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Dismissal, labor law and ideology

Licenziamento, diritto del lavoro e ideologia

Demissão, direito do trabalho e ideologia

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ABSTRACT

In distinct historical phases, at least in three of them, Labor Law has been questioned about which discipline to apply to the dismissal or to the withdrawal. A brief reading of these three phases intends to evidence the intercurrent relations between the norm and doctrinal and jurisprudential elaborations, that is, the "legal constructions" that have accompanied their evolution. I will take into consideration the origins phase, the post-constitutional phase and obviously the current phase. I will seek to grasp the link between the ideologies of the time in order to reach the conclusion that fundamentally the key issue, which is the choice for the preferred model, is always the same and focuses itself on the recognition of asymmetry between the parties in a labor relation, particularly in the moment of withdrawal. It will be possible to observe how Labor Law, in this matter, is strongly tributary to the predominance of ideologies external to it.

KEYWORDS: Labor law, Work Relations, Dismissal, Asymmetry, Ideology

RIASSUNTO:

In distinte fasi storiche, almeno tre, il Diritto del lavoro si è interrogato sulla disciplina da applicare al licenziamento, o al recesso. Una breve rilettura di queste tre fasi consente di mettere in evidenza le relazioni intercorrenti tra la norma e l'elaborazione dottrinale e giurisprudenziale, cioè le "costruzioni giuridiche" che hanno accompagnato la sua evoluzione. Prenderò in considerazione la fase delle origini, quella post-costituzionale e ovviamente la fase attuale. Lo farò cercando di cogliere il nesso con le ideologie del tempo per arrivare alla conclusione che, in definitiva, il problema di fondo, che è quello scegliere il modello preferibile, è sempre lo stesso ed è incentrato sul riconoscimento della asimmetria della parti nel rapporto di lavoro, ed in particolare nel momento del recesso. Si potrà osservare come il Diritto del lavoro, in questa materia, risulti fortemente tributario dal predominio di ideologie esterne ad esso.

PAROLE CHIAVE: Diritto del Lavoro. Rapporto di Lavoro. Licenziamento. Asimmetria. Ideologia.

RESUMO

Em pelo menos trê sdistintas fases históricas, o Direito do Trabalho foi interrogado sobre a disciplina a ser aplicada à demissão, ou à renúncia. Uma breve leitura dessas três fases permite evidenciar as relações intercorrentes entre a norma e a elaboração doutrinária e jurisprudencial, isto é, as "construções jurídicas" que acompanharam a sua evolução. Levarei em consideração a fase das origens, a fase pós-constitucional e, obviamente, a fase atual. O farei procurando colher o nexo com as ideologias do tempo para chegar à conclusão de que, fundamentalmente, o problema de fundo, que é o de escolher o modelo preferido, é sempre o mesmo e é focalizado no reconhecimento da assimetria das partes na relação de trabalho, sobretudo no momento da rescisão. Poder-se-á observar como o Direito do Trabalho, nesta matéria, resulta densamente tributário do predomínio de ideologias que lhe são externas.

PALAVRAS-CHAVE: Direito do Trabalho, Relação de Trabalho, Demissão, Assimetria, ideologia.

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INTRODUCTION. ORIGINS OF SYMMETRY IN THE WORK CONTRACT. AN IDEOLOGICAL CHOICE.

We can open this subject by recalling the cry of pain emitted by Mario Napoli the day after the abrupt "dismantling" of the stability promoted by the reform of Fornero[1].

This act is first and foremost a severe and forceful denunciation of a passionate scholar who, as he himself proclaimed, "devoted a lifetime to clarifying the dimension of the system of real stability"[2]. However, either by the affection that many nourished for him, or by the coincidence of the decline of the institute of real stability with that of Mario's life, most preferred to interpret, in that act, rather the vigor of passion than the energy of rationality.

As if that denunciation arose from the suffering of seeing the castle itself collapse, and not from the latent preoccupation that a "cultural and political delegitimization of labor law"[3] would inevitably lead to a degradation of the conditions of life and the level of citizenship of which Western societies were so proud that it even posed a risk to the democratic balance of the Republic[4].

The discipline of dismissal has always been the casting vote of vitality, of the torments and of the ambiguities of Labor Law. The power to terminate unilaterally constitutes the supreme modality of affirmation of the predominance of one of the two parties of the contract. In fact, the power of unilateral termination can definitively silence any other claim from the more fragile party. Such power, frightening the extinction of the relation, has the force to impose the renunciation to other rights and to promote the acquiescence of the abuse.

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[1] NAPOLI, M. Il diritto del lavoro tra sfregio della stabilità e attesa dello sviluppo*, in* Napoli M.*,* **Diritto del lavoro in trasformazione**, Giappichelli, Turim 2014, p. XI ss.

[2] NAPOLI, M. Il diritto del lavoro tra sfregio della stabilità e attesa dello sviluppo*, in* Napoli M.*, Diritto del lavoro in trasformazione*, Giappichelli, Turim 2014, p. XII.

[3] NAPOLI, M. Il diritto del lavoro tra sfregio della stabilità e attesa dello sviluppo*, in* Napoli M.*, Diritto del lavoro in trasformazione*, Giappichelli, Turim 2014, p. XI.

[4] RUSCIANO, M. Legificare la contrattazione per delegificare e semplificare il diritto del lavoro, *in* **Lavoro e Diritto,** n. 4/2016, p. 953 ss.

The contract of employment, at first, was attributed, indistinctly, to the role of other private contracts. It was intended that the guarantee offered by the freedom of contract would be able to guarantee the rights and expectations arising from the contract itself, without the need for the State to interfere in such a relationship. But it soon became evident that it was not so!

Asymmetry, which was promptly established and stigmatized in the social sphere, was also considered in the legal sphere, under the prerogative of freedom of termination, or the unilateral power of dismissal *ad nutum*, at the heart of the common law of reciprocal contracts, that is to say, of a right in principle inspired by the purest symmetry. The solutions proposed by the prevailing doctrine to justify the power of dismissal *ad nutum* subsequently asserted, focused on purely legal motivations. Barassi justified this power by emphasizing the *locatio operarum* for a certain time, with the fiduciary nature of the relation, Carnelutti, in turn, resorted to the analogy with the lease of things, avoiding the objection of a possible "moral repugnance by equating man with things"[5]. What I would like to highlight in this regard is the fact that this debate was motivated by economic, social, and ethical considerations.

It is clear that such a debate originated from the awareness of the profound inequality between the parties to the contract, arising from a careful observation of the labor market, from economic and social phenomena, as well as from the reflexes of the legal act on the existential condition of the people. This is a careful analysis, especially on the part of some of those involved, since it even details the risk that the worker must bear according to the developed work activity. This is because "the domestic worker, even if dismissed, easily finds a new service, since the number of people engaged in domestic service is decreasing, while the difficulties are much greater for other employees. Their numbers increase as formal education spreads and if they are dismissed by the boss, their reintegration into the labor market is much

[5] CARNELUTTI, F. Del licenziamento nelle locazioni d'opera a tempo indeterminato, in: **Riv. Dir. Comm.**, 1911, I, p. 397.

more difficult"[6]. Anticipations of modern economic analysis of law?

Both the doctrine of the rising Labor Law and jurisprudence on this point are divided. It is possible to see a combination of positions between those who deny the right of free dismissal on the part of the employer[7], who contends to mitigate the sudden injury of the weaker party by recognizing the right of prior notice or indemnity to the dismissed worker, as is part of the jurisprudence, or those who, as we have already said, recognize the freedom of dismissal at the heart of the relationship for a certain time[8].

