the main European countries, with regulation rigidity, considered not as a guarantee, but as a cost to cut.

11. The morphology of the labor market and how it has changed. Concluding remarks.

There seems to be no doubt whatsoever about the fact that the labor market is still extremely fragmented (or better, segmented) with an irrepressible dualism, many years since the beginning of the economic crisis which started in the second half of 2008.

The dualisms based on generational and gender contrapositions are now accompanied by a new expression of labor market segmentation: the dualism between typical and atypical workers.

The effect of this dualism could be described by the parallel coexistence in the labor market of “protected” workers and other workers

²³⁹ P. TULLINI, *Proposte di revisione della disciplina del lavoro flessibile*, cit., 482.

²⁴⁰ *Ex multis*, see: S. HIPPLE, *Contingent Work*, in *MLR*, 2001, 124, 3, 3-27 and A.E. POLIVKA – T. NARDONE, *On the definition of “contingent work”*, in *MLR*, 1989, 9-14.

who are more vulnerable, because the system of protection prepared for the former is not extended to the latter²⁴¹.

National legislators are called to measure themselves with a new labor market morphology, which imposes on them to develop solutions suitable for the new regulation requirements.

Even the scenario behind these changes is characterized by a particular dualism, the European dimension and the local one (for example, the Italian Regions²⁴² and the Spanish *Comunidades autónomas*).

Despite the new morphology of the labor market, characterized by changeable requests of regulation and by a flexibility which tries to react to and answer them, it is the case to reconsider the warning of Silvana Sciarra, who has declared the need to «*spogliare di retorica e riempire di contenuti le politiche del lavoro ispirate alla flexicurity, ovvero a una combinazione ottimale fra flessibilità e sicurezza nelle tutele da riservare ai lavoratori*»²⁴³.

In order to elaborate a more effective table of contents about *flexicurity*, we need to make a preliminary specification.

The concept in exam needs to be reformulated, overcoming *flexicurity* as a tool capable of cutting labor costs by reducing workers' rights, in the unique perspective of improving the enterprises' competitiveness in Europe and worldwide.

The conceptual paradigm which could render *flexicurity* a model capable of creating a unity of opinion and of scholarly positions, has in

²⁴¹ On this aspect, see the essay of G. PROIA – M. GAMBACCIANI, *Totalizzazione e flessibilità*, in *Dir. rel. ind.*, 2009, 869 *et seq.*

²⁴² In other words, it is the «*processo di regionalizzazione [...] che ha fatto emergere la centralità della dimensione territoriale per la conformazione giuridica e il governo del mercato del lavoro*», P. TULLINI, *Proposte di revisione della disciplina del lavoro flessibile*, cit., 484.

²⁴³ S. SCIARRA, *L'Europa e il lavoro. Solidarietà e conflitto in tempi di crisi*, cit., 111.

the considerations of Fernando Valdés Dal-Ré its foundation: «*La flexiseguridad no es, como de manera interesadamente ideológica en ocasiones se presenta, un mecanismo de reducción de derechos de los trabajadores o, más en general, de reducción de costes laborales para mejorar la competitividad de las empresas europeas. Es o debiera aspirar a ser una estrategia compleja de conciliación de la seguridad en el empleo y en las rentas de las personas con un marco flexible en el mercado de trabajo y en la organización de trabajo, guiada, como objetivo final, a garantizar la decencia y dignidad en el trabajo*»²⁴⁴.

²⁴⁴ F. VALDÉS DAL-RÉ, *El debate de la flexiseguridad en la Unión Europea (y II)*, in *RL*, 2010, 12, 8.

Chapter 4 –

Economics and labor law in the comparative framework of the *ius variandi*. The professional demotion/deskilling of the worker in Italy and Spain: an emblematic institute of paradigmatic changes.

«el contrato de trabajo no es un mero intercambio de trabajo y salario, contiene también un elemento de vinculación personal entre las partes. Y esta vinculación personal tiene que basarse necesariamente en la realización efectiva de trabajo, y en los vínculos que origina su producción en la empresa».

Miguel Rodríguez-Piñero y Bravo-Ferrer²⁴⁵

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²⁴⁵ M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Contrato de trabajo y relación de trabajo*, Sevilla, 1967, 22.

1. Methodological introduction.

The impact of economics on national labor law regulations can be appreciated in its entire meaning making specific reference to certain labor law ambits.

Some fundamental institutes of the subject have felt the consequences of the increasing requests of labor regulation flexibility coming from the market and, *lato sensu*, from the economy.

A reasoned study of one of these institutes could therefore be interesting for the research the present work is proposing.

Indeed, the complex dimension of the regulation of work relationships for its very nature suffers the requests of economy.

In this regulatory context, there is who sees in the regulations of the worker's tasks (as in those of the worker's remuneration and work-time) the privileged ambit where to consider the adherence of these regulations to the economic and productive sphere of reference.

The juridical considerations proposed in the first part of the present work in a theoretical-systemic dimension find in the comparative study of this institute their natural logical-complementary *pendant*.

Hence, we offer a reasoned and parallel analysis of the recent reforms introduced in the two legal systems chosen for the comparison – Italy and Spain – for what concerns the worker's tasks.

The comparison we are going to perform will offer a “critical” reading of a specific (and core) institute of positive labor law, which will contribute to develop the reflection on the relationship between labor law and economics.

The institute object of comparison will be considered in its “dynamic” aspects because they allow to appreciate more the impact of economics on labor law. It is therefore on the *ius variandi* that we wish to focus our attention.

From the methodological point of view we will not merely offer an analytic and compilatory treatment of the Italian and the Spanish discipline of the subject.

We prefer to privilege a research which can highlight the points of convergence and divergence between the two legal systems, by offering a “problem area” treatment (in other words, addressed to a «*pensare problematicamente*»²⁴⁶) of the subject, with specific reference to the regulation of the institute considered following the methodological approach presented above.

2. Executive power and subordination as the “keystone” of the system of relations between labor law and economics.

As said above, economics “dialogues” with labor law first of all in the discipline of the work relationship.

More in particular, the powers connected to the position of the employer – and, among these, especially the ones which organize the content of the labor performance – have a central role in the present work.

We are talking about juridical powers considered *stricto sensu*, which are inserted in the complexity proper of the work relationship, and divided more specifically into executive power and disciplinary power.

With particular reference to the first one, it is useful already from now to stress that its substance is to be found in the organizational power wielded by the employer in order to make the work performance of each worker conform to the needs of the enterprise. Its natural declination is

²⁴⁶ M. PERSIANI, *Diritto del lavoro e autorità del punto di vista giuridico*, in *Arg. dir. lav.*, 2000, 55; See also L. MENGONI, *L'argomentazione orientata alle conseguenze*, in *ID.*, *Ermeneutica e dogmatica giuridica*, Milan, 1996, 94.

represented by a specifying or conforming power, that is the power of the employer to determine in concrete the contents and the ways of carrying out the work performance.

In the case of Italy, we are referring to «*disposizioni per l'esecuzione e per la disciplina del lavoro impartite dall'imprenditore e dai collaboratori di questo dai quali [il lavoratore] gerarchicamente dipende*», of which at the article 2104, paragraph 2, c.c. (indexed: “*Diligenza del prestatore di lavoro*”).

A similar disposition can be found in Spain at the article 20 of the *Estatuto de los trabajadores* (indexed: “*Dirección y control de la actividad laboral*”), under the first paragraph: «*El trabajador estará obligado a realizar el trabajo convenido bajo la dirección del empresario o persona en quien éste delegue*».

In both the systems here considered, the executive power in general does not require particular forms of expression and practice, because it can become manifest in written and oral form. As said above, this is possible because we are talking about juridical powers *stricto sensu*, whose wielding is therefore addressed to the exclusive satisfaction of the interests of their holder (in this case, the employer), without the need of a justification or of «*presuntos intereses objetivos de la empresa como abstracción ficticia de valor diferenciado de los propios del empleador; intereses de la empresa e intereses del empleador se identifican a todos los efectos, por lo que el ordenamiento jurídico no exige la concurrencia de circunstancias particulares justificativas en cada caso concreto del ejercicio del poder directivo*»²⁴⁷.

However, it is useful to specify that in some cases – as is, *in primis*, the one of the *ius variandi*, which brings to a substantial change of the work conditions – the exercise of the employer’s power of

²⁴⁷ J. CRUZ VILLALÓN, *Compendio de derecho del trabajo*, cit., 202.

definition of the work performance is subordinate to the effective existence of certain presuppositions provided for *ex lege*.

In general, the authoritative-hierarchical character of the executive power, and as such unilateral, of the employer, is significantly mitigated by a series of restrictions, the most meaningful of which is without doubt the prohibition of discrimination: in no case can the employer's executive power be wielded on unequal terms, according to the article 15 of the *Statuto dei lavoratori*²⁴⁸ and the article 17, paragraph 1, of the *Estatuto de los trabajadores*²⁴⁹.

The centrality of the employer's executive power (or *de dirección*) – in particular for the comparative study we are about to make on the exercise of the *ius variandi* – requires a specification as to the work “model” we take into consideration.

²⁴⁸ Under the article 15, law 20 May 1970, n. 300 (*Statuto dei lavoratori*): «1. *É nullo qualsiasi patto od atto diretto a: a) subordinare l'occupazione di un lavoratore alla condizione che aderisca ad una associazione sindacale ovvero cessi di farne parte; b) licenziare un lavoratore, discriminarlo nella assegnazione di qualifiche o mansioni, nei trasferimenti, nei provvedimenti disciplinari, o recargli altrimenti pregiudizio a causa della sua affiliazione o attività sindacale ovvero della sua partecipazione ad uno sciopero. 2. Le disposizioni di cui al comma precedente si applicano altresì ai patti o atti diretti a fini di discriminazione politica, religiosa, razziale, di lingua o di sesso*».

²⁴⁹ Article 17, paragraph 1, law 10 March 1980, n. 8 (*Estatuto de los trabajadores*) establishes: «1. *Se entenderán nulos y sin efecto los preceptos reglamentarios, las cláusulas de los convenios colectivos, los pactos individuales y las decisiones unilaterales del empresario que den lugar en el empleo, así como en materia de retribuciones, jornada y demás condiciones de trabajo, a situaciones de discriminación directa o indirecta desfavorables por razón de edad o discapacidad o a situaciones de discriminación directa o indirecta por razón de sexo, origen, incluido el racial o étnico, estado civil, condición social, religión o convicciones, ideas políticas, orientación o condición sexual, adhesión o no a sindicatos y a sus acuerdos, vínculos de parentesco con personas pertenecientes a o relacionadas con la empresa y lengua dentro del Estado español. Serán igualmente nulas las órdenes de discriminar y las decisiones del empresario que supongan un trato desfavorable de los trabajadores como reacción ante una reclamación efectuada en la empresa o ante una acción administrativa o judicial destinada a exigir el cumplimiento del principio de igualdad de trato y no discrimination*».

Indeed, the “typological” context we have taken as reference is the one of subordinate work, which is in both systems the element traditionally considered crucial in order to be able to distinguish the area of application of the regulations which make up labor law²⁵⁰.

In fact, it is with reference to this conceptual premise that we can appreciate a first element of significant convergence between the Spanish and the Italian legal systems.

In Italy, article 2094 c.c. defines the subordinate worker as the person «*che si obbliga mediante retribuzione a collaborare nell'impresa, prestando il proprio lavoro intellettuale o manuale alle dipendenze e sotto la direzione dell'imprenditore*».

In Spain article 1, paragraph 1, of the *Estatuto de los trabajadores* circumscribes the ambit of application of the Statute to the only «*trabajadores que voluntariamente presten sus servicios retribuidos por cuenta ajena y dentro del ámbito de organización y dirección de otra persona, física o jurídica, denominada empleador o empresario*».

It is therefore in the definition of subordinate employment – on which we do not focus here for reasons of space²⁵¹ – that we place in light a first significant aspect of substantial convergence between the two labor law systems.

Entirely applicable also to the Italian regulatory context is, in fact, the definition offered by the most authoritative Spanish labor law

²⁵⁰ J. CRUZ VILLALÓN, *Compendio de derecho del trabajo*, cit., 33; by the same author see also ID. (edited by), *Trabajo subordinado y trabajo autónomo en la delimitación de fronteras del Derecho del Trabajo. Estudios en homenaje al profesor José Cabrera Bazán*, Madrid, 1999, *passim*. See also the interesting work of the late Prof. Manuel Ramón Alarcón Caracuel: M.R. ALARCÓN CARACUEL, *La ajenidad en el mercado de trabajo: un criterio definitorio del contrato de trabajo*, in *REDT*, 1986, 28, 501 *et seq.* See M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *La dependencia y la extensión del ámbito del Derecho del Trabajo*, in *RPS*, 1966, 71, 158 *et seq.*

²⁵¹ On this aspect see S. BINI, *Lungo lo scosceso confine tra autonomia e subordinazione*, in *Giur. it.*, 2016, 1, 131-138.

scholar, who identifies the essence of subordination in the circumstance for which «*el trabajador pone a disposición del empleador su fuerza de trabajo, de modo que ha de ejecutar su prestación sometido a los poderes organizativos y de dirección del empresario*»²⁵².

The fact that both systems provide a definition of subordinate employment (from which it is then possible to extract – though with a non-secondary hermeneutic effort – a more general one of subordination) is undoubtedly of exquisite importance, especially in the light of the regulatory framework which characterizes the other countries of the European continent.

Such definition can be considered an expression of the Roman law juridical culture, which has shaped the identity of the national legal systems in both Spain and Italy. In these systems it is clearly noticeable a “methodical” approach to the concept of subordinate employment (as, on the other hand, to the one of employment contract).

In any case, it is useful to specify that this methodic approach has brought to a legislative definition of the subordinate worker only in some of the Roman law systems (*rectius*, Romano-Germanic): in addition to Italy and Spain, we can think about Holland and Portugal. On the contrary, in countries such as France and Germany, the definition – precisely methodic – of the subordinate worker has been developed by the judiciary, which has this way “replaced” the legislator²⁵³.

In the light of what has been anticipated so far, a problematic profile which deserves to be analyzed (later on), also in the perspective of the study of the relationship between economics and labor law, is certainly the definition of borders, and thus, of the limits of the

²⁵² J. CRUZ VILLALÓN, *Compendio de derecho del trabajo*, cit., 33.

²⁵³ On this aspect see A. SUPLOT, *Lavoro subordinato e lavoro autonomo*, in *Dir. rel. ind.*, 2000, 2, 220.

employer's organizational power, considered as the specification of the content of the subordinate worker's performance.

In other words, picking up again a reflection proposed years ago by an authoritative Italian scholar, we need to «*stabilire, per un verso il rapporto tra il potere specificativo e il potere modificativo del datore di lavoro*» and «*per l'altro, l'idoneità di quest'ultimo potere ad essere definito come un effetto tipico essenziale del contratto e, quindi, un requisito qualificante della fattispecie lavoro subordinato*»²⁵⁴.

3. A historical-evolutionary introduction to work organization. The worker's tasks as a paradigm of change: from Ford to Toyota, to Amazon.

3.1. Evolution, part one: beyond “Modern Times”²⁵⁵.

The historical-evolutionary process undergone by the organization of production and work over time, and during the last century in particular, is the fundamental setting to consider in the perspective of a mature reflection about the normative regulation of the content of the work performance.

The very concept of “task”, on which we will focus in the following pages, cannot be fully understood if it is not inserted in the wider context of a work organization setting.

²⁵⁴ R. PESSI, *Contributo allo studio della fattispecie lavoro subordinato*, cit., 79.

²⁵⁵ The reference is to Charlie Chaplin's movie, *Modern Times*, 1936, in which there is an interesting artistic representation of the essence of the stability typical of Fordist economy, centred on the model of mass production, on the workers' alienating repetition of the same actions in a constant acceleration of the production rhythm, established and controlled by the employer according to an evident hierarchical approach.

We start from the considerations made in an economic ambit by Stefano Zamagni: «*Con l'avvento della rivoluzione industriale prima e del fordismo-taylorismo poi, avanza l'idea della mansione (segno di attività parcellizzate) [...]»*²⁵⁶.

In other words, the concept of “task”, which characterizes the essence of Italian labor law, is itself the result of a paradigmatic change in the organization of the production phase: it is indeed an emblematic representation of the work division determined by the Industrial Revolution and Fordism.

As is known, production organization (and therefore also work organization) has had an evolution which has brought to the gradual success, in addition to the organizational model typical of mass production (precisely the Fordist one), of the so-called “lean production”.

With the expression “lean production”²⁵⁷, we refer to the organizational philosophy which emerged in the Japanese production context of Toyota²⁵⁸, in the aftermath of the Second World War, as an alternative production method to the Fordist one, based on the scientific organization of work, predominant in the industrial scenario of the Western world²⁵⁹.

The fundamental principles of lean production are presented also with different expressions and formulas – often substantially fungible – as for example, *Toyota Production System* (TPS), which refers in particular to the specific innovative organizational practices and methodologies developed by Toyota, or *Just in Time* (JIT), which expresses a lean industrial philosophy, but with a particular emphasis on

²⁵⁶ S. ZAMAGNI, *Per un'economia a misura di persona*, Rome, 2012, 44.

²⁵⁷ The expression “lean production” was used for the first time in J.P. WOMACK – D.T. JONES – D. ROOS, *op. cit.*, *passim*.

²⁵⁸ See S. BHASIN – P. BURCHER, *op. cit.*, 56-72.

²⁵⁹ F.W. TAYLOR, *op. cit.*, 143 *et seq.*

the management of storehouses and stocks, being based on the reduction of the stocks in excess and thus, of the considerable costs deriving from them²⁶⁰.

The key concepts on which the lean production organization model is based, can be identified in flexibility (considered *lato sensu*), in the employees' active involvement and assumption of responsibility, and in the marked attention to the client's orientation.

Work is mainly considered in a team dimension with a cyclical rotation of the activities and the duties performed by each employee in the perspective of favoring a deeper and more mature understanding of the overall sense of the work and a relevant awareness of the sum of the productive activities²⁶¹.

In the ambit of a similar production vision, a particular role is held by the workers themselves in the making of decisions and in the solution of problems, with an important reduction of the gap between thinkers and doers, that is between those who decide and those who perform, till reaching its gradual elimination.

In order for this "responsible" involvement of the workers to be advantageous, it is necessary to maintain a high level of competence and

²⁶⁰ The Fordist trend of stock and supply management, based on the so called "push logic" – that is on the presence in warehouses of considerable quantities of raw materials, semi-worked and finished products with clearly high costs of management, maintenance and handling – is turned into a "pull logic", as incorporated in the Toyota production model, whose essence can be summed up with the equation: "useless stock = waste to eliminate". The "winning" and competitive enterprise on the market is therefore the one which organizes its production in short and lean processes, coordinating just in time the availability of the resources with the real needs of production, with a consequent reduction of costs. On this aspect see the interesting work of T. OHNO, *op. cit., passim*, with particular reference to pages 19 *et seq.*

²⁶¹ J.P. WOMACK – D.T. JONES – D. ROOS, *op. cit.*, 111-112: «L'azienda davvero snella presenta due caratteristiche aziendali chiave: trasferisce il massimo numero di mansioni e responsabilità ai lavoratori che contribuiscono effettivamente al plusvalore dell'automobile nella linea di assemblaggio e istituisce un sistema per l'individuazione dei difetti che riesce a rintracciare la vera origine di ogni problema scoperto».

knowledge, a significant professional qualification, constantly updated with continuous training courses with the participation of the employees²⁶².

