

Fifty years of the Workers' Statute (1970-2020)

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Abstract

The essay commemorates the fifty years passed since the birth of the Workers' Statute. The A. recalls its long gestation over the course of almost twenty years, with the maturation of its two souls: the constitutional one (guaranteeing the freedom and dignity rights of workers), and the “promotional” one (promoting trade unions with particular representativeness). He also analyses if and how the spirit of the statute has found place within following legislation. According to the A. Workers' Statute is still alive, albeit amputated, but with a much narrower scope, due to the reduction of its reference model, that of the Fordist factory. However, it is not yet clear what the next path of labour legislation will be. It still appears to be rather uncertain as regards the constantly expanding “grey area” between employees and self-employed workers. The options are two: extension of the typical protection granted to the employment relationship *vs.* introduction of a graduated protection regime.

Keyword: Workers' Statute; Constitutional fundamental workers' rights; Promotion of trade unions action; Flexibility; Quasi-self-employed work area.

1. The anticipation of the Workers' Statute.

The defeat of the overwhelmed fascist dictatorship entailed the end of the corporative “trappings”. The corporation was conceived as a structure participated by the associations of employers and workers. The system was based on the legal personality of public law granted to these associations, on the generalized effectiveness granted to collective

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agreements, with the criminal repression of lockout and strike, and the crucial role attributed to labour courts. Due to the lack of implementation of the 1948 Constitutional Charter, with regard to both the trade unions phenomenon (articles 39 and 40 of the Constitution), and the individual employment relationship (article 36 ff. of the Constitution), legal scholarship and case-law gave the current form to the new labor law. Trade unions, the collective agreement, the strike (potestative right, conditional and limited as regards the subjects, methods, purposes) were framed within civil categories and Book V, Title Two, Section Two ("Of the entrepreneur's collaborators", art. 2094 ff.) of the Civil Code of 1942 was cleaned of corporate encrustations.

Only at the turn of the 1950s and 1960s a significant legislative intervention took place, with the act n. 741/1959, so-called Vigorelli Act, on the transposition into decrees of the minimum wages and working conditions provided for by the collective agreements stipulated in the post-war years.

The absence of legislative measures implementing art. 39 Cost. was attributable to the differences between the political beliefs of the Italian General Confederation of Labor (CGIL), linked to the Italian Communist Party (PCI), and the Italian Confederation of Workers' Unions (CISL), linked to the Christian Democrats (DC). The CGIL was in favour of an intervention by statutory law, while the CISL was against it, especially with regard to the implementation of art. 39, co. 2 and ss. Const. This divergence emerged with regard to act n. 604/1966, which implemented the Cross-Industry agreement on individual dismissals. However, the act was passed, paving the way for the next law n. 300/1970, known as the Workers' Statute.

At the 1952 National Congress of the CGIL, the Secretary General, Giuseppe De Vittorio, had presented the proposal for a Workers' Statute, entrusting it to the agreement between the three main Confederations, CGIL, CISL and the Italian Workers Union (UIL). The climate then existing in the country reproduced the international one, with the division of the world into two blocs hegemonized by the USA and the USSR. Italy, included in the sphere of influence of the United States, was engaged in post-war reconstruction, under the leadership of the DC, which had largely won the political elections of 1948. The PCI's opposition was especially oriented on an anti-American foreign policy, fully aligned with Moscow. The CGIL consistently adhered to this "ideological mobilization", with little attention to the evolution taking place in the workplace.

In bigger companies and establishments trade union presence was ensured by the internal commissions (IC), an inter-union body elected by all the workers on the basis of lists, with (limited) powers of proposal and control of compliance with statutory and collective regulations by the employer. Nonetheless, despite the clear indication of the 1948 Constitution in favour of the fundamental freedoms of the citizen and the protection of the worker, the working conditions were made extreme by the harsh control of employers, to whom complete autonomy was granted by the Government economic policy, and by a very strong repression of left-wing PCI and CGIL militants. Di Vittorio's proposal started precisely from this scenario, aiming to guarantee individual and collective freedom rights recognized by the constitutional text of 1948 even within the gates of factories, by means of an inter-union agreement or even of a statutory provision.