It is not up to us to describe the issue, which Mario Napoli has already carefully analyzed. It is necessary to emphasize the aspects related to overcoming, based on the recourse of general principles, of the apparent symmetry between employer and employee introduced by art. 1628 of the civil code, pursuant to art. 1870 of the Napoleonic Code. Since the public order directive of Article 1628, as recalls Mario Napoli, was dictated by the freedom of the worker[9] , the fact that the employer can undertake to keep the workers in service for life is not in conflict with this standard.

In fact, symmetry is only apparent; because "in the first case, the domestic woman alienates her freedom, because she is the one who serves, in the second case, the employer does not alienate his freedom, because he is the one who serves" and, consequently, art. 1628 does not impose any restriction on the employer in the sense of obliging him to keep the housekeeper for life[10]. The asymmetry will then be reaffirmed, in substantially similar terms, by the subsequent doctrine. Giorgio Ghezzi states that while the worker suffers "a compression of personal freedom," for the employer, conversely, it is a "limitation of the freedom of economic initiative"[11]. Federico Mancini, on the other hand, considers the symmetry inadmissible, for putting at risk "on one side the person and on the other the patrimony"[12].

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[6] LAURENT, F. **Principi di diritto civile**, Milan 1900, II, XXV, p. 431-432.
[7] LAURENT, F. **Principi di diritto civile**, Milan 1900, II, XXV, p. 431-432.
[8] BARASSI, L. **Il contratto di lavoro**, Milão, 1901, p. 830 ss.
[9] NAPOLI, M. **La stabilità reale del rapporto di lavoro**, Angeli, Milão, 1980, p. 64, nota n. 26.
[10] NAPOLI, M. **La stabilità reale del rapporto di lavoro**, Angeli, Milão, 1980, p. 64, nota n. 26.
[11] GHEZZI, G. **Il recesso**, I, p. 338.
[12] MANCINI, F. **Il recesso unilaterale e i rapporti di lavoro**, Giuffrè, Milão, 1962, p. 338.

That part of the doctrine and jurisprudence that concentrates its attention beyond the formal equilibrium projected by the law, does so considering and taking advantage of the socioeconomic context. The opportunity, or the need to look at economics, is evidently not recent acquisitions, they are almost inherent in the DNA of Labor Law.

The awareness of economic phenomena, their social implications, as well as the initial indifference of the legislator, however, do not suggest a univocal response. It is enough to reflect on the motivations, at least in the meta-juridical scope, that justified the advanced theories of the main interpreters of the time.

Barassi acknowledges and regrets the sad condition of the worker, not only because of all that refers to the (lack) of stability of the labor relationship, but also because of the risk and suffering that this entails. Although it states that it cannot infringe the strict rules imposed by private law. Not being insensitive to the problem, it hopes that the safety of the worker, in every sense, comes from the State, by adopting measures that contemplate it, at least in a prevalent way, in public law. Even though he could not ignore that "de jure condendo" reforms could also cover common law, he, "as a good conservative," like Mario Napoli[13] defines it, avoids this hypothesis. It is possible to glimpse in this key of reading very few similarities with the reasons of who, today, invokes a greater flexibility in the subject of the resignation while, at the same time, waiting for the worker to satisfy their own aspiration to the security in the labor market or through other social security or welfare instruments.

No less positivist seems to be the approach of one of the main advocates of the freedom of dismissal *ad nutum*, Carnelutti. For him, as already stated, the only reason for not using the analogy with the lease could be represented by the moral repugnance of placing man and things on the same level. However, he considers it an "*excessive repression*"[14]. The author, with the addition of a pinch of pragmatism, makes the following reasoning: since, in practice, everyone ends up arriving at the same result by different ways, accepting the analogy with the rule of art. 1609 of the

[13] NAPOLI, M. **La stabilità reale del rapporto di lavoro**, Angeli, Milan, 1980, p. 64, nota n. 26, p. 70.
[14] CARNELUTTI, F. Del licenziamento nelle locazioni d'opera a tempo indeterminato, in **Riv. Dir. Comm**., 1911, I, p. 397.

Civil Code, is not only the sincerest solution, but also the most effective. It is a reasoning that today, for many, still fascinates.

In a diametrically opposed way, Laurent's conception, a forerunner of those who consider that worker safety should not be neglected[15]. Based on the assumption of the social and economic disparities between the parties, the author considers it justified to use the principles of fairness and justice, recourse to the category of abuse of rights, to at least partially offset the disadvantage of the weakest party in the work relationship.

FIRST PERIOD: THE LEGISLATOR ANNULS ASYMMETRY, BUT IT IS REAFFIRMED IN THE RIGHT TO WORK CONSECRATED BY THE CONSTITUTION OF THE REPUBLIC.

The civil code of 1942 formalizes the acquisitions of the doctrine favorable to the recognition of the right of dismissal *ad nutum*, consecrating them in a norm that, disciplining only the resignation, recognizes the perfect symmetry of position between the entrepreneur and the subordinate worker. It is a formulation that fits the relations of strength that had been consolidated in the country and the doctrinal and jurisprudential orientations that were better represented. A formally equidistant norm, but which, in fact, favors the patronage which, by an interpretation favorable to the full availability of the power of dismissal *ad nutum*, could bring indisputable advantages[16].

The apparent symmetry contained in the formulation of art. 2118 and 2119, which penalizes those belonging to the working class, suffered a crisis as soon as the Constitution of the Republic came into force.

The formulation of the civil code in terms of dismissal will remain unchanged for a long time, but an idea will begin to take shape that the proclamation of the Right to work is a cornerstone meant to flourish both from the point of view of the interpretive profile of ordinary legislation and the reference point for the new

[15] LOI, P. **La sicurezza, diritto e fondamento dei diritti nel rapporto di lavoro**, Giappichelli, Turim, 2001.
[16] BALLESTRERO, M.V. **I licenziamenti**, Angeli, Milão, 1974, p. 23, according to the view of MANCINI, F. Il recesso unilaterale nel contratto di lavoro, in **Giusta causa e giustificati motivi nel licenziamento individuale**, Giuffré, Milão, 1967, p. 5.

"builders" who, in compliance with art. 3 of the Constitution, are called to remove economic and social obstacles that prevent the full development of the human person[17].

The absence of protection against illegitimate dismissal certainly constitutes an obstacle to the realization of Labor Law. However, at that time, even the notion of justified dismissal that had begun to appear in the first part of the century failed.

The reasons that led to the formulation of the Constitutional norm guided towards the interest of the working class and, consequently, to the limitation of entrepreneurial prerogatives for the latter (with art. 35 as the point of reference, and art. 41 indicating the measure) were evidently inspired by an ideal choice, in a program, or in a utopia, that is, to consider that it was time to promote the conditions so that the disadvantaged classes could achieve full and true equality.

This objective is incompatible with the permanence of the principle of the code of symmetry of the parties in the dismissal, expressed with the derogatory formula of the right to dismiss *ad nutum*, with a simple nod, not faltering even before a discriminatory act.

The maturation of a new juridical consciousness intertwines with the maturation of the common conscience and is accelerated by facts and conflicts. The resignation of Santihia in 1951, motivated by explicitly discriminatory motives, will not find a legal answer to remedy the evident *vulnus* of a principle that gradually takes root in the collective conscience, but will cause indignation and will ripen the performance of the principle of Labor Law (and not only it) through legislation that prevents at least the most odious forms of discriminatory dismissal. The pioneering case will be the law that establishes the nullity of dismissal motivated by matrimonial reasons.

