HUNGARIAN LABOUR LAW
E - J O U R N A L

Labour, Law and Economics

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Markets and images of the market

I have been asked to share a few considerations on the relationship between 'market logics' and 'juridical rules' in the perspective of labour law[2]. Beside my partial, limited knowledge of the economic literature (not unlike, I believe, most Italian jurists with a traditional academic background) I must immediately admit two difficulties. The *first* one concerns identifying the focus of the subject of discussion, and is caused by the difficulty to identify and define the very *terms* of the relationship presented in the title with a certain degree of precision. The *second* one, instead, is due to the problematic extension of that relationship, which entails (and imposes) a new reflection on the present *function* of labour law. A reflection which is not easy indeed, at least insofar as we deem it impossible to accept *conflicting* perspectives of an 'indefeasible otherness' of juridical logics to market rules[3] or opposing Posnerian *mimetic* perspectives[4]. *Mild and reasonable* regulation perspectives should be put forward instead, to try and bring together commercial interests and non-appropriative values by means of new tools and a new, inclusive approach, and to combine the demands of economic logics and the

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[2] Paper presented and discussed at the conference "*Logiche di mercato tra economia ed efficienza delle regole giuridiche*" ("Market logics between economics and efficiency of legal rules"), organised by the Department of Law of the University of Messina and by the Megara-Ibleo University Consortium, Siracusa – 10-11 May 2013. The conference, organised by Tommasini, provided an interesting forum for a debate involving civil and labour law experts (participants included Barcellona, Montanari, Gorassini, Pardolesi, Carinci F., Di Raimo, Mazzù, Romeo, Scalisi, and the author). The paper was translated into English by Giovanna Pistillo.

[3] In these terms, cf. Barbieri, *Lavoro e diritto tra mercati e poteri*, paper presented at the Fondazione Jacopo Malagugini conference *I diritti del lavoro e le pretese dell'economia*, Milan – 16 February 2001, in *fondazionemalagugini.it*, 2001, p. 3.

[4] Posner, *Economic Analysis of Law*, 6th ed., Aspen, 2003, and *Overcoming law*, Harvard University Press, 1995, p. 416: "*The law tries to make the market work and, failing that, tries to mimic the market*".

aspirations to a different sociality, rationality of technique and indefeasible complexity of the human existence[5]. This remains, however, in the framework of a mandatory relationship that is due to integrate individual performances into complex organisational contexts, which are in turn characterised by a strong correlation with external market dynamics as well as strong personal involvement.

For obvious consequences on the analytic level, we should stress what has often been highlighted: before and beyond the markets (and their logics), it is the *images of the market* that are plural, markets being viewed as a place, an ideology, a paradigm of the social action and finally as an institution[6]. Because of this circumstance, the researcher is required to perform a strong critical control of discourse in order to prevent the multiple narrative levels from causing improper consequences at the analytic level, especially for what concerns the very understanding of the function of the exchange which, in my opinion, should be regarded as being relational – not only economic, that is to say belonging to the social dimension of the human experience before contributing to the establishment of the market. It has effectively been stated that "the exchange is the most highly civil answer to the 'human tragedy' of the condition of lack, a 'peace treaty' which, as such, bans the use of force and grants each and every one the freedom to reject others' offers and to choose their own counterparts freely"[7].

Because of this sort of *anthropological redundancy* of the exchange[8], it is *still necessary* to highlight the power asymmetry between the parties as a specific feature of the employment relationship – which should bring to light the reasons why labour law often "violates the principles that regulate the law of obligations in general"[9]. At the same time however, *it is no longer sufficient* to simply invoke that asymmetry to justify a pervasive extension of the principle of mandatory rule (and following necessary prevalence of both the heteronomous component over the autonomous one, and of the collective dimension over the individual one) going as far as legitimising any limitations on the space of autonomy and self-regulation, even when the interests protected by a certain principle have little to do with the power asymmetries between the parties. In short, because of the interests it protects and of the social costs it

[5] Please see Viscomi, Chapt. 28 - *Presupposti concettuali ed ambiti della diversificazione*, in Rusciano, Zoppoli L. (a cura di), Diritto del mercato del lavoro, Jovene, 1999, p. 209.

[6] Ferrarese, *Immagini del mercato*, in *Stato e Mercato*, 1992, p. 291. More recently, Cassetti, *La cultura del mercato tra interpretazioni della costituzione e principi comunitari*, Giappichelli 1997, p. 15 ff.