This anticipatory proposal could not be concretely implemented, given the current political and trade unions' situation, characterized by an antagonistic opposition, in Parliament and in the Country. Nonetheless, this idea was cultivated by a part of the legal scholarship, gathered around the legal journal "*Rivista giuridica del lavoro*", close to the CGIL. This debate would have constituted the "constitutional soul" of the future Workers' Statute.

The difference between the CGIL and the CISL did not concern only the political field alignment, but, above all, the way of conceiving the trade union phenomenon. The CGIL aimed to give a voice to the entire working class, with a view to changing the development model in a socialist sense. Instead, CISL intended to represent its own membership, supporting a correction of this model according a reformist approach. Consequently, the CGIL was in favour of a general mobilization on great objectives to be achieved by law; CISL's action was oriented toward the achievement of economic and regulatory treatments' improvements by means of collective bargaining. The different attitude of the two organizations emerged also with regard to the principles contained in art. 39 of the Constitution. In fact, the *erga omnes* extension of multi-employer collective bargaining, according to these principles, would have ended up delivering the final decision to the CGIL, which was then the majority, even with respect to the same sum of CISL and UIL. In addition, differences of views were also recorded on the transposition of the Cross-Industry agreement on individual dismissals made by l. n. 604/1966.

However, in the orbit of the CISL, a young legal scholar, Gino Giugni, who had the opportunity to study American trade unionism, became the champion of the idea that the trade union presence within the enterprise's establishments was to be ensured and guaranteed by law, intended to go further the model of the IC. This perspective would have represented the "promotional soul" of the Workers' Statute.

2. The social and political situation that facilitates its birth.

So far, the theoretical foundations of the Workers' Statute were already laid down, but a particular social and political situation was needed for them to be united and transferred into a single statute, which appeared at the end of the 1960s. On the one hand, there was a large mobilization that was born in the universities on the thrust of the French May of '68, and that later involved the working class of the great factories in the North. It characterized the entire two-year period '68 -'69, up to culminating in the so called "hot autumn" of '69, coinciding with the renewals of the national multiemployer collective agreements. At the same time, a centre-left government was launched, sustained by the DC and the PSI. The Minister of Labour was the socialist Giacomo Brodolini, who, as soon as he took office, appointed Giugni as the Chief of a commission in charge for drafting a bill to be presented to Parliament destined to become the Workers' Statute. Approved by the Council of Ministers on 20 June '69, the Government's bill was deposited in the Senate of the Republic, thus starting a parliamentary path that would have taken about a year, in the succession of various centre-left governments. Brodolini, who died shortly after, was replaced by the Christian Democrat Carlo Donat Cattin, equally determined to bring the bill to become

statutory law. Subjected to examination by the Labor Commission of the Senate, the bill came out integrated, richer and more incisive, also due to the influence of the definitely innovative new metalworkers' contract. The bill was subject to a further update by the Assembly, and approved with the DC and PSI majority vote and the abstention of the PCI. The path at the Chamber of Deputies was much easier and the act n. 300/1970 - known as the Workers' Statute - was finally approved.

3. The “constitutional” soul: Titles I and II.

Legal scholarship has always recognized in the Statute a "constitutional" and a "promotional soul": the first expressed by Titles I ("On the freedom and dignity of the worker") and II ("On trade union freedom"); the second from Titles III ("Trade union activity") and IV ("Various and general provisions"), with the addition of a Title V ("Placement rules"), and the closure of a Title VI ("Criminal and general provisions").

Titles I and II are characterized by the fact that the proclamation of individual worker's rights is followed by the identification of employer behaviours that could harm them, with appropriate sanctions.

Title I opens with the recognition of the freedom of opinion, followed by a series of articles concerning the implementation within the employment relationship of the fundamental workers rights. Title II starts with the recognition of the right of association and trade union activity, which is accompanied by a series of provisions declaring null and void any discriminatory acts and pacts put in place by the employer, and ban the creation and support of company unions, better known as "yellow" unions.

Article 18 is the last of the second title, and - with good reason - it was considered as the backbone of the entire promotional soul, because it introduces the so-called “tutela reale”, based on the reinstatement of the illegitimately dismissed worker.