“Specularly”, the scientific organization of work, typical of the Fordist model, is characterized by a rigid and specific work division, in the ambit of which each worker is always called to perform – in a “static” way – the same tasks, which consist of repetitive and standardized activities, requiring a limited level of competence. The performance is inserted in a context, where there is a marked distinction between the

²⁶² Among the main consequences that the change of the paradigms of production and work organization has brought, considerably interesting are those determined by the human resources management practices. We can think about the promotion of “team working”, the wide use of so-called “quality control circles”, which consist in moments of confrontation between employees and management, with the aim of studying valid solutions to develop in the perspective of solving problems which can bring improvements (it is the so-called *kaizen*, or improvement changes). Essential elements in the ambit of Human Resources Management are also the development and the constant updating of specific and heterogeneous competences in the diffusion of performance-related pay systems (a variable remuneration with a component anchored to performance). The employees’ active involvement in the production process and in the path towards its continuous improvement, results functionally addressed to favor and promote their loyalty, so that they develop a sense of attachment and belonging to the enterprise. These last elements are crucial ones in the lean philosophy because they are capable of stimulating the employees’ potential, pushing them to make a discretionary effort, a *quid pluris* effort, which is made despite not being specifically necessary or requested. It is therefore possible to notice among the numerous human resources management practices, in the perspective of acquiring an advantage over one’s competitors typical of the lean organization model: a marked and rigid selectivity in the choice of the personnel, the accurate training and continues development of the employees’ competences, the variability of the tasks performed by each employee in a structure characterized by job rotation and cross utilization, the variable remuneration anchored to performance, as a tool to stimulate the motivation, participation, sense of responsibility and active involvement of the employee – who is always considered as the member of a team and not as a single individual – in the perspective of a team, whose members are all engaged in reaching in the long term the same objectives. See A. GALGANO, *Toyota*, Milan, 2005, 96-106.

decision levels and the operative-doing ones, according to a hierarchical-pyramidal work organization approach²⁶³.

3.2. Evolution, part second: work organization in the digital era.

The comparative study of a specific work relationship institute presupposes and imposes in the present global scenario the making of some methodic reflections which take into consideration the highly international contemporary context.

Indeed, we need to stress a first fact of crucial importance, that is that production processes and enterprise activities take place and are contextualized in a necessarily international dimension, represented by the global market.

In this it is possible to highlight a first fundamental critical aspect, represented by the substantial separation of what an authoritative scholar has efficaciously defined as a dichotomy between the spatiality of economics and the limited territoriality of law²⁶⁴.

²⁶³ A paradigmatic representation of the distinction between the Fordist production model and the Toyota one can be found in the subject authorized to interrupt the production. In the Toyota factories, a switch to stop the assembly line is installed in correspondence of every work-place, so that the workers – expressly and specifically trained for this – can interrupt the assemblage process when a problem arises. Problem which is then solved by the working team in its sum of synergies: this is the philosophy “just in time”, which is used in the various production phases. On the contrary, in the Ford model, the only subject authorized to interrupt the line is the assembly line director; on this aspect see: J.P. WOMACK – D.T. JONES – D. ROOS, *op. cit.*, 65 *et seq.* See also R. DORE, *Bisogna prendere il Giappone sul serio*, Bologna, 1991, 23 *et seq.*, with particular regard to the contraposition between “community enterprises”, like Toyota, and “public limited enterprises”, like the companies which follow the Ford model.

²⁶⁴ R. PESSI, *La protezione giurisdizionale del lavoro nella dimensione nazionale e transnazionale: riforme, ipotesi, effettività*, cit., 195 *et seq.*

Hence, we are facing a «*cambio de escenario que sin retórica puede definirse como cambio de época*»²⁶⁵.

A mature reflection in terms of law cannot in fact be separated from the economic and the productive scenario in which the system considered is contextualized. It is a scenario currently characterized by the deep influence of technological innovation on the working of the so-called “on-demand”²⁶⁶ economy.

Multiformity is – with evidence verifiable everyday – one of the typical features of the complex process of globalization, which involves the world scenario, determining epochal transformations and changes, favored by the growing diffusion of information technology and digital processes.

As placed in light by one of the world’s most authoritative labor law scholars, who recently sadly passed away: «*el revolucionario cambio tecnológico da impulso a una sociedad de trabajo en red que genera oportunidades no conocidas antes para el comercio y la inversión*»²⁶⁷.

The framework of reference is represented by an (almost) totally globalized market, in which the digital process is an innovation factor of the work relationship paradigms²⁶⁸.

²⁶⁵ U. ROMAGNOLI, *El Derecho del Trabajo en la era de la globalización*, in *RDS*, 2003, 24, 11.

²⁶⁶ See the interesting study *Workers on tap*, published in *The economist*, 3-9 January 2015, 7 *et seq.*: «The rise of the on-demand economy poses difficult questions for workers, companies and politicians». See L. GALANTINO, *I riflessi dell’innovazione tecnologica sull’inquadramento professionale e sulla struttura retributiva dei lavoratori*, in AA. VV., *Innovazione tecnologica e professionalità del lavoratore*, Padua, 1987, *passim*.

²⁶⁷ B. HEPPLER, *Diritto del lavoro, disuguaglianza e commercio globale*, cit., 28, quoted in Spanish in E. COLÀS NEILA, *Derechos fundamentales del trabajador en la era digital: una propuesta metodológica para su eficacia*, Albacete, 2012, 41.

²⁶⁸ On the modernization of work relationships, determined by the diffusion of new technologies see M. DÉMOULAIN, *Nouvelles technologies et droit des relations de travail. Essai sur une évolution des relations de travail*, Paris, 2012.

It is undeniable that the content of the work performance and with it of the wielding of the employer's power of specification and change of the employees' tasks, deeply suffer the evolution of the production organization models.

Indeed, the economic crisis together with the technological revolution and the phenomenon of globalization typical of the current global scenario, determine deep changes also to the work performance.

The concrete activities to be carried out by the worker are undergoing a deep structural change, rendering indispensable the more and more frequent – and sometimes meaningful – adoption of changes to the tasks assigned to the worker.

Among the most emblematic phenomena of the epochal changes which are taking place in present-day work relationships, significant is the so-called *smart working*, based on execution of the «*prestazione lavorativa al di fuori dei locali aziendali, per un orario medio annuale inferiore al 50 per cento dell'orario di lavoro normale, se non diversamente pattuito*»²⁶⁹.

4. The object of the work performance: the conceptual dimension.

After the specifications made above, it is useful to proceed to a linguistic-definition clarification, concerning the object of work obligation.

In fact, in the Italian legal system the expression which has a central role is that of “*mansioni del lavoratore*”, referring to the

²⁶⁹ Bill connected to the 2016 Italian Stability Law.

«insieme di prestazioni lavorative, cioè dei comportamenti concreti e specifici dovuti dal lavoratore in un determinato contesto lavorativo»²⁷⁰.

This concept therefore identifies an organic *corpus* of concrete activities to perform, which outline the content of the work obligations the worker is asked to fulfil by his/her employer, the “creditor”²⁷¹.

In other words, it is the tenet institute of the work relationship, placing itself as the central pillar of the regulative discipline: duties are indeed the object of the subordinate worker’s main obligation²⁷².

The Italian labor law juridical system with reference to the content of the work performance, recognizes the absolute centrality of “task”.

As stressed by an authoritative scholar: «*mansione (o compito) è l’unità elementare di un facere*»²⁷³.

We can well say that tasks indicate the specific object of the work obligation, the sum of operations, tasks and activities the worker is expected to perform and the employer can consequently expect from the worker him/herself.

Edoardo Ghera identifies in tasks «*il criterio di determinazione qualitativa della prestazione dovuta*»²⁷⁴.

The importance held by the concept here analyzed is to be considered exactly in the light of the fundamental importance of the

²⁷⁰ M. BROLLO – M. VENDRAMIN, *op. cit.*, 512.

²⁷¹ G. GIUGNI, *Mansioni e qualifica*, in *Enc. dir.*, Milan, 1975, 25, 545 *et seq.*

²⁷² M. BROLLO – M. VENDRAMIN, *op. cit.*, 512 *et seq.*: «*le mansioni sono il principale “criterio di determinazione qualitativa” della prestazione di lavoro perché identificano il “valore” del lavoro concretamente esigibile, con inevitabili collegamenti e ricadute sul principio di corrispettività di cui all’art. 36 Cost.*».

²⁷³ G. GIUGNI, *Mansioni e qualifica*, *cit.*, 546.

²⁷⁴ E. GHERA, *Diritto del lavoro*, Bari, 2006, 96.

employee's tasks, as essential criterion for the concrete identification of the work performance²⁷⁵.

«Le mansioni individuano l'oggetto della prestazione lavorativa e ne qualificano il contenuto sotto il profilo della effettività»²⁷⁶.

On the Spanish conceptual side, we cannot find a word or an expression exactly correspondent to the Italian one. The tendency is to valorize from the conceptual point of view the contentual dimension of the *prestación de trabajo*.

5. The organization of the worker in Italy: tasks, qualifications and categories.

With reference to the Italian regulatory framework which disciplines the organization of the worker, it is useful to focus on the concepts which, together with that of “*mansione*”, make up the specific object of the work obligation, contributing to “placing” the worker within the organization structure of the enterprise: qualifications and categories.

Proceeding step by step, it is necessary to point out that there are numerous senses in which the word “qualification” is generally used (in the juridical ambit, of course).

We refer to the “subjective” qualification to indicate the overall sphere of professional capabilities, attitudes, characteristics and

²⁷⁵ V. F. GIAMMARIA, *Le mansioni del lavoratore (art. 2103 c.c.)*, in R. PESSI (edited by), *Codice commentato del lavoro*, Milan, 2011, 329.

²⁷⁶ M.N. BETTINI, *op. cit.*, 47. See also for its definitions the interesting contribution offered by C. PISANI, *Mansioni del lavoratore*, in *Enc. giur. Treccani*, Rome, 1990, 19, 1: tasks indicate «*il tipo di attività, le operazioni, i compiti per lo svolgimento dei quali il lavoratore viene assunto, che è tenuto ad eseguire e che il datore di lavoro può esigere. Le mansioni fungono dunque da criterio di determinazione qualitativa della prestazione e tramite esse viene delimitata gran parte dell'area del debito del lavoratore nei confronti del datore di lavoro*».

experiences of the worker, which can be independent and pre-existent to the work relationship.

On the contrary, with the expression “objective qualification”, we refer to the sum of tasks objectively described in the employment contract; emphasizing the centrality of the contract as *sedes* for the definition of the tasks assigned to the employee, the objective qualification is equally defined as “*qualifica contrattuale*”²⁷⁷.

Evident seems the substantial coincidence between the concept of qualification, considered in its objective-contractual meaning, and the essence of the concept of task: the foundational nucleus of both concepts is, in fact, represented by the “agreed upon activity”.

In contrast with the crystal clarity of the term “task”, the word “qualification” has an ambiguity of non-secondary relevance for what concerns its true essence, to the point that an authoritative scholar has stated the substantial coincidence of the concepts of task and qualification: we would be in presence of a semantic variation of the same conceptual *substratum*²⁷⁸.

²⁷⁷ To this regard, G. GIUGNI, *Mansioni e qualifica*, cit., 546, points out how in terms of qualifications irrelevant is the employee’s possession (or not) of the *corpus* of the professional competences which allow him/her a correct and advantageous execution of the duties included in the same objective qualification. The example provided by the author is particularly efficacious: the individual in possession of the objective qualification of turner is the person who has accepted to perform the correspondent activity, which consists in turning the lathe. That the same individual may not be effectively prepared and in possession of adequate competences to carry out his activity with positive results for the enterprise, is not important for what concerns his objective qualification: in any case, he will be a turner, even if an “inexperienced” one.

²⁷⁸ *Ivi*, 547; ID., *Mansioni e qualifica nel rapporto di lavoro*, Naples, 1963, 32, in which the author criticizes the phenomenon of the so-called «*germinazione di nozioni che valgono soltanto ad enfatizzare con potenzialità confusionarie dati del tutto ovvi*». The substantial “overlapping” of concepts, stressed by Prof. Giugni can be found also with reference to the concepts of “qualification” and “category”, if we consider a jurisprudential orientation of the Supreme Court, even if it is not consolidated and not recent (see Cass., sez. lav., 12 January 1999, n. 275, in *Mass. giur. lav.*, 1999, 430 *et*

Simplifying, we can say that by “qualification” we intend the sum of the duties contractually stipulated, identifying this way the *status*, the professional figure of the worker and therefore, “positioning” him/her within the company organization²⁷⁹.

Hence, it is clear that while the word task indicates the object of the work performance in its specificity and concreteness, the word qualification limits itself to a generic indication of the work obligation, referring to the professional *status* of the worker.

Finally, the concept of “category” deserves a separate definition: it is a classificatory entity which gathers in itself the different qualifications or the different professional profiles, in what can be defined as an articulate system of professional classification.

Categories can then be divided into “legal” and “contractual”: with the former we refer to the “Categories of employees” of which at the article 2095, paragraph 1, c.c. («*dirigenti, quadri, impiegati e operai*»); with the latter we intend those object of collective bargaining, as an integration and an extra to the legal ones (we can think about the “*funzionari*” or about the so-called “*intermedi*”).

What we have so far examined is the Italian classificatory system, which is deeply centered on the essential concept of task, considered as a fundamental pre-supposition for the classification of the employee.

seq.). Also in legislation it could be possible to find some cases of “alternative” use of the term “qualification” with that of “category”.

²⁷⁹ P. POZZAGLIA – A. VALLEBONA, *Mansioni e qualifiche del lavoratore*, in S. PATTI (edited by), *Il Diritto. Enciclopedia giuridica*, Milan, 2007, 371.

6. The organization of the worker in Spain: from the *categorías profesionales* to the *grupos profesionales*. Much more than a semantic variation.

As we have already said, in the Spanish regulatory system, the Italian concept of “employee’s tasks” does not have a similar linguistic expression: in that legal system we refer to the wide category of “work conditions”.

More in particular, the definition of the work performance taken on by the employee, is based on a system of professional organization, which finds in collective bargaining its source of reference.

The ultimate sense of the importance attributed in Spain to the classification system lies in concrete in the fact that it is the fundamental “mechanism” to define the content of the work performance requested by the employer.

On the other hand, the centrality of collective bargaining (also) when it comes to classification and professional organization is “coherent” with the need to have a taxonomic system respondent as much as possible to the specificities typical of the different work organization models and characterizing single sectors and single enterprises.

The consequence of this is that the methodology and the criteria – with reference to which professional classification has developed over time – have significantly changed during recent years. For example, as a consequence of the change caused by technological-informative development and by work professional and organizational transformations.

More in detail, article 22 of the *Estatuto de los trabajadores*, indexed “*Sistema de clasificación profesional*”, considers the fundamental principle as a consequence of which law assigns to

collective bargaining (or, in its absence, to an agreement between employer and employee representatives) the determination of the employees' professional classification system, through professional groups.

What clearly emerges therefore is the centrality of the concept of “professional group”, defined by article 22, paragraph 2, E.T., as a unitary grouping of «*aptitudes profesionales, titulaciones y contenido general de la prestación*», which can include «*distintas tareas, funciones, especialidades profesionales o responsabilidades asignadas al trabajador*».

In addition, the law specifies – in what in reality seems a statement of principle – that, in the definition of these professional groups, it is necessary to follow criteria and systems oriented towards the exclusion of any form of direct or indirect discrimination between men and women²⁸⁰.

Hence, the Spanish labor law system attributes a particular importance to the concept of “professional group” in the ambit of a system of classification that places collective bargaining in a privileged position.

As highlighted by an authoritative scholar, exactly the latter “traces” a «*diseño de la clasificación profesional en la empresa o en el sector*»²⁸¹, which groups together a series of duties that make up the employees' work performance and that find in the concept of “professional group” their conceptual reference.

²⁸⁰ Article 22, paragraph 3, *Estatuto de los trabajadores*.

²⁸¹ J. CRUZ VILLALÓN, *Compendio de derecho del trabajo*, cit., 208. The author adds: «*Esta agrupación se realiza de forma unitaria, con carácter general y abstracto, con vistas a elaborar un listado de grupos profesionales, atribuyendo una denominación a cada uno de ellos y la descripción del correspondiente contenido de cada una de las unidades en las que se descompone dicha clasificación profesional*».

The importance of the disposition here recalled and of the concept of professional group here presented can be fully appreciated only if considered as the result of a recent reform which has radically “re-orientated” Spanish labor law (but not only) on the subjects of professional organization and functional mobility.

On this point legislation has undergone changes of extraordinary importance. Changes addressed towards the versatility and the “adjustability” of the classificatory systems in force in the various enterprises to the productive and organizational changes determined by the quick mutability of the market trends.

In a first moment, the employees’ professional classification was centered on the concept of “professional category”, considered as *«estructura profesional que coincide con el modo de producción taylorista o fordista»*²⁸².

It was obviously a taxonomic model particularly rigid and parceled, typical of a system characterized by a high work division with a big number of categories, each of which carefully describing the correspondent tasks (in the light of objective parameters and criteria).

However, this taxonomic-professional system was in time gradually “surpassed” as a consequence of the development and diffusion of new technologies and new models of production organization (and therefore, of work), which required quick and efficacious answers to the changes imposed by the market.

The “*categorías profesionales*” give way to the “*grupos profesionales*” in the perspective of a substantial reduction of the internal articulations of the professional classification system and especially of a more flexible definition of the content, the object of each group.

²⁸² Ivi, 209.

As stressed by an authoritative Spanish labor law scholar: *«con el paso al modelo de los grupos se pretende emplear una metodología diversa en la definición de los contenidos de cada uno de los grupos, de modo que las definiciones correspondientes apenas tengan en consideración la enumeración de tareas y atiendan prevalentemente a las capacidades y méritos necesarios para la ejecución de los trabajos integrados en ese grupo»*²⁸³.

As we can understand from the words just quoted, the change is deep and radical because it refers to the conceptual sphere of professional classification, in order to permit the employer to have greater flexibility in the use of human resources.

The Spanish 2012 labor market reform (Law 6 July 2012, n. 3 e Royal Decree-Law 13 July 2012, n. 20) has in fact deeply conditioned the institutes through which flexibility is usually inserted in the work relationship, that is the so-called internal or functional flexibility.

It is through it that work conditions are “adapted” to the needs imposed by the market on the enterprises.

*«El elevado número de variaciones que pueden afectar el desarrollo de la relación laboral determina el establecimiento de un régimen jurídico flexible que permita la adaptación de las condiciones de trabajo inicialmente pactadas, bien lo sean pactadas individual como colectivamente, en beneficio tanto de los intereses empresariales como del mantenimiento del empleo»*²⁸⁴.

It is useful to clarify also here that at the basis of the Spanish reform to the internal flexibility of the work relationship, there is a common spirit with the reforms introduced in other European systems. According to this spirit, *«la rigidez y la falta de adaptación es causa de*

²⁸³ *Ibidem.*

²⁸⁴ *Ivi*, 331.

*que las empresas opten (casi como único recurso) al despido, lo cual se rechaza por irrazonable»*²⁸⁵.

In any case, the novelties introduced in Spain by the 2012 reform are certainly various and heterogeneous: let's think, for example, of the changes which touched the discipline of contract suspension, the reduction of the work day for economic reasons and the employee's geographic mobility.

In the present research we focus on the regulatory development of the so-called *movilidad funcional*, which has caused a “rupture” with the regulatory schemes of the past, which were based on the concept of “professional category” and which has been removed from the system and replaced by the one of “professional group”.

What could *prima facie* seem as a mainly (if not an exclusively) semantic change, reflects instead – as we have said – a substantial redefinition of the employees' professional classification system, with a consequent readjustment of the principles inspiring the discipline itself.

The foundation of the conceptual change is to be found in the purpose followed by the legislator and expressly declared in the text of the law: «*el sistema de clasificación profesional pasa a tener como única referencia el grupo profesional con el objetivo de sortear la rigidez de la noción de categoría profesional y hacer de la movilidad funcional ordinaria un mecanismo de adaptación más viable y eficaz*»²⁸⁶.

The declared objective of the legislator is therefore to overcome the rigidity which connaturalizes the concept of *categoría profesional*, valorizing the tool of functional mobility, as virtuous mechanism of

²⁸⁵ A.V. SEMPERE NAVARRO – R. MARTÍN JIMÉNEZ, *Claves de la Reforma Laboral de 2012*, Pamplona, 2012, 211.