[7] Infantino, *Potere. La dimensione politica dell'azione umana*, Rubbettino, 2013, p. 260 ff. in dialogue with Simmel, *Filosofia del denaro*, Utet, 1984, pp. 418-419 [my translation].

[8] After all, "it's the people that make a market, not the commodities": AIME, *La casa di nessuno. I mercati nell'Africa occidentale*, Bollati Boringhieri, 2002. [my translation].

[9] Ministry of Labour, *Libro Bianco sul mercato del lavoro in Italia. Proposte per una società attiva e per un lavoro di qualità*, Rome, 2001, p. 67, in the perspective of the overcoming of the mentioned asymmetry occurred. [my translation]

produces, the principle of mandatory rule can only have a plural identity and be shaped around variable conceptual – more than juridical – geometries, considering that the protection of the individual, as I have highlighted elsewhere – does not necessarily require a uniform discipline, and that a uniform discipline does not always translate into protection of the individual[10]. For this reason, the mandatory norm can only be recognised, at the same time, as a 'foundation' and current 'problem' of labour law[11].

Prudent knowledge and reasonable regulation

However, it is not only the images of the market that are plural, but also their related narrations, as is shown, among others, by at least two elements. On the one hand, the emergence of an academic network, which has been growing for more than ten years, stressing the self-referentiality of an economic science suffering a certain *loss of contact with the real world outside*, also as a consequence of the greater mathematical formalisation of its own language[12]. Quite emblematically, the essential methodological lines of this network are well expressed by the very name of the reference journal, the *Real-World Economics Review*[13]. On the other hand, from an in-depth analysis of the frontiers of economic research it becomes apparent that a "series of external events and shocks", together with the "repeated attainment of some results of experimental Economics" have brought about *the "crisis" of the idea of a "rational, all-knowing individual agent"* and have caused, if not a collapse of the "dominance of neoclassical orthodoxy", at least a "weakening of more orthodox approaches, namely of the models

[10] Please see VISCOMI, *Autonomia privata tra funzione e utilità sociale: prospettive giuslavoristiche*, in *Diritti, Lavori, Mercati*, 2012, p. 441 ff. Lastly, the reconstructive proposal by DE LUCA TAMAJO, who is critical on this point, *Il problema dell'inderogabilità delle regole a tutela del lavoro, ieri e oggi*, paper presented at the Aidlass Conference, *Il diritto del lavoro al tempo della crisi*, Bologna 16-17 May 2013, in *aidlass.org*, and p. 13 below.

[11] I am referring to the title of CESTER's essay *La norma inderogabile: fondamento e problema del diritto del lavoro*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2008, p. 341. Cf. TULLINI's "methodological proposal", *Indisponibilità dei diritti dei lavoratori: dalla tecnica al principio e ritorno*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2008, p. 424, calling for "a different systematic sensitivity making the focus of labour law no longer (or not only) the mandatory rule – because it is presumed or tendential or traditional or ideal – but also (and above all) the unavailable law". [My translation].

[12] It may be relevant here to remember the "blackboard" economics mentioned by COASE in the speech delivered during his Nobel Prize ceremony, 9 December 1991, *The Institutional Structure of Production*, nobelprize.org: "*What is studied is a system which lives in the minds of economists but not on earth. I have called the result 'blackboard economics'*".

[13] LAWSON, *Mathematical Modelling and Ideology in the Economics Academy: competing explanations of the failings of the modern discipline?*, in *Econ. Thought*, 2012, vol. 1(1), et worldeconomicsassociation.org: "*My contention, in short, is that contemporary academic mainstream economics is indeed often underpinned by ideology. But this ideology is first of all methodological in nature, being in effect the widespread cultural view that mathematics is essential to science. Incidentally I argue elsewhere not only that this ideology covers a false view in that successful natural science does not actually rest on the application of mathematics, but also that a nonmathematical economics can actually yet be a science in the sense of the successful natural sciences".*

characterised by a single, stable balance"[14]. As a consequence, several authors recommend the adoption of a wider cognitive paradigm that may capture the complexity of reality: *"the neoclassical era in economics has ended and has been replaced by an unnamed era; we believe what best characterizes the new era is its acceptance that the economy is complex, and thus that it might be called the complexity era"*[15]. To further confirm this process it may be useful to mention the ambitious project of the theorists of behavioural economics: it is an emerging field[16] whose aim is *"to synthesize findings from economics, political science and psychology into a more unified theory of individual and multi-person decision theory*"[17]. In the light of these perspectives, I believe it may reasonably be admitted that, in the area of Economics research, the neoclassical approach is about to lose its role of "accepted model or pattern"[18], that is to say of a paradigm, so that jurists themselves – and labour jurists in particular – are called to a careful control of the impact of traditional cognitive paradigms, which are shaped