The constitutional principle of Labor Law, with respect to the limitation of the freedom of dismissal, is affirmed by the effect of the evolution of social conscience and derives from the conflict, also now constitutionally guaranteed. It is collective autonomy, in fact, that establishes the first limits to the power of dismissal in large

[17] About this: LOY, G. Una repubblica fondata sul lavoro, in **Dir.lav.rel.ind.**, 2009, p. 197 ss.

private companies. Despite the impartial formulation of art. 2018 and 2119, the asymmetry between dismissal and resignation that was already debated at the beginning of the century resumes its power.

Today it is easy to perceive the incongruity between the principle contained in art. 4 of the Constitution and the indiscriminate freedom of dismissal established by the Civil Code; and even a constitutionally oriented reading of those norms, despite the authority of those who preached it, was not easy.

There were those, like Natoli, who understood art. 4 as a "right to the conservation of employment"[18]. Art. 4, according to a political orientation of law well represented by Mortati and Smuraglia, considered that art. 4 of the Constitution not only prescribed to the legislator the adoption of provisions for the application of that principle, but also a prohibition on private entities to adopt provisions that denied or compromised the objective indicated in the constitutional norm[19].

Of course, for the climate experienced at the time, it was not easy to "circumvent" the freedom of dismissal only through the use of interpretive instruments, "although technically valid"[20]. Federico Mancini himself, at the time, considered that art. 4 of the Constitution was not so contradictory, but rather presented a "heterogeneous" character in relation to the discipline of dismissal established in articles 2118 and 2019 of the civil code. Therefore, he concluded that even if "the legislator changed art. 2118, the relative norms would not find in the second (*that is, in art. 4 Const*.) the constitutional legitimation"[21].

Obviously, Mancini's dissent in relation to this political line of law concerned the technique of interpretation, and not its purpose. He himself, in fact, in relation to two of the hypotheses placed (introducing a control on motivations, or even mitigating the absolute freedom of dismissal foreseeing an equity adjustment)

[18] NATOLI, U. **Limiti costituzionali dell'autonomia privata nel rapporto di lavoro:** Introduzione, Giuffrè, Milão, 1955, p. 57.
[19] MORTATI, C. Il diritto al lavoro secondo la Costituzione della Repubblica (Natura giuridica, efficacia, garanzie*),* in **Atti della Commissione parlamentare d'inchiesta sulla disoccupazione***,* Roma, 1953, vol. IV, t. I, p. 79; SMURAGLIA, C. **La costituzione ed il sistema del Diritto del lavoro**, Milan, 1958, p. 143 ss.
[20] BALLESTRERO, M.V. **I licenziamenti**, Angeli, Milan, 1974, p. 44.
[21] MANCINI, F. **Il recesso unilaterale e i rapporti di lavoro**, Giuffrè, Milan, 1962, p. 362.

resolutely opted for the first, since such an exit could constitute "a premise for further developments in the real stability scope"[22].

Therefore, the constitutionalist current could not be imposed. The other current

was much more profitable, which, through conflict and ensuing collective bargaining, built the model that would later be received by legislators in 1966.

What is at stake, in this sense, is the relation between Labor Law and the discipline of dismissal, here it is important to emphasize that the constitutional derivation of the discipline limiting free dismissal refers, and presupposes, together with the demand for other values, an accurate view of the market economy. A conception which, for Mortati, "presupposes the conviction that equilibrium in the labor market cannot come from the spontaneous play of factors that work to determine it"[23] and implies (considering the religiosity professed by the author) a critique of coherent liberal theory and inspired by the orientations already present and destined to consolidate themselves in the social doctrine of the church. In other words, the legal debate developed roughly according to the discipline's own techniques but was strongly conditioned by the authors' *bias*. They interposed to the respective legal arguments, to a greater or lesser extent, their own ideological convictions, or their own idealizing passions.

I say this in order to deny the warnings of those who, at any time, incite labor lawyers not to ignore the economy, forgetting that it is just the opposite, since Labor Law was born and grew within the waters, sometimes turbulent, of economy; however, often far from accompanying them, it is opposed to supposed economic theories that wanted to provide free rein to the alleged spontaneous mechanisms of the market.

In order to demonstrate this, since I have made a prevalent reference to a "progressive" doctrine, I find it interesting to also invoke some arguments, also inspired by economic theories, which, contrary to what art. 4 of the Constitution

[22] MANCINI, F. **Il recesso unilaterale e i rapporti di lavoro**, Giuffrè, Milão, 1962, p. 362.
[23] MORTATI, C. Il diritto al lavoro secondo la Costituzione della Repubblica (Natura giuridica, efficacia, garanzie), in **Atti della Commissione parlamentare d'inchiesta sulla disoccupazione**, Roma, 1953, vol. IV, t. I, p. 79; SMURAGLIA, C. **La costituzione ed il sistema del Diritto del lavoro**, Milan, 1958, p. 143 ss.

considers, while enshrining the "right to work" as a principle, does not postulate any intervention by the State.

Mazziotti, for example, returning to a much older idea inherited from the beginning of capitalism[24] , did not hesitate to affirm that the most coherent instrument of action of the right to work was the total abandonment of the economy to market freedom; of a market that, spontaneously and virtuously, would have achieved the constitutional objective of the "right to work."[25]

It is impossible not to see how the jurist's interpretation in both cases posits an ideological choice and suggests the application of a distinct economic theory due to the innocuous contemplation of the virtuous effects of market rules, the need for state intervention in order to correct the effects not consistent with the program established in Article 2 of the Constitution.

The reference to article 4 corroborates and finds technical basis in art. 41 of the Constitution. This norm, once the freedom of initiative of the economy is affirmed, does not delineate its limits. It "cannot develop in contrast to social utility or in such a way as to cause harm to security, freedom, and human dignity." It is only to establish if the power of unjustified dismissal, according to art. 2118, may "injure" one or more limits indicated by the constitutional norm. The indiscriminate freedom of dismissal, according to an orientation supported mainly by renowned constitutionalists, would contrast with the right to worker safety. The term security, referring to the worker, must be understood here as security of one's own existence. It consists in the "assurance of power, at any time, to have the means necessary for one's own existence and that of their family;" the dismissed worker without justification would be in a position where they would be unable to protect, in the constitutionally

[24] "El capital, abandonado a su libre y espontánea acción se invierte forzosamente en dar trabajo y pago de salarios". DE FERRAN, I. M. **Cartas a un arrepentido de la Internacional.** El comunismo, el derecho al trabajo, la libertad del trabajo, Gutemberg, Madrid, 1882, p. 91.

[25] MAZZIOTTI M., **Il diritto al lavoro**, Milan, 1956, specie p. 59 e 69. In analogy: D'EUFEMIA G., **Le situazioni soggettive de lavoratore dipendente**, Milan, 1958, p. 25 ss. "Se la Repubblica dovesse attuare il diritto al lavoro di tutti i cittadini solo moltiplicando posti di lavoro dipendente lo Stato finirebbe…per divenire uno stato collettivistico, non molto diverso da quello sovietico, il che certo non corrisponde ai principi della costituzione" this way: MAZZIOTTI, M. Lavoro (diritto costituzionale), in **Enciclopedia del diritto**, vol. XXIII, Milão, Giuffré,1973, 338 ss.

guaranteed ways, their own personality[26]. It is therefore possible to argue that in the right to work "the right to the preservation of the work position is also admitted for those who have previously had an occupation"[27] and that the worker's interest in the retention of his work position represents "a constitutionally protected interest"[28].