²⁸⁶ Law 6 July 2012, n. 3, with «*medidas urgentes para la reforma del mercado laboral*», § IV of the *Preámbulo*.

greater utility to adapt the work performance to the needs proper of the economic efficiency of an enterprise.

Thus, the reform has concerned article 22 of the *Estatuto de los trabajadores* (“*Sistema de clasificación profesional*”) with the aim of facilitating and making more flexible the exercise of internal mobility from the functional (article 39 E.T.) and geographical (article 40 E.T.)²⁸⁷ point of view.

The concept of professional group assumes the form of a limit because as we mentioned above, once the employee has been inserted in a certain professional group, he/she will be able to be used in all or only in some of the tasks correspondent to the group of reference²⁸⁸.

Furthermore, it is worth specifying that the Spanish labor law system considers also the so-called “functional versatility”, establishing in the last part of article 22.4 E.T.: «*Cuando se acuerde la polivalencia funcional o la realización de funciones propias de más de un grupo, la*

²⁸⁷ M.V. BALLESTRERO, *Declinazioni di flexicurity. La riforma italiana e la deriva spagnola*, in *Lav. dir.*, 2012, 3-4, 441-464.

²⁸⁸ More in detail, it is worth clarifying that, once the concrete attitude of the professional classification system has been defined through collective bargaining, the personal employment contract simply assigns to the employee a certain professional group, relying on collective bargaining for what concerns the concrete identification of the object of the work performance (see article 22.4 E.T.). In any case it is necessary to clarify that the content of the work performance can be determined by an agreement between the parties different from the dispositions of collective bargaining, according to article 22.4 E.T.: «*Por acuerdo entre el trabajador y el empresario se asignará al trabajador un grupo profesional y se establecerá como contenido de la prestación laboral objeto del contrato de trabajo la realización de todas las funciones correspondientes al grupo profesional asignado o solamente de alguna de ellas*».

Hence, as efficaciously stressed by an authoritative scholar: «*puede afirmarse que el Estatuto de los Trabajadores convierte en totalmente disponible el sistema de clasificación profesional elaborado por la negociación colectiva en lo que se refiere a la delimitación de la prestación debida, por cuanto no establece límites ni condicionantes a lo que se pueda pactar en contrato*». J. CRUZ VILLALÓN, *Compendio de derecho del trabajo*, cit., 211.

equiparación se realizará en virtud de las funciones que se desempeñen durante mayor tiempo».

To this regard, it does not seem possible to deny a certain perplexity about this last criterion of prevalence, because it seems to present critical aspects in its practical application. In fact, it is easy to imagine how the assessment of the tasks performed in concrete can represent a reason of controversy between the parties.

The Spanish legislator expressly considers therefore the possibility to assign the employee to tasks of two or more professional groups: with reference to this, essential is the role of the individual agreement between the parties (the so-called “*pacto de polivalencia*”).

Wanting to sum up the sense of the regulatory development of the complex subject of professional classification in the Spanish legal system, we can say that «*la movilidad funcional se amplía rompiendo con esquemas pretéritos basados en la categoría profesional, la cual se sustituye forzosamente por la noción de grupo profesional*»²⁸⁹.

7. Two core regulations in comparison: the article 2103 c.c. in Italy and the articles 39 and 41 E.T. in Spain. The results of two parallel paths of reform.

Far from wanting to present in this research an analytic-descriptive picture of functional mobility in the two legal systems we have chosen to compare, it is particularly interesting to make some meditated considerations about hermeneutic issues and juridical aspects which can represent the substantial inter-system convergence between Italy and Spain.

²⁸⁹ A.V. SEMPERE NAVARRO – R. MARTÍN JIMÉNEZ, *op. cit.*, 211.

Indeed, beyond the heterogeneity of the two semantic approaches, it is useful to highlight the substantial conceptual identity characterizing the Italian and the Spanish regulatory systems.

Both in Italian and Spanish scholarly research we can recognize in fact the complex nature of work obligation, whose main content is the work performance, substantially made up of a *corpus* of concrete activities which the worker is called to perform.

These are the specific activities and the concrete tasks established by the employer and for which the employee «è stato assunto»²⁹⁰.

Not being this the place to describe as in a treatise the tasks of the employee in Italy and in Spain, we need to focus on some hermeneutic aspects and on some specific juridical issues which are particularly important in the present research.

7.1. Article 2103 c.c. in Italy.

There does not seem to be any doubt in the Italian labor law system about the centrality of article 2103 c.c.

A regulatory disposition, the one mentioned above, which has in time undergone reforms that we can identify in three moments of crucial importance: the original formulation dating back to the coming into force of the Civil Code in 1942 (R.D. 16 March 1942, n. 262); the new version of 1970 brought by article 13 of the Statute of Laborers (law 20 May 1970, n. 300) and, finally, the very recent re-writing of the disposition, introduced with the coming into force of the legislative decree 15 June 2015, n. 81 (better known as *Job's act*).

Hence, we can say that the version currently in force is the result of a historical-evolutionary process, which presents interesting aspects in

²⁹⁰ Article 96, disp. att. c.c.

its latest phase for what concerns the relationship between labor law and economics.

In order to fully grasp the *ratio* of the current wording of article 2103 c.c., we think it is useful to stress the “dynamic-evolutionary” dimension of the regulatory disposition here considered.

Over the last two decades Italian and Spanish labor law have lived an expanded and prolonged creative moment of particular intensity, depth and importance²⁹¹.

With reference to the content of the work performance, the aim which has guided the national legislators in their reforms, has obviously been to favor a greater flexibility in the discipline of employment relationships, in order to allow a stronger and better adaptation of the work conditions to the changed needs of the enterprises.

7.1.1. Article 2103 c.c. in Italy: the original formulation (1942-1970).

Proceeding step by step, it is useful to stress that article 2103 c.c., in the version antecedent to the one of 1970, established that the worker had to be assigned certain tasks at the moment of his/her hiring, stating the fundamental principle of “contractual tasks”.

Despite this, the employer was recognized the power to change unilaterally the task assigned to his/her employee, destining him/her to different tasks from those originally agreed upon in the work contract, “anchoring”, and therefore limiting, this change to the “needs of the enterprise”.

²⁹¹ G. PROIA, *Manuale del nuovo corso del Diritto del lavoro*, cit., 5: «Nell'ultimo ventennio del secolo andato, man mano che veniva maturando consapevolezza del carattere strutturale dei problemi dell'economia, si sono intensificati gli interventi del legislatore volti a trovare ad essi soluzione».

A further essential restriction to the exercise of such power was the condition that the variation of tasks could not damage the worker in professional or economic terms, bringing to a reduction in remuneration²⁹².

The complexity of the substantial indeterminateness of the restrictions placed by the law to the employer's power to change tasks (*ius variandi*), with the consequent inefficaciousness of the system of guarantees and measures of protection in favor of the worker, resulted immediately evident.

Considering in particular the «*esigenze dell'impresa*», as the first fundamental constraint to the change of tasks, the evanescence of the concept is in fact clear and this brought to a deep discretion of the entrepreneur in his/her exercise of the *ius variandi* and therefore, to a total guarantee of the employer's interests²⁹³.

The scarce incisiveness of the regulatory disposition in terms of protection of the worker, was then particularly evident in the stated exception to the rules of the civil code itself in the disposition: «*se non è convenuto diversamente*».

The possibility to decide differently from what was established in the article here considered, together with the free receding from the employment relationship with the only obligation for the employer to give notice, determined a substantial “emptiness” in terms of efficaciousness and meaningfulness of the already poor system of

²⁹² Article 2103 c.c., in its version antecedent the change introduced by the Statute of Laborers was formulated as follows: «*purché essa [l'adibizione del lavoratore a mansioni diverse da quelle contrattualmente pattuite] non importi una diminuzione nella retribuzione o un mutamento sostanziale nella posizione di lui*» (extract).

²⁹³ R. FABOZZI, *Le mansioni*, in P. CENDON (edited by), *Il diritto privato nella giurisprudenza. Il lavoratore*, Milan, 2009, 2, 22.

guarantees placed to protect the rights of the subordinate worker in the system in effect till 1970²⁹⁴.

The only restriction inside the disposition which had an intrinsic effectiveness in protecting the worker was the principle of remuneration irreducibility.

In any case, this principle did not prevent the employer from changing the worker's tasks and activities, destining him/her to less important duties than those performed when originally hired.

Hence, it is possible to affirm that the original text of article 2103 c.c., though containing a system of limits and restrictions to the employer's exercise of the *ius variandi*, did not have a sufficiently specific and effectively significant discipline for the protection of the employee, because it could be disregarded by the parties, thanks to the expressed possibility to agree on different terms.

What deserves particular attention and consideration – especially in comparison with the current formulation of article 2103 c.c. – is however the absence of a prohibition to destine the worker to poorer level tasks, in contrast with those established by the contract, which is instead the novelty of the 1970 reform.

7.1.2. Article 2103 c.c. in Italy: the novelty of 1970 (1970-2015).

Article 13 of the Statute of Laborers brought indeed significant changes to the original text of the article, arriving at what authoritative scholars have defined as an overall reformulation of the relationship

²⁹⁴ M. BROLLO, *La mobilità interna del lavoratore: mutamento di mansioni e trasferimento*, in P. SCHLESINGER (edited by), *Commentario al Codice Civile*, Milan, 1997, 13.

between entrepreneur and employee, with a consequent re-equilibration of rights and duties in the ambit of the same subordination²⁹⁵.

The spirit and the *ratio* of the reform of article 2103 c.c. seems well summed up by Gino Giugni in 1976: «*Nella norma in esame convivono due anime: una è quella di carattere garantistico che vieta il declassamento sia retributivo che professionale dei lavoratori; l'altra è frutto della costruzione che ha cercato di inserire questa norma nella politica sindacale di difesa della professionalità, onde affermare il principio per cui il mutamento di mansioni è ammissibile solo se comporti una crescita di livello professionale dei lavoratori*»²⁹⁶.

These words contain the double *ratio* of the 1970 reform: the legislator wished on one hand to assure a regulatory framework capable of protecting the worker from the retributive and professional point of view, and on the other hand, he/she wanted to state the fundamental principle around which moves the entire reformulation and according to which the *ius variandi* cannot worsen the worker's conditions.

In order to protect the worker, article 2103 c.c., as it appears after the 1970 reform (in force till the Summer of 2015), declares the essential principle according to which a worsening of the worker's tasks, even if with the same remuneration as before, is forbidden.

The main objective of the reform introduced by the Statute of Laborers was therefore to create a system of guarantees in favor of the worker and in contrast with the employer's possible power of changing the worker's duties unilaterally.

²⁹⁵ R. FABOZZI, *op. cit.*, 23.

²⁹⁶ G. GIUGNI, *Riconversione, mobilità del lavoratore, collocamento*, in *Riv. giur. lav.*, 1976, 6, 635.

The legislative guarantees find then their “complementary” element in the «*ingresso del sindacato nella fabbrica*»²⁹⁷, widely promoted by the law n. 300/1970, as a further efficacious tool of protection for the workers.

Making a more organic analysis, it is necessary to specify that the formulation of the disposition here considered, together with the intrinsic complexity of the subject regulated, determined the onset of numerous and considerable interpretative issues from the coming into force of article 13, law n. 300/1970. An authoritative scholar has efficaciously stressed this fact, talking about rules «*assai generali*»²⁹⁸.

Certainly, making a “critical” analysis, it seems possible to affirm that the legislator of the Statute of Laborers, with the introduction of the new (now outdated) art. 2103 c.c., intended to declare the centrality of a balanced mitigation of opposite interests: on one hand, the need to protect the worker and on the other hand, the necessity to guarantee the flexibility of the production organization.

This contraposition of interests, an evident projection of the antithesis historically and structurally existent between capital and labor, found in the civil code’s discipline of the *ius variandi* (before the *Job’s act*) a fundamental point of synthesis.

We need to pay particular attention to the rigor used by the legislator in 1970 when circumscribing in tight limits the employer’s power to unilaterally change the worker’s tasks²⁹⁹.

First of all, we can consider emblematic the adoption of the worker’s professionalism as parameter of reference, placed as “a

²⁹⁷ M. PERSIANI, *Prime osservazioni sulla nuova disciplina delle mansioni e dei trasferimenti dei lavoratori*, in *Dir. lav.*, 1971, 1, 12.

²⁹⁸ *Ivi*, 11.

²⁹⁹ R. PESSI, *Lezioni di Diritto del lavoro*, Turin, 2014, 272 *et seq.*

garrison” against the change of tasks, in replacement of the previously considered “interests of the entrepreneur”.

Indeed, comparing the two literal formulations of the article 2103 c.c. (in the previous version and in the one of 1970)³⁰⁰, we understand how the employer’s power to change the worker’s tasks was circumscribed within the perimeter of the only hypothesis of destining the worker to equivalent or higher level tasks towards those agreed upon at the moment of hiring or those to be considered the last effectively and in concrete performed.

A further fundamental element characterizing the reform introduced with article 13 of the Statute of Laborers is the prohibition under penalty of invalidity to destine a worker to lower level tasks.

Of great importance is also the statement of the principle of effectivity, when talking about the worker’s tasks, as a declination of what has been defined by an authoritative scholar as the general prevalence of the executive aspect of the relationship over the programmatic aspect of the contract³⁰¹.

³⁰⁰ In order to favor the comparison between the two versions of the disposition considered, we present an extract of the formulations, starting from the one in force till 1970: *«Il prestatore di lavoro deve essere adibito alle mansioni per cui è stato assunto. Tuttavia, se non è convenuto diversamente, l'imprenditore può, in relazione alle esigenze dell'impresa, adibire il prestatore di lavoro ad una mansione diversa, purché essa non importi una diminuzione nella retribuzione o un mutamento sostanziale nella posizione di lui»*. On the contrary, the discipline introduced by the reform of the Statute of Laborers declared: *«Il prestatore di lavoro deve essere adibito alle mansioni per le quali è stato assunto o a quelle corrispondenti alla categoria superiore che abbia successivamente acquisito ovvero a mansioni equivalenti alle ultime effettivamente svolte, senza alcuna diminuzione di retribuzione»*.

³⁰¹ O. MAZZOTTA, *Manuale di Diritto del lavoro*, Padua, 2015, 192; ID., *Diritto del lavoro*, in G. IUDICA – P. ZATTI (edited by), *Trattato di Diritto privato*, Milan, 2008, 410. See also F. CARINCI – R. DE LUCA TAMAJO – P. TOSI – T. TREU, *Diritto del lavoro. Il rapporto di lavoro subordinato*, Milan, 2011, 2, 154.

7.1.3. Article 2103 c.c. in Italy: the novelty of the *Job's act*, legislative decree 15 June 2015, n. 81 (2015-today).

Article 3 of the legislative decree 15 June 2015, n. 81, containing an “organic discipline of employment contracts and the revision of the regulations about tasks, as in article 1, paragraph 7, of the law 10 December 2014, n. 183” has radically intervened on the article 2103 c.c., rewriting incisively the regulatory disposition, which represents the real point of reference for what concerns workers’ tasks.

The most significant aspect of this regulatory intervention lies in the re-visitation of the concept of professional equivalence between tasks and therefore in the introduction of the possibility to destine the worker to tasks considered inferior to the previous ones.

We are clearly in front of the substantial reversal of one of the cornerstones which have for decades sustained and shaped Italian labor law: the prohibition of labor deskilling and “retrogression”.

This has occurred with the possibility to destine the worker to lower level tasks both in the case of a change in the enterprise’s organizational structure and in the cases considered through collective bargaining (also in proximity).

In any case, even if we are facing a conceptual change of considerable importance, we need to stress a significant point of contact between the new and the previous discipline of worker tasks. A point of contact which we can find in the preservation of the principle of remuneration irreducibility³⁰².

³⁰² See E. GHERA, *Diritto del lavoro*, cit., 119 *et seq.*; M. BROLLO, *Le modificazioni oggettive: il mutamento di mansioni*, in C. CESTER (edited by), *Il rapporto di lavoro subordinato: costituzione e svolgimento*, in F. CARINCI (directed by), *Commentario*, Turin, 2007, 1527 *et seq.*; O. MAZZOTTA, *Diritto del lavoro*, cit., 413 *et seq.*; G. CIAN – A. TRABUCCHI, *Commentario al Codice civile. Art. 2103*, Padua, 2010, 2301 *et seq.*; F. GIAMMARIA, *Le mansioni del lavoratore (art. 2103 c.c.)*, cit., 331 *et seq.*

Indeed, the Italian legislator in the *Job's Act*, at the fifth paragraph of the new article 2103 c.c., has expressly affirmed that, in all the cases in which the *ius variandi* is exercised, the worker has the right to keep his/her assignment level and remuneration, with the exception of the elements of the retribution intrinsically connected to specific ways of carrying out the work performance before the exercise of the *ius variandi*³⁰³.

A further element of discontinuity with the previous discipline of tasks is represented by the possibility of stipulating “under protection”³⁰⁴,

³⁰³ We can think, for example, of the so-called shift differential to which the shift worker has right or to the compensation for money management. It seems therefore that the recent reform has ended a long hermeneutic debate. Indeed, according to a first interpretation – a more “rigid” one, based on a literal approach to the previous formulation of article 2103 c.c. – the irreducibility of the retribution should have been considered in its widest meaning, that is comprehensive of all its entries. See with reference to this: G. SUPPIEJ, *Mansioni del lavoratore*, in U. PROSPERETTI (directed by), *Commentario dello Statuto dei lavoratori*, Milan, 1975, 359 *et seq.* A more flexible hermeneutic approach stated instead that it was legitimate to reduce the retribution – in the case of a worker with “new” tasks – as long as it concerned only the variable elements, anchored to and typical of the activities previously performed: see to this regard, M. PERSIANI, *I nuovi problemi della retribuzione*, Padua, 1982, 63 *et seq.*

In this last sense, it is necessary to explain the consolidated hermeneutic point of arrival of the jurisprudence, which has over time recognized that the principle of retribution irreducibility had to be applied – in the cases of application of the *ius variandi* – considering only the compensations received by the worker for his/her professional qualities, and not those connected to specific modalities of the work performance (for example, a certain discomfort the worker is asked to tolerate). See Cass., 18 November 1997, n. 11460, in *Riv. it. dir. lav.*, 1998, 2, 259 *et seq.* (with a note of G. CONTE, *La nozione di retribuzione irriducibile a norma dell'art. 2103 c.c.*). V. P. RESCIGNO (edited by), *Codice civile*, Milan, 2010, 2, 4190. See also Cass., 8 May 2006, n. 10449, in *Giust. civ.*, 2007, 1, 239 *et seq.*: «il livello retributivo acquisito dal lavoratore subordinato, per il quale opera la garanzia della irriducibilità della retribuzione, prevista dall'art. 2103 c.c., deve essere determinato con il computo della totalità dei compensi corrispettivi delle qualità professionali intrinseche alle mansioni del lavoratore, attinenti, cioè, alla professionalità tipica della qualifica rivestita».

³⁰⁴ That is: «Nelle sedi di cui all'articolo 2113, ultimo comma, o avanti alle commissioni di certificazione di cui all'articolo 76 del decreto legislativo 10 settembre 2003, n. 276».

«accordi individuali di modifica delle mansioni, del livello di inquadramento e della relativa retribuzione, nell'interesse del lavoratore alla conservazione dell'occupazione, all'acquisizione di una diversa professionalità o al miglioramento delle condizioni di vita»³⁰⁵.

The worker can therefore be destined to lower skill tasks also in all the cases of private autonomy – both collective and individual – in the perspective of improving the worker's life conditions and especially the keeping of his/her job.

7.2. The articles 39 and 41 E.T. in Spain.

The natural regulatory *pendant* of the Italian article 2103 c.c. in the Spanish legal system is represented by the articles 39 and 41 of the *Estatuto de los trabajadores* (E.T.).