[14] BARKLEY ROSSER jr, *Frontiere della ricerca economica*, in *Treccani – XXI secolo*, 2009, *treccani.it*; cf. KIRMAN, *Whom or What Does the Representative Individual Represent?*, *Journ. Econ. Persp.*, 1992, 6(2), p. 117: "*my basic point is to explain that this reduction of the behavior of a group of heterogeneous agents even if they are all themselves utility maximizers, is not simply an analytical convenience as often explained, but is both unjustified and leads to conclusions which are usually misleading and often wrong*". In the classical sense, cf. for example JENSEN, MECKLING, *The nature of man*, in *Journ. Appl. Corp. Finance*, 1994, 7(2), p. 4; after discussing "*five alternative models of human behavior that are commonly used (though usually implicitly) … the Resourceful, Evaluative, Maximizing Model (REMM), Economic (or Money Maximizing) Model, Psychological (or Hierarchy of Needs) Model, Sociological (or Social Victim) Model, and the Political (or Perfect Agent) Model (…) we argue that REMM best describes the systematically rational part of human behavior. It serves as the foundation for the agency model of financial, organizational, and governance structure of firms*". For a critique of the *homo oeconomicus* model, see also INFANTINO, *Potere*, cit., p. 28 ff.

[15] HOLT, BARKLEY ROSSER Jr., COLANDER, *The Complexity Era in Economics*, in *Rev. Pol. Econ.*, 2011, 23(3), p. 357, who continue as follows: "*The complexity era has not arrived through a revolution. Instead, it has evolved out of the many strains of neoclassical work, along with work done by less orthodox mainstream and heterodox economists. It is only in its beginning stages, but it is, in our view, the wave of the future*". More comprehensively, BARKLEY ROSSER Jr., *Complex Evolutionary Dynamics in Urban-Regional and Ecologic-Economic Systems: From Catastrophe to Chaos and Beyond*, Springer, 2011, where the attempt is to analyse the approaches based on discontinuity developing an "*integrated view of economics as a whole from the perspective of inherent discontinuity*".

[16] It should be highlighted, however, that "*behavioral economics*" has remarkable precedents in the 1950s works of SIMON H.A. (according to whom, economic choices often aim at satisfying rather than optimising, as the standard theory assumes instead) and ALLAIS (whose "paradox" describes the fact that, in situations of risk, many people assign exceedingly high values to given probabilities, if these represent the difference between risk and certainty). Cf. *Behavioral Economics*, sub entry, *Enciclopedia Treccani on line*, *treccani.it*.

[17] CAMERER, TALLEY, *Chapter 21 - Experimental Law and Economics*, in POLINSKY, SHAVELL (eds), *Handbook of Law and Economics*, Elsevier, 2007, vol. II, p. 1619. More recently, ENGEL, *Behavioral Law and Economics: Empirical Methods*, in *Max Planck Society Preprints of the Max Planck Institute for Research on Collective Goods*, Bonn 2013/1, www.coll.mpg.de/pdf_dat/2013_01online.pdf. For a preliminary analysis cf. HOFFMAN, SPITZER, *Experimental Law and Economics: An Introduction*, in *Col. Law Rev.*, Vol. 85, No. 5 (Jun., 1985), pp. 991-1036, who spoke in terms of "*new research technique*" (Spitzer and Hoffman are considered to be the ones who "*first introduced the idea of experimental law and economics*" by MCADAMS, *Experimental Law and Economics*, in BOUCKAERT, BOUDEWIJN AND DE GEEST, GERRIT *(eds.)*, *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics*, Elgar, 2000, p. 539 ss.). Cf. WRIGHT J.D., GINSBURG D.H., *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, in *Northwestern Un. Law Rev.*, Vol. 106, No. 3, 2012.

[18] KUHN T., *La struttura delle rivoluzioni scientifiche*, Einaudi, 1969, p. 43.

by economic science or, more often, by its ideological jargon[19], on the argumentative construction and, before that, on the legal framework one[20]. It is indeed meaningful that a careful (sometimes visionary) scholar of the post-modern transition draws attention to the urgency of a "prudent knowledge", to be combined with a greater ethics of responsibility and opposed to the easy ethical approaches of conviction[21].