4. The “promotional” soul: Title III.

The most innovative part of the Workers' Statute is Title III and, to a lesser extent, Title IV, where the promotional soul finds expression. The most important article of Title III is the first: art. 19. It concerns the establishment of company trade union representative bodies (*Rappresentanze sindacali aziendali* - RSA) within enterprise's establishments, on the basis of the "initiative of the workers", but still "within" particularly qualified trade unions, with a mix of spontaneous initiative and union control. Trade union promotion was selective, to ensure responsible management of the collective action. RSAs could be constituted by the organizations adhering to the “most representative confederations”, a formally neutral expression, but tailored to include CGIL, CISL, UIL. Furthermore, the RSAs could also be constituted by trade unions not affiliated with these confederations, which had signed national or provincial collective agreements applied in the relevant company establishment.

This second formula was provided in order to take into account autonomous trade unionism. RSAs are recognized with consistent prerogatives within company establishments. They can individually convene workers' assemblies outside or during working hours, and jointly call referendums. Their representatives have rights to paid and unpaid leaves. RSAs have also the right to post information and communications in places accessible to every worker, and to suitable premises for their activities within the firm. Finally, they are granted special protections for their official representatives in the event of transfer and dismissal.

Furthermore, art. 26 guarantees workers the right to collect contributions and proselytize, "without prejudice to the normal course of business". The same provision requires employers to pay membership contributions directly to the trade unions, on the basis of a delegation from the workers. This provision is combined with the provisions of Title II, which recognize the right of association and trade union activity to all workers.

There is an undoubted continuity between Titles III and IV, explicit with regard to the incentive for the merger of RSAs, so as to facilitate the transition to a unitary trade union representation (RSU). The same line of continuity is recognized in the extension of some trade union rights beyond the limits of the organizations identified in the art. 19. For example, provincial and national union leaders and workers called to elected public functions have the right to paid or unpaid leaves.

Article 28 is also founded on a logic of extension of guarantees beyond the scope of more representative unions. This provision opens the Title IV and introduces the right to an urgent plea to the labour court by "local bodies of national trade union associations that have an interest" in it, against "conduct aimed at preventing or limiting the exercise of trade union freedom and activity, as well as the right to strike". The legitimate subjects are the local bodies (territorial bodies, not RSUs and RSAs) of the national trade union associations (all of them, not just those legitimized to establish RSAs, provided they are effective trade unions).

5. Title IV.

Two articles of Title VI remain to be mentioned. The title bears the anodyne name of "Final and penal provisions". Art. 35 defines the scope of the Statute. Both art. 18, on the reinstatement of the worker unlawfully dismissed, and Title III apply to all the companies which employ a minimum staff of more than fifteen employees in a single establishment, or in different establishments located in the same municipality, with a lower number of workers in agriculture sector.

Article 36 tries to compensate the non-implementation of art. 39, co. 2 ff. of the Constitution, which prevent collective bargaining agreements from having effect on non-unionized workers. This article imposes that a clause binding beneficiaries and contractors to "apply or enforce in favour of employees conditions not lower than those resulting from the collective agreements of the economic sector and the area" is to be provided within the provisions for the conferring of benefits to enterprises and in public procurement contracts.

The expression designating the collective agreement to be used as parameter is a rather generic one and refers to contracts signed by any trade union. Art. 36 gave origins to a series of so-called “social clauses” of first (obligation to comply with collective agreements) and second (obligation to preserve existing employment) generation.

6. The philosophy of the Workers' Statute.

The spirit of the Statute rests on the close interconnection between the constitutional and the promotional soul, already present in the bill prepared by the Giugni Commission. The proclamation of the rights of individual workers, although duly recognised by statutory law, could not be left to judicial protection alone, since they are difficult to be activated pending the relative subordinate relationships. Therefore, the protection of these rights had to be entrusted mainly to the active presence of collective representatives within the company.

From the point of view of legislative policy, the Workers' Statute is part of the line already drawn by all post-constitutional legislation. The choices of the Statute are based on full recognition of trade unions as a social phenomenon regulated by private law, differently from the model designed by the second part of art. 39 of the Constitution. Indeed, the Statute only provides for the presence and action of RSAs in company's establishments, taking for granted the existence of trade union associations entitled to establish them on the basis of their representativeness, although the associations are not recognized or regulated in any way by law. Similarly, a form of incentive for collective bargaining is contemplated, assuming its existence and without extending its effectiveness beyond the members of trade unions.

The Statute could not ignore the trade unions pluralism existing in the contemporary Italian reality, represented par excellence by CGIL, CISL, UIL. Therefore, the RSAs are envisaged as trade union sections constituted, first of all, by members of the associations belonging to the three great Confederations. At the same time, provisions encouraging the main confederations' representatives to give life to RSUs (endowed with the rights granted to the RSAs themselves) were established.