In Spain, the subject of the objective changes that can concern the performance of the employment relationship on initiative of the employer, is itself heterogeneously made up of various specific profiles.

The types of objective changes to the work conditions can be arranged in at least three conventional typologies: the “*movilidad funcional ordinaria*”, the so-called *ius variandi* intended *stricto sensu* and the so called “*modificaciones sustanciales*”.

The discerning criterion generally adopted as parameter of reference, in order to subsume the different cases of objective change of the work relationship within the distinct taxonomic classes just introduced, is the “intensity” of the change which is produced.

It is possible to distinguish between an “accessory” change (“*movilidad funcional ordinaria*”) and a “substantial” one (*ius variandi* and “*modificaciones sustanciales*”).

³⁰⁵ See paragraph 6 of the new article 2103 c.c.

In the first case, the worker is asked to perform different tasks from those originally (or previously) attributed to him/her, but belonging in any case to the contractual agreement and therefore to the object of the contract defined by the parties.

On the contrary, the *ius variandi* and the “*modificaciones sustanciales*” have as peculiarity the exorbitance of the new employment conditions (and in particular of newly assigned tasks) towards what was “contractually agreed upon”.

In addition to this fundamental conceptual *discrimen*, it is worthwhile specifying that the objective changes of the content of the work performance can be divided also in the light of other criteria.

For example, it is possible to distinguish between changes decided unilaterally by the employer and ones agreed upon with the employee, individual changes or collective ones (according to the number of workers involved), temporary changes (in the case of *ius variandi*) or permanent ones. Finally, there are changes which impose or not on the employer to communicate to the worker involved the reasons which have determined the change of his/her tasks.

Proceeding step by step, we will consider the different typologies in which the “objective” changes of the work relationship are articulated in the Spanish labor law system, following the increasing intensity of these changes.

As highlighted by an authoritative scholar, «*la movilidad funcional puede definirse como todo cambio sobrevenido en la ejecución del contrato de trabajo que comporta la realización por parte del trabajador de tareas o actividades profesionales diversas de las que viene ejecutando en función del puesto asignado*»³⁰⁶.

³⁰⁶ J. CRUZ VILLALÓN, *Compendio de derecho del trabajo*, cit., 333.

In other words, by *movilidad funcional ordinaria* we mean those changes of the worker's tasks which are in any case inserted in the ambit of the performance agreed upon *inter partes*. This is therefore an expression of the employer's power to specify what the work performance consists in.

Ordinary functional mobility, whose ambit of application has been significantly widened following the recent reform in 2012, is conceived within the perimeter of non-secondary objective limits, represented by the respect of the academic and professional titles required to perform a specific professional activity (article 39.1 E.T.), by the possibility to destine the worker only to tasks belonging to a certain professional group (article 22.4 E.T.) and by the respect of the worker's dignity and fundamental rights (article 39.1 E.T.).

To these restrictions expressly considered in the *Estatuto de los trabajadores*, we can add a further meaningful condition for the legitimate exercise of the *movilidad funcional ordinaria*: the respect of the regulations on the subjects of health and work safety (see in particular article 25.1, *Ley de Prevención de los Riesgos Laborales*).

Consequently, as unshakeably pointed out by the Supreme Court: *«el artículo 39 del citado cuerpo estatutario, en materia de movilidad funcional en el seno de la empresa, consagra un criterio permisivo aun cuando subordinado a que, al acordarse aquélla, no se rebasen los límites que al respecto se establecen por el propio precepto. Es claro que uno de tales límites consiste en que el cambio impuesto no determine una modificación sustancial en las condiciones de trabajo, pues modificación de tal clase rebasa el ámbito del “ius variandi” y sólo resulta posible en función de las causas, siguiendo el procedimiento y, en su caso, con*

sujeción a las consecuencias que figuran previstas por el artículo 41 del citado Estatuto»³⁰⁷.

On the contrary, the so-called *ius variandi* consists in destining the worker to tasks which are different from the ones agreed upon, as they are not attributable to the professional group he/she belongs to.

This change, unilaterally decided by the employer according to article 39.2 E.T., has to be necessarily temporary: «*La movilidad funcional para la realización de funciones, tanto superiores como inferiores, no correspondientes al grupo profesional sólo será posible si existen, además, razones técnicas u organizativas que la justifiquen y por el tiempo imprescindible para su atención. El empresario deberá comunicar su decisión y las razones de ésta a los representantes de los trabajadores*».

The taxonomic characteristic of the concrete application of the *ius variandi* resides in the difference – in Spain as in Italy – between *ius variandi in melius* and *ius variandi in peius*.

Both cases have to be based on the existence and demonstration of concrete justifying causes («*razones técnicas u organizativas que la justifiquen*»³⁰⁸).

To this we can add that – as mentioned above – the mere existence of effective justifying reasons for the change is not enough to legitimize the change of duties, being also necessary for it to be circumscribed and limited to the «*tiempo imprescindible para su atención*», as in the quoted article 39.2 E.T.

³⁰⁷ STS 4ª – 14/06/1990 – EDJ 1990/6367.

³⁰⁸ Article 39.2 E.T. On this aspect it is worth clarifying that «*a pesar de que la referencia causal en la norma es muy genérica, imprecisa y amplia, en todo caso se exige la presencia de una específica circunstancia justificativa vinculada con las necesidades empresariales que debe ser explicitada por el empleador y comunicada al trabajador afectado por el cambio*» (J. CRUZ VILLALÓN, *Compendio de derecho del trabajo*, cit., 336).

In order for the *ius variandi* to be legitimately exercised, it is necessary for it to be imposed by really existent justifying reasons and to be limited to the time strictly necessary to face the needs expressed above.

Hence, it is useful to clarify that while the so-called “ordinary” *movilidad funcional* is conceived within the perimeter of the *grupo profesional* (about which we reasoned *supra*), without particular restrictions for what concerns its length and content, the *ius variandi* will be able to be legitimately exercised only in presence of the aetiological-objective and temporal presuppositions indicated by article 39.2 E.T.

In any case, a non-irrelevant point of contact between the *ius variandi* and the “*movilidad funcional ordinaria*” can be found in the existence in both cases of a common restriction, consisting in the necessary respect of the worker’s dignity and fundamental rights (article 39.1 E.T.), and in the regulations on the subject of health and safety at work (article 25.1 LPRL).

An aspect which is of the maximum relevance for our research – and on which we will return later on – is the substantial overcoming of the worker’s professional training as a limit to the legitimate exercise of the *ius variandi*.

Although the disappearance of the role of professional training is emblematic of the deep changes which have taken place in the Western world labor law regulatory context, it is worth specifying that in reality a professional training restriction to the exercise of the *ius variandi* survives in article 4.2.b E.T., according to which: «*En la relación de trabajo, los trabajadores tienen derecho: A la promoción y formación profesional en el trabajo, incluida la dirigida a su adaptación a las modificaciones operadas en el puesto de trabajo, así como al desarrollo de planes y acciones formativas tendentes a favorecer su mayor empleabilidad*».

In addition, the system obliges the employer to communicate to the workers' representatives the changes with their related justifying reasons.

Though confirming what has been said so far, we need to emphasize that among the main restrictions to the application of the *ius variandi* there is article 39, paragraph 3, E.T., which describes the correlation between the tasks effectively performed and their retribution.

This principle encounters one exception in the case in which the worker is destined to lower skill tasks: in this case, in fact, the worker will be entitled to keep his/her retribution of origin.

*«El trabajador tendrá derecho a la retribución de origen correspondiente a las funciones que efectivamente realice, salvo en los casos de encomienda de funciones inferiores, en los que mantendrá la retribución de origen»*³⁰⁹.

In other words, it is the principle of retribution irreducibility, which finds recognition also in the Spanish labor law system³¹⁰.

A further restriction to the *ius variandi* resides in the impossibility to appeal to the *«causas de despido objetivo de ineptitud sobrevinida o de falta de adaptación en los supuestos de realización de*

³⁰⁹ Article 39, paragraph 3, *Estatuto de los Trabajadores*.

³¹⁰ V. J. CRUZ VILLALÓN, *Compendio de derecho del trabajo*, cit., 336-337: *«Cuando se trata de ius variandi in peius el mantenimiento de la retribución no tiene el carácter de límite en sentido estricto, de tal manera que impida el ejercicio de facultades de movilidad, sino todo lo contrario; se presupone que el empresario puede destinar al trabajador a la ejecución de funciones inferiores siempre que las retribuya con lo estipulado para la actividad de origen; eso sí, al resultar el cambio particularmente gravoso desde el punto de vista económico para la dirección de la empresa, ésta procurará buscar otros métodos de organización del trabajo menos costosos o bien no dilatar en el tiempo la asignación de las funciones correspondientes a ese puesto de trabajo (art. 26.3 E.T.)»*.

*funciones distintas de las habituales como consecuencia de la movilidad funcional»*³¹¹.

Hence, if such causes were to be invoked, we would be in the case of a “*improcedente*” dismissal with deriving sanctionative consequences.

Finally, we need to consider the so-called *modificación sustancial de las condiciones de trabajo*.

Article 41 of the *Estatuto de los trabajadores* contains the discipline of the substantial changes of the employment conditions, in the ambit of which there are also those changes that concern the «*funciones, cuando excedan de los límites que para la movilidad funcional prevé el artículo 39*».

From the study of the regulatory disposition of reference – article 41, paragraph 1, letter f) – we understand how its peculiarity in comparison to the one of article 39 E.T., substantially resides in the same exorbitance towards the restrictions placed by the last mentioned rule.

First of all, we need to stress the substantial indeterminateness of the juridical concept of “*modificación sustancial*”, as emphasized by the Supreme Court³¹².

For this indeterminateness, it is worthwhile clarifying already from now that to be able to consider as “substantial” the changes of the work conditions, it is necessary «*que se hubiera producido una transformación en la misma de tal índole que quedara desdibujada en sus contornos esenciales*»³¹³.

³¹¹ Article 39, paragraph 3, *Estatuto de los Trabajadores*.

³¹² STS 4^a – 22/09/2003 – 122/2002 – EDJ2003/127788: «*concepto jurídico indeterminato, el de “modificaciones sustanciales” que no ha sido delimitado por el legislador ni tampoco precisado de manera definitiva por la doctrina jurisprudencial*».

³¹³ STS 4^a – 15/03/1990 – EDJ1990/2935.

In other words, in order for the change of work conditions to be considered really substantial, it is necessary for it to directly influence the essential aspects of the employment relationship, altering and/or transforming fundamental aspects of the relationship itself³¹⁴.

Article 41 E.T. with its procedures for the cases of individual or collective changes, finds application in this context.

For the employer to be legitimately able to make the substantial changes required, the presence of proven economic, technical, organizational or productive reasons is necessary.

With reference to this, meaningful is the specification of article 41.1 E.T., according to which the above mentioned justificatory “causes” have to be connected and related to the enterprise’s needs of competitiveness, productivity, technical or work organization³¹⁵.

The formulation of the disposition considered is so wide that in the ambit of the legitimate substantial changes, it includes all the modifications “imposed” by effective and concrete entrepreneurial needs – and not necessarily linked to a situation of crisis of the enterprise – and not attributable to arbitrary evaluations of the employer.

«Se contemplan las modificaciones en un contexto de evolución fisiológica de la empresa, que no patológica. Nos situamos, pues, en el terreno de la cotidianidad, de la normalidad, de los cambios ordinarios en la evolución de la actividad empresarial»³¹⁶.

³¹⁴ STS 4ª – 03/12/1987 – EDJ1987/8822.

³¹⁵ Article 41.1. E.T.: *«La dirección de la empresa podrá acordar modificaciones sustanciales de las condiciones de trabajo cuando existan probadas razones económicas, técnicas, organizativas o de producción. Se considerarán tales las que estén relacionadas con la competitividad, productividad u organización técnica o del trabajo en la empresa».*

³¹⁶ V. J. CRUZ VILLALÓN, *Compendio de derecho del trabajo*, cit., 336-340.

In any case, what is clear is the existence of an aetiological connection binding justificatory causes to the measures which are adopted in concrete.

8. Hermeneutic issues in comparative studies. What spaces can there be for the professional training of a worker?

In the light of the considerations made so far, we proceed now to reflect on some issues which deserve to be considered comparatively.

The above examined regulatory dispositions, both in Italy and in Spain, have in fact created hermeneutic issues and interpretative contrasts of meaningful significance, through which it is possible to “read” paradigmatically the changes, the developments and the “disruptions” labor regulations have been subject to.

The issues which will be object of critical consideration in the following pages, allow us to – also and especially thanks to the use of comparisons – to give an interesting contribution based on an unavoidable methodical question.

Can the new “physiognomy” of labor law be considered *«radicalmente nuova, improntata a mutati principii e finalità»* or, *«pur scontando fenomeni di micro-discontinuità»*, will it see the prevalence of *«quella ispirazione ideale – figlia di una precisa matrice genetica orientata alla protezione di chi lavora alle altrui dipendenze – che già nel corso del secolo appena trascorso ha fatto sopravvivere la “specialità” e la vitalità del Diritto del lavoro a ben diverse temperie politiche e culturali»*?³¹⁷

³¹⁷ Cfr. R. DE LUCA TAMAJO, *Evoluzione o sconvolgimento delle regole del lavoro?*, in C. ROMEO (edited by), *Il futuro del Diritto del lavoro: dall'inderogabilità alla destrutturazione*, in *Quad. Dir. lav.*, 2003, 8, 65-70.

Proceeding step by step, it is useful first of all to stress that the labor market reforms – in Spain in 2012 and in Italy in 2015 – both contain significant dispositions on the subject of workers’ training, when connected to the application of the *ius variandi*.

Moving from the reform which was introduced first, that is the Spanish one, we need to underline that article 23.1 E.T. declares the worker’s right to “receive” the training made necessary by the changes in the tasks he/she performs.

An analogous disposition can be found also in article 2103, paragraph 3, c.c., after the introduction of the so-called *Job’s act* (legislative decree n. 81/2015).

In any case it is useful to specify that the Italian disposition is less specific than the Spanish one just mentioned.

Comparing the two literal formulations, we can grasp the greater problemativeness of interpreting the Italian disposition, according to which:

«Il mutamento di mansioni è accompagnato, ove necessario, dall’assolvimento dell’obbligo formativo, il cui mancato adempimento non determina comunque la nullità dell’atto di assegnazione delle nuove mansioni»³¹⁸.

It is true that the regulation introduces a form of training obligation in the cases in which the change of duties requires the training of the worker.

An analogous disposition could be found also in the previous Italian regulatory system.

And in a certain way it seems possible for us to say that the introduction of this obligation can be conceived as a “consequence” of

³¹⁸ Article 2103, paragraph 3, c.c.

the overcoming of professionalism, before considered as the parameter of reference for the legitimate exercise of the *ius variandi*.

The extension of the list of tasks in concrete expected by the employer can mean that the employee may not have all the necessary competences and professionalism to perform them.

Because of the possibility for the employee to be destined to tasks requiring different professional skills from the ones he/she possesses, a “training activity” could be necessary to make the work performance advantageous.

From a critical and reasoned analysis of the disposition here considered, it seems possible to affirm that there are many hermeneutic aspects deriving from it.

Indeed, we need to emphasize that the legislator generically refers to the «*assolvimento dell’obbligo formativo*», without however identifying on whom the obligation is placed.

Plausibly, despite the silence of the disposition considered, it seems possible to affirm that the employer is obliged to guarantee the necessary training, being – in general terms – the person responsible for the training of his/her employees.

Reflecting on this we could be brought to ask ourselves: *quid iuris* in the case in which the employer were to be in default for what concerns this training obligation?

What could be the consequences of this default?

The regulatory disposition considered is clear in excluding that the non-performance of the training obligation can determine the invalidity of the act by which the worker is destined to new duties.

In other words, there is no sanctionative system to “support” the training obligation recently introduced³¹⁹.

And this in spite of the fact that after a first cursory reflection, we could be pushed to think that the employer’s default in guaranteeing the training should be followed by the invalidity of the disposition which has changed the duties to be performed.

There does not seem instead to be any doubt that if the employer does not discharge the training obligation requested *ex lege*, «*questi non possa poi contestare al lavoratore l’inadeguatezza della prestazione*»³²⁰.

Indeed, the training of the worker made necessary by the change of the worker’s tasks is first of all in the interest of the employer.

For this reason it does not seem singular to suppose that we are not in front of a juridical obligation *stricto sensu*, but of a subjective juridical situation of “burden” (“*onere*”)³²¹.

Specularly to the qualification of the employer’s passive juridical situation, we think it is worth considering the theme of the recognition of the worker’s right to training.

As is known, this theme is not a novelty in Italian labor law, because scholars of different orientation have discussed it³²².

³¹⁹ M. TIRABOSCHI, *Prima lettura del d.lgs. n. 81/2015 recante la disciplina organica dei contratti di lavoro*, Modena, 2015, 22.

³²⁰ F. LISO, *Brevi osservazioni sulla revisione della disciplina delle mansioni contenuta nel decreto legislativo n. 81/2015 e su alcune recenti tendenze di politica legislativa in materia di rapporto di lavoro*, in C.S.D.L.E. “Massimo D’Antona” *Working papers*, 2015, 257, 13.

³²¹ N. IRTI, *Introduzione allo studio del Diritto privato*, cit., 45. Of the same author see also ID., *Due saggi sul dovere giuridico (obbligo – onere)*, Naples, 1973, 51-121.

³²² In favor of the existence of a right to training see C. ALESSI, *Professionalità e contratto di lavoro*, Milan, 2004, 155 *et seq.*; *contra* see M. MAGNANI, *Organizzazione del lavoro e professionalità tra rapporti e mercato del lavoro*, in *Dir. lav. rel. ind.*, 2004, 184 *et seq.*

In this period, following the coming in force of the new (and innovative) formulation of the disposition here considered, the issue is not of secondary relevance.

In fact, the legislator has expressly circumscribed the training obligation within the limited perimeter of the *«ove necessario»*, without however specifying who has to identify and evaluate the effective necessity in concrete.

Reflecting in general, it seems possible to say that intrinsic to the very formulation of the disposition considered, is a widespread genericness of content from which emerges a non-secondary uncertainty of interpretation.

This uncertainty will be overcome only through the irreplaceable contribution that collective bargaining is called to give every day.

On the contrary, we do not find the same interpretative uncertainty in the Spanish regulatory system, where article 23.1, letter d), E.T. considers the worker's right to receive the necessary training to perform his/her new duties.

«El trabajador tendrá derecho: (omissis)

d) a la formación necesaria para su adaptación a las modificaciones operadas en el puesto de trabajo. La misma correrá a cargo de la empresa, sin perjuicio de la posibilidad de obtener a tal efecto los créditos destinados a la formación. El tiempo destinado a la formación se considerará en todo caso tiempo de trabajo efectivo»³²³.

From the comparison with the Italian regulatory disposition it is *prima facie* evident how the Spanish one reveals a greater specificity and accuracy in its formulation, so that it is able to still many of the interpretative doubts which have emerged.

Indeed, on the contrary of what happens in Italy, in Spain to the

³²³ Article 23.1, letter d), E.T.

worker is expressly recognized the right to training and its discharge is placed on «*la empresa*», that is on the employer.

Therefore, it seems possible to say that in the case considered, we are in presence of a true juridical situation of “subjective right – obligation”.

Certainly, also in Spain, the training obligation is “anchored” to an evaluation of necessity, whose outlines are blurred.

It is worth then considering a fact which, *prima facie*, could be neglected: the collocation of the regulatory disposition about training in the taxonomy of the *Estatuto de los trabajadores*. In fact, the Spanish legislator did not insert the disposition in the ambit of article 39 (indexed: “*Movilidad funcional*”), nor in that of article 41 (indexed: “*Modificaciones sustanciales de condiciones de trabajo*”), but in article 23 (indexed: “*Promoción y formación profesional en el trabajo*”).

