Massimiliano Delfino

Legal orders in dialogue and the "resources" of the Italian Workers' Statute

Contents: **1.** Reasons for comparison. **2.** The "ascending" and "descending" comparison. **3.** The Workers' Statute and comparison: the discipline of changes of duties and the Spanish forerunner. Overview. **4.** The personal scope of application of the Statute and the workers of the *gig economy*: the differences with *Common law* systems. **5.** *Continued*. *Gig workers* in the Italian legal system. **6.** Article 18 and the influences of the "filtered" comparison. **7.** Short conclusions.

"*The main purpose of comparative law is a better understanding of one's labour law system*".

(Manfred Weiss, *The Future of Comparative Labour Law as an Academic Discipline and as a Practical Tool*, 25 Comparative Labour Law & Policy Journal, 2003, 169-182).

1. *Reasons for comparison*

The idea of comparison in this paper is well explained by the expression "legal orders in dialogue", demonstrating the enduring relevance of what Otto Kahn-Freund emphasised more than fifty years ago. He highlighted that comparative law is not a separate subject matter but rather a tool of analysis, the best way to understand one's legal system: one of the merits of legal comparison is that it allows a scholar to place himself outside the labyrinth of details in which legal thought easily gets lost and to see the broad outlines of law and its main features[1]. Moreover, again according to

[1] Kahn-Freund, *Comparative Law as an Academic Subject*, in *LQR*, 1966, 82, p. 40. See also

the same author, the comparative method is intricate, requiring knowledge of the legal system and the social and primarily political context of the countries under consideration[2]. In short, understanding the framework in which law operates is essential to prevent the use of comparative law for practical purposes from becoming abused.

2. *The "ascending" and "descending" comparison*

The time is ripe today, more than ever, for some considerations on comparison for the reasons familiar to all the disciplines of the legal area and others typical of labour law.

It is appropriate to start with the general reasons.

The globalisation of society and the economy make it increasingly necessary to compare the legal systems of different countries.

The dimension of the European Union, which now appears to be definitively settled, already from the stage of designing actions, presents the "germ" of comparison because it is not possible to intervene with supranational legislation (of harmonisation or not) without being acquainted with the legal systems of the 27 Member States. The case of the EU Directive 2022/2041 on adequate minimum wages is particularly eloquent in that, from its structure, it reveals the underlying comparative work. The circumstance that the directive is divided into two parts, one aimed at countries where there is a statutory minimum wage and the other at those where the fixing of minimum wages is left to collective bargaining, gives a demonstration of the work of analysis of domestic legislation carried out by the Union's institutions. This is somewhat less valid for international law because, for example, the ILO compares the significant adhering countries before issuing Conventions with less "diligence" than the Union does since the adhering states are not obliged to ratify these Conventions. In contrast, the Member States of the European Union must apply the primary (Treaties and the

the remarks of Hepple, *The Influence of Otto Kahn-Freund on Comparative Labor Law*, in Aa.Vv., Liber amicorum. *Spunti di dialogo con Bruno Veneziani*, Cacucci, 2012, p. 153 ff.

[2] Kahn-Freund, *On Uses and Misuses of Comparative Law*, in *MLR*, 1974, p. 27. On this point see also Blanpain, *Comparativism in Labor Law and Industrial Relations*, in Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Economies*, Kluwer Law International, 2010, p. 3 ff.

Charter of Fundamental Rights of the European Union) or secondary sources with direct effect or implement those with indirect effect (directives, decisions).

It is now the case to list the typical reasons for comparative analysis in labour law.

The development of multinational companies requires that they operate in different countries and intersect with a plurality of legal systems, from which functioning problems arise, which can be solved only by understanding each national context[3].

The European Union means many things for labour law, but since its origins, it has, first and foremost, meant freedom of movement for workers, who must be granted certain rights in the various Member States.

Globalization in recent years for labour law (and beyond) has been intertwined with the outset and development of the platform economy and digitalisation, which has brought with it the exponential increase of the number of companies that, through their "*Apps*", make use of the services of delivery workers, for whom a similar problem arises in all the legal systems in which those companies operate, namely their classification.