The Communist Party's abstention in parliamentary vote was motivated on the basis of the contrariety to the minimum staff limit of fifteen employees imposed to the scope of the Statute. This limit delineated the application of the reinstatement against unlawful dismissals, excluding small businesses from the scope of art. 18. Furthermore - and above all - the Workers' Statute limited only to trade unions the presence and action in companies' establishments, without taking into account political groups; and at that time, the privileged constituency of the PCI was the working class, in accordance with its ideology. As a consequence, without any direct access of political organizations within the worker place, the relationship of the party with its voters was mediated by an increasingly autonomous CGIL in the workplaces, so autonomous as to strongly support the adoption of the Statute, in contrast with the party.

7. After the Workers' Statute: the turning point at the turn of the millennium.

The aim of this article is not to provide a history, even if only in broad outline, of the evolution of labour law over the fifty years opened by the launch of the act n. 300/1970, too rich and complex not to require a broader digression. It only tries to outline the background scene on which the main successive legislative reforms took place. A central role has been played by the subsequent statutes on individual labour disputes (no. 533/1973), which launched a special procedure, much faster thanks to strict foreclosures and to a trial inspired by orality, immediacy and concentration. The new procedure favoured the action of the young and motivated labour judiciary, who provided a pro-labour reading of the Statute, although with the risk of ideological forcing.

The last decade of the last century marked the maximum expansion of the philosophy behind the Worker's Statute. The historical moment was characterized by the influence of EC hard law; by the Tangentopoli crisis (a massive political bribery scandal), which caused the end of the traditional parties (DC and PSI) and the birth of new ones (Forza Italia, Berlusconi's party; the Bossi's Lega, today led by Salvini; the PCI, refounded first as PDS then as DS and finally as PD; and later Fratelli d'Italia and 5Stelle); as well as by the transition from the first Republic to the so-called second one, by virtue of the adoption of a majoritarian first-pass-the-post system.

Many provisions of that phase constitute a direct emanation of the Workers' Statute philosophy. Law n. 108/90 on individual dismissals extends the application of art. 18 of the Statute to the companies which employ more than 60 workers overall, regardless of the number of staff employed in each establishment, and grants the unlawfully dismissed worker the possibility to opt for a 15 months-wage compensation in lieu of being reinstated. The l. n. 223/1991 on collective dismissals distinguishes between dismissals for "mobility" and those for "redundancies", each of them with their own numerical and causal requirements and their own procedures. Numerous laws against discrimination are also affected by the climate initiated by the Statute, starting with l. n. 125/1991, on positive actions and equal opportunities between male and female workers. At the same time, the legislator more strongly recognized the role of confederal trade unions, which were recognized as substantial protagonists in controlling the strike in essential public services (l. 146/1990, amended by l. 83/2000), as well as privileged interlocutors of the Government. The Protocol of July 1993 - a triangular agreement between the Government and the social partners - gave collective bargaining a centralized structure and adjusted the wage dynamics to the programmed inflation rate. The Christmas Pact for Development and Employment of December 1998, formalized the cooperation of Government and Most representative unions on main economic policies ("*concertazione*"), making it so rigid in the procedure as to remain a dead letter and be replaced by an informal consultation depending on the choices of the various center-left and center-right parliamentary majorities.

In addition, two other structural reforms were protagonists of the same decade: the decentralization of the administrative system and the so-called privatization of the public service, with a major and decisive contribution by Massimo D'Antona.

Both of these reforms were destined to issue, in the following decade, into two branches of legislation of primary importance: the first, in the so-called “Consolidated act on public employment (Legislative Decree no. 165/2001, *Testo unico sul pubblico impiego*)”, which was also subject to a continuous process of modification; the second, in the federalist reform of Part II, Title V of the Constitution, with a consequent strengthening of the legislative and administrative powers of the Regions.

On the other hand, the transition from the first to the second millennium marks the beginning of a break with respect to some structural choices made by the Workers' Statute. With the abrogative referendum of 1995, both art. 19 and art. 26 were amended. In art. 19, the requirement relating to the most representative organizations for the establishment of RSA was repealed. Instead, a single criterion remained in force relating only to the associations signing any collective agreement applied in the relevant company establishment, including the company level agreements, removing the previous limitation to national and provincial ones. In turn, the right to receive trade union contributions through direct withholding from wages by the company (art. 26 - Trade union contributions) was suppressed.