This aspect reflects the choice of the legislator of the R.D.-Law 10 February 2012, n. 3 and of the Law 6 July 2012, n. 3 to insert the training made necessary by the *ius variandi*, in an organic regulatory framework on the subject of employment training.

In the law text, well emphasized is the necessity to concentrate on «*una formación profesional que favorezca el aprendizaje permanente de los trabajadores y el pleno desarrollo de sus capacidades profesionales. El eje básico de la reforma en esta materia es el reconocimiento de la formación profesional como un derecho individual (...). Asimismo, se reconoce a los trabajadores el derecho a la formación profesional dirigida a su adaptación a las modificaciones operadas en el puesto de trabajo*»³²⁴.

With specific reference to the complex theme of the worker’s professionalism, it is worth stressing how in the Italian juridical context

³²⁴ *Exposición de motivos (apdo. II) E.T.*

the legislative decree 15 June 2015, n. 81 intervened (among other things) on article 2103 c.c., at a distance of forty-five years from the last change brought to the disposition with the article 13, law 20 May 1970, n. 300³²⁵.

More in detail, the equivalence referred before to the tasks «*ultime effettivamente svolte*»³²⁶ is now “measured” on the «*mansioni riconducibili allo stesso livello e categoria legale di inquadramento delle ultime effettivamente svolte*»³²⁷.

The importance of this specific aspect of the reform seems, in fact, historical, because we can already now affirm that we reach a substantial overcoming of the concept itself of professional equivalence, around which was based the entire regulatory framework of the previous formulation of the article 2103 c.c.

According to a consolidated orientation, both doctrinal and jurisprudential, the equivalence between tasks has been traditionally considered with reference to the professional value of the activity performed by the worker, evaluating “dynamically” even the notion of professionalism, in an inclusive perspective, addressed to valorize the professional capabilities (also only potential) of the worker him/herself³²⁸.

³²⁵ See M. PERSIANI, *Prime osservazioni sulla nuova disciplina delle mansioni e dei trasferimenti dei lavoratori*, in *Dir. lav.*, 1971, 11-22.

³²⁶ Article 2103, paragraph 1, c.c. in the formulation antecedent to the coming into force of the legislative decree 15 June 2015, n. 81.

³²⁷ Article 3, paragraph 1, c.c. in the formulation after the coming into force of the legislative decree 15 June 2015, n. 81. See article 2095 c.c. with reference to the legal organizational categories.

³²⁸ See Cass., 13 November 1991, n. 12088, in *Giur. it.* 1992, 1040. See L. GALANTINO, *Lavoro atipico, formazione professionale e tutela dinamica della professionalità del lavoratore*, in *Dir. rel. ind.*, 1998, 319: «*la professionalità del lavoratore non si identifica più con determinato e specifico profilo, ma si configura piuttosto come insieme di conoscenze teorico-pratiche in ordine al ciclo produttivo, che gli consentono*

Following the coming into force of the legislative decree n. 81/2015, as emphasized by the first commentators: «*il concetto di equivalenza non è più parametrato al contenuto professionale delle mansioni effettivamente svolte, ma rinvia alle classificazioni contenute nei contratti collettivi*»³²⁹.

The consequence is, therefore, that equivalent tasks are now to be considered the ones correspondent to the same classification made by collective bargaining, and not anymore the ones characterized by equivalent professional contents.

On the other hand, the illustrative report accompanying the legislative decree framework prepared by the government, clarifies when presenting the main novelties on the subject of tasks: «*il lavoratore può essere assegnato a qualunque mansione del livello di inquadramento, così com'è previsto nel lavoro alle dipendenze della pubblica amministrazione [...] e non più soltanto a mansioni "equivalenti", a mansioni, cioè, che implicano l'utilizzo della medesima professionalità*»³³⁰.

The innovative relevance of the reform is of palpable evidence, if we consider that both in doctrine and in jurisprudence the orientation which excluded the equivalence between tasks, only on the basis of the

di svolgere una serie dinamicamente variabile di funzioni caratterizzate da un certo grado di complessità».

³²⁹ G. MIMMO, *Mansioni, la riscrittura di uno dei capisaldi del diritto del lavoro*, in AA. VV., *Contratti e mansioni. Il riordino dopo il D.Lgs. 15 giugno 2015, n. 81*, Rome, 2015, 18.

³³⁰ Illustrative report accompanying the «*Schema di decreto legislativo recante il testo organico delle tipologie contrattuali e la revisione della disciplina delle mansioni, in attuazione della legge 10 dicembre 2014, n. 183*», www.documenti.camera.it, 7. The reference to work subordinate to the public administration is at article 52, legislative decree 165/2001.

formal identity of the contractual level, was consolidated (see Cass., 6 May 2015, n. 9119)³³¹.

The theme of professionalism is of fundamental importance in a reflection which wishes to analyze the interesting aspects of the relationship – dialogical or conflictual – between economics and labor law regulations.

In Spain, the Italian concept of professionalism finds its correspondent in the notion of *cualificación*, considered as «*el conjunto de capacidades y conocimientos teóricos y prácticos, de habilidades y destrezas que son útiles para el desarrollo de la producción*»³³².

In reality, the above mentioned concept describes a wider perimeter than the one traditionally described in the Italian version of professionalism, including in addition to the worker's "know-how" – considered as «*il complesso di attitudini, capacità e competenze già acquisite dallo stesso durante lo svolgimento delle precedenti mansioni*»³³³ – also a "know how to be".

It is worth stressing that with the Spanish labor market reform in 2012, new concepts were introduced in the labor law system such as the

³³¹ From the jurisprudential point of view, in addition to the already recalled sentence of May 2015, see among the most recent: Cass., 3 February 2015, n. 1916, in *Giust. civ. mass.*, 2015; Cass., 31 May 2012, n. 13281, in *Guida lav.*, 2012, 31, 40; Cass., 12 January 2012, n. 250, in *Guida lav.*, 2012, 7, 43; Cass., 8 June 2009, n. 13173, in *Mass. giur. lav.*, 2009, 757. *Contra*, cfr. Cass., 12 January 2006, n. 425, in *Arg. dir. lav.*, 2006, 845 (with a note by M. LIBERATORE, *Dequalificazione professionale e tutela in forma speciale*), in which the Supreme Court clarifies that: «*il fatto che le nuove mansioni siano comprese nel livello contrattuale nel quale è inquadrato il lavoratore assume una forte valenza presuntiva circa il loro carattere equivalente a quelle eseguite in precedenza*». It is useful to recall another sentence which is closer to the regulatory dispositions introduced by the *Job's act*: Cass., 21 June 1986, n. 4139, in *Notiz. giur. lav.*, 1986, 722 considers in fact equivalent the tasks inserted in the ambit of the same contractual level.

³³² R. HERRANZ GONZÁLEZ, *La sociología de los mercados internos de trabajo*, Madrid, 2007, 164.

³³³ M. BROLLO – M. VENDRAMIN, *op. cit.*, 18.

tareas and the *responsabilidades*, which express a greater involvement of the worker in the enterprise organization and therefore, a widening of the formal relevance of the previous concept of professional category.

This substantial conceptual extension reveals itself also in the overcoming of the concept of *«equiparación a la categoría, grupo profesional o nivel retributivo previsto en el convenio colectivo»*, which characterized the abrogated article 22.5 E.T.: the new Spanish regulation, in fact, establishes the above mentioned principle thanks to which the worker is assigned to a professional group, destining the same worker to the *«realización de todas las funciones correspondientes al grupo profesional asignado o solamente de alguna de ellas»*³³⁴.

As a gloss to the reflections made so far, we wish to recall the thought of an authoritative Italian labor law scholar who, decades ago, affirmed with foresight: *«in un'economia in crisi e in un apparato produttivo in riconversione, non solo lo sviluppo della professionalità, ma il mantenimento stesso della professionalità acquisita è estremamente difficile»*³³⁵.

The topicality of the author's observation is totally evident. It is suitable for the present-day economic-financial crisis, which exploded all over the world in the second half-year of 2008.

9. Recapitulation considerations.

To the considerations made so far, also using a comparative method, we wish now to add some recapitulation reflections of wider breadth.

³³⁴ Article 22.4 E.T.

³³⁵ G. GIUGNI, *Riconversione, mobilità del lavoratore, collocamento*, cit., 635.

It is undeniable that the new and innovative regulatory dispositions introduced in Italy and in Spain on the subject of the worker's destination to lower level tasks, are the paradigmatic representation of a new labor law which has seen light and is gradually emerging more and more.

The reforms of the *ius variandi*, introduced in the Spanish and Italian labor law systems, respectively in 2012 and in 2015, carry inside a systematicity which is totally coherent with the concept of flexibility and modernization of labor law regulations, of which we have spoken in the previous chapters.

The discipline of the worker's tasks, respectful of the essence of *facere* which characterizes the «*obbligazione fondamentale di lavorare*»³³⁶, produces implications on the crucial dimension of subordinate employment.

What results from the recent labor market reforms (and therefore, also from the worker's tasks) is the physiognomy of a new labor law³³⁷, of a new labor law "course"³³⁸, expression of a vision of the balance

³³⁶ R. SCOGNAMIGLIO, *Mansioni e qualifiche dei lavoratori: evoluzione e crisi dei criteri tradizionali*, in AA. VV., *Mansioni e qualifiche dei lavoratori: evoluzione e crisi dei criteri tradizionali*, Milan, 1975, 15.

³³⁷ J. CRUZ VILLALÓN, *Hacia una nueva concepción de la legislación laboral*, in *TL*, 2012, 115, 18 refers to «*una nueva filosofía, que anuncia una nueva comprensión del papel interventor del poder público en el complejo sistema de relaciones laborales. La intuición es que [...] se ha superado una determinada línea de tendencia para situarnos en un terreno que manifiesta una concepción cualitativamente diferente del papel de la legislación laboral en la tutela de los intereses respectivos de trabajadores y empresarios*». See R. PESSI, *Persona e impresa nel Diritto del lavoro*, cit., 1238-1257; see also ID., *Valori e "regole" costituzionali*, cit. 14-15. On the mitigation of opposite interests see also S. BINI, *Per un bilanciamento di valori tra persona e impresa*, in *Rass. Avv. Stato*, 2012, 4, 318 et seq.

³³⁸ G. PROIA, *Manuale del nuovo corso del diritto del lavoro*, cit., *passim*.

between employer and worker³³⁹, different from the historical one and from the “classical” one of the Italian and Spanish juridical tradition³⁴⁰.

It is then the balancing between interests and values in contrast – which identifies the very essence of labor law – to be object of deep change³⁴¹.

The reforms which came to birth in Italy and Spain in recent years are contextualized in the scenario of a European trend³⁴², which has gradually made the employment relationship more flexible, with reference not only to its genetic moment, or to its extinction, but also and especially to the internal “phase” of the relationship itself, concerning the ways in which the work performance is to be carried out³⁴³.

³³⁹ As highlighted by an authoritative French labor law scholar, A. SUPLOT, *Critique du droit du travail*, cit., 109: «*Dans tous les pays industriels où elle a prospéré, la relation de travail salarié a été, et demeure, définie comme une relation où l'un peut commander et où l'autre doit obéir*».

³⁴⁰ On the influence exercised by international organizations in the design of the labor reforms of the single European countries, see M. ESPÍN SÁEZ – A. GUAMÁN HERNÁNDEZ – Y. MANEIRO VÁZQUEZ – J.M. MIRANDA BOTO, *Evolution in labour law and social security in Spain during the economic and financial crisis (2007-2014)*, in www.aedtss.com, 2014, 13.

³⁴¹ J. CRUZ VILLALÓN, *Presentación*, in ID. (edited by), *Eficacia de las normas laborales desde la perspectiva de la calidad en el empleo*, cit., 13.

³⁴² On this aspect see G. LOY, *op. cit.*, 3 *et seq.*: «*i provvedimenti adottati durante, e talvolta con esplicito riferimento alla crisi, paiono inserirsi nell'ambito della più generale tendenza ad una complessiva evoluzione del modello sotto la spinta di visioni largamente ispirate alla analisi economica del diritto e fatte proprie dall'Unione Europea. In questo contesto può dirsi che la crisi ha costituito l'occasione per accelerare quel processo di trasformazione del Diritto del lavoro suggerito dal Libro Verde sulla modernizzazione del Diritto del lavoro che interessa, allo stesso tempo, l'orientamento della dottrina, la produzione normativa e l'autonomia collettiva*». See M. RODRÍGUEZ-PIÑERO y BRAVO-FERRER, *Flexiseguridad: el debate europeo en curso*, cit., 3 *et seq.*; J. GARCÍA MURCIA, *op. cit.*, 121 *et seq.*; F. VALDÉS DAL-RÉ, *Flexiseguridad y mercado de trabajo*, cit., 1 *et seq.*

³⁴³ J. CRUZ VILLALÓN, *Prólogo*, in ID. (edited by), *Estatuto de los trabajadores*, cit., 22: «*En tiempos más recientes las reformas se han centrado en las preocupaciones por proporcionar a las empresas instrumentos de flexibilidad laboral, particularmente acentuando los elementos dirigidos a fomentar la flexibilidad interna de condiciones de*

These reforms directly condition the dualism enterprise-work, determining a significant change in the physiognomy of subordination itself.

Certainly, the reforms which have been introduced in Europe in recent years seem to answer the need to create flexible tools, suitable to adapt the work performance to the effective economic-productive needs of the enterprise, through the valorization of the worker's versatility³⁴⁴.

More in particular, we can say that the discipline of the *ius variandi* is one of the most interesting in order to appreciate the influence of economics on the regulation of work.

It is with specific regard to the worker's destination to lower level duties that we appreciate more the connection between labor law and economics.

Unstoppable and deep are the changes which – under the impulse of global economic change – have concerned the organization models of the enterprise, more and more considered as a «complessa situazione giuridica attiva che ha per oggetto l'azienda (in senso lato, e, dunque, comprensiva anche dell'organizzazione di persone) e per contenuto quel potere di gestione»³⁴⁵.

trabajo, sin perjuicio de incidir también en la flexibilidad externa por la vía de aligerar causas, procedimientos y costes de los despidos por causas económicas y empresariales en general». See also M.N. BETTINI, op. cit., 188-189: «Non v'è dubbio che, negli ultimi anni, si è assistito, attraverso le diverse vie consentite dal sistema (giurisprudenza, ccnl, circolari, interPELLI, ecc.), allo smantellamento progressivo delle rigidità e delle tutele disposte a livello normativo in materia di mansioni del lavoratore. In realtà, nel campo delle qualifiche, inquadramento e mansioni, il processo di erosione delle certezze e, soprattutto delle staticità, è in atto "da sempre"».

³⁴⁴ P. ICHINO, *La qualità del lavoro dovuto e il suo mutamento*, in AA. VV., *Scritti in onore di Giuseppe Suppiej*, Padua, 2005, 489: «tutto induce a pensare che i mercati del lavoro stiano evolvendo rapidamente in direzione di una sempre maggiore valorizzazione di questa qualità della prestazione».

³⁴⁵ M. MARAZZA, *Saggio sull'organizzazione del lavoro*, Padua, 2002, 121; see also R. NICOLÒ, *Riflessioni sul tema dell'impresa e su talune esigenze di una moderna dottrina*

Hence, it is in this scenario that the reformed disciplines of the worker's tasks necessarily have to be contextualized³⁴⁶.

And indeed, with reference to these specific dispositions, the new regulations of the worker's functional mobility express well the essence of a labor law, more and more conditioned by the economy and by its economic-productive trends.

In this context, the worker's tasks become a privileged ground to verify the adaptation of "rules" to changing economic realities.

In the peculiarity of the modificability *ex parte datoris* of the worker's tasks resides a specificity typical of labor law, first of all towards civil law, whose roots go back to the principle of contractual freedom³⁴⁷.

Indeed, as clearly highlighted by an authoritative Spanish labor law scholar, «*La posibilidad de que las partes que celebraron el contrato posteriormente acuerden su modificación, con mantenimiento del mismo contrato, siempre resulta posible en aplicación de los principios generales de la contratación privada*»³⁴⁸.

del diritto civile, in *Riv. dir. comm.*, 1956, 1, 187 *et seq.* See L. CORAZZA – O. RAZZOLINI, *op. cit.*, *passim*. See also M. BARBERA, *op. cit.*, 205.

³⁴⁶ See F.W. TAYLOR, *op. cit.*, 143 *et seq.*; R. DORE, *op. cit.*, 23 *et seq.*; J.P. WOMACK – D.T. JONES – D. ROOS, *op. cit.*, 5-12; T. OHNO, *op. cit.*, 19 *et seq.*; S. BHASIN – P. BURCHER, *op. cit.*, 56-72; E. MINGIONE – E. PUGLIESE, *Il lavoro*, Rome, 2010, 41-59.

³⁴⁷ See R. PESSI, *Lezioni di Diritto del lavoro*, cit., 273 *et seq.*: «*al datore di lavoro è anche attribuito il potere di modificare unilateralmente, nel corso dello svolgimento del rapporto, le mansioni e, quindi, di assegnare il lavoratore a mansioni diverse, con possibili effetti sullo stesso inquadramento legale e contrattuale*»; and again: «*Trattasi di potere da considerarsi eccezionale nella disciplina generale dei rapporti obbligatori, nei quali le modificazioni possono intervenire solo per mutuo consenso delle parti contraenti (vedi art. 1372 cod. civ.)*». J. CRUZ VILLALÓN, *La movilidad geográfica del trabajador y su nuevo régimen legal*, in *Rev. pol. soc.*, 1980, 125, 81 *et seq.*: «*el régimen jurídico de las modificaciones de las condiciones laborales se presenta radicalmente diverso al vigente para la contratación civil*». See also F. SANTORO-PASSARELLI, *Dottrine generali del Diritto civile*, Naples, 1954, *passim*.

³⁴⁸ J. CRUZ VILLALÓN, *Compendio de derecho del trabajo*, cit., 331.

And again: *«la especificidad del ordenamiento laboral reside en la facultad del empresario de acometer la modificación de las condiciones contractuales unilateralmente, sin contar con el consentimiento del trabajador»*³⁴⁹.

This specificity, typical of the labor law relationship, lies in the fact that the employment relationship is a relationship destined to have a duration, physiologically subject to the change of the organizational and productive needs to which the work performance is connected.

Hence, it is in the perspective of a permanent adaptation of the work performance to the organizational needs of the enterprise that we have to conceive the power of unilateral change of the worker's tasks.

Thanks to the new disciplines regulating the worker's functional mobility, the intention is to reach a renewed balance of interests, guaranteeing on one hand the protection of the employer's need to "adapt" the production organization to the changing conditions of the economic-productive system³⁵⁰ and on the other hand, the worker's interest to keep his/her occupation³⁵¹.

In any case, it is undeniable that there is a trend which tends to protect in particular the entrepreneur's/employer's needs – first of all, the continuity of the entrepreneurial juridical relationship – as results from recent reforms, with a possible limitation of the margins of protection for the worker who wants to keep the work conditions agreed upon.

From the reforms so far analyzed many systematic questions can emerge.

³⁴⁹ *Ibidem.*

³⁵⁰ *Ibidem.*

³⁵¹ *Ivi*, 331-332: *«El legislador, admitiendo la posibilidad de modificación unilateral, opta por proteger en mayor medida estas necesidades empresariales y la continuidad de la relación jurídica, aunque ello pueda contravenir el interés del trabajador por mantener las condiciones laborales pactadas».*

In primis: can we say that the regulatory solutions identified by the national legislators represent in a certain way the sign of a deep crisis, which from economic has become juridical?

Certainly, also considering the new national dispositions on the subject of the worker's functional mobility, it seems possible to say that labor law has been considered as a tool of political economy, in the sense of being a catalyzer of the impact of the economic crisis that has been concerning global economy for little less than a decade³⁵².

In any case, it does not seem possible to consider "outdated" a "vision" of the subject which considers labor law as a system of values, animated by the fundamental mission of guaranteeing an advantageous balancing of the multiplicity of interests involved in the phenomenon "work"³⁵³.