In other words, and to the purpose of the paper, the very presence of significant fragments of a new paradigm urges to take two issues seriously at last (and to rethink them in the light of this evolution): a) the first, concerning the *limits* and *fallibility* of human rationality, either individual or institutional, especially if and when it is called to perform in complex social systems[22]; b) the second issue, which concerns the plausibility of a "privileged point of view" on the world, the search for which seems to be as ambitious as it is often useless because of the real *wastage* of knowledge and of the plural *proliferation* of interests[23]. If we agree on the validity of this starting point, which is more related to the human aspect than to the economic one, the consequences on the extension and intensity of legislation and the very function this can have without causing unwanted or even perverse unforeseen events appear to be immediately perceivable. Besides, it is well-known that a particular analytical and heuristic consideration has been established in the framework of the game theory, namely that of 'strategic rationality' to the detriment of the one traditionally known as 'parametric': the former provides a synthetic description of the maximising behaviours adopted by individuals on the assumption that individual actions leave the environment in which others also make their

[19] "The mistake that a large part of the operators – lobbyists, lawyers, politicians and influential economic journalists –namely those who refer to the traditional economic literature make, is that they do not realise that the handbook-like conceptualisation of the free market might well describe all these qualities, but not only does such a market not exist, it probably cannot exist in reality": Basu, *Oltre la mano invisibile. Ripensare l'economia per una società giusta*, Laterza, 2013, p. XI, where he also states (p. 17) that "Smith's great intuition has gradually crystallised in a rigid, inflexible doctrine, that here I define 'Smithian myth'". [my translations]

[20] Of all, it is sufficient to quote GENTILI, *Informazione contrattuale e regole dello scambio*, in *Rivista Diritto Privato*, 2004, p. 555: "The discipline of contract information is the expression of the marginalist economic theory on which contract theory is based" and the following consideration in a footnote "the point is obvious, but probably also for this reason seldom considered in the juridical doctrine" with quotations from LANZILLO, *Regole del mercato e congruità della scambio contrattuale*, in *Contratto Impresa*, 1985, p. 309 and GORDLEY, *The philosophical origin of modern contract doctrine*, Claredon Press, 1991. [my translations].

[21] DE SOUSA SANTOS B., *Toward a New Common Sense. Law, Science and Politics in the Paradigmatic Transition*, Cambridge University Press, 1995. "*The ecology of knowledge enables us to have a much broader vision of what we do not know, as well as of what we do know, and also to be aware that what we do not know in our own ignorance, non a general ignorance*": ID., *Beyond Abyssal Thinking: from global line to ecologies of knowledge*, in *Review*, 2007, vol. XXX, no. 1. The call for an ethics of responsibility is to be viewed according to JONAS, *Il principio responsabilità. Un'etica per la civiltà tecnologica*, Einaudi, 1990.

[22] Cf. also MINOGUE, *La mente servile. La vita morale nell'era della democrazia*, IBL libri, 2012.

[23] "The peculiar nature of the problem of a rational economic order is due precisely to the fact that the knowledge of the circumstances we are supposed to use never exists in a concentrated or integrated form, but only as scattered fragments of incomplete and, often, contradictory knowledge which all individuals hold separately", HAYEK, *The Use of Knowledge in Society*, in *Amer. Econ. Rev.*, 1945, 35, 4, p. 519 [my translation].

choices unchanged; the latter, instead, is based on the idea that because individual choices change the surrounding environment, they are conditioned choices, that is to say choices whose outcomes depend on the *interactions* that are set up with the choices of the other actors.