The intention of the promoters of the abrogative referendum was clearly inspired to challenge the monopoly of the three major confederations (CGIL, CISL and UIL). However, the legislative changes had often opposite effects, which, for art. 26, penalized precisely smaller trade union formations, like the so called “*Sindacati di base*”. In fact, all main trade unions had contracts applied in most of the company and company establishments, and were therefore able to provide for clauses that recognized their right to receive contributions directly from employers, no longer on a legislative but on a contractual basis.

Not even the “mutilation” of art. 19 was without consequences.

Later on, the criterion for the selection of collective agreements entrusted with the power to integrate the regulation of employment relationship provided by statutory law changes. Bargaining trade unions are no longer required to be “more representative”, but only “comparatively more representative”.

In case-law, the Constitutional Court focuses on the surviving part of art. 19, finally establishing that the actual formal signature of the collective agreement is not necessary in order to create an RSA. The Court changes its long-established position, deeming it sufficient for the establishment of the RSA that the trade union participates in the negotiations, even without signing the final text of the collective agreement.

The Statute remains unchanged for the rest, maintaining its original scope of application. But, in other respects, the regulation of the employment relationship undergoes significant transformations. The so called “*Pacchetto Treu*” of 1997 (act n. 196/1997) (a bunch of statutory provisions on the flexibilization of employment relationship and labour market) adapts the Italian labour market to the flexicurity promoted by the EU, both with respect to “functional” flexibility, i.e. relative to the execution of the work performance, and to “incoming” (or “at margin”) flexibility.

8. Flexicurity in the Italian version: from the Biagi Act to the Fornero Act.

Already in the 1990s, labour legislation tends to become increasingly dependent on economic policy. This characteristic has manifested itself even more in the first decades of the century, which saw the international financial crisis of 2008 and the one of the sovereign debt of 2011, and today see the health crisis due to Covid-19. This has resulted in the constant criticism of a part of the labour law scholarship against the alleged hegemony of “law and economics” approach. Critics were about the dependence of labour legislation on the needs of capitalist economy, with a reduction in the protection granted to workers for the benefit of profit growth. This criticism has more than once been brought to excess and often exaggerated, because the concern of the political majorities alternating at the Governments has been the quantity and quality of employment, with conjunctural policies that tend to converge, albeit with some discontinuities. In fact, there is a common thread between the legislative decree implementing the so called “Biagi Act” of 2003 (legislative decree n.276/2003) and the Jobs Act of 2014-2015, under the banner of flexicurity and protection of the formally self-employed or quasi-self-employed work area. However, the increase in flexibility at the entry of the employment relationship does not correspond to effective security in the labour market.

Since early with the second Berlusconi government, a legislative decree of 2001 had liberalized the fixed-term contract, but the legislative decree n. 276/2003 goes much further on the way of incoming flexibility, providing for a multiplicity of non-standard relationships, with the launch of temporary agency work, a more indulgent employment regulation in procurement contract, of employment relationship of posted workers, of the transfer of the undertaking, of the part-time work and apprenticeship. In addition, the legislator deals with the grey area between self-employed and subordinate work, not entirely included within the scope of art. 2094 civ. cod.

Formerly, the part of that grey area remaining outside the definition of art. 2094 civ. cod. was included among the quasi-self-employed relationships, according to the original terms of art. 409, n. 3, cod. proc. civ. With the legislative decree implementing the so called “Biagi Act”, those relationships were not allowed, and, in their place, the so-called “project work” was launched, being the contract related to a well-defined work program in terms of performance and objective, with a special protective regime.

The legislative introduction of greater exit flexibility dates back to the Fornero Act of 2012 (no. 92/2012), issued under a Government chaired by Mario Monti. This provision breaks the taboo of art. 18 of the Workers’ Statute, and establishes a regulation of individual dismissals still applicable to workers hired before March 7th, 2015. The act combines less entrance flexibility in and greater exit flexibility, with an extremely complex and articulated revision of art. 18 of the Statute. Four types of protection against unlawful dismissals are introduced. They can be conventionally indicated as: full reinstatement protection (paragraphs 1, 2, 3), reinstatement protection with limited compensation (paragraphs 4 and 7), strong indemnity protection (paragraphs 5 and 7), reduced indemnity protection (paragraph 6).