3. *The Workers' Statute and comparison: the discipline of changes of duties and the Spanish forerunner. Overview*

The Italian Workers' Statute is a clear example of what can be defined as both an "ascending" and "descending" comparison. Ascending because the Statute is "indebted" to the comparative method since some topics come from an appraisal of other legal systems[4]. However, it also represents a descending comparison because the Statute anticipated significant developments ten years before they happened in France[5] and Spain. In the latter country, reference was often made to the Italian experience in drafting the 1980 *Estatuto de los Trabajadores.* However, the Workers Statute's overall

[3] Magnani, *Diritto sindacale Europeo e comparato*, Giappichelli, 2017, p. 2.

[4] See, for example, discrimination protection and trade union rights: the French *Loi Auroux* of 1968 already granted the trade union in the company the right of posting and assembly.

[5] Dorssemont, *Lo Statuto all'avanguardia: uno strumento pioneristico per l'Europa e oltre*, in Rusciano, Gaeta, L. Zoppoli (eds.), *Mezzo secolo dallo Statuto dei lavoratori. Politiche del diritto e cultura giuridica*, I, *Diritti Lavori Mercati*, *Quaderno*, 2020, p. 73.

structure was much more considered than any of its single provisions. Both bodies of law, while presenting significant differences[6], guarantee respect for the rights arising from the subordinate employment relationship through imperative standards of a "quasi-constitutional" character.

Assuming this, however, it is appropriate to go into the details of some issues that, from the perspective of comparison, appear more interesting than others. The first is the regulation of workers' duties contained in Article 13. The second is the personal scope of Law 300 of 1970, which, as is well known, is that of employees, which has undergone tensions in recent years in various legal systems. The third is Article 18, particularly the protection against unlawful dismissals, one of the hot spots of the Statute. All three profiles are highly topical, so it is appropriate to refer to the current version of the Statute and not the original one.

It is better to start with the discussion on workers' duties because it is the one to which less time needs to be devoted from the comparative point of view. Article 13, and consequently Article 2103 of the Italian Civil Code, was amended in 1970 by statutory provisions and significantly revised in 2015. Less known is that in Spain, through the use of emergency decrees between 2010 and 2012, the legislature intervened on the notion of professionalism, replacing the "individual" categories with the more extensive concept of "professional group" to allow greater and "easier" flexibility in the functional mobility of workers. It is necessary, however, to give an account of how collective bargaining, entrusted with the task of solidifying and implementing this reforming line, refrained from conducting this process, continuing instead to refer to the previous taxonomic system of the classification of professionalism[7]. The essence of the reform intervention carried out in Spain a decade ago lies in giving the employer

[6] On this point see, Pérez de los Cobos Oriuel, *El Estatuto de los Trabajadores español en el cincuenta aniversario del italiano*, in *FRCJS*, vol. 22, no. 2, 2019, pp. 51-69, according to whom "el contraste entre los contenidos de la norma española y la de su homónima italiana no puede ser más elocuente. ... [A]mbas respondieron a momentos, necesidades políticas y sociales y proyectos políticos muy diferentes, y por ello, sus contenidos fueron y son muy dispares. En un seminario europeo celebrado en octubre de 1979 en el Instituto de Estudios Sociales para hacer un balance del proyecto presentado, precisamente Gino Giugni, padre del Statuto dei lavoratori, consideró el texto español muy diferente del italiano, señalando que era más un pequeño código de trabajo que una ley sobre la protección de la libertad y la dignidad del trabajador en el lugar de trabajo" (p. 59).

[7] Bini, *Contributo allo studio del demansionamento in Italia*, in *DRI*, 2016, p. 211.

more comprehensive ranges in exercising its power to modify the conditions under which work is performed, with an actual increase in the relative flexibility, "internal" to the same employment relationship. And this approach is not very different from the one given in Italy to the discipline of duties with the *Jobs Act*, at least in terms of its effects on the increased ease of demoting the worker[8].

4. *The personal scope of application of the Statute and the workers of the* gig economy*: the differences with* Common law *systems*

Regarding the notion of subordinate work, there would be many profiles to address. Starting with an important one, the autonomy/subordination dichotomy has changed and is undergoing tensions but remains at the very core of labour law both in the European Union legal system[9] – as emphasised, for example, in the Court of Justice's 2017 *Uber* ruling and the 2021 proposal for a directive on digital platform work – and in many national legal systems, including those outside the Union, albeit with significant differences between *Civil law* and *Common law* systems. Many of those profiles will be analysed below.