A typical example of this is a growing discipline[24] which tends to discourage the use of overtime in the attempt to increase additional employment, to be implemented by means of dedicated taxation: needless to say, such a discipline – which still seems to assume the abstract model of a rationally utilitarian entrepreneur – cannot but be characterised by high levels of ineffectiveness, since it is unable to understand the real context of production, the specific interests of the parties or the interpersonal relationships (and possibly, not even the merely economic factors, considering that the new recruits' training cost could be higher than the taxes on overtime). Similarly, it does not seem surprising that, in lasting critical contexts characterised by high income taxes, the social partners have been led (as they did in the recent agreement of 24 April 2013) to use the financial resources available to achieve a reduction in labour costs rather than to ensure a correlation (which the law imposes in an abstract manner) between de-taxation and reorganisation, to be pursued by reorganising the work hours, assigning holidays in a more flexible way, using new technologies to control the working environment or using employees for different tasks. Regardless of the system's consistency and of the practical opportunity of using public resources (in terms of positive or negative incentives) to affect the companies' choices on matters of organisation (even by promoting a different distribution of tasks), and failing to consider that this situation draws our attention on the existence of a critical salary issue in our country that is caused, among other things, by an omnivorous fiscal policy, it is clear that in both taxing and de-taxing overtime, the law seems to not be taking in due consideration that the concrete economic and organisational contexts call for specific adjustment strategies among the actors concerned, even regardless of the potential benefits the law abstractly hypothesises (and of the economic models themselves).

This is the reason why, in the clash between antagonist law and mimetic law, I[25] and several others[26] have long deemed it reasonable to put forward a mild regulation ("*diritto mite*" in italian language) model, which focuses more on defining the frame than on painting the picture,

[24] Para. 19 of Art.. 2 of Law no. 549 of 28 December 1995: "For companies with more than 15 employees, overtime work entails paying a contribution equal to 5% of the pay for the overtime hours worked to the Fund for temporary work of the National Institute of Social Welfare (INPS). For industrial companies, the amount is 10% for the hours exceeding 44 hours and 15% for those exceeding 48 hours".

[25] VISCOMI, *Modelli normativi e prassi contrattuali nei mercati di lavoro locali*, in *Diritto del Mercato del Lavoro*, 2001, p. 371.

[26] CARUSO, *Alla ricerca della "flessibilità mite": il terzo pilastro delle politiche del lavoro comunitarie*, in *Diritto Relazioni Industriali*, 2000, p. 141; ID., *Il diritto del lavoro nel tempo della sussidiarietà (le competenze territoriali nella* governance *multilivello)*, in *Argomenti Diritto Lavoro*, 2004, p. 842.

more on the 'how' than on the 'what'. In order to be implemented, however, this model requires and assumes that the pretension (or obsession) of juridical modernity (in fact, of the policy-maker) to freeze the multiplicity of change in the inelasticity of the law is finally abandoned: "There is too much law" – complained Jean Carbonnier[27] a few years ago – "it is necessary to reduce the juridical burden and change the type of norms at the same time" [my translation]. In practical terms, this means to be able to devise a light regulation, be it legislative or contractual, which limits itself to defining the 'frame', thus letting individual and/or collective actors paint the 'picture'. Therefore It seems fair to believe that an *approach taking into due account the complexity of the economic system must be accompanied by a necessary re-consideration of the sources and forms of regulation even before that of the contents of the regulations, while fully abiding to the principle of subsidiarity*, which is to be viewed as a constitutional criterion of the structure and legitimation of the sources of labour law, both in terms of decentralisation of regulatory competences and in the opposite meaning of bringing them back to the centre when the situation being regulated cannot be regulated in an optimal way elsewhere[28].

Having said this, it is not difficult to agree with Luca Nogler, who remarks the impossibility to reduce reality to any abstract regulatory model[29]. Similarly, the methodological suggestion given by Luigi Mengoni to jurists remains relevant and topical: to combine "talent" and "imagination" (if and when they are present) with a careful "control of one's pre-comprehension"[30]. Actually, the necessary cognitive opening and the adoption of analytical methodologies focussing on the economic and organisational dimension – and, however, no longer stuck in the formalism of a rigid organisational *Stufentheorie*[31] – cannot translate into (or, I would say, reduce themselves to) a belief that the "postulates of market economy constitute the *prius* of juridical solutions"[32] [my translation]. It would be surprising if this should really happen, if one only considers the second thoughts of one of the strongest

[27] CARBONNIER, *Flessibile diritto*, Giuffrè, 1997, p. XXIX.

[28] NAPOLI, *Le fonti del diritto del lavoro e il principio di sussidiarietà*, in *Giornale diritto del lavoro e relazioni industriali* 2002, p. 85; TULLINI, *Breve storia delle fonti nel mercato del lavoro*, in *Argomenti Diritti Lavoro* 2005, p. 168, while believing that "a more relational, inclusive, and tolerant dynamics of the sources according to the twofold coordinates of subsidiarity (…) is, then, the only possible vision to deliver the integration of social and juridical pluralism at community level", it marks the appearance of an "acute need to process the changes by means of an additional reflection and comprehension effort", taking into account the possible risks of de-structuring for the reference legal framework also because "the difficulties to resolve the socio-economic conflicts that are not 'mild' cannot be concealed" [my translation].