The first constitutional jurisprudence did not accept the idea that the combination of art. 4 and 41 may be immediately effective under the terms of art. 1374 of the Civil Code, which also obliges the parties in the consequences of the contract that derive according to law or, in the absence thereof, according to equity and uses. However, the Constitutional Court, in 1965, even confirming that the worker is not granted a subjective right, immediately actionable, to the conservation of labor, invited the legislator to "adapt the discipline of labor relations for an indefinite period with the specific purpose of ensuring to all the maintenance of the work position" and to delimit with "due guarantees" and "timely remedies the cases in which it is necessary to dismiss"[29]. The sentence precedes somewhat the era of legislative interventionism, which in 1966 will break the symmetry between resignation and renunciation imposed by the civil code of 1942.

After the introduction of the legislation limiting individual dismissals, the theory of constitutional derivation of the right to the conservation of the work position finds new adepts. Everyone has a clear and defined distinction between the right to a job and the right to retain it. In the second case, "the right not to be arbitrarily deprived of the job itself... is perfectly conceivable," as D'Antona[30] will later say, since it would be in contrast to the interest in "security" protected by art. 41 of the Constitution.

Not everyone, of course, accepts this formulation. Giuseppe Pera, reversing

[26] BALDASSARRE, A. Iniziativa economica privata, in **Enciclopedia del diritto**, vol. XXI, Milão, Giuffré, p. 602.
[27] CRISAFULLI, V. **La Costituzione e le sue disposizioni di principio**, Milan, Giuffrè, 1952, p. 145 ss. according to which the worker's interest in conserving his work position represents "a constitutionally protected interest. CRISAFULLI, V. **La Costituzione e le sue disposizioni di principio**, Milan, Giuffrè, 1952, p. 161.
[28] CRISAFULLI, V. **La Costituzione e le sue disposizioni di principio**, Milan, Giuffrè, 1952, p. 145.
[29] Corte Const. 26 de maio de 1965, n. 45, *in GC*, 1965, 661.
[30] D'ANTONA, M. **Reintegrazione nel posto di lavoro**, Cedam, Pádua, 1979, p. 110.

the two poles of the constitutional provision, instead of starting from the freedom of the company and then identifying the limits indicated, part of the latter to affirm that "this interest of the worker cannot be protected beyond the limit exceeded, since it would put at stake or in question those choices in relation to which the constitutional guarantee of freedom is worth "[31] . I would therefore like to prove that there is an immutable level of constitutional guarantee in favor of the freedom of enterprise and that the worker's interest in safeguarding his dignity and safety is limited by the freedom of the company. But this is not so: in order to be "flexible," not only the right to dignity or safety of the worker should be indicated as limits, but also the extent of freedom of enterprise that cannot exceed these limits.

In the event of "more general matrix of the safeguarding of freedoms and dignity of the worker contained in art. 41, 2nd paragraph of the Constitution," is evident, it is evident that "the potential detrimental element of these goods, which are subject to limits, is characterized in private initiative *tout court*, that is, directly in the power of the entrepreneur to dispense with the legal modalities in which it is explained".[32]

Art. 42 of the Constitution, recognizing the freedom of private initiative, evidently also lays down the power of dismissal on the part of the employer, but there would be an "internal limit to its exercise, inherent to the proper function for which the relative powers were legally recognized"[33]. Indeed, it is reductive to say that the worker's right to safety or dignity (the locutions of art. 41 of the Constitution express a total value in its set) constitutes an internal limit to the exercise of the power of the employer. Nor does the reference to the balancing technique[34], in this case, seem

[31] PERA, G. Il licenziamento nell'interesse dell'impresa. Relazione alle Giornate di studio Aidlass, Florença 27-28 de abril de 1968, agora in **Scritti di Giuseppe Pera**, Giuffré, 2007, p. 199.
[32] TREU, T. **Condotta antisindacale e atti discriminatori**, Milão, 1974, p. 43 ss.
[33] GAROFALO, R. **Recesso dal rapporto e tutela del lavoratore, la specialità del Diritto del lavoro**, Doctoral Thesis, 2008-2009.
[34] D'ANTONA, M. **Reintegrazione nel posto di lavoro**, Cedam, Pádua, 1979, p. 70; NOGLER, L. La disciplina dei licenziamenti individuali nell'epoca del bilanciamento tra i <<principi>> costituzionali, in **Disciplina dei licenziamenti e mercato del lavoro***.* Atti delle giornate di studio di diritto del lavoro. Veneza, 26-26 de maio de 2007, Giuffrè, 2008, 14 against DI MAJO, A. Sindacato di legittimità o sindacato di merito sui licenziamenti cd. tecnologici?*,* in **GM**, 1970, p. 523 and PROTO PISANI, A. Le ragioni di un distacco, in **FI**, 2006, p. 147.

convincing. Balancing presupposes that the interests to be compared are placed at the same level in the hierarchy of principles. But in this case, this is not what happens. Notwithstanding the distinct opinion of a doctrine endowed with authority, freedom of enterprise is not at the same level as the absolute rights of the person invoked by art. 41 of the Constitution. Obviously, these are not intangible rights, because even "fundamental rights are always intrinsically limited, even those enunciated in the constitutional charter"[35]. But it is correct to say that the wording of the norm states unequivocally that security, freedom, and human dignity "limit" the freedom of private enterprise, or the modalities of its exercise, such as "social utility."

The principle-balancing technique, in Alexis's theory, is the point of arrival of a course that presupposes an assessment of the suitability and necessity of adopting a measure, as well as the absence of adequate alternative instruments to obtain the desired effect. Only in the final analysis, that is, when a principle can be achieved only at the expense of the other, a balance is drawn, which is substantially inspired by the principle of proportionality and objective of the rule, for which "the more intensive the intervention in a fundamental right, the more weight should the justifications have"[36]. But we must not forget, as Mengoni reminds us, that the process of balancing two principles does not necessarily determine a "reconciliation of one with another," this can also be concluded by affirming "prevalence of one over the other"[37].

In this case, in my view, the hermeneutical operation does not require a comparison. The content of the precept contained in the paragraph should be delimited at best. Therefore, it is necessary to characterize and circumscribe the rights that are part of the concept of "security," "dignity" or "social utility." If it is considered that the constitutional formula comprises the right not to be arbitrarily dismissed, that

[35] MENGONI, L., Fondata sul lavoro: la Repubblica tra diritti inviolabili dell'uomo e doveri inderogabili di solidarietà, in NAPOLI, MARIO (Org.) **Costituzione, lavoro, pluralismo sociale**, Milan, 1998, p. 8.
[36] ALEXY, R. Collisione e bilanciamento quale problema di base della dogmatica dei diritti fondamentali. In: LA TORRE, M.; SPADARO, A., (a cura di), **La ragionevolezza nel diritto**. Turim: Giappichelli. 2002, p. 42.
[37] MENGONI, L., Fondata sul lavoro: la Repubblica tra diritti inviolabili dell'uomo e doveri inderogabili di solidarietà, in NAPOLI, MARIO (Org.) **Costituzione, lavoro, pluralismo sociale**, Milan, 1998, p. 8.

is, that arbitrary dismissal damages the dignity of the person, it is clear that a rule that would allow arbitrary dismissal would be in contrast with the constitutional rule. There would be no principles to be balanced, for the simple reason that the legislator already has unequivocally established the prevalence of the right to safety and dignity before that of freedom of enterprise. There is no doubt, then, about the fact that arbitrary dismissal cannot find legitimation under constitutional principles in contrast to Articles 4 and 41 of the Constitution.

Another discourse contemplates the right of the entrepreneur, constitutionally guaranteed by art. 41 of the Constitution, to terminate the contract motivated by a justification related, for example, to impossibility, to default of the counterparty, to the organization of the company, etc. In fact, such a right does not succumb before the right of the worker to the maintenance of his work position which, as has been seen, is insurmountable in relation to arbitrary dismissal, but still does not prevail. Article 18, as D'Antona reminded us, "translates into the language of law [...] the idea that there is and it must be defended a right of the worker to the conservation of his concrete work position"[38], the author reaffirmed, in other words, the principle for which the right to work of constitutional referral is essentially a right to stability.