In the time of the platform economy, the above-mentioned dichotomy remains an ever-green topic, as well as the idea that the work of delivery men and women is not necessarily performed outside the area of subordination simply because of the existence of a digital platform. On the contrary, the classification problem, while taking different forms, also remains valid for the types of work used in the gig economy[10].

[8] On this point, see *ex multis* GARGIULO, *La determinazione della prestazione di lavoro tra libertà e dignità: potere direttivo e jus variandi a cinquant'anni dallo Statuto*, in RUSCIANO, GAETA, L. ZOPPOLI (eds.), *Mezzo secolo dallo Statuto dei lavoratori. Politiche del diritto e cultura giurudica*, I, *Quaderno of this journal*, 2020, p. 379; VOZA, *Autonomia privata e norma inderogabile nella nuova disciplina del mutamento di mansioni* in GHERA, M.G. GAROFALO (ed.), *Contratti di lavoro, mansioni e misure di conciliazione vita-lavoro nel Jobs Act*, Cacucci, 2015, 2, p. 199; BROLLO, *La disciplina delle mansioni dopo il Jobs Act*, in *ADL*, 2015, p. 1156.

[9] See most recently MONDA, *The Notion of the Worker in EU Labour Law: "Expansive Tendencies" and Harmonisation Techniques*, in this journal, 2022, p. 2.

[10] On this point, see PERULLI, SPEZIALE, *Dieci tesi sul diritto del lavoro*, il Mulino, 2022, while pointing out that "this typically twentieth-century construction of labour law hinged on subordination is outdated today" (p. 57) and that we need to adopt the "perspective of a labour law 'beyond' subordination" (p. 61), believe that this is a trend in the subject that has not yet been brought to fruition at least in our legal system.

Similar "respect for tradition" in the just indicated sense is found in the approach used by the British courts, which have dealt with Uber through rulings by the Employment *Tribunal* in 2016[11], the *Employment Appeal Tribunal* in 2017[12], the *Court of Appeal (Civil division)* in 2018[13] and the *UK Supreme Court* in 2021[14].

The 2017 judgement confirms the classification given in the first instance, ruling out that drivers are "employees" (workers with the broadest protection) as well as "self-employed" and opting for the intermediate category of "workers", who are entitled to some of the employees' rights, from minimum wage to the protection provided by working time regulations.

It has just been mentioned that the British courts have classically conducted the classification activity, as attested by the same judges, according to whom the Uber model is familiar. At the same time, the concrete attitude of the contractual agreement because of the use of new technologies has been changing[15]. Indeed, the *Employment Appeal Tribunal* points out that new

[11] *Uber B.V. and Others* v *Mr Y Aslam and Others*, October 26, 2016, [2017] IRLR 4.

[12] The judgment of the *Employment Appeal Tribunal*, *Uber B.V. and Others* v *Mr Y Aslam and Others*, UKEAT 0056 17 DA, is dated November 10, 2017. On the British rulings, see Pacella; *"Drivers" di Uber: confermato che si tratta di "workers" e non di "self-employed"*, in *LLI*, 2016, 2, p. 15 ff.; Cabrelli, *Uber e il concetto giuridico di "worker": la prospettiva britannica*, in *DRI*, 2017, p. 575 ff.; Prassl, *Pimlico Plumbers, Uber Drivers, Cycle Couriers, and Court Translators: Who is a Worker?*, in *LQR*, 2017, p. 33 and *Oxford Legal Studies Research Paper*, No. 25/2017; Perulli, *Lavoro e tecnica al tempo di* Uber; De Stefano, *Lavoro "su piattaforma" e lavoro non standard in prospettiva internazionale e comparata*, and Auriemma, *Impresa, lavoro e subordinazione digitale al vaglio della giurisprudenza*, all in *RGL*, 2017, respectively, p. 195 ff. (p. 205 ff.), p. 241 ff. (pp. 249-252) and p. 281 ff.; Voza, *Il lavoro reso mediante piattaforme digitali tra qualificazione e regolazione* and Loffredo, *Il lavoro su piattaforma digitale: il curioso caso del settore dei trasporti*, both in *QRGL*, 2017, 2, p. 71 ff. and p. 117 ff. respectively. On the *Employment Appeal Tribunal*'s ruling, see De Luca, *Uber: ormai è un assedio. Prospettive future sul diritto del lavoro nella* gig economy *alla luce della sentenza della Corte d'Appello di Londra*, in *DRI*, 2018, p. 977 ff. On the British rulings and, more generally, on labour in the platform economy, see Kenner, *Uber drivers are "workers" - The expanding scope of the "worker" concept in the UK's gig economy*, in Kenner, Florczak, M. Otto (eds.), *Precarious Work. The Challenge for Labour Law in Europe*, Edward Elgar Publishing, 2019.