In the ambit of this scenario, the theme of the qualitative dimension of the work performance is really unavoidable in the perspective of an authentic rediscovery of the fundamental axiological dimension which characterizes labor law, yesterday as today³⁵⁴.

*«El trabajo es el hombre mismo en situación de actuar»*³⁵⁵.

Indeed, as stressed by an authoritative Spanish scholar, quoted at the beginning of the present chapter, *«el contrato de trabajo no es un mero intercambio de trabajo y salario, contiene también un elemento de vinculación personal entre las partes»*³⁵⁶.

³⁵² F.J. CALVO GALLEGO – M.C. RODRÍGUEZ-PIÑERO ROYO, *op. cit.*, 4 *et seq.*

³⁵³ A. PERULLI, *Evaluer le droit du travail*, cit., 5.

³⁵⁴ A. SUPLOT, *Critique du droit du travail*, cit., 151: *«tandis que le droit civil des obligations évolue sur un terrain solide – celui du sujet de droit, maître de son corps et de sa volonté – la subordination prive le salarié de sa liberté et le place dans une relation juridiquement inégalitaire avec l'employeur»*.

³⁵⁵ H. SINZHEIMER, *op. cit.*, 73.

³⁵⁶ M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Contrato de trabajo y relación de trabajo*, cit., 22. See R. PESSI, *Il dialogo tra giurisprudenza costituzionale e sistema*

In last analysis, we think that it is necessary to point out that a vision which reduces the contract (and therefore, the work relationship) to a mere exchange (a civil law reciprocity) between work performance (and so the execution of certain duties) and retribution³⁵⁷ is impossible to imagine.

Indeed, it is when he/she performs his/her tasks that the worker expresses his/her personality, as an insuppressible component of the entire work matter³⁵⁸.

The consequence of this is that the effective impact of the new regulatory system adopted both in Italy and in Spain on the subject of destining the worker to tasks different from the ones previously assigned will be able to be appreciated and evaluated only in the medium-long period thanks to a research aimed at understanding the applicative consequences of the new dispositions.

What can be said already now is that such a reflection will not be certainly circumscribed within the perimeter of a mere quantitative evaluation, because it will be necessary to appreciate also the qualitative and axiological sphere of the issue.

ordinamentale, in *Arg. dir. lav.*, 2006, 6, 1553 *et seq.* See also I. PICCININI, *Sulla dignità del lavoratore*, in *Arg. dir. lav.*, 2005, 746 *et seq.*; F. MAZZIOTTI, *Diritti fondamentali e solidarietà nei rapporti di lavoro*, in R. PESSI – A. VALLEBONA (edited by), *Il lavoratore tra diritti della persona e doveri di solidarietà*, Padua, 2011, 121 *et seq.*

³⁵⁷ M. GRANDI, *Persona e contratto di lavoro. Riflessioni storico-critiche sul lavoro come oggetto del contratto di lavoro*, in *Arg. dir. lav.*, 1999, 2, 313 (as recalled in M.N. BETTINI, *op. cit.*, 3 *et seq.*): «l'inerenza della persona del debitore al contenuto dell'obbligazione acquista, nel contratto di lavoro, una più intensa e decisiva caratterizzazione, per l'intervento di un complesso di condizioni organizzative e modali, che incidono sul coinvolgimento della persona nella sua attività di prestazione».

³⁵⁸ See M. D'ANTONA, *La grande sfida delle trasformazioni del lavoro: ricentrare le tutele sulle esigenze del lavoratore come soggetto*, in B. CARUSO – S. SCIARRA (edited by), *Massimo D'Antona. Opere. Scritti sul metodo e sulla evoluzione del diritto del lavoro – Scritti sul diritto del lavoro comparato e comunitario*, Milan, 2000, 1, 249 *et seq.*

In the light of the emblematic nature of the regulatory changes on which we have reasoned so far, a reflection – which will be developed and discussed in the following pages – about the identity of the “new” labor law³⁵⁹, in its future development³⁶⁰, is unavoidable.

³⁵⁹ Cfr. R. DE LUCA TAMAJO, *Evoluzione o sconvolgimento delle regole del lavoro?*, cit., 65-70: «La storia dei prossimi anni ci dirà se il nuovo corso risulterà idoneo a disegnare i tratti di una materia radicalmente nuova, improntata a mutati principii e finalità o se, invece, pur scontando fenomeni di micro-discontinuità, prevarrà quella ispirazione ideale – figlia di una precisa matrice genetica orientata alla protezione di chi lavora alle altrui dipendenze – che già nel corso del secolo appena trascorso ha fatto sopravvivere la “specialità” e la vitalità del Diritto del lavoro a ben diverse temperie politiche e culturali» (70).

³⁶⁰ M. D’ANTONA, *Diritto del lavoro di fine secolo: una crisi di identità?*, in *Riv. giur. lav.*, 1998, 318. See also R. DEL PUNTA, *L’economia e le ragioni del diritto del lavoro*, cit., 3 et seq.; P. ICHINO, *Il dialogo tra economia e diritto del lavoro*, in *Riv. it. dir. lav.*, 2001, 1, 165 et seq.

Chapter 5 –

Conclusions. Rethinking labor law in the transnational enterprise

4.0. A return to the founding principles and to the rediscovery of values: the balance compass.

«legal convergence is not the likely out-come of globalization. Differences between the labour laws of countries and localities will remain and may even increase. For this reason we have to try to mitigate the adverse effects of regulatory competition by transnational labour regulation».

Bob Hepple³⁶¹

TABLE OF CONTENTS: 1. The *status quo* of labor law and its complexity. – 2. Future perspectives... the importance of returning to the founding principles. – 3. Labor law between past and future. – 4. Labor law in becoming: the economic and the social dimensions... the two sides of labor law. – 5. Evaluation and efficaciousness of and in labor law: values and quality. – 6. Labor law being and having to be. – 7. Law and tradition: the projection of values in regulations. – 8. The balancing of values, between the Constitution and private collective autonomy. – 9. The parameter of rationality and the balancing of interests: the role of the Constitutional court. – 10. Rationality and tables of values, polycentrism and transnationality.

1. The *status quo* of labor law and its complexity.

The natural result of the considerations made so far, also by using comparisons, can only be a more in depth reflection on the future development that contemporary labor law can imagine for itself.

³⁶¹ B. HEPPLE, *Labour laws in the context of globalisation*, in AA. VV., *Scritti in onore di Edoardo Ghera*, Bari, 2008, 523.

In order to be able to do this, we need to move from an attentive and unhurried evaluation of how the subject is currently seen by its exegetes in the two legal systems considered in this work and in the overall European juridical context.

There seems to be no doubt about the fact that the main characteristic of the labor law *corpus* of regulations in the various European legal systems is its complexity, which has grown over the years and decades.

One of the most authoritative French scholars speaks with extraordinary strength about the «*vision d'un droit du travail perçu comme une forêt trop obscure et hostile pour qu'on s'y aventure (...). Et le droit du travail ainsi mystifié joue contre les travailleurs qu'il est censé protéger*»³⁶².

The obscurity of the regulation of a phenomenon, work, which is in constant development, is one of the most important aspects in contemporary legal systems.

These are, in fact, afflicted by a pathological regulatory hypertrophy, which has made labor law «*obèse, malade*»³⁶³.

The seriousness of the issue can be first of all appreciated from the paradigmatic point of view in the “quantitative” dimension of the problem, with the extraordinary number of regulations disciplining work³⁶⁴.

³⁶² R. BADINTER – A. LYON-CAEN, *Le travail et la loi*, Paris, 2015, 11.

³⁶³ *Ivi*, 12-13.

³⁶⁴ As an example, see the interesting research carried out by P. LOKIEC, *Il faut sauver le droit du travail!*, Paris, 2015, 70 *et seq.* France is one of the few European labor law systems to have had since the beginning of the Twentieth century a Labor code, that is a unitary *corpus* of all the rules created to regulate the various aspects of the work relationship. The development of this legal source, also only in numerical terms, is emblematic: in 1973, the Code consisted of only 600 articles. These reached over 10.000 in 2015.

The main consequence of this multiplication of regulations can be grasped in qualitative terms in the poor comprehensibility of regulations in general and in the modest quality of labor regulations in particular.

With reference to this, meaningful are the words of Descartes, a classic of modern philosophy, who affirmed in the 17th century: «[...] *la multitud de leyes sirve a menudo de disculpa a los vicios, siendo un Estado mucho mejor regido cuando hay pocas pero muy estrictamente observadas [...]*»³⁶⁵.

2. Future perspectives... the importance of returning to the founding principles.

In the conviction of the need to have a theoretical elaboration capable of simplifying the complexity of the contemporary regulatory system, we consider crucial the development of an awareness about the necessity to reflect on the founding principles of labor law.

Any consideration about the ontological-evolutionary aspects of the subject implies, in fact, a reasoning on the very “essence” of things: in other words, we need to «*extraire du droit actuel ses lignes directrices ou mieux ses principes*»³⁶⁶.

Therefore, it seems necessary to return to the essence of labor law, to its foundations, conceived as a constant and insurmountable

³⁶⁵ R. DESCARTES, *Discurso del método*, Madrid, 2011, 106.

³⁶⁶ R. BADINTER – A. LYON-CAEN, *Le travail et la loi*, cit., 20. The authors add: «*Par “principe”, il faut entendre une règle d’un niveau élevé de généralité qui fonde et ordonne tout un ensemble de dispositions détaillées*».

tension between conflicting interests inserted in a more and more dynamic market³⁶⁷.

As scholars have stressed, labor law is becoming more and more ambivalent and pluralized and this makes it necessary to consider the work regulation system in a new perspective, which takes into account its «*valenza economica di regolatore del mercato*»³⁶⁸.

We must add that research can no longer be confined to national juridical experiences, but must open up to a wider and wider scenario.

In other words, borrowing from Giuseppe Santoro-Passarelli, we need to re-conceive «*le “ragioni” dell’impresa e la tutela dei diritti del lavoro nell’orizzonte della normativa europea*»³⁶⁹.

The search of a direction to give to the labor law “to be” is urgent and this means to face the relationship between law and the market.

3. Labor law between past and future.

The re-consideration, re-reading and re-meditation of the great classics of the subject – as mentioned in previous pages – is inevitable if we want the natural tension of the subject towards its future to be effectively fruitful.

As highlighted by an authoritative scholar, «*il giurista deve avere l’abilità di usare il patrimonio di sapienza giuridica ereditata dal passato e in pari tempo di ridurlo là dove occorre dare spazio a nuovi*

³⁶⁷ LORD WEDDERBURN OF CHARLTON, *Consultation and collective bargaining in Europe: success or ideology?*, in *ILJ*, 1997, 1 et seq.

³⁶⁸ V. BRINO, *Diritto del lavoro, concorrenza e mercato. Le prospettive dell’Unione Europea*, Padua, 2012, 16.

³⁶⁹ G. SANTORO-PASSARELLI, *Le “ragioni” dell’impresa e la tutela dei diritti del lavoro nell’orizzonte della normativa europea*, in *Eur. dir. priv.*, 2005, 63 et seq.

punti di vista che prendono le distanze dalle certezze proprie delle forme tradizionali di vita e si fanno portatori di nuove ragioni»³⁷⁰.

Only using the interpretations provided by the authoritative scholars of the past, we can carry out a mature and conscious work of definition of the labor law of tomorrow.

More in detail, we need to reason about the future of labor law «*come disciplina e come assetto regolativo del mercato*»³⁷¹. Hence, the scientific dimension of the subject, that is the identification of its object, and the dimension of the development of its regulations in terms of politics of law, have to be considered.

The deepness of the changes which have taken place globally in the economic and social spheres – we can think, for example, about the extension of competition in the contemporary global context we live in³⁷² – suggests adopting an approach which favors the permeation between the cognitive-epistemological sphere and the regulation planning one.

In the ambit of this research, the first issue to consider is the ontological relationship between labor law and civil law.

Renewed attention has to be given to the complex (and in part, mysterious) relationship between civil law and labor law³⁷³.

Also from a historical point of view, labor law becomes an independent juridical discipline, separating itself from the *corpus* of

³⁷⁰ L. MENGONI, *Il diritto costituzionale come diritto per principi*, in *Ars interpretandi*, 1996, 101.

³⁷¹ M. MAGNANI, *Il Diritto del lavoro e le sue categorie. Valori e tecniche nel Diritto del lavoro*, Padua 2006, 1. See also: U. ROMAGNOLI, *Il diritto del secolo. E poi?*, in *Dir. merc. lav.*, 1999, 233 *et seq.*; T. TREU, *Il diritto del lavoro: realtà e possibilità*, in *Arg. dir. lav.*, 2000, 467 *et seq.*

³⁷² M.R. FERRARESE, *Le istituzioni della globalizzazione*, Bologna, 2000, *passim*.

³⁷³ G. LYON-CAEN, *Du rôle des principes généraux du droit civil en droit du travail*, in *RTDC*, 1974, 234 *et seq.*

private law³⁷⁴, when the need is felt to have an organic regulation system with a specificity of its own, in the light of the principles of the Constitution.

Indeed: «*mentre il diritto civile (tradizionale) – se il diritto civile tradizionale è da definire quale settore dell’esperienza giuridica in cui esercita un ruolo preminente l’autonomia riconosciuta all’individuo – è il regno della norma dispositiva, il diritto del lavoro (tradizionale) è il regno della norma inderogabile*»³⁷⁵.

This interdisciplinary relationship has a particular value and importance in the scenario of a catalogue of legal issues which call for the jurist’s attention.

The relationship between private law and labor law has been efficaciously contextualized by an authoritative Italian jurist in the ambit of a «*resa dei conti*», about some «*punti caldi: a) la contrapposizione tra contrattualismo e anticontrattualismo nell’individuazione della fonte del rapporto e nella ricostruzione complessiva dello schema giuridico; b) la tensione, nell’ambito del rapporto obbligatorio, fra subordinazione e organizzazione; c) la diseguale distribuzione dei poteri, con il corollario della necessaria ricerca di una strategia di condizionamento delle posizioni di supremazia*»³⁷⁶.

With reference to this last aspect, we cannot deny that labor law has kept its characteristic of moving all around the exercise of power and therefore, the relationship supremacy-subjection between one person and another.

³⁷⁴ C. CASTRONOVO, *Diritto privato generale e diritti secondi*, in *Jus*, 1981, 158 et seq.

³⁷⁵ M. MAGNANI, *Il Diritto del lavoro e le sue categorie. Valori e tecniche nel Diritto del lavoro*, cit., 4.

³⁷⁶ O. MAZZOTTA, *Diritto del lavoro e categorie civilistiche*, in ID., *Diritto del lavoro e diritto civile. I temi di un dialogo*, Turin, 1994, 14. See L. MENGONI, *Lezioni sul contratto di lavoro*, Milan, 1971, 16.

«Le droit du travail est un droit du pouvoir, au même titre que le droit public»³⁷⁷.

Hence, the ultimate sense of the subject is – today as yesterday – in its being a balancing tool of the positions and the interests involved in the work relationship.

4. Labor law in becoming: the economic and the social dimensions... the two sides of labor law.

As already said, over the last decades labor law has been characterized by a substantial and deep process of transformation, moving towards a transnational dimension, which has contributed to the change of the informative paradigms of the subject.

In the light of the epistemological-investigative path followed so far, it is the case to place our attention on the deep change which has affected contemporary labor law, touched first of all by the relevant phenomenon of the “multiplication” of the regulatory sources of reference, structured in a not always harmonious pluralism.

Emblematic to this regard seems the new and changing attitude of the traditional dualist relationship law-collective contract, which has historically “marked” modern labor law – and “post-modern”, to say it with the words of Paolo Grossi³⁷⁸ – by attributing the unavoidable regulation of employment and industrial relationships not only to the law, but also – and more and more – to collective bargaining; the latter has been recently valorized, especially in terms of company and territorial proximity.

³⁷⁷ G. AUZERO – E. DOCKES, *Droit du travail*, Paris, 2015, 3.

³⁷⁸ P. GROSSI, *op. cit.*, *passim*.

As stressed by an authoritative scholar, particular importance is given to the «*tendenze che investono specificamente il diritto del lavoro: da una parte, da un punto di vista sociologico, la perdita di identità del gruppo sociale di riferimento (gli operai impiegati nell'impresa di tipo fordista), che aveva consentito in passato di considerare addirittura "oziosa" la questione della subordinazione; d'altra parte, sul piano economico, l'accentuata concorrenzialità cui sono soggetti i sistemi nazionali che inducono a ripensare, in una con i destinatari, anche la qualità delle regole o delle tecniche di tutela (e questo è il dibattito sulla flessibilità)*»³⁷⁹.

The consequence of the dualist dimension which pervades labor law is well expressed in Alain Supiot's *Critique du droit du travail*: «*il n'est pas de lien de droit qui n'ait à la fois une dimension économique et une dimension social*»³⁸⁰.

In these words is summed up the double vocation of labor law, also in comparison with the other legal disciplines, which do not experience in their essence such a meaningful "contamination" between the economic sphere and the social one.

Imagining the future mission of labor law, what can and should the subject identify itself in? And again: what will be the trade-off point of the just mentioned economic and social dimensions typical of labor law?

According to the most authoritative Spanish labor law jurist, «*la tutela del trabajo debe seguir siendo su elemento identificador, y debe evitar en las relaciones de trabajo un uso antisocial de la libertad de empresa, solo así podrá cumplir el Derecho del Trabajo su función*

³⁷⁹ M. MAGNANI, *Il Diritto del lavoro e le sue categorie. Valori e tecniche nel diritto del lavoro*, cit., 16-17.

³⁸⁰ A. SUPIOT, *Critique du droit du travail*, cit., XXIII.

eminentemente integradora en un compromiso entre la tutela del trabajador, su seguridad económica, su libertad y su dignidad y facilitar el funcionamiento de la empresa sin trabas injustificadas e irrazonables»³⁸¹.

The doctrinal contribution here provided seems really illuminating, as it can be considered a light in the hermeneutic path the jurist – overcoming «*lo sgomento generato dall'incertezza, dalla fluidità, dalla complessità*»³⁸² – is called to follow, along the border between epistemology and politics of law or, to say it in other words, between *de jure condito* and *de jure condendo*.

The issue of the subject's function has to be seen therefore in the terms of a research to find the ways through which labor law can keep its social vocation in a historical moment and in a socio-economic context radically different from those of its origins and of its later developments.

In other words, labor law has to adapt – through the constructive contribution of its most far-sighted interpreters, the wise use of comparative study methodologies and the opening to international influences – to the changed contextual situations, without losing its identity, its substance, its essence and thus, the very reason of its existence³⁸³.

In the present work which is reaching its conclusion, we have tried to reason, moving from a systematic analysis of the relationship between economics and labor law, passing onto then a more detailed analysis of the influence of economy on labor law regulations, first in

³⁸¹ M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *La difícil coyuntura del Derecho del Trabajo*, cit., 13.

³⁸² P. GROSSI, *op. cit.*, 117.

³⁸³ M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *La difícil coyuntura del Derecho del Trabajo*, cit., 13 affirms on this aspect: «*el problema es como cumplir su función de socialidad en este momento, adaptándose a la coyuntura y a los cambios sin perder su sustancia, su entidad y su razón de ser permanente*».

general terms and after more specifically, with reference to the issue of demotion/deskilling in a comparative perspective, reserving some preliminary considerations to methodology and to comparative studies in particular.

These tools have been used in a comparative study exercise, which has tested the importance and the resistance of two “parallel but convergent” juridical experiences – the Spanish and the Italian – with particular reference to the issue of the worker’s professionalism (in Spain related to the so called *grupos profesionales* and in Italy to the worker’s tasks and the concept of professional equivalence).

Hence, what is in synthesis the message to be considered as paradigmatic representation of the research results achieved?

In order to be able to give a balanced answer to these fundamental questions, we need to make a further prodromal reflection.