It follows, first, that the true and only protection against unlawful dismissal, as stated by Mario Napoli, is that it guarantees the preservation of the work position, that is, real stability. The systems that allow extinguishing the effects of illegitimate dismissal, accompanied by indemnity compensation, play a simple deterrent role, and do not in any way protect the worker's right to the maintenance of the work position, nor can they be considered as instruments acting on the constitutional principles mentioned. Such systems sometimes even stand in contrast to the general principles of contracts, being set up as special law. There is nothing more rational, as already satisfactorily supported by Mario Napoli even in his later writings, than to prevent an illegitimate act from taking effect. It is not a case where the effect of extinguishing the legitimate act intervenes as a special law and finds grounds, paradoxically, in the

[38] Recently invoked by Carlo Smuraglia, Art. 18, storia di battaglie per I diritti, in http://www.anpi.it/articoli/1254/art-18-storia-di-battaglie-per-i-diritti

sentence with which the judge, once established the illegitimacy of the act, allows it to produce effects.

Secondly, in light of the right to stability already mentioned, the countervailing right of resignation guaranteed by Article 41 must be justified in the light of the general principles of reasonableness and proportionality. Principles that hold different interpretive instruments according to the reasons that justify the dismissal. It is not the same, for example, to evaluate the seriousness of the breach or the reasons of the company, or to establish abstract legal hypotheses (fattispecies) that, in compliance with the general principles, exclude a priori the restitution protection.

In any case, the reference to the importance of the protected property is inevitable. Since the limiting discipline of illegitimate dismissals is the expression of the right to work, according to art. 4 of the Constitution, it is the duty of the legislator to indicate the criteria for the justification of dismissal, while it is for the judge to concretely evaluate the legal hypothesis (fattispecie).

The right to conservation of the work position, in different historical contexts, more precisely in the case of the protection of real stability, was first exalted, later defended, and now execrated. In reality, the ideological option that sustained it, defended it, and today opposes it, is that which prevails over and over again. The recent legislative reforms, which Mario Napoli warns as a dismantle, are not the result of a summer storm, but the resolution of a decades-long opposition to the Workers' Statute, especially its art. 18.

Opposition which, today, after a long series of defeats in several fronts in which the confrontation has articulated, it does not forget the referendum of 2000, when finally it triumphed.

SECOND PERIOD: THE LEGISLATOR ATTACKS AGAIN: A) THE "INTERNAL" RESPONSE WITH THE INSTRUMENTS OF THE LAW.

I am very pleased to introduce this second part, the most current one, with an affirmation that, at a certain point in the reasoning, Mario Napoli's 1980 monograph is

present. It is a phrase, pronounced many years before by J.H. von Kirchmann[39] which Mario Napoli thus interprets: "If it's true that three words from the legislator can destroy an entire legal construction (and this is the professional risk of the lawyer not covered by insurance), it may also be true that the consolidated legal constructions end up destroying the three words"[40].

A clash of State powers, ultimately. And if the goal is to "destroy" a legal construct or a legal norm, it is clear that the outcome could not allow mediations. It is not a novelty, therefore, that "when discussing issues that have some ideological force – *warned Mengoni* – , tensions arise between the judges"[41]. In recent times, however, the shock has surpassed the level of normal dialectics and has assumed the tone of an actual fight between the legislature and the judiciary, represented by a jurisprudence that, "in carrying out a corrective rebalancing operation," exercising "the power to amend or integrate the contract in order to ensure an equitable conciliation of the parties or to prevent and suppress the abuse of law"[42] has ended up contrasting with the ideological option expressed by the legislature.

Hence comes the reaction of the legislator who, at least since 2010, seeks in every way to limit the discretionary power of the judge: on the one hand, limiting his power to determine the legitimacy presupposition of the act and therefore preventing him from entering on the merits of organizational and productive technical assessments; and, on the other hand, imposing the restriction of remaining concentrated in the typification of the causes of dismissal contained in the applicable collective agreements, or even in those "certified" individuals[43].

It is the three words of the legislator that intend to destroy, with the 1970 standard, a legal construction. However, the legal construction in turn can react,

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[39] VON KIRCHMANN, J.H. **La mancanza di valore della giurisprudenza come scienza** (Die Werthlosigkeit der jurisprudenz als Wissenschaft), Stutgarnewd, Kohlhammer, 1938, trad.

[40] NAPOLI, M. **La stabilità reale del rapporto di lavoro**, Angeli, Milão, 1980, p. 64, nota n. 26, p. 56.

[41] MENGONI, L., Fondata sul lavoro: la Repubblica tra diritti inviolabili dell'uomo e doveri inderogabili di solidarietà, in NAPOLI, Mario. **Costituzione, lavoro, pluralismo sociale**, Milan, 1998, p. 428.

[42] LOI, P. **Il principio di ragionevolezza e proporzionalità nel diritto del lavoro**, Giappicchelli, Turim, 2016, p. 198.

[43] L. n. 183, 2010, art. 30.

thanks to the invocation of the general planning principles that the legislature of 2010, of course, cannot omit. It follows that a part of the case-law might frustrate the intention of the legislature when it states, for example, that by "non-existence of the contested fact", one should not understand material non-existence, but legal non-existence. In fact, the reform of the resignation introduced in 2012 through the Fornero Law marks a momentary withdrawal in the enlightened strategy of reducing the discretion of the judge regarding dismissal, so as to establish that, in the case of dismissal for just objective cause, in case of “manifested absence of fact,” the judge "may” arrange, instead of the protection of compensation, the reintegration to the work position, or even in its fragile variant that establishes a maximum limit of 12 months indemnity of compensation due to the worker. The most appreciable doctrine, and with it Mario Napoli himself, considers that the phrase "may" must be "functionally equated with *must*"[44]. In any case, it is a transitional retreat, due essentially to the fact that this provisional restitution of the judge's discretion was, at that time, indispensable for obtaining the mediation between the social parties without which the approval of the Reform would be uncertain.

However, once the first blow to art. 18 was given, and considering the possible resistance of the case-law, the legislator, with three other words, has reshaped the power (or, if you prefer, the countervailing power) of the case-law. In the first place, it rendered the judge’s power to establish the compensation body within the maximum limits indicated by the legislature. Then, it prevented judges from exercising the prerogatives that traditionally were part of their professional training. With the new reform, the Jobs Act, in force since March 2015, if the dismissal is devoid of justified cause or just cause, reintegration is only admitted when "directly proved in court the inexistence of the material fact contested to the worker.” The wording is similar to the one already contained in the Fornero Law, but in order to avoid an interpretive misunderstanding, the legislator, with a particularly brutal formula, explicitly states that “every assessment of the *disproportion* of dismissal is strange.” It is not for me to

[44] NAPOLI, M. Il diritto del lavoro tra sfregio della stabilità e attesa dello sviluppo*, in* NAPOLI, Mario. **Diritto del lavoro in trasformazione**, Giappichelli, Turim 2014, p. XIII.

enter into this specific theme. I restrict myself only to pointing out the meaning: the judge, even if he considers that the dismissal is absolutely disproportionate to the material fact that befalls the worker, must, in any case, "declare the employment relationship terminated from the date of dismissal."

Mario Napoli, deprived of these later and more recent three words of the legislator, imagines that the defenders of a more intense (and possibly real) guardianship of the unjustified dismissal, open two ways: an internal, that is to say, the concentrated "legal construction" especially in interpretation, and an external one, to be disputed on open ground of the clash between ideologies that suggest differentiated techniques of intervention (or non-intervention) in the face of an illegitimate dismissal.