[13] *Uber B.V. and Others* v *Mr Y Aslam and Others*, December 19, 2018, [2018] EWCA Civ 2748.

[14] Judgement of February 19, 2021.

[15] See *Employment Appeal Tribunal* judgment, para. 82: "Uber's agency model was nothing new: it was simply the scale of the arrangement that was different, but that reflected the new technology".

technologies swap how the existence of an employment relationship is ascertained without questioning whether this ascertainment should be the main activity to be performed. Indeed, technology has relevance primarily to the application of (EU-derived) working time legislation, according to which the worker (*worker* or, perhaps, *employee* but not *self-employed*, except for what the 2018 ruling decided) is required to be: at work, in the performance of his or her duties, and available to the employer. Well, of these three requirements, the one that is most affected by technological innovation is the last one, since drivers, according to the British courts, assume a work obligation when they are in the urban area where London-based Uber operates and when they connect to the company's "*App*". The lack of a Web connection depends solely on the worker. On the other hand, the physical presence on the territory, because of the rules provided by Uber, is equivalent to not responding to the customer's call and "triggering" the qualification as a *worker*.

As partially anticipated, a contrary view is in the 2018 ruling, which reverses the approach of previous decisions by denying the existence of an employment relationship between drivers and Uber and assimilating their situation to that of drivers operating in the traditional cab service. For this purpose, the presence of the *App* and the circumstance that the company handles bookings and payments for the service is irrelevant, in the judges' opinion. In other words, according to the 2018 ruling, there is no employment contract between the driver and Uber. Still, there is a *service contract* (and thus self-employment) between driver and passenger, while the company only plays the role of a mere intermediary[16].

The final word on the matter, at least so far, has been written by the *UK Supreme Court* in its 2021 judgment rejecting the Appeals ruling classifying Uber drivers as *workers* and holding that the purpose of labour legislation is to protect workers merely because they are in a position of dependence to a person or organisation that exercises control over their work. Moreover, again the 2021 ruling recalls that the same labour legislation prevents employers from waiving the protection provided by law.

[16] This follows from the 2018 ruling, where it is stated that the *Employment Tribunal*'s assertion that if there were a contract between the driver and the passenger, the latter would be burdened with the employer's obligations, first and foremost, the responsibility to recognise the minimum wage, is incorrect. Instead, for the *Appeal Court*, the passenger is simply a customer of the driver ("the passenger is the customer of the driver's business": para. 140), while the company acts as an intermediary ("a booking agent for a group of self-employed drivers": para. 133).

What has been said so far makes realising that the classification of employment relationships with Uber remains within the framework of the classic British tripartition between *self-employed*, *worker* and *employee*, with fluctuations between the former and the latter "category" depending on case law under consideration.

A "traditionalist" approach was also used by the French *Cour de Cassation*, in 2020, starting from the assumption that the performance of work within a *service organisé*, when the employer unilaterally determines the conditions of implementation of the service and follows the typical paths of that system that does not provide for a different alternative between autonomy and subordination, qualified Uber France's cycle drivers as dependent workers[17].

Returning to the United Kingdom, the courts turn out to be aware of the problems generated by the *gig economy* in an employment relationship and the fact that workers must be afforded protections of *workers* as it is possible for them to be economically dependent on the platform[18]. However, case law, even in *Common law* systems, cannot extend protection beyond legal definitions. In short, it has reached a point, highlighted by the 2018 and 2021 judgements, in which courts cannot be asked to protect the contractual imbalance between the driver and the transport company because it is necessary for an express legislative intervention in the case[19].