[29] NOGLER, *Problema e comparazione nella controversia sulla riforma del diritto del lavoro*, in *Politica del Diritto*, 2012, p. 53: "People do not make their choices based only on the rationality of the *resourceful evaluating and maximising man*, not even if they are entrepreneurs, as experimental economics shows" [my translation].

[30] MENGONI, *Ancora sul metodo giuridico*, in *Rivista Trimestrale Diritto Procedura Civile*, 1984, p. 330.

[31] Please refer to some reflections on this aspect in VISCOMI, *L'adempimento dell'obbligazione di lavoro tra criteri lavoristici e principi civilistici*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2010, p. 595.

[32] NOGLER, *op. loc. ultt. citt*.

supporters of *Law and Economics*, who described it using such phrases as "glorious past" and "cloudy future", putting forward a greater attention to "institutional arrangements" as a possible fruitful line of research and calling for an even greater attention to "the demands of history"[33]. Quite paradoxically, it is the more economy-focussed orientations that have been rediscovering the historical and social dimension of law recently, together with its action in shaping and keeping together a social community. It is then worthwhile to stress, once again and precisely at this point, the compelling 'planning' (and not merely exegetical) nature of labour law[34]. Possibly, that opening and those methodologies should raise, in jurists too, a mature awareness of the deep condition of *uncertainty in which we find ourselves with regard to the actual consequences of a regulation (and interpretation) that is due to act in complex contexts, which cannot be fully controlled* even by the most sophisticated algorithms. With regard to this, one might just think of the doubts concerning the impact that re-employment protection has on employment or, more in general, the current debate on the relationship between budgetary policies and growth policies[35]. Such a cautious attitude is all the more necessary as the economic analysis extends from the descriptive level to the prescriptive one, where it is often presented as the ultimate, therefore quasi-religious truth (in fact, orthodoxy is now more a subject for Economics in the academia than for theological debate). It is precisely the consideration of the presumption of being able to encapsulate the complexity of the world in the linearity of Excel spreadsheets, with their banal calculation errors, that led Paul Krugman to write a forceful editorial in the New York Times[36]: "*These aren't good times for austerian economics; and, to be honest, they aren't too good for economics in general. Even if some economists have come out of the Reinhart/Rogoff/Alesina/Ardagna business looking pretty good, the reputation of the intellectual enterprise as a whole has clearly suffered*".

From this point of view, while still doubting the actual implementation of what was planned, I believe that, quite remarkably, Law no. 92 of 28 June 2012 has introduced an observatory aiming at monitoring the effects of the reform on the efficiency of the labour market, on the citizens' employability, on the ways to obtain and leave a job (art. I, para. 2). According to the

[33] EPSTEIN, *Law and economics: Its glorious past and cloudy future*, in *Un. Cal. Law Rev.*, 1997, 64, 4, p. 1167.
[34] I am referring to the title of BAYLOS GRAU's book, *Diritto del lavoro: un modello per progettare*, Giappichelli, 1993.
[35] For all, cf. the recent debate raised by REINHART, ROGOFF's book, *This Time Is Different: Eight Centuries of Financial Folly*, Princeton University Press, 2009, and the critical remarks of HERNDON, ASH, POLLIN, *Does High Public Debt Consistently Stifle Economic Growth? A Critique of Reinhart and Rogoff*, in *University of Massachusetts, Political Economy Research Institute*, WP 322, April 2013 according to whom: "*the evidence we review contradicts Reinhart and Rogoff's claim to have identified an important stylized fact, that public debt loads greater than 90 percent of GDP consistently reduce GDP growth*".
[36] KRUGMAN, *Varieties of Academic Temptation*, 3 May 2013, in *krugman.blogs.nytimes.com*.

law, the outcomes of the monitoring and of the following evaluation can produce "elements for the implementation of or any corrections to the measures and actions introduced by the (…) law, also in the light of the evolution of the macroeconomic picture, of production trends, of the labour market's dynamics and, more in general, of social dynamics" (art. I, para. 3)[37]. In Deakin and Wilkinson's words, "finding the 'right' type of regulation is a process of discovery, in the labour market just like everywhere else"[38] [my translation]. The well-known risk is that an objectively improper regulation (or one that the actors perceive as such) may be immediately marked by high levels of ineffectiveness. Actually, we might well suggest a direct correlation between the effectiveness of regulation and the compatibility with the development dynamics of an organised economic system"[39].