5. Evaluation and efficaciousness of and in labor law: values and quality.

In 1985, Luigi Mengoni asked himself *«se il diritto abbia soltanto la funzione di organizzare forme esteriori del processo economico, nell’ambito delle quali i singoli comportamenti economici si svolgono in condizioni di sostanziale immunità dalla regola giuridica, essendo deterministicamente orientati verso un ordine naturale prestabilito, oppure se il diritto costituisca uno strumento attivo del processo economico, in virtù del quale l’ordine economico riceve l’impronta della volontà umana»*³⁸⁴.

³⁸⁴ L. MENGONI, *Diritto e valori*, Bologna, 1985, 147.

From the quoted words of this authoritative scholar, it seems possible for us to make a consideration about the relationship between economics and labor law and on whose balance we have reasoned so far.

In its interaction with economic rationality, labor law expresses the axiological structure of its essence and it faces another dimension, proper of economics.

The fruitfulness (or not) of the interaction between labor law and the conceptual framework of economics can be considered and appreciated by carrying out a research with the objective of evaluating the efficaciousness of the labor law regulatory system.

While performing the comparative study, it was necessary to take into account the *corpus* of regulations of the two legal systems considered, in order to check the efficaciousness of the “work rules” through the rigorous use of an evaluative “method”³⁸⁵.

As highlighted by an authoritative French scholar in fact: *«Évaluer, ce peut être “estimer, mesurer”, ou encore juger un objet à l’aune d’un étalon de valeur. L’acte d’évaluation repose sur une mise en rapport, sur une comparaison entre deux termes bien distincts: l’objet évalué et l’étalon d’évaluation. [...] l’évaluation se distingue nettement de la description. Cette dernière a pour horizon la correspondance – pour ne pas dire la confusion – entre l’objet décrit et le produit de la description. Une description réussie doit rendre fidèlement compte de l’objet décrit. A l’inverse, l’objet évalué et le jugement de valeur porté sur cet objet ne sauraient se confondre. Un tel jugement ne se contente pas de dire ce qui est, à l’instar de la description, mais permet de placer*

³⁸⁵ On this aspect, see: T. SACHS, *op. cit.*, *passim* and in particular 225 *et seq.*; A. LYON-CAEN, *A propos de l’adjectif “économique” dans la langue du droit*, *cit.*, 137 *et seq.* See also J.-F. CESARO, *op. cit.*, 185 *et seq.*

*l'objet évalué sur une échelle de valeurs, de le distinguer par rapport à d'autres objets, de le classer»*³⁸⁶.

This conceptual specification seems indispensable in the perspective of a fruitful development of the topic of labor law efficaciousness. The reflection quoted above stresses the intensity with which work “rules” are subject to continuous reforms. This conditions in a more and more significant way the identity of labor law and how it measures itself with and faces economics.

In any case, around the concept of efficaciousness, there are many semantic undertones to be stressed³⁸⁷.

The relationship between labor law and economic rationality can certainly be explored only in the light of the table of values which represents the ultimate and insuppressible essence of the subject. A subject which will continue to be based on the balance of these values.

In addition to the efficaciousness of work regulations, further consideration should be given to the quality in and of labor law.

Indeed, this aspect is generally considered with reference to the “quality of the worker’s performance” in the ambit of the complex and central topic of the worker’s tasks and of the *ius variandi*, which were

³⁸⁶ T. SACHS, *op. cit.*, 225.

³⁸⁷ A. PERULLI, *Valutazione ed efficacia del Diritto del lavoro*, in A. LYON-CAEN – A. PERULLI, *Efficacia e diritto del lavoro*, cit., 11 et seq.: «In una prima accezione giuridico-dogmatica, che accomuna tanto le teorie idealistiche che le teorie giuspositivistiche di stampo normativistico, l’efficacia designa la creazione di un effetto, il quale si qualifica come valore condizionato (in generale a un determinato fatto della realtà) che risiede sul piano del dover essere normativo-ideale (il Sollen, nel quadro d’analisi kelseniana), a prescindere dalla realizzazione fattuale di tale valore». Furthermore: «in una seconda accezione, l’efficacia del diritto designa l’attitudine della regola a raggiungere lo scopo normativo contemplato, e ciò mediante riscontri di efficienza strumentale della legge, che saggia la consistenza del rapporto di connessione causale mezzi-fini da essa posto». While, «in una terza accezione, l’efficacia giuridica chiama in gioco la causalità materiale per interrogarsi sugli effetti extra-giuridici della norma, ossia sulle sue conseguenze economiche – e quindi pratiche-esterne al sistema giuridico».

discussed in previous pages (we can think about Pietro Ichino's essay, *La qualità del lavoro dovuto e il suo mutamento*³⁸⁸).

It is extraordinarily interesting to consider instead labor law in the axiological dimension of quality; we can think about Adalberto Perulli's essay entitled: *I concetti qualitativi nel diritto del lavoro: standard, ragionevolezza, equità*³⁸⁹.

In this research the author stresses how the essence of labor law cannot be reduced to the merely quantitative and deterministic dimension of the market and of economy: «*la prospettiva della regolazione giuslavoristica di tradizione continentale valorizza l'apprezzamento di nozioni fondate su parametri valoriali, principi, qualità, standard di comportamento, che rappresentano altrettanti punti di partenza per operazioni di ponderazione e valutazione*»³⁹⁰.

On the other hand, national regulations are intrinsically “impregnated” of values and this gives inevitable relevance to the qualitative dimension – which can be appreciated thanks to the above mentioned “evaluation” – rather than to the purely quantitative one, which characterizes instead the structural paradigms of economics and of the economic analysis of law³⁹¹.

In spite of this, the qualitative essence of labor law – which determines in part also the complexity we have already mentioned – has been for decades subject, in Italy as in other EU legal systems such as Spain, to the “stress” of a simplification process, which risks however to

³⁸⁸ P. ICHINO, *La qualità del lavoro dovuto e il suo mutamento*, cit., 489 et seq.

³⁸⁹ A. PERULLI, *I concetti qualitativi nel diritto del lavoro: standard, ragionevolezza, equità*, in *Dir. lav. merc.*, 2011, 403 et seq.

³⁹⁰ *Ibidem*.

³⁹¹ U. ROMAGNOLI, *Libres propos sur les rapports entre économie et droit du travail*, in A. JEAMMAUD (edited by), *Le droit du travail confronté à l'économie*, cit., 7 et seq.

create a «riduzione del diritto ad un sistema di prezzi, puramente quantitativo»³⁹².

This trend, which clearly reflects an approach based on economic schemes, wishes to bring the axiological rationality typical of labor law within quantitative economic dimensions.

Identifying in the *corpus* of rules which make up labor law a limitation to market dynamics, this deeply liberal vision sees with favor a deregulation which could encourage the economic logic of a competitive market³⁹³.

With specific reference to labor law, competition can become a particularly interesting topic.

As stressed by a scholar, «il quadro di riferimento è rappresentato dal mercato, luogo economico ma, al contempo, giuridico nel quale operano molteplici sub-sistemi normativi, differenziati per oggetto e contenuti, ma destinati [...] a superare le logiche di autoreferenzialità per valorizzare invece, sia pur non in modo totalizzante, percorsi di avvicinamento e di interdipendenza»³⁹⁴.

Extremely far-sighted is the warning given by the above mentioned authoritative scholar: «La quantificazione del diritto del lavoro depotenzia le aspirazioni ideali che stanno alla base dei diritti sociali e dissolve la tensione verso una giustificazione razionale-assiologica dei poteri economici»³⁹⁵.

³⁹² A. PERULLI, *I concetti qualitativi nel diritto del lavoro: standard, ragionevolezza, equità*, cit., 404. See A. SUPLOT, *L'esprit de Philadelphie. La justice sociale face au marché total*, Seuil, 2010, *passim*.

³⁹³ P. CAHUC – F. KRAMARZ, *op. cit.*, *passim*.

³⁹⁴ V. BRINO, *op. cit.*, 7. See also L. MENGONI, *Fondata sul lavoro: la Repubblica tra diritti inviolabili e doveri inderogabili di solidarietà*, in *Jus*, 1998, 45 *et seq.*

³⁹⁵ A. PERULLI, *I concetti qualitativi nel diritto del lavoro: standard, ragionevolezza, equità*, cit., 405.

Hence, it is only by keeping firm this fundamental logical premise of labor law that we can conceive the inevitable work of structural reevaluation of the founding paradigms of labor law itself.

This process, presented from the very first pages of the present work in terms of “re-conceptualization”, certainly cannot determine an overcoming or a “dilution” of the values the subject has placed its roots in.

6. Labor law being and having to be.

In the light of the contemporary widespread structural crisis, it seems impossible not to notice the *«fallimento delle scienze economiche, mai così evidente e mai così drammatico»*, clearly stressed by an authoritative Italian scholar³⁹⁶.

In this context, ineludible is the task labor law jurists are called to perform. Jurists coming from different countries and with different levels of experience, united by the common vocation to contribute to the *«rifondazione anche della nostra materia partendo dai fondamentali»*, in an unquestionably international juridical dimension³⁹⁷.

Thus, we need to accept the call the above mentioned scholar addresses especially to the younger generation of labor law jurists and, more in general, jurists³⁹⁸ to *«esprimere, con fantasia, una sistematica*

³⁹⁶ R. PESSI, *Le riforme del lavoro nel 2014: ideologie, post-ideologie, valori*, in *Mass. giur. lav.*, 2014, 11, 728.

³⁹⁷ *Ibidem*.

³⁹⁸ P. CALAMANDREI, *Fede nel diritto*, Rome-Bari, 2008, 102-103 (edited by S. Calamandrei and with essays of G. Alpa – P. Rescigno – G. Zagrebelsky): *«I giovani più generosi che giustamente cercano nella vita posizioni di lotta e di rischio, e pensano giustamente che in momenti gravi come quelli che il mondo attraversa non c'è più posto, neanche nelle professioni, per gli intellettualismi non ravvivati da una fede,*

innovativa idonea a riformulare l'essere ed il dover essere del nostro Diritto del Lavoro»³⁹⁹.

The labor law jurist has to be guided by caution, rigor and moderation in the robust and mature work of re-conceptualization he/she is called to perform with equilibrium and sense of responsibility.

The tendency to renewal “at all cost” is in fact dangerous, although it is true that labor law is looking for a new conceptual framework capable of interpreting and de-codifying the complexity of our times.

However, it would be a big mistake to consider outdated the teachings and the scientific works that the interpreters and scholars of yesterday and today have left with intellectual rigor, diligence and sensitivity, contributing to build a plural and united discipline, central in the cultural debate of Western legal systems, and in particular, of Italy and Spain.

Among all of them, alive and vibrant as ever is the lesson of the founder of the subject in Italy, Francesco Santoro Passarelli: «un

*devono sapere che la professione dei giuristi, anche se necessariamente ristretta, per ragioni di specializzazione tecnica, entro i limiti della legalità, non è una professione comoda; non è un rifugio per i pigri e per i vili. Anche il difendere le leggi comporta dei rischi; anche per servir la giustizia giuridica ci vuol del coraggio. Per difendere i deboli contro i forti, per sostenere le ragioni dell'innocenza, per sventare le inframmettenze, per dire la verità anche se cruda, per chiudere la porta in faccia alle seduzioni della ricchezza, alle promesse di onori, alle intimidazioni e alle lusinghe al solo scopo di far rispettare la legge – anche se questo può dispiacere a qualcuno – per far tutto questo occorre una tale solidità morale, che può dare all'esercizio delle professioni legali la nobiltà di un apostolato». See E. MOSCATI, *Fede nel diritto (A margine di un saggio a lungo inedito di Piero Calamandrei)*, in G. DALLA TORRE – C. MIRABELLI (edited by), *Verità e metodo in Giurisprudenza*, Vatican City, 2014, 445 et seq.*

³⁹⁹ R. PESSI, *Le riforme del lavoro nel 2014: ideologie, post-ideologie, valori*, cit., 728.

insegnamento tutto imperniato sulla fede nella libertà e sull'esigenza di tutelare la personalità umana del lavoratore»⁴⁰⁰.

Only through the rediscovery of such high and noble teaching, it is possible to fully understand the fundamental “mission” of law, and labor law in particular, and which has been efficaciously and authoritatively summed up also recently: *«mediare tra la realtà economica – ossia le valutazioni normative, ad essa sottese, e le finalità perseguite dagli attori economici – e un sistema di valori morali, autonomi rispetto all'economia, con il loro bagaglio di intrinseche valutazioni normative»⁴⁰¹.*

The reflections made so far find their natural conclusion in the suffered and touching words of Matteo Dell'Olio in Rome, the 14th of November 2005, during his last appearance in public, in occasion of the awarding of the Prize “Giuseppe Chiarelli” for his juridical studies and career.

In them we can find the essence of the teaching of Francesco Santoro Passarelli, summed up in his *«grande fede, condivisa con l'ordinamento (non, dunque, per imporla a questo ma per ricercarvela), nella libertà»⁴⁰².*

The consequence is that we can have no doubt whatsoever about the non-negotiability of a concept of labor law *«caratteristicamente ordinato alla tutela della libertà, anzi della stessa personalità umana del lavoratore»⁴⁰³.*

⁴⁰⁰ M. PERSIANI, *Presentazione*, in M. DELL'OLIO, *Inediti*, Turin, 2007, X.

⁴⁰¹ M. RUSCIANO, *Una rilettura di Luigi Mengoni*, in *Riv. trim. dir. proc. civ.*, 2011, 994.

⁴⁰² M. DELL'OLIO, *Diritto del lavoro e libertà*, in ID., *Inediti*, cit., 1.

⁴⁰³ M. DELL'OLIO, *Lavoro, lavori, lavoratori: nuovi scenari e nuove regole*, in ID., *Inediti*, cit., 67.

And it is in this that we can find the fundamental anchorage to the dimension of values recognized by the Constitution of the Italian Republic and by the *Constitución* of the Spanish Monarchy.

In conclusion, the relationship between economics and labor law can only develop reorganizing itself according to a renewed balance between the many interests at stake and as much as possible determined by the qualitative categories, which have historically formed the identity of the subject rather than the quantitative ones.

The rediscovery of the balance between the two disciplines will be carried out keeping well in mind the lesson of Gunter Teubner on «*meccanismi inclusivi*», capable of allowing the inclusion of market interests in labor law and its logic based on rationality⁴⁰⁴.

Hence, it is in the renewed discovery of values that we can attribute the right importance to an axiological framework, which creates a vision of «*lavoro che è compimento della persona, della sua capacità creatrice, quasi compartecipazione all'opera del Creatore*»⁴⁰⁵.

In the light of what we have considered so far, it is the case to stress that the chapters of the present work open with citations of great Italian and Spanish labor law scholars.

These “fragments” seem to share a *fil rouge* from which we can take hermeneutic elements precious for the creation of a new labor law conceptual taxonomy of the crisis and, especially, of the post-crisis.

It is, indeed, useful to take in due consideration the warning launched by an authoritative French scholar: «*La crise du droit du travail, dans sa fonction de protection des salariés, c'est d'abord et avant tout un discours critique puissant, non pas tant par la teneur des*

⁴⁰⁴ G. TEUBNER, *Ordinamenti frammentati e costituzioni sociali*, in *Rivista giuridica degli studenti dell'Università di Macerata*, 2010, 52.

⁴⁰⁵ G. ZAGREBELSKY, *Fondata sul lavoro. La solitudine dell'articolo 1*, Turin, 2013, 31.

arguments soulevés que par les représentations – parfois caricaturales – qu’il véhicule»⁴⁰⁶.

In a moment of deep crisis concerning the very foundations of the subject, there does not seem to be a safer road than the one of a “return” to the principles and values which have for decades supported the axiological and regulatory framework of labor law.

7. Law and tradition: the projection of values in regulations.

In order to fully understand the centrality of values and their balance – necessarily placed at the basis of law, and of labor law in particular – important is the study of the relationship between “law” and “tradition”⁴⁰⁷.

“Law”, in its being a *corpus* of shared rules, naturally internalized in the soul and in the collective conscience of a certain community (according to the Latin maxim *ubi societas ibi ius*), is called to face “tradition”, that is the synthesis and the expression of socially shared ethical values and moral principles, which identify a community and express a common ideology of regulations.

If we consider these two concepts in parallel, what clearly emerges is that when law, in its continuous historical development, follows paths which draw it away from tradition (provoking a division, a fracture between the two categories), the effect is the passage from a fruitful sharing of values to an arbitrary dictation of rules, perceived as something imposed, because no longer socially shared.

⁴⁰⁶ P. LOKIEC, *Avis de tempête sur le droit du travail*, cit., 738 *et seq.* The author adds: «*les temps sont durs pour le droit du travail*».

⁴⁰⁷ R. PESSI, *Il dialogo tra giurisprudenza costituzionale e sistema ordinamentale*, cit., 1542-1566.

More in detail, the risk of a similar friction between law and tradition can be perceived in concrete, in the relationship between the table of values of a nation and its law, expression of “another” identity, perceived as extraneous and unshareable (exactly because based on values not always and not *in toto* convergent with the national ones).

This is in all evidence the case of European regulations: particularly interesting is therefore the coherence between “rules” and “traditions” in the relationship between national legal systems and community law.

In fact, it is with reference to it that we notice the connection between all the values and principles socially shared by national communities and a form of law representative of “other” values and principles⁴⁰⁸.

In the single national systems we can find “watching over” the risk of friction between regulations and values, bodies constitutionally placed to guarantee (also) the complex integration of national law with community law (in the light of a necessary and fruitful dialogue with the European court)⁴⁰⁹: the Constitutional courts.

Through the identification of the coherences and the overcoming of the antinomies, these bodies give a crucial contribution in bringing

⁴⁰⁸ Particularly rich are the contributions about this aspect; see *ex multis*: G. SANTORO-PASSARELLI, *Il difficile adeguamento del diritto interno al diritto comunitario*, in *Riv. it. dir. lav.*, 1998, 317 *et seq.*; M. D'ANTONA, *Armonizzazione del diritto del lavoro e federalismo nell'Unione Europea*, in *Riv. trim. dir. proc. civ.*, 1994, 695 *et seq.*; R. FOGLIA, *Il lavoro*, in M. BESSONE (directed by), *Il diritto privato nell'Unione Europea*, Turin, 1999, 18 *et seq.*

⁴⁰⁹ Interesting is the work by R. FOGLIA, *Il ruolo della Corte di Giustizia e il rapporto tra giudice comunitario e i giudici nazionali nel quadro dell'art. 177 del Trattato (con particolare riferimento alle politiche sociali)*, in *Dir. lav.*, 1999, 138 *et seq.*

back into the system different regulations, this way avoiding possible regulatory chaos⁴¹⁰.

Indeed, it does not seem possible to exclude a vision of law – and in particular, of labor law – based on its being a complex regulatory *corpus*, subject to a constant and continuous historical development and significantly conditioned by the marked and prolonged socio-economic instability, determining a gradual stratification of the values and the moral principles which represent the tradition of a certain community⁴¹¹.

The regulatory chaos⁴¹² which derives from this, together with a widespread uncertainty, fueled in part also by the heterogeneity (and sometimes the incoherence) of hermeneutic standstills adopted from time to time by jurisprudence, characterize the transition phases between one legislation ideology and another, as if they were «*traumi ordinamentali*»⁴¹³.

Confirming what has been stressed so far, it is the case however to highlight that the process of internalization and assimilation of a tradition in the collective consciences of a community, felt as if it were “theirs” and a sort of *idem sentire*, is not easy to change in the succession of various historical phases⁴¹⁴.

⁴¹⁰ M. PERSIANI, *Diritto del lavoro e autorità del punto di vista giuridico*, cit., 14; A.M. SANDULLI, *Il principio di ragionevolezza nella giurisprudenza costituzionale*, in *Dir. soc.*, 1975, 561 *et seq.*

⁴¹¹ Law is presented as a fundamental cultural element of society and as such, subject to historical development, also in G. VISENTINI, *Lezioni di teoria generale del diritto*, Padua, 2008, 2 *et seq.*: «*Il diritto è fenomeno storico e peculiare di una civiltà, quella alla quale apparteniamo, che oggi va diffondendosi*».