The role of the legislature is growing in another *Common law* system, namely that of the United States of America. Indeed, some State laws (enacted by 18 States) have yet to intervene in the classification of drivers of transportation companies, thus making the traditional test applicable, while other States, including Utah, classify drivers as self-employed. Another model

[17] Cour de Cassation Chambre sociale 4 March 2020 no. 374, with a comment by I. Zoppoli, *I* Travalleurs Uberises*: meglio qualificati o meglio tutelati in Francia?*, in *RIDL*, 2020, 2, p. 782.

[18] The 2018 ruling is clear: "the question whether those who provide personal services through internet platforms similar to that operated by Uber should enjoy some or all of the rights and protections that come with worker status is a very live one at present. There is a widespread view that they should, because of the degree to which they are economically dependent on the platform provider" (*Appeal Court* judgment, para. 164).

[19] The court again states that "in cases of the present kind, the problem is not that the written terms misstate the true relationship but that the relationship created by them is one that the law does not protect. Abuse of superior bargaining power by imposing unreasonable contractual terms is a classic area for legislative intervention, not only in the employment field" (*Appeal Court* judgment, para. 164).

gives the individual contract much more weight in organising drivers of transportation companies operating through "*Apps*". The North Dakota example is eloquent because it presumes that transportation companies only exercise control over drivers if agreed to in a written contract[20].

In this regard, it should be remembered that in the United States, the role of the employment contract is decisive because it can qualify the worker as an employee. At the same time, the contractual qualification as a self-employed person has no relevance.

The various legal and *Common law* tests may consider the contract as an element in determining whether the person is self-employed. Still, they usually go further by analysing the concrete case and its effectiveness.

This being the case, in *Common law* systems, one is far from the unavailability of the type of contract typical of the Italian legal system – according to which not even the legislator can authorise the signatory parties to the individual contract to apply the protections of self-employment to employment relationships that have contents and modes of execution typical of subordination[21] – and also from the positions of French doctrine and case law, according to which the existence of an employment relationship depends neither on the intentions expressed by the signatory parties nor on the *nomen iuris* contained in the contract but on the factual conditions in which the activity of the workers in question is carried out[22]. Moreover, it should be noted that in 2019, the French *Conseil Constitutionel* intervened in this area by declaring unconstitutional the presumption of *non-salariat* contained in Article 44 of *Loi* 2019-1428 on the relationship between the platform and the worker, as it considered the determination of the scope of labour law to be among the fundamental principles of the matter and as such not available to the parties.

That said, attention will need to be paid to how to implement, if passed, in *civil law* jurisdictions a provision of the proposed directive on work through a digital platform of 2021, according to which "the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship"[23].

[20] Rachabi, *Despite the Binary: Looking for Power Outside the Employee Status*, in *TLR*, 2021, 95, p. 11 and A. Zoppoli, *Prospettiva rimediale, fattispecie, sistema*, Editoriale Scientifica, 2023, p. 51 ff.

[21] C. Const. 31 March 1994 no. 115.

[22] Freedland, Countouris, *The Legal Construction of Personal Work Relations*, Oxford University Press, 2011, 53.

[23] Art. 4 (1) of the proposed directive.

The issue is sensitive because, although the presumption favours subordination and not autonomy in this case, contrary to the French example, this provision cannot be understood and implemented in the sense that the European Union can establish without any limitation the scope of labour law. This is not so much – and it should be emphasised – because there would be a breach of the principle of the unavailability of the type of contract that characterises the Italian system and, in fact, other *civil law* systems as well, but because the Union requires the application of domestic protections for employment in the presence of at least two of the criteria indicated in Article 4(3)[24]. The provision's wording, however, gives Member States some discretion by allowing them to provide for the presence of even more than two of the presumption criteria indicated. By doing so, on the one hand, the Union's interference would grow proportionally to the increase in the number of criteria chosen and, on the other hand, there would seem to be a risk of nullifying the albeit minimal harmonisation effect typical of the legal basis of the directive, i.e., Article 153 TFEU, because discretion in the choice of the number of criteria brings with it the possible differentiation between jurisdictions.