One part of the doctrine, relying on the tradition that recognizes a power of "corrective rebalancing" to the judge, concluded aiming at "just reconciliation of the parties,"[45] felt assured by the explicit (or implicit) invocation of general principles, perhaps underestimating the effects of the most recent discipline regarding dismissal. It is a doctrine of authority, committed to valuing instruments of contrast faced with the liquidation tendency of workers' guardianships, which re-examines rules of variable content, those that allow jurisprudence to constitute a true source of law, whether principles, elastic clauses, "good faith," abuse of the law, proportionality, and reasonableness..., i.e., the "legal constructs" to which Mario Napoli referred, and continues to refer. Moving in the midst of this terrain, he says that the legislator "violates the principle of reasonableness, disrespecting the internal coherence of the discipline, as well as that of the system which the new provisions affect (a reference obviously to the Fornero law), violating art. 3, paragraphs 1, 24 and 35, paragraph 1 of the Constitution"[46]. More specifically, it reaffirms that "the restitution of the position means reviving the work relationship interrupted in an unjustified way" and asks:

[45] LOI, P. **Il principio di ragionevolezza e proporzionalità nel diritto del lavoro**, Giappicchelli, Turim, 2016, p. 198 and referred jurisprudence.
[46] NAPOLI, M. Il diritto del lavoro tra sfregio della stabilità e attesa dello sviluppo*, in* NAPOLI, Mario. **Diritto del lavoro in trasformazione**, Giappichelli, Turim 2014, p. XII.

"what is rational about that?"[47]. There is some reason, if it is true, as already said, that the termination of the relationship is declared by the judge precisely at the moment when he finds that the dismissal is not justified.

It was argued that the principle of reasonableness and proportionality, which is in the process of expansion, has become, even in Labor Law, "the instrument to be used in the resolution of conflicts"[48], in order to "to guide the judge in determining the content of a variable notion of law"[49].

Some norms contained in the reform of dismissal, however, demonstrate the intolerance of the legislature power regarding the judge who, drawing the sap from the general principles, would enjoy a "wide range of discretion in the choice of possible meanings of the norm" to be interpreted[50].

In the first case, the legislature refers to the hypothesis in which the norms susceptible to interpretation "contain general clauses"[51]. This is a slippery terrain that hinders the legal model sought by the legislator, that is, a model that, operating according to the binary computer system, produces the least complications for the efficiency of the system or, in other words, to affirm that the concrete law, that of the sentences, faithfully corresponds to the intent of the legislator (in the sense of the ideology that inspires it) without the risk of being manipulated or misrepresented by the hands of the interpreter. The legislator, as it turned out, did not formally damage the judge's power (or rather, the *right*) to refer to general principles, but the message is clear.

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[47] NAPOLI, M. Il diritto del lavoro tra sfregio della stabilità e attesa dello sviluppo*, in* NAPOLI, Mario (Org.) **Diritto del lavoro in trasformazione**, Giappichelli, Turim 2014, p. XII.

[48] LOI, P. **Il principio di ragionevolezza e proporzionalità nel diritto del lavoro**, Giappicchelli, Turim, 2016, p. 2.

[49] LOI, P. **Il principio di ragionevolezza e proporzionalità nel diritto del lavoro**, Giappicchelli, Turim, 2016, p. 198, p. 3.

[50] GENTILI, A. Prefazione, in VELLUZZI, V., **Le clausole generali. Semantica e politica del diritto**, Giuffrè, 2010, XVII.

[51] Law 183/2010, art. 30. In all cases whose legal provisions are contained in the matters provided for in Article 409 of the Code of Civil Procedure and article 63, paragraph 1 of the Legislative Decree of March 30, 2001, n. 165, contain general clauses, including norms about establishing an employment relationship, exercise of employment powers, transfer of business and resignation, judicial control is limited exclusively *in accordance with the general principles of law, verification of legitimacy assumption, and cannot be extended to the merit syndicate on technical, organizational, and productive evaluations that compete with the employer or his representative.*

In the overall strategy underlying the field, the importance of ball possession is evident. A judicial power that succeeds in gaining a space in the process of creating law becomes an obstacle both to the pretensions of absolute government of the prince, concern of origin, and to the monopolistic pretensions of economic interests, current concern. And since the general clauses, the elastic norms, the general principles, and all that is indeterminate are within the reach of the judicial power, it configures itself as technique and at the same time as legitimation of a power no longer only declarative, these instruments end up having an extraordinary relevance in the system's evolution strategies.

The second example is certainly more embarrassing. In relation to the finding of the fact placed on the basis of the dismissal, the legislator does not allow the judge to resort to the criterion of proportionality in the assessment of the specific case. It just so happens that proportionality, usually associated with reasonableness (reasonableness and proportionality) and that, according to the doctrine, is nothing more than "an abstention from reasonableness"[52], is a general principle of ordering. Therefore, a "global constitutional principle and... characterizing feature of modern constitutional systems"[53].

It would be less, therefore, one of the legal constructions that inspire the constitutionality of laws and, in the scope of Labor Law, guarantee the principle of equality and allow the correction of imbalance between the parties.

That said, only two possible solutions are projected: either the norm that (in the context of dismissal for a just subjective cause) seeks to exclude the principle of reasonableness and proportionality is unconstitutional or, if it is not, we should now become accustomed to the idea that, at least in connection with disciplinary dismissal, the general principles do not operate.

Not allow the judge proportionality control, however, means restoring a regime of arbitrary dismissal. Exceptions made to the nullity, discrimination, or

[52] LOI, P**. Il principio di ragionevolezza e proporzionalità nel diritto del lavoro**, Giappicchelli, Turim, 2016, p. 198, p. 3.
[53] LOI, P. **Il principio di ragionevolezza e proporzionalità nel diritto del lavoro**, Giappicchelli, Turim, 2016, p. 198, p. 4.

absence of written form, in fact reintegration would be excluded based on the mere subsistence of a material fact that could be totally devoid of legal subsistence. This is a material fact which the court can and should consider in order to establish, on the basis of the criterion of proportionality, the subsistence of a justified ground for dismissal, but the gravity of which would immediately become irrelevant to the decision on the applicable penalty.

The principle of proportionality, in addition to being explicitly denied in the context of dismissal on grounds of just subjective cause, is in fact eroded, both in quality and quantity, also in dismissal for just objective cause. The judge, even in the face of an absolutely fictitious motive, could only condemn the payment of an economic indemnity, even if pre-established. In particular, we could face a substantially arbitrary dismissal, where the court has only recognized the limited power to exempt employers who demonstrate the effective subsistence of reasons justifying the payment of pre-fixed rates. All the doctrinal and jurisprudential debate that characterized the last half century can be shelved, the construction of the theory of "extreme ratio" would be ruined and therefore completely innocuous. Ruined in the light of the Fornero Reform, which allows a part of the doctrine to affirm that the "extreme ratio" would no longer be a dismissal, but rather a reintegration that could be imposed only as an extreme remedy in case of total absence of alternatives[54]. It is of course useless, with the introduction of a growing guardianship contract, which cancels all possible cases of reintegration in case of economic dismissal.

Sufficient reasons exist for a juridical construction inspired by the principles of law and order to remain engaged, within the best tradition, in search of suitable instruments in order to destroy the last three words of the legislator[55].

CONCLUSION. THIRD PERIOD: IN SEARCH OF A FINAL SOLUTION?