All in all, the fact of calling Economics a science – following what Pugliatti said about Law – seems to have a somewhat 'mythological' nature: the word knowledge ("sapere" in Italian language) seems to be more appropriate and preferable, in fact, as it better comprehends the limits of human rationality[40]. Also for this reason, the law-maker and, more in general, any regulating subject that is aware of the systemic complexity in which they work, cannot but give up their pretension of *cognitive self-sufficiency* and of *regulative hybris* in favour of a more rational, cautious attitude based on a *pragmatic, experimental approach*[41]. The coordination of initiatives is, in fact, not always useful, nor does it always produce the expected results, not only because it may affect the spontaneity of individual actions and prejudice the desired optimal outcome for the community, *but rather because of the difficulty to predict the consequences of the choices made, especially when they concern a variety of social, economic and cultural contexts*. As Coase writes: "I am convinced that … policy-makers have overestimated the advantages deriving from the government's action"[42] [my translation]. Such

[37] According to Art. 2, para. 8 of Decree-Law no. 76 of 28 June 2013 converted into law no. 99 of 9 August 2013, the extraordinary measures provided for herein to promote youth employment are the object of monitoring *ex lege 92*.

[38] DEAKIN, WILKINSON, *Capabilities, ordine spontaneo del mercato e diritti sociali*, in *Diritto del mercato del lavoro*, 2000, p. 338.

[39] Cf. BIN, *Effettività*, in DI COSIMO, LANZALACO (a cura di), *Riscoprire la sfera pubblica*, Atì editore, 2012, p. 59: "Effectiveness and efficiency are the natural dimension of the market and its rules. The market does not have the problem of the validity or legitimacy of the behaviour models it imposes" [my translation].

[40] PUGLIATTI, *Diritto pubblico e diritto privato*, in *Enciclopedia del diritto*, XII, Giuffrè, 1964, p. 722.

[41] "In the traditional culture a law, a treaty, an agreement 'close' a problem, freezing it for a long time. In my personal opinion, a dynamic idea of the rule and mandate should be experimented instead, which, since the very beginning, provides for 'windows' allowing changes to be made quickly", BARATTA, *Come cambia la rappresentanza politica e sindacale nel post-fordismo. Spunti per un'agenda*, in *Quaderni Rassegna Sindacale*, 2010, 4, p. 129 [my translation].

[42] COASE, *Impresa, mercato e diritto*, il Mulino, 1995 p. 222, who continues: "this opinion, justified as it might be, cannot go beyond the suggestion that government regulation should be reduced; it does not say where the boundary should be drawn" [my translation].

advantages could, instead, be remarkable if using a mild and reasonable regulation that is able to enhance the 'scattered', 'fragmented' cognitive contribution of the socio-economic actors[43].

Adaptation to the context and search for new ways

It is time now to make some reflections on the second of the terms put in relation in the workshop title: juridical rules (in particular, the ones relating to labour, of course). Before discussing their efficiency, as the title suggests, I believe a definition of their function is necessary, as, without this preliminary investigation, the very notion of efficiency would be heuristically unproductive. As a matter of fact, in its basic dimension the notion of efficiency *compares the achieved results with the efforts undertaken to attain them*. Therefore, a system is considered efficient if it makes it possible to achieve the set objectives through an optimal use of one's resources. This is the reason why – although every encounter between Labour Law and Economics involves a methodological issue[44], and more precisely the definition of the disciplinary epistemological statute together with a cognitive openness towards other forms of know-how – every encounter presupposes and imposes an identity reflection on the *function of the discipline* and its current state, maybe a bit too often rhetorically smuggled as "crisis" of labour law. Rather than in a crisis, labour law seems to me to be looking for *new ways* capable of ensuring, in this bewildered beginning of the century, that labour remains a human experience marked by the aim proclaimed by the Constitution: an instrument of individual fulfilment and participation in the material or spiritual progress of society, in which every person's dignity is deep-rooted and their fundamental freedom guaranteed[45]. As it has been effectively said: "*Labour law's back pages do not have to dominate our thinking ... Both substantive and procedural labour law will have to find new techniques and platforms of operation to do the required work*"[46].