9. The Jobs Act of the Renzi Government.

During the two-year period 2014-2015, the Renzi Government launched a radical reform, based on a decisive liberalization and presented under the label of “the Jobs Act”. This definition reflects the purpose of creating jobs. The use of the fixed-term contract is made easier (Act No. 78/2014, then Legislative Decree No. 81/2015), though reiterating that the permanent contract remains a common form of employee hiring. The most important provision is the act n. 183/2014, which aims to implement the European flexicurity within Italian employment law. In fact, flexibility in the employment relationship is accentuated, the entrance one, the exit one and the functional one - well beyond what the Fornero Act did - at the same time strengthening security in the labour market. The implementation of the legislative decrees brought to the revision of some articles of the Workers' Statute: 4 (Audiovisual systems), 13 (Worker's duties, revisiting art. 2103 of the civil code), and 18 (Reinstatement in the workplace), substituting this article with a separated and articulated regulation of remedies against unlawful dismissals, contained within act. n. 23/2015.

The new regime of individual dismissal applies to all workers hired on permanent contracts after March 7th, 2015. It represents a Copernican revolution: indemnity protection becomes the rule, while reintegration protection remains only an exception (Legislative Decree no. 23/2015). This latter protection is still applicable in the case of discriminatory or oral dismissal, as well as disciplinary dismissal, in which "the non-subsistence of the material fact contested to the employee is directly demonstrated in court". This ambiguous language is interpreted by the Supreme Court as meaning that even the non-subsistence of a non-insignificant breach of the employment relationship's obligations by the worker is sufficient for the implementation of workers reinstatement. Instead, in all other cases of disciplinary and economic dismissal only indemnity protection is applied and the indemnity is proportionate to the length of the employment relationship, so that the legislator speaks of "Permanent contract with increasing protections". In the so-called “full reinstatement protection”, due to lack of justification, indemnity is "equal to 2 months of the last salary [...] for each year of service, in any case not less than 4 and not more than 24 months"; in the “reduced indemnity protection”, due to lack of form or procedure, the indemnity is "equal to one month's salary [...] for each year of service, in any case not less than 2 and not more than 12 months". The purpose pursued by the legislators is clear: to make the cost of a dismissal deemed illegitimate by the judge predictable for the company. With regard to the Workers' Statute, the Jobs Act introduces greater functional flexibility, made necessary by the digital evolution of the economy. Art. 4 (Audio-visual systems) is revised, excluding controls aimed at remotely monitoring the activity of workers, and including within “audio-visual systems” all the IT means in use today. These forms of remote control are allowed only if "unintentional", i.e. introduced "for organizational and production needs, for work safety and for the protection of company assets". The information collected through the devices installed in compliance with the established procedures or through the electronic devices used by employees can be used for all purposes related to the employment relationship, therefore also disciplinary. Nonetheless, it is required that adequate information has been given to workers on how to use the tools and on the form of control they are

subject to, in any case in compliance with the privacy legislation (Legislative Decree no. 151/2015).

The original art. 13 (Duties of the worker) had re-written art. 2103 of the civ. cod., on the employer's *ius variandi*. Now it is further modified, moreover with the return of its original title "Work performance". Horizontal mobility between different tasks is no longer governed by the equivalence rule, (applied in a relatively restrictive manner in case-law), but by the belonging of both tasks to the same legal category and at the same professional qualification defined by the collective agreement. Vertical mobility towards lower tasks is now divided into several hypotheses: unilateral, collective and individually negotiated. Mobility towards higher positions provides for the right to the treatment corresponding to the activity carried out, while the right to promotion matures after a period defined by collective bargaining, except in the case of replacement of another worker with the right to retain the job, or the case of a renunciation carried out by the same worker (Legislative Decree no. 81/2015).

However, the Jobs Act take position also on another front, namely the already mentioned grey area between subordinate and self-employed work (increased by the advent of the so-called Gig-economy). The Biagi Act's project work has been suppressed. Instead, the quasi-self-employment relationships (co-called *co.co.co.*, *collaborazioni coordinate e continuative*) provided for by art. 409 n. 3, cod. proc. civ. are exhumed.