5. Continued. *Gig workers in the Italian legal system*

The decisions of the foreign courts mentioned earlier are also very relevant from the Italian perspective concerning another delivery platform, namely *Foodora*. It is generally known that the Court of Turin, in a judgment of May 7, 2018[25], classified the bikers of that company as self-employed workers, while the Court of Appeals of the same city, in its ruling of January 11, 2019, No. 468, came to a different conclusion, considering the same workers hetero-organized collaborators to whom the discipline of subordinate employment applies, under Article 2, Legislative Decree 81/2015.

[24] Level of pay; obligation to abide by rules on outward appearance, behaviour, and work performance; supervision of work performance; restriction of freedom to organise one's work; limitation of the ability to have clients.

[25] V. Tullini, *First reflections on the Turin ruling on the Foodora case*, in *LDE*, 2018, p. 1; Spinelli, *La qualificazione giuridica del rapporto di lavoro dei fattorini Foodora tra autonomia e subordinazione*, in *RGL*, 2018, 2, p. 371 ff.

And this was also the position taken by the Supreme Court in its January 24, 2020, ruling No. 1663.

It is worth noting here that the Italian Appeal and Supreme Court rulings recognise the application of employee protections based on the 2015 legal provision. In fact, in the absence of this provision, it would have been complicated, with one sporadic exception[26], to extend the protection of subordinate labour to the case of hetero-organized work. In other words, the Italian legislation of 2015 made available to the interpreter (in this case, to case law) a tool, Article 2 of Legislative Decree 81, moreover using "assimilation" techniques typical of French law[27], which made it possible, without modifying Article 2094 of the Civil Code, to extend to *Foodora* delivery workers protections that they would not otherwise have obtained. And all this is in tune with what the British judges decided in their 2018 ruling, which calls for legislative intervention, subject to the particularities of the legal system across the Channel.

The centrality of the legislature's role in qualifying the relationship and the relevance of the autonomy/subordination dichotomy in the Italian legal system is demonstrated by another legislation block, namely law 81/2017, the so-called *Jobs Act* for the self-employed, thanks to which the distance between the protections guaranteed to subordinate work and the measures to protect self-employment remains considerable[28].

Returning to the *gig economy*, the problem of the autonomy/subordination dichotomy is accentuated by another of the elements that drive comparison and dialogue between legal systems, namely globalisation. Uber drivers or Foodora cycle drivers will be classified differentially, depending on the legal

[26] See Palermo Tribunal, November 4, 2020, which qualifies delivery workers as employees regardless of Article 2, Legislative Decree no. 81/2015.

[27] Perulli, *Oltre la subordinazione. La nuova tendenza espansiva del diritto del lavoro*, Giappichelli, 2021, p. 38.

[28] Ballestrero, *La dicotomia autonomia/subordinazione. Uno sguardo in prospettiva*, in *LLI*, 2020, 6, p. 14 ff. recalls how the autonomy/subordination dichotomy is not in *rerum natura*: it is the fruit of a systemic arrangement that has distant origins and has been consolidated over time, which appears to be confirmed by Law no. 81/2017. Not of the same opinion are Perulli, Speziale, cit., according to whom this regulatory block, law no. 128/2019 and Article 2, Legislative Decree no. 81/2015, shows how by now, the "great dichotomy" between subordinate and self-employment is much more relative (pages 61-62), while admitting that this is still only a trend since "the Italian system has not yet achieved this goal of extensive modulation of protections" (p. 64).

system of the EU Member State (or, why not, even in non-EU countries)[29], even though Uber's business rules are similar worldwide. This will make it convenient for the company to await the outcome of the domestic "classification activity", which is the courts' responsibility in applying the legal case and investing more in those domestic contexts, in which case law will place drivers outside the area of subordination. This is a familiar phenomenon for labour law, as multinational companies have constantly been subjected to different rules in different domestic legal systems, including the classification of employment relationships. However, the difference from the past is the presence of a digital platform, which is a-territorial.