The resignation reform has an undeniable symbolic value. After a siege that

[54] VALLEBONA, A., **La riforma del lavoro 2012**, Giappichelli, Turim, 2012.

[55] For all effects, see the contributions in UNIVERSITÀ DI BOLOGNA. Autonomia e subordinazione del diritto del lavoro. Per i 30 anni di Lavoro e diritto, in **Lavoro e Diritto**, 2016, n. 4, pp. 567 ss.

lasted half a century, the opponents invaded the fortress, which obstinately and proudly lifted the banner of art. 18 of the Workers' Statute. Fortress that resisted many other assaults, but not the last.

The war, in fact, was already lost. Liberal ideology had already ruled, gradually altering the system inherited from the last century. Paradoxically, or rather, with a certain amount of hypocrisy, we pretended to change the content of the standards without changing its heading. Inequalities thrive, guardianships recede, workers regress at the mercy of employer support, new technologies accentuate real subordination, one works harder and earns less. But at the same time, we pretend that we can still define ourselves as a Social State (if we ever were that) inspired by the values of equality and solidarity, and we attribute these reforms to "modernity" and "increased guarantees."

In the nineteenth century, Labor Law had contributed to a more egalitarian (or at least so considered) distribution of risk between employer, worker, and State; a low level of security was achieved, referring both to worker status and citizen status[56]. Contrary to what they say (or promise) today that security was the result of a legislative evolution that affected both labor relations and the labor market, and, more generally, reforms of the welfare State.

The protection against illegitimate dismissal, in the sense of the right to reintegration, constitutes a symbolic, paradigmatic form of that era. It often appeared as the key to access to the rights of citizenship that the legislator wanted to recognize the citizen, the person, also in the context of the relationship of subordination through which he finds, or is obliged to verify, the domain of the counterpart.

Labor Law, after all, is nothing more than a set of rules that governs, both individually and collectively, the relationships that go back to the origin of the

[56] "Nel nostro ordinamento, il giudice deve sottoporre il licenziamento per gmo ad un controllo di ragionevolezza e proporzionalità e deve, in presenza di criteri dettati dalla legge, quanto mai vaghi e imprecisi, calcolare, il costo assicurativo del rischio del licenziamento, distribuendone il carico parzialmente al datore di lavoro e al lavoratore e, seppur indirettamente, alla collettività. *Apud* LOI, P. Rischio e sicurezza nel rapporto di lavoro, in **Rivista Giuridica del lavoro e dela Previdenza sociale**, 2013, n. 3, pp. 481 ss.

essentially (but not only) economic phenomenon of the exchange that constitutes its presupposition.

Rules that for a long time were characterized by a progressive or reforming advance in the historical meaning that such terms had in a recent past. However, when it comes to a technique, I do not doubt, like Bavaro and many others, that Labor Law is assuming an inflexion of neo-liberal style[57].

However, it cannot be denied that Labor Law also has a history, a spirit. It cannot be denied that it was born with a motivation and a purpose, and that this noble purpose has aroused passions and conflicts over time. In fact, there was a moment when Labor Law became a Right to conflict, a conflict that could advance democracy. The republican Constitution, for example, through the recognition of the right to strike, still retains some remnant of this conflict.

Nevertheless, like everything that ends, we no longer have such prerogatives. Someone can be hurt, somebody else can triumph. However, one cannot pretend it to be - or for it to be treated as - a natural evolution. Neither can the new inspiring principles be intended to nullify two centuries of history. The explanation of the recent evolution of Labor Law cannot be sought exclusively within its own system, precisely because it was not - at least in a limited way - a natural evolution, but a colonization. By external means, it was necessary to adopt rules that no longer conflict with interests that are now considered prevalent, from other subjects that, with different expectations and in different roles, still work in the *Comédie Humaine* that we never stop staging.

The rules that Labor Law until a few years ago were still capable of imposing were rules and collective manifestations that their cultists relegated to the values of civility; rules which for others, however, were considered to be limitations of the rights or freedoms claimed before the State. Several economists, at that time, attributed

[57] BAVARO, V., Appunti su scienza e politica sul diritto del lavoro, in **Lavoro e diritto**, n. 4/2016, pp. 707 ss.

them to the "bonds and shackles" of the pitfalls that, according to them, muzzled the economy, prevented economic growth and, consequently, collective well-being.

Would it not be strange that these gentlemen, once they had acquired the power to influence political decisions and therefore the legislature, imposed the annulment of rules which they considered to be contrary to their interests?

We find it difficult to recognize, once and for all, the fact that the points of reference have been altered, that another star orbits the *Zenith* of heaven, that other principles govern society. But it is not – as they would have us believe in a quasi-caricature way – that these changes derive from the demands of the economy. This is a simplification that camouflages reality. The economy does not exist! Just as there is no work – according to Mengoni's lesson so dear to Mario Napoli[58] –, there are men who work, but it is equally true that economics does not exist either: what exists are economic theories. Recently, a labor lawmaker in love with economics summarized the role of the economist in the following way: "economists do not deal with a set of values: they simply study what values a society decides to promote, and which instruments are best suited to achieve them (in order to minimize costs in relation to each outcome)[59]. It seems to me a great step forward compared to the vision of a soulless and heartless economy that is simply about maximizing profit. The most significant part of Ichino's statement is not that contained in the second part of the statement, that is, the characterization of the appropriate instruments to achieve an objective, as this belongs to the discipline technique, but the premise, that is, the choice of which values "a society decides to promote." This choice belongs neither to the arsenal of economists nor to that of labor lawyers. It is a patrimony, pre-legal and pre-economic, constituted by a set of values and ideas that aims to guide the social, economic, or political behavior of individuals, it is, peremptorily, an ideology.

The fact that ideology, while inspired by sentiment and faith, is an economic theory - according to Pareto's lesson - is completely irrelevant. The real problem, in a

[58] MENGONI, L. **Il contratto di lavoro** (org. de Napoli M.), Milão, Vita e Pensiero, 2004, p. 9.
[59] ICHINO P., **Perché i giuslavoristi non possono ignorare l'economia del lavoro**, in Pietro Ichino.it, 05/27/2017.

historical context, the principles of which inspired the economic, political, and legal models at the turn of the century waver, lie in the redefinition of the framework of values that inspire the inventors of the complex of norms designed to regulate social relations and, regarding us, the labor relations. The discipline of dismissal introduced in 1970 through art. 18 of the Workers' Statute, is not in fact an accident of history, it is simply a normative translation, the fruit of a complex elaboration of the still hegemonic idea that the interest in the stability of the worker must prevail over the interest of the employer, since it freely disposes of the means of production. Was there sentiment and faith in that? Probably. I believe so. The socialist minister Brodolini, while engaged in drafting the law, during an assembly of workers in a busy factory, shortly before his death, stated that before the conflict between employer and worker, he would stand, without hesitation, on the side of the workers. The minister of labor, the Christian Democrat Donat Cattin, who was committed to the defense of Christian social values, convincingly carried out the work initiated by Brodolini, declaring himself inspired by these values.

When this patrimony of values no longer belongs to the majority, or to those who exercise power, when other interests prevail, the normative system produced by such values begins to suffer, weakens and dies.

This does not prevent the intellectuals who have supported this system, including real stability here (unless, in the meantime, its ideals of reference have evolved), continue to support it and lament the fact that the history of Work law has taken other paths.

It is normal that this bears in itself the critique of theories that intend to carry out, as soon as possible, the dismantling of the legal system that limited the employer's powers by virtue of the guardianship of the workers. Above all, that bears the critique of the interests and ideologies that underlie these theories.