Relationships governed by art. 409, n. 3 cod. proc. civ. are deprived of any substantial protection. Therefore, the legislator makes a leap forward and provides that "the regulation of subordinate work" is applied to them when "they take the form of exclusively personal, continuous work and the execution methods of which are organized by the client also with reference to the timing and the workplace". It is difficult to classify this figure as subordinate or self-employed work. The language of the provision would seem to include it within the definition of subordinate work pursuant to art. 2094 civ. cod. In fact, with a questionable decision on the Foodora riders, the Corte di Cassazione got away with considering it a case of mere "regulation". According to the Court, the entire legislation on subordinate work is applied by law, without, however, mentioning or solving the difficulty of a complete transposition of all this legislation to the new legal figure (Cass. n. 1663/2020).

Finally, the overall design of the Jobs Act is concluded, on the one hand, through a series of civil, administrative, fiscal and social security protection for all employment relationships; on the other hand, with the regulation of smart working, which tries to cope with the different space-time dimension of the working performance imposed by the increasing informatization of productive processes. Smart working takes the form of an agreement attached to the employment contract, which allows to work outside the workplace, without the need for a fixed location, but contextually provides for rules on the exercise of employer powers (act n. 81/2017).

The Jobs Act also amends art. 409, n. 3 civ. proc. cod. In fact, it provides that "the collaboration is coordinated when, in compliance with the coordination methods established by mutual agreement of the parties, the self-employed worker organizes the work activity independently" (Article 15, act n. 81/2017). Basically, when, according to the agreement and its execution, the organization of the activity is responsibility of the company, the self-employment relationship ("collaboration"), though not formally qualified as subordinate

work pursuant to art. 2094 civ. cod., is regulated as a relationship of employment, except for the necessary adaptations; when the organization is up to the worker, the relationship is regulated as self-employment one.

10. The legislation of the last legislature, from the yellow-green Government (5Stelle/Lega) to the yellow-red Government (5Stelle/Pd).

As confirmation of the fluctuating trend of the legislation, the 5stelle/Lega Government, commonly called "yellow-green", with Giuseppe Conte as President of the Council of Ministers, issues the so-called "Dignity decree" (legislative decree n. 87/2018, converted into Act n. 96/2018, and intended to counteract the excess of flexibilization attributed to the Jobs Act). On the one hand, this intervention hinders the use of a fixed-term contract, making it difficult, therefore particularly exposed to being converted into a permanent contract; on the other hand, it extends the indemnity provided for in the contract with increasing protections from a minimum of 6 to a maximum of 36 months, without, however, changing the calculation system linked to working seniority. Nonetheless, two successive decisions of the Constitutional Court dismantled this system and deprived it of its policy, aimed at making the cost of an unlawful dismissal predictable by companies. By virtue of Constitutional Court judgements n. 194/2018 and of Constitutional Court n. 150/2020, it is up to the judge to decide which indemnity is to be paid to the worker dismissed without any lawful justification (between 6 and 36 months), or in presence of a formal or procedural flaw (between 2 and 12 months), without anchoring it exclusively to the seniority of service, which nevertheless remains the first criterion to be taken into consideration.

Once the Government has been changed, still in the same legislature, with a new 5Stelle/Pd alliance, and still led by Giuseppe Conte, the attention has been focused on the grey area between self-employed and subordinate work, with a particular attention to the digital revolution, which can produce precarious work as well as sophisticated one. The case of quasi-self-employed relationships provided for by art. 2 of Legislative Decree n. 81/2015 is re-written by Legislative Decree n. 101/2019 (converted into act n. 128/2019).

In the current version, it states: "The regulation of subordinate work is applied to relationships of collaboration that take the form of mainly personal, continuous work and the execution methods of which are organized by the client. The provisions of this paragraph also apply if the procedures for performing the service are also organized through digital platforms".

A simple literal comparison between the old and the new language - where the word "exclusively" is replaced by "mainly" and the expression "also with reference to the time and place of work" is eliminated - is sufficient to notice the expansion of the scope of subordination regime. Now it goes far beyond the definition of subordinate worker pursuant to art. 2094 civ. cod., and is delimited, more than ever, by that of the self-employed worker provided for by the new art. 409, 3, civ. proc. cod.