In addition, referring the classification issues to domestic judges causes the risk of having different treatments not only among other countries but also within each of them, as judges may not necessarily decide similar cases uniformly throughout the country unless there is an intervention of a High Court, as, for example, happened in the United Kingdom and partly in Italy, which, moreover, may not necessarily be decisive because there may be a change of orientation.

6. *Article 18 and the influences of the "filtered" comparison*

It is appropriate to deal now with Article 18 of the Workers' Statute, which, as it is well known, was profoundly amended between 2012 and 2015 through Law 92/2012 and Legislative Decree 23/2015. Currently, only null and void dismissals and dismissals taken for discriminatory or unlawful reasons are hit with the maximum sanction of full reinstatement. Evidence of the place at the top of the fundamental needs protected by the legal system is provided by their unconditional punishment, i.e., the most severe sanction on dismissals is applied regardless of the size of the enterprise, the professional qualification held and the date of the worker's employment.

Comparison played a significant role in this matter because a reform of that magnitude required a comparison with the leading Member States of the European Union, from which it appeared that Italy was the only country to have in large companies a practically generalised application of

[29] As self-employed, subordinate, hetero-organized in Italy; or as an employee, worker, self-employed in the UK, and so on in other countries.

reinstatement. In almost all other countries, there was (and is) a system under which monetary, not reinstatement, sanctions are applied, except for Germany, where the choice between compensatory and reinstatement remedies is left to the judges who can take into account many elements before choosing between one and the other[30].

Once the reform was enacted, Italy searched for the constraints arising from the European Union and international law in the direction of the need for reinstatement. This search has much to do with the comparative method since, as mentioned at the beginning, EU law and international law have in them, albeit differently, the "germ" of comparison.

This attempt, shaky from its outset, finally waned with the Italian Constitutional Court's ruling no. 194 of 2018, which, after recalling that reintegration protection is not the only paradigm implementing Articles 4 and 35 of the Constitution[31], highlighted the absence of any constraint stemming from the Union's system because of the applicability of Article 30 of the Charter of Fundamental Rights of the European Union – according to which, moreover, every worker has the right to protection against any unjustified dismissal while it does not refer to reinstatement protection – "Article 3, paragraph 1, of Legislative Decree No. 23 of 2015 should fall within the scope of application of Union law other than the Charter itself".

In contrast to what happened with Article 30 CFREU, the Constitutional Court has shown much more room for international law, recalling Article 24 of the European Social Charter[32], which "must qualify

[30] L. Zoppoli, *Flex/insecurity. La riforma Fornero (l. June 28, 2021, no. 92) prima, durante e dopo*, Editoriale Scientifica, 2012, p. 128.

[31] Constitutional Court ruling no. 303 of 2011 is cited on this point.

[32] Since "the plaintiff has stated that her health condition has severely deteriorated and that she would be physically unable to resume an activity within" the Union body at which she worked, "the parties are invited, in the first place, to seek an agreement to determine fair monetary compensation for the plaintiff's dismissal". Fontana, *La Corte costituzionale e il decreto n. 23/2015:* one step forward, two steps back, WP CSDLE "Massimo D'Antona".IT - 382/2018 emphasises the innovativeness of this principle since "the Constitutional Court has never shown towards the Social Charter great openings and indeed in the past has considered its provisions as norms 'without a specific preceptive content' (see, for example, judgment no. 325/2010), documents of 'mere direction', that is, not binding (Constitutional Court no. 50/2015)." (p. 29). Of the same opinion is M.T. Carinci, *La Corte costituzionale n. 194/2018 ridisegna le tutele economiche per il licenziamento individuale ingiustificato nel "Jobs Act", e oltre*, WP CSDLE "Massimo D'Antona".IT - 378/2018, according to whom "the CSE thus definitively comes out of the limbo of legal irrelevance in which the Judge of Laws for a long time confined it, to finally rise

as an international source, according to Article 117, paragraph 1 of the Constitution"[33], moreover, applicable to Italy, which has ratified the European Social Charter.

However, Article 24 does not directly mention reinstatement but refers to "the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief". Thus, the 2018 ruling specifies for unjustified dismissal, the obligation to ensure the adequacy of payment, in line with what the Court affirmed based on the internal constitutional parameter of Article 3 of the Constitution. Thus, an integration between sources and – what is most relevant – between the protections they guarantee is realised[34].