All this, with the controversy unleashed by Ichino against those workers who, in their view, ignore the labor economy and denounce the subordination of Labor Law to the market economy or economic thinking, is beside the point. On the other hand, it would be sufficient to reread some pages of the dissertation that Maria Vittoria

Ballestrero (one of the main ones involved) wrote on the dismissal, to realize the attention given, for some time, to the "discussion on the relationship between economics, sociology and law" and to the search for "answers to the demands of new research paths, beyond a legal science that traditionally defines the law 'as such', beyond mere observation, and exhausts knowledge in the cult to normative data, isolated from the socio-economic context and, therefore, of other dimensions of knowledge"[60].

In short, the perpetual cantilene according to which labor lawyers cannot ignore the economy is absolutely devoid of meaning. The truth is that whether they want to or not, they have never ignored it and cannot ignore it. It is necessary to point out, once and for all, that we are in the presence of a kind of metonymy: when one uses the term "economics" or "economists," it is clear what is meant, i.e., the dominant idea that imposes the changes of which we are witnesses, the power relations that are imposed upon us, contradicting those colleagues who, according to Ichino, "are limited to studying what values a society decides to promote." It is not about underestimating, nor of belittling the limits of economic science and its economists.

For many, however, it is really important to understand *what values a society decides to promote*, that is, whether the interest in worker safety or the freedom to undertake should prevail, whether the risk should be shared between the State and the worker, or if it should, and to what extent, extend to the company as well. Whether the policies of States should be based on solidarity or competition. How can dignity at work be guaranteed. Many others still prefer to take sides, to go for the *rive gauche*, not to confine themselves to the staging of others' scripts, but to present their own opinions, in the hope that the future Labor Law may also incorporate some values that each one of us, by sentiment or faith, carries within ourselves.

These are, therefore, issues that far exceed the scientific scope itself, belonging to a category in disuse and kept under suspicion: ideology. Themes of which all have

[60] BALLESTRERO, M.V. I licenziamenti, Angeli, Milan, 1974, p. 11.

the right to speak, not only the specialists in work, but also those who are inspired by sentiment and faith: a faith. Themes that should find inspiration in the principles contemplated by the Constitutional Charter. In relation to the current controversy, two aspects seem worthy of attention to me.

The first concerns the subtle and persuasive tendency to change the object of the discipline in order to surreptitiously convert the labor Law into labor market law, which is something else. Full employment is undoubtedly an appropriate purpose to be fulfilled in the right to work, according to art. 4 of the Constitution, but the fundamental rights of workers, those who offer concreteness to the dignity, from a minimum salary that allows a free and dignified life, cannot be sacrificed on the altar of full employment. A society where everyone is employed, but with miserable working conditions, as fascinating as it is, does not belong to my vision of society. I do not think it has a place in the constitutional horizon.

The second aspect, tributary of the first, concerns the too-excessive emphasis on the efficiency of the labor market. It is stated that the concept of "labor market efficiency" *refers* to an objective that incorporates the constitutional values to which we refer in the labor sphere. And he might even be appropriate, if this means that an efficient instrument is more suitable to achieve a result than a less efficient instrument. However, I believe that those who claim that none of the constitutional values "could achieve a successful outcome in an inefficient labor market," or when they claim "it is impossible to defend the dignity of the worker, his effective freedom, his right to work, in a market characterized by high unemployment or by great difficulty in harmonizing supply and demand" are exaggerating[61]. This may be suggestive and even fruitful, but it is not true. For Law - and I apologize if some economist does not appreciate subtlety - knows of other instruments, absolutely independent of the efficiency of the labor market, and completely adequate to safeguard the right. In addition, the efficiency of the labor market remains an instrumental element in relation to values. The presence of a high index of

[61] ICHINO P., **Perché i giuslavoristi non possono ignorare l'economia del lavoro**, in Pietro Ichino.it, 05/27/2017.

employment or an efficient system of adequacy between labor supply and demand does not, in fact, guarantee the effectiveness of the constitutional design, i.e., that all workers are actually recognized, by quality and quantity, the rights sought by the constitutional legislator.

Therefore, I am concerned that an instrumental element, efficiency, devoid of autonomous existence, since it can only be appreciated if associated with a purpose, can free itself from its generic traits, transform itself and begin to have a life of its own, like a robot that emancipates itself. I would be cautious in recognizing in the efficiency of the labor market the quality of "value" which "also responds to an essential value such as the right to work enshrined in Article 4 of the Constitution"[62]. I do not wish for the term value to be used in the same sense immediately attributed to the right to work, and that it could compete on the same plane with the "values" in the sense of principles and rights, so as to limit its expansion. The call for efficiency, moreover, is not a new fact for labor lawyers. In the course of the debate before the promulgation of the law on the prohibition of dismissal by marriage, Giuseppe Pera, unable to deny the inspiration of the provision in constitutional principles, found a way to criticize the solution found by him on the basis of efficiency. In support of his own thesis, contrary to the introduction of the legal prohibition of dismissal on matrimonial grounds sanctioned by nullity, he wrote that "the best laws are those that somehow co-ordinate with the natural and egoistic propensities of individuals; on the other hand, the effectiveness of behavior according to certain principles is better assured when, in the opposite direction, other economically relevant impulses do not operate"[63]. This reasoning is explicitly inspired by the "identification of the determinant economic impulse...that leads employers “to the exclusion of married workers"[64]. The alternative solution to that adopted by the legislator, always inspired

[62] DEL PUNTA, R; CARUSO, B. Il diritto del lavoro e l'autonomia perduta, in **Lavoro e diritto**, n. 4/2016, p. 654.

[63] PERA, G. Divieto di licenziamento delle lavoratrici a causa di matrimonio, in **Diritto del lavoro**, 1962, p. 353. Agora in: **Scritti di Giuseppe Pera**, Giuffré, Milão, 2007, p. 83.

[64] In other words, the "mandatory charges" in the remuneration due to the worker during the suspension period which, especially in the administrative sectors, incurs on the employer. PERA, G. Divieto di licenziamento delle lavoratrici a causa di matrimonio, in ***Diritto del lavoro***, 1962, p. 353. Agora in: *Scritti di Giuseppe Pera*, Giuffré, Milão, 2007, p. 81.

by the economic reasoning, would be "to provide the integral mutualization of such charges." This, according to Pera's hypothesis, could lead to "a substantial disappearance of the deplorable phenomenon as a mass phenomenon" without the need to legally sanction the nullity of the clauses of nubilato and unlawfulness of dismissals by marriage. The difference of perspective in relation to those, on the contrary, invoked the need to legally sanction the unlawfulness of such dismissals, since "they contrast with the fundamental principles of the legal order that ensure to all citizens the right to the formation of family and, in particular, guarantee to the working woman the fulfillment of her essential family function"[65], it is evident and anticipates one of the fundamental discrepancies of the current debate.

The truth is that when we speak of Labor Law and the discipline of dismissal is one of its peculiar expressions, we must always bear in mind its profound impact with social values in a comprehensive way. As we look beyond our subject matter, others, in turn, look at our Constitution and our discipline, "Because when you do not work, or you work poorly, you work little or you work hard, it's democracy which goes into crisis"[66]. It is the Pope who affirms it, making explicit reference to art. 1 of the Constitution, since "to hinder people's work or exploit people through unworthy or underpaid work is unconstitutional." I therefore invite readers to "look fearlessly but responsibly at the technological transformations of the economy and life," and "not resign themselves to the ideology that is taking shape all over the world"[67].

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[65] As reiterated in the opinion of CNEL n. 44-28 of May 24, 1962.
[66] POPE FRANCIS, **Address to Workers**, Genoa, May 27, 2017.
[67] POPE FRANCIS, **Address to Workers**, Genoa, May 27, 2017.

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