The reference to the organization through digital platforms is attributable to the acknowledgment by the legislators of the affirmation of the so-called gig economy. In this

perspective, also the provision of a Chapter V-bis, entitled "Protection of work through digital platforms", can be explained, even if the application of these rules to the case referred to in the revised art. 2 is discussed. Without examining more in depth this subject, I only confirm my interpretation, according to which this regulation, much less extended than that on subordination, would apply precisely to riders, due to the peculiar nature of their activity.

The employment law of the Covid-19 emergency also deserves to be mentioned, in particular, its largely conjunctural character, the rigid defence of stable employment, with extensive use of social safety nets, as well as with the blocking of dismissals throughout the whole current year.

11. Politics and Trade Union.

The speech is shorter on trade union law, affected only by a peculiar legislative provision during the third Berlusconi Government. This provision was presented as "promotional" by the Government, but it was explicitly rejected by the three main trade union confederations, as it was aimed at affecting the collective bargaining structure, with a widest possibility of derogation on the national agreements and statutory law itself by establishment and company level agreements.

The Protocol of July 1993 helped to bring down the inflation rate, by virtue of a planned inflation always lower than the actual one, so as to penalize wages. Once the positive thrust of the Protocol was exhausted, it was necessary to link wages' growth to actual inflation, according to a shared solution between the CGIL and CISL, led to favour national collective agreements over the company and establishment level ones.

The "unitary" Cross-Industry framework agreement of 28 June 2011 establishes a uniform procedure for the approval by workers of national and company level collective agreements, according to a democratic procedure. Furthermore, company and establishment level agreements can derogate to national level regulation on the basis of a specific permission provided for by the national agreement itself.

In this scenario, the Government intended to force the collective bargaining decentralization towards the company level, with art. 8 of legislative decree n. 138/2011 (converted into act no. 148/2011), which not only legitimizes, but also gives general effectiveness to "specific agreements", defined "of proximity", stipulated at company and local level by comparatively more representative trade union organizations. These agreements must be stipulated by the company representatives "on the basis of a majority criterion" in order to have these effects. Art. 8 has officially been ignored by the three main confederations, because it affects the autonomously defined bargaining structure and because it violates the mandatory nature of statutory law. Nonetheless it has had been a kind of hidden revival in crisis situations, when the need to protect employment became crucial, even at the cost of some waiver to statutory law protections.

The path followed by the three Confederations to update the collective bargaining system outlined by the '93 Protocol is a long one and cannot be retraced here even in a synthetic

measure. This process culminated in the Cross-Industry agreement of January 10th, 2014, the so-called “Consolidated agreement on trade union representation”, followed by the Cross-Industry agreement of July 2017 for the “Modification of the Consolidated agreement on trade union representation”. However, paraphrasing a phrase from my academic mentor Federico Mancini, the agreement can do a lot, but not everything, because its effectiveness is limited to unionised workers.

On the other hand, the opposition on the part of the CISL to statutory law on unions’ representation seems to have definitively disappeared. However, this union supports a statutory provision inspired by the Consolidated agreement on union representation and not the one designed by art. 39, co. 2 et ff. of the Constitution, unimplemented but still in force. At present, this solution is impracticable, unless the Constitutional Court radically changes its case-law on the inadmissibility of any solution that does not comply with the criteria of art. 39, co. 2 ss. in order to attribute *erga omnes* effectiveness to collective bargaining agreements. In the past, the Court has given the green light to some exemptions, but always with argumentations strictly decided on the precise provision submitted to it, so as not to presage more significant developments.

12. Conclusions.

Following the itinerary outlined above requires a considerable effort on the reader, but it highlights the cyclical nature of labor law, which, in pursuing the sole purpose of creating more or better employment, combines the flexicurity rule in different way. It is not a matter of ideology. In fact, the level of flexibility has been increased both under the second Berlusconi centre-right government (Biagi Act) and under the centre-left Renzi government (Jobs Act). During the years economic policy has not had profound differences in Italy in constant struggle with its deficit and its debt. In fact, that part of the doctrine always ready to deduce from a legislative season a historical turning point in favour of “law and economics” approach ends up being disproved by the immediately following season. Workers’ Statute is still alive and well, though the two articles which formed the basis of the constitutional (art. 18) and the promotional soul (art. 19) have been largely tampered. Indeed, it has broadened its scope, not only to the privatized public service, but also to the quasi-self-employment relationships referred to in art. 2, as amended by Legislative Decree no. 81/2015, given that they are subject to the relative regulations, even though they are not qualified as subordinate work.

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