⁴¹² Expression coined by M. PEDRAZZOLI, *La difficile conoscibilità delle norme. In margine ad un Codice dei Valori*, in AA. VV., *Scritti in memoria di M. D’Antona*, Milan, 2004, 1181 *et seq.*

⁴¹³ R. PESSI, *Il dialogo tra giurisprudenza costituzionale e sistema ordinamentale*, cit., 1543.

⁴¹⁴ With reference to this we can consider a particularly emblematic case, the one of the so-called «*impermeabilità della società alla recezione della previdenza*».

Being solidly anchored to a robust set of values stops law from becoming in time an empty and dangerous manifestation of arbitrariness, remaining instead expression of a common and shared ideology of values and regulations.

As unshakeably stressed by an authoritative Italian scholar: «*il giurista non è solo quando possa contare su una robusta codificazione di valori, quali quelli espressi dalla Carta Costituzionale e da un organo di chiusura del sistema che vigila sulla loro persistenza nell'ordinamento, garantendo un processo evolutivo operato attraverso un loro ragionevole e razionale bilanciamento*»⁴¹⁵.

The jurist, therefore, is comforted by the presence of a solid axiological set of values when it comes to the creation of regulations.

On the other hand, as underlined by an authoritative constitutional jurist, law «*è un po' come uno specchio, una superficie riflettente. Noi, per lo più, ci concentriamo sullo specchio, senza osservare l'immagine riflessa. Ma in quell'immagine c'è la fotografia d'un popolo. Nelle regole giuridiche si riflette una storia nazionale, e poi le tradizioni, la cultura, l'etica, il costume; e si riverberano le passioni del momento. Dunque lo specchio della legge può aiutarci a comprendere meglio anche noi stessi, ciò che siamo diventati*»⁴¹⁶.

In order to guarantee the coherence and adherence of law to tradition, fundamental is the role played by the national Constitutional courts in verifying constitutional legitimacy: it is through the “lens” of

complementare» (Ivi, 1544). For a wider description of supplementary social security pension system within the Italian constitutional model, see R. PESSI, *Lezioni di diritto della previdenza sociale*, Torino, 2012, 25-26 and 805-855.

⁴¹⁵ M. PERSIANI, paper on the topic *L'interpretazione: categorie concettuali e argomentazioni retorico-persuasive*, at the seminar in Bertinoro, 15-16 July 2005, *Le fonti e l'interpretazione nel diritto del lavoro*, in R. PESSI, *Il dialogo tra giurisprudenza costituzionale e sistema ordinamentale*, cit., 1545.

⁴¹⁶ M. AINIS, *L'umor nero. Alfabeto del nostro scontento*, Milan, 2015, 7.

rationality that these constitutional bodies evaluate the balancing of interests specifically performed by the legislator.

8. The balancing of values, between the Constitution and private collective autonomy.

Moving from the considerations made in the previous paragraph, it is useful now to look at the axiological dimension of the labor world and of labor law in particular.

An authoritative Italian constitutional jurist has clearly stressed that *«i valori sostanziali (o materiali) sono gli elementi primi delle disposizioni costituzionali e il loro contenuto essenziale. Ma i valori non sono strutture inerti o cose. Essi sono portatori di una propria logica “essenziale” e “di relazione” ed esigono, pertanto, che le regole dell’interpretazione e la natura stessa dell’ermeneutica si adeguino alla loro logica, alla logica della ragionevolezza e alle regole sulle relazioni tra valori (bilanciamento, ecc.). Essi, dunque, esigono un profondo rinnovamento teorico e un significativo cambiamento del metodo [...]»*⁴¹⁷.

From the inevitable coexistence of work and enterprise values in the axiological table of constitutional principles, derives the impossibility to consider these values in a hierarchical order: in fact, they have to coexist thanks to an intelligent use of balancing techniques⁴¹⁸.

The labor law “crisis of identity”, which we have so much reasoned on in the present work, imposes on us to consider the

⁴¹⁷ A. BALDASSARRE, *Costituzione e teoria dei valori*, cit., 658. See also of the same author ID., *Diritti della persona e valori costituzionali*, Turin, 1997, 80 et seq.

⁴¹⁸ M. PERSIANI, *Diritto del lavoro e autorità del punto di vista giuridico*, cit., 17.

constitutional rules and principles about work and enterprise in a systematic way.

In any case, the predominance of the values of the person on those of the enterprise is impossible to overcome because the latter has restrictions unforeseen for the former⁴¹⁹.

This “primacy” clearly reveals itself through an attentive analysis of the constitutional provision, considered in its being «*precipitato in opzioni di diritto positivo dei valori etici, ovvero la positivizzazione dei principi morali*»⁴²⁰.

Crucial is therefore the concept of an enterprise – and more in general, of the concept of “economic efficiency” – functional and instrumental to the protection of the values of the person.

In this perspective economic efficiency is conceived as an essential precondition for the protection of the values of the person.

Hence, in the perspective of balancing interests and values reciprocally distant, labor law is the privileged ground to recompose regulatory antinomies based on different interests and values, but not in contradiction.

⁴¹⁹ The main example can be found in the very formulation of art. 41 of the Italian Constitution, which in its first two paragraphs efficaciously expresses the need of a balance between private economic initiative (recognized as free in the first paragraph: «*L’iniziativa economica privata è libera*») and the sphere of freedom and rights of the human being (sanctioned by the second paragraph: «*Non può svolgersi in contrasto con l’utilità sociale o in modo da recare danno alla sicurezza, alla libertà, alla dignità umana*»). By predisposing in the second paragraph a system of restrictions to private economic initiative, the fathers of the Constitution recognized the predominance of the values of the person on those of economic activity.

See also: F. MAZZIOTTI, *op. cit.*, 121 *et seq.*; the author sees in paragraph 2 of art. 41 of the Constitution «*il primo e principale limite alla realizzazione di finalità economiche*», as well as «*il principale riconoscimento dei diritti fondamentali nei rapporti di lavoro*».

⁴²⁰ R. DE LUCA TAMAJO, *Giurisprudenza costituzionale e diritto del rapporto di lavoro*, in AA. VV., *Lavoro. La Giurisprudenza costituzionale (1 luglio 1989 - 31 dicembre 2005)*, Rome, 2006, 9, 42.

As previously considered, labor law itself is intrinsically and deeply characterized by dualist relationships (capital – work; *insiders* – *outsiders*)⁴²¹.

“Conflict” is therefore the intrinsically inevitable element we can find in social relationships in a pluralist and democratic form of State.

Hence, it would be pointless to try and eliminate this conflict: as long as it is always expressed in the full respect of the Constitution, we need to make a continuous and constant attempt to recompose, harmonize and balance of the interests and of the values under tension⁴²².

This is indeed the characteristic of labor law: its constant and never-ending search of a reasonable balance between the different and heterogeneous interests involved.

9. The parameter of rationality and the balancing of interests: the role of the Constitutional court.

In the development of labor regulatory ideologies within each national legal system, a particular role is held by the Constitutional courts.

Through a balanced evaluation of constitutionality, the judges analyze the values behind the choices of the legislator.

In other words, the Constitutional courts make a judgement which constantly recalls the *corpus* of values at the basis of the political choices

⁴²¹ R. PESSI, *Persona e impresa nel diritto del lavoro*, cit., 1238-1257; A. LINDBECK – D.J. SNOWER, *op. cit.*, 2 *et seq.*; R. DEL PUNTA, *L'economia e le ragioni del diritto del lavoro*, cit., 3 *et seq.*

⁴²² R. PESSI, *Economia e diritto del lavoro*, cit., 448.

adopted by the national legislators and helps a continuous «“vivificazione” dell’ideologia normativa»⁴²³.

The function of the national Constitutional courts can therefore be understood in their being “closing valves” of the legal system and of the labor law system in particular (for the reasons we are interested in here).

The judgement of constitutionality is in fact expressed following regulations which are a compromise between the various interests involved. And labor law legislation in particular is the result of a continuous axiological tension that the legislators recompose using balancing of interest techniques⁴²⁴.

The consequence of this is that legislative choices undergo an evaluation of proportionality with reference to the values and principles set in the Constitutions.

In the exercise of their functions, constitutional judges are necessarily expected to consider the system not as a static and finished regulatory *corpus*: a constant evolutionary reading of the constitutional values through hermeneutic techniques, which allow a continuous adjustment of the existent legislation to the changing social and historical contexts, is unavoidable⁴²⁵.

The consequence is that the Constitutional courts have created conceptual parameters and canons used by the judges when making their evaluations on a possible arbitrariness of the legislator in balancing interests and values.

⁴²³ R. PESSI, *Diritto del lavoro: bilancio di un anno tra bipolarismo e concertazione*, Padua, 2008, 12 *et seq.*

⁴²⁴ See R. PESSI, *Fattispecie ed effetti nel diritto del lavoro*, in R. PESSI, *Valori e “regole” costituzionali*, cit., 137 *et seq.*

⁴²⁵ With reference to the many techniques of interpretation, see F. MODUGNO, *Appunti dalle lezioni di teoria dell’interpretazione*, Padua, 1998, 2 *et seq.*

Among all the parameters, a predominant role is without doubt given to the criterion of rationality, the parameter at the basis of the control of legality in terms of the coherence, adequacy and proportionality of the political choices made by the legislator in balancing interests distant from the principles and values expressed by the Constitution.

«Ponendosi i principi costituzionali come elementi direttivi del sistema giuridico, diviene necessario il giudizio di coerenza tra quei principi ed il singolo precetto dettato dal legislatore ordinario»⁴²⁶.

10. Rationality and tables of values, polycentrism and transnationality.

The evaluation of “reasonableness” performed by the Constitutional courts of the single national systems – considered as a *«verifica di compatibilità tra l’opzione “politica” del legislatore e le scelte di “valore” operate dalla Carta costituzionale»⁴²⁷* – is central in contemporary labor law.

This control refers to *«“sia alla rispondenza, in termini di valutazione politica quale è inevitabilmente quella del ragionevole, dei mezzi utilizzati agli interessi da perseguire”, and to the congruity or arbitrariness in the balancing of conflicting interests “che è stato realizzato con gli atti assoggettati a quel controllo”»⁴²⁸.*

⁴²⁶ R. PESSI, *Il dialogo tra giurisprudenza costituzionale e sistema ordinamentale*, cit., 1553.

⁴²⁷ A. PACE, *Metodi interpretativi e costituzionalismo*, cit., 35-61.

⁴²⁸ A. PACE, *Interpretazione costituzionale e interpretazione per valori*, cit., 88-89. See also A. BALDASSARRE, *Costituzione e teoria dei valori*, cit., 655 et seq.

We need therefore to reaffirm that, *«per legare la natura dei mezzi (criterio di efficacia) alla natura dei fini (criterio di giustizia) è necessaria una politica pubblica capace [...] di valorizzare la funzione antropologica del diritto (del lavoro, in particolare)»*⁴²⁹.

With reference to this, far-sighted seem the words of the late Piero Alberto Capotosti: *«è compito della politica alta l'individuazione ed il bilanciamento dei diversi valori in competizione»*⁴³⁰.

In this reasoning we have to stress a fact of central importance.

As we have had the possibility to highlight in the present work, many past dichotomies are in part inappropriate to have the role of systematic categories in the reality of today, object of the labor jurist's research.

The traditional framework, based on the dualism self-employed/subordinate, with the consequent concentration of protection measures only for the latter, presents contradictions which are so deep that a reflection – referring to both the epistemology and the politics of law – about the legislative situation in contemporary labor law systems is urgent.

From this derives the need felt and emphasized by many to proceed attentively to a *«indilazionabile rimodulazione delle tutele dispensate dal diritto del lavoro»*⁴³¹.

⁴²⁹ A. PERULLI, *Valutazione ed efficacia del Diritto del lavoro*, cit., 42-43.

⁴³⁰ P.A. CAPOTOSTI, *Concertazione e riforma dello Stato sociale nelle democrazie pluraliste*, in *Quad. cost.*, 1999, 3, 490. See also ID. – G. DI GASPARE, *op. cit.*, 6: *«la legge sembra sempre di più lo strumento attraverso il quale la mediazione politica aderisce a tutte le pieghe della realtà sociale e, plasmandosi sulle stesse, si evolve seguendone le interne evoluzioni. [...] In questo senso la legge, non più come frutto di una volontà “decisionista”, ma come rappresentazione simbolica e linguistica, in un linguaggio che perde sempre più i caratteri tecnico-giuridici tradizionali, di questo processo reale»*.

⁴³¹ M. MAGNANI, *Il Diritto del lavoro e le sue categorie. Valori e tecniche nel Diritto del lavoro*, cit., 142: *«il tradizionale sistema lavoristico basato sulla dicotomia*

This action is indispensable to maintain adequate standards of effectiveness in the issuing of norms for the cases object of regulation.

In order to achieve a similar result, it is necessary to support the institutions which operate on the labor market.

And indeed, the consolidation of the labor market protection system is the “precondition” for the revision of work relationship regulations.

Certainly a warning will have to be constantly considered as a foothold in the work of reform which will follow the intense and radical one which has characterized the development of Italian and Spanish labor law in recent years.

From the methodological point of view, *«nell’incertezza di questa fase di transizione, vanno evitate due tentazioni opposte: osservare le tendenze, fattuali e normative, con le categorie sociali e giuridiche del passato e, d’altra parte, operare estrapolazioni affrettate alla ricerca di modelli unificanti prematuri»*⁴³².

Especially this last risk cannot be neglected because the reality the labor law jurist is called to measure him/herself with is intrinsically characterized by the polycentrism and transnationality of the organizational and productive phenomena, as well as of the regulatory sources of reference.

In any case, the centrality of the axiological sphere of work and enterprise has to be necessarily recognized.

autonomia/subordinazione, da un lato attribuisce in blocco tutte le tutele possibili a chiunque sia lavoratore subordinato, senza alcuna ragionevole distinzione e proporzionalità (basti pensare all’attrazione dei dirigenti nel suo statuto protettivo); dall’altro, lascia interamente, o quasi, sguarnito di tutela il lavoratore non subordinato».

⁴³² Ivi, 146.

Exactly in the heterogeneity of the values which give life to the Italian and Spanish constitutional systems, we can find the compass to identify an always valid direction for labor law to follow.

«I principi morali incorporati dalla Costituzione nella forma dei diritti fondamentali, oggettivamente intesi come principi elementari dell'ordinamento, acquistano natura giuridica e, con essa, un nuovo modo di validità senza perdere il loro status originario. Essi appartengono in pari tempo al diritto e alla morale, di guisa che, da un lato, è restituita al diritto positivo la fondazione in un ordine oggettivo di valori sostanziali, e non semplicemente nella legalità procedurale, dall'altro è salvaguardata la sua autonomia assoggettando la determinazione dei criteri di integrazione – che non può avvenire se non caso per caso in relazione a singoli contesti concreti – ai modi, alle procedure e ai vincoli specifici dell'argomentazione giuridica»⁴³³.

From an eminently methodological point of view, worthwhile seems the option of an approach oriented towards a *«pensare problematicamente»⁴³⁴*, in the perspective of stressing the effects and possible fall backs of the reforms which – in the single legal systems, as at community levels – in time see the light.

And this is true also in the difficult search of a *«nuovo equilibrio tra tutela del lavoro e ricerca della flessibilità e competitività delle imprese attraverso riforme profonde della legislazione del lavoro e della contrattazione collettiva»⁴³⁵*, in an economic reality rich of global challenges.

⁴³³ L. MENGONI, *Diritto e tecnica*, in *Riv. trim. dir. proc. civ.*, 2001, 7.

⁴³⁴ M. PERSIANI, *Diritto del lavoro e autorità del punto di vista giuridico*, cit., 55. See also L. MENGONI, *L'argomentazione orientata alle conseguenze*, cit., 94; ID., *Problema e sistema nella controversia sul metodo giuridico*, in ID., *Diritto e valori*, cit., 11 et seq.

⁴³⁵ M. RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *La crisi economica e i fondamenti del Diritto del lavoro in Spagna*, 2013, www.aidlass.it.

The same can be said for the scenario in which the peculiarity of the subject fully appears: *«il diritto del lavoro, per sua natura, è il luogo elettivo della libertà intellettuale. Perché, appunto il diritto del lavoro è per sé materia incerta, friabile, persino rozza se presa come disciplina “autonoma”, straordinaria se intesa come una chiave per guardare il mondo»*⁴³⁶.

⁴³⁶ L. MARIUCCI, *op. cit.*, 166.

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List of abbreviations

- *Arch. phil. droit* *Archives de philosophie du droit*
- *Cambridge J. econ.* *Cambridge journal of economics*
- *Comp. Lab. L. & Pol'y J.* *Comparative labor law & policy journal*
- *Dir. lav.* *Diritto del lavoro*
- *Dir. lav. rel. ind.* *Giornale di diritto del lavoro e delle relazioni industriali*
- *Dir. merc. lav.* *Diritto del mercato del lavoro*
- *Dir. prat. lav.* *Diritto e pratica del lavoro*
- *Dir. rel. ind.* *Diritto delle relazioni industriali*
- *Dir. soc.* *Diritto e società*
- *DL* *Documentación laboral*
- *Il Diritto. Enc. giur.* *Il Diritto. Enciclopedia giuridica*
- *ILJ* *Industrial law journal*
- *Intern. lab. rev.* *International labor review*
- *Econ. j.* *The economic journal*
- *EDJ* *El Derecho jurisprudencia*
- *Enc. dir.* *Enciclopedia del diritto*
- *Enc. giur. Treccani* *Enciclopedia giuridica Treccani*
- *Eur. dir. priv.* *Europa diritto privato*
- *Eur. econ. rev.* *European economic review*
- *J. Law & Econ.* *Journal of law and economics*
- *J. L. Econ. & Org.* *Journal of law, economics and organization*
- *JMTM* *Journal of manufacturing technology management*
- *Lav. dir.* *Lavoro e diritto*
- *Lav. prev. oggi* *Lavoro e previdenza oggi*

- *Mass. giur. lav.* *Massimario della giurisprudenza del lavoro*
- *MLR* *Monthly labor review*
- *Pol. dir.* *Politica del diritto*
- *Quad. cost.* *Quaderni costituzionali*
- *Quad. Dir. lav.* *Quaderni di diritto del lavoro*
- *Qualità* *Qualità*
- *Rass. Avv. Stato* *Rassegna Avvocatura dello Stato*
- *RCDP* *Rivista critica di diritto privato*
- *RDS* *Revista de derecho social*
- *RDT* *Revue de droit du travail*
- *REDT* *Revista española de derecho del trabajo*
- *Rel. lab. y der. empleo* *Relaciones laborales y derecho del empleo*
- *Rép. Défrenois* *Répertoire du Notariat Défrenois*
- *Rev. inter. trab.* *Revista internacional del trabajo*
- *Rev. pol. soc.* *Revista de política social*
- *Riv. dir. comm.* *Rivista di diritto commerciale*
- *Riv. dir. sic. soc.* *Rivista di diritto della sicurezza sociale*
- *Riv. giur. d'Italia* *Rivista giuridica d'Italia*
- *Riv. it. dir. lav.* *Rivista italiana di diritto del lavoro*
- *Riv. it. scienze giuridiche* *Rivista italiana per le scienze giuridiche*
- *Riv. giur. lav.* *Rivista giuridica del lavoro e della previdenza sociale*
- *Riv. trim. dir. proc. civ.* *Rivista trimestrale di diritto processuale civile*
- *RL* *Relaciones laborales*
- *RPS* *Revista de previdencia social*
- *RTDC* *Revue trimestrielle de droit civil*

- *TL* *Temas laborales*
- *U. Chi. L. Rev.* *The University of Chicago law review*
- *Yale L. J.* *The Yale law journal*