The reference in the 2018 judgement to the decision of January 31, 2017, rendered because of collective complaint No. 106/2014 brought by the *Finnish Society of Social Rights* against Finland, is another example of the application of the comparative method because the examination of complaints provides insight into solutions adopted in other legal systems, does not appear incongruous.

Reference to this decision clarifies what "reasonable compensation" means in Article 24 ESC, *i.e.*, *adequate* and *deterrent* compensation.

From what has been said, it is clear that the comparative method, "filtered" through the provisions of Union law and international law, cannot be used to argue the constitutional illegitimacy of Article 18 of the Statute and Article 3, Legislative Decree 23/2015 in the part in which they replaced reinstatement with monetary sanctions, but only to require that these sanctions be adequate and dissuasive, to be brought somewhat closer to restorative protection.

to the status of an interposed parameter of the constitutionality of the law" (p. 22). More generally on the content of Article 24 CSE see Orlandini, *La tutela contro il licenziamento ingiustificato nell'ordinamento dell'Unione europea*, in *DLRI*, 2012, p. 624; Cester, *I licenziamenti nel Jobs Act*, in *W.P. CSDLE "Massimo D'Antona".IT*, no. 273, 2015, pp. 8-10; Perulli, *La disciplina del licenziamento individuale nel contratto a tutele crescenti. Profili critici*, in *RIDL*, 2015 1, p. 418.

[33] Thus C. Const. no. 120/2018 on the union's freedom of the military.

[34] C. Const. no. 194/2018.

7. *Short conclusions*

The time has come for some brief concluding remarks.

Around the Workers' Statute, the world has changed profoundly in fifty years. Much water has flowed under the bridge, but the original approach of law 300/1970 has held up regarding the profiles considered here. Indeed, this has happened for the personal scope because, as seen, the autonomy/subordination dichotomy has been characterised by tensions and twists. Still, it has by no means waned, not even in the wake of the digital revolution, and the classification as a dependent worker is still the gateway to the protections of the Statute.

With regard, on the other hand, to Article 18 and the consequences following an unlawful dismissal, on closer inspection, the current framework is not substantially different from the original one because from 1970 to 1990, most companies were covered by compensatory remedies, reinstatement being confined to companies with more than 35 employees. Of course, the approach at that time was different from the contemporary one because the *rationale* behind that version of Article 18 was that large companies could economically afford the reinstatement of workers unlawfully dismissed, while the idea behind the 2012/2015 reform was that reinstatement should be confined only to the particularly detestable cases of discriminatory dismissals or dismissals that are void on other grounds. The implication, however, is that the number of workers protected by reinstatement in 1970 is like the current one since, as noted above, the space reserved for reinstatement protection is similar.

What has been said so far makes realising that comparing the statutory profiles under consideration was crucial.

It showed that the amendment of the workers' duties provision in 2015 had its antecedent in the Spanish reform a few years earlier.

It was instrumental in adapting the notion of subordination to the changing dynamics of the platform economy because examining the choices made in other supranational and national *civil* and *common-law* legal systems made it possible to realise that the problems to be addressed and the answers provided were all in all analogous.

The affair concerning Article 18 (and related provisions) made the Italian legal system, which has not always been characterised by linear regulatory interventions, assimilate the crucial changes deriving from the marginalisation of the reinstatement protection.

Abstract

The idea of comparison in this paper is well explained by the expression "legal orders in dialogue", demonstrating the enduring relevance of what Otto Kahn-Freund emphasised many years ago. According to him, comparative law is not a separate subject matter but a tool of analysis, the best way to understand one's legal system. The time is ripe today for some considerations on comparison for the reasons familiar to all the disciplines of the legal area and others typical of labour law. This paper concentrates on the logic specific to labour law and particularly on the Italian Workers' Statute, which is a clear example of what can be defined as both an "ascending" and "descending" comparison. Ascending because the Statute is "indebted" to the comparative method since some topics come from an appraisal of other legal systems. However, it also represents a descending comparison because the Statute anticipated significant developments ten years before they happened in France and Spain.

Keywords

Comparison, Italian Workers' Statute, workers' duties, classification issue, individual dismissals.