In other words, the question is not "if and to what extent labour law must discard its genetic makeup"[47], but how it can achieve its aims in different, instable and dynamic contexts: after all, *from an evolutionary perspective the competitive advantage does not derive from conserving*

[43] Similarly, the enhancement of the actors' autonomous composing skills derives more from an awareness of the fragmentation and wastage of knowledge than of confidence, which was critically discussed by TULLINI, *Breve storia*, cit., p. 166, "in the (institutional and social) actors' capacity to cooperate and collaborate". The very realistic consideration of such capacities calls for a clear, relevant legal framework.
[44] DEL PUNTA, *op. loc. ultt. citt.*
[45] Cf. ZAGREBELSKY, *Fondata sul lavoro. La solitudine dell'art. 1*, Einaudi, 2013.
[46] LANGILLE, *Labour Law's Back Pages*, in DAVIDOV, LANGILLE (eds), *Boundaries and frontiers of labour law*, Hart, 2006, p. 13 and below 32, 34.
[47] GARILLI, *La crisi del diritto del lavoro*, in *temilavoro.it*, 2012, 4(1).

one's original characters like in a museum but from being able to adapt them to the context. From this point of view, the jurists' contempt for the cognitive contribution of social and economic sciences[48] (that is, their seeking refuge in a set of rules or in a merely exegetic perspective) entails an immediate and evident impairment of the ability to understand and transform reality. This is why it is still worth quoting Heidegger's famous aphorism: "What is decisive is not to get out of the circle but to get into it in the right way"[49].

If one agrees with this remark, the "structural surplus of labour law compared to the market, the market demands, the market economy, the market ideologies"[50] is not such as to marginalize the circumstance that "the problems of economic development and efficiency are central to labour law, at least for those who try and develop legal rules in a responsible way – that is by discussing the solutions and taking all the stakeholders into account. In order to assess how these stakeholders are involved in concrete cases it is not sufficient to refer to abstract models, however, but it is necessary to relate to the empirical reality"[51]. Therefore Ichino is right when he says that "we must be wary not only of the absolute pretension to explain everything by means of theoretical models inspired by Neoclassicism, but also of the absolute pretension to deny any usefulness of those models (…). It is always just a matter of understanding which part of reality can be explained by each model"[52]. In his words: "not a mortal duel between Law and Economics but, a fundamental contribution that Economics can give (both when it comes to creating the rule and to interpreting it) to the reinforcement of law, that is its ability to actually make an economic *being* correspond to *being set* by the rule" [my translation], that is by politics, the shared society model in which a community decides to identify itself. Quoting: "*Economics should not be expected to provide us with a set of straight-forward answers. Nor should we treat economics analysis as the only valid insight into the problem of labour law….Nevertheless, economics plays a vital role in helping us to understand the cost and benefits of policy choices*"[53].

[48] With some conceptual twist, some link it to the well-known statement on the "hybrid mixture" between law and sociology described in the *Introduction* by BARASSI, *Il contratto di lavoro nel diritto positivo italiano*, Milano, 1901, p. 2. I say twist, because the well-established autonomy of the two branches of knowledge is linked to the construction of identity of the budding discipline.
[49] HEIDEGGER, *Essere e tempo*, § 32, p. 166.
[50] Which is strongly affirmed by BARBIERI, *Lavoro e diritto*, cit., p. 3.
[51] NOGLER, *op. cit*., p. 55.
[52] ICHINO, *Il giuslavorista tra marginalisti e istituzionalisti*, intervento al convegno della Fondazione Jacopo Malagugini "*I diritti del lavoro e le pretese dell'economia*", Milan, 16 February 2001, in *fondazionemalagugini.it* and also in ID., *I giuslavoristi e la scienza economica: istruzioni per l'uso*, in *ADL*, 2006, p. 454 ff.
[53] DAVIES, *Perspectives on Labour Law*, Cambridge University Press, 2009, p. 35.

Contract, market and juridical regulation

In this perspective, one should consider that labour law has a twofold nature, so to say, since on the one hand it is meant to regulate the continuative functional integration of individual services in the framework of an organisation devoted to the production of goods or services; on the other hand, it has to regulate the encounter between demand and supply in the peculiar dimension of the labour market. *The contract and the market are therefore the two environments – neither symmetrical nor homogeneous – typical of labour law regulation*. With reference to the former aspect, and trying to summarise the outcomes of earlier reflections, we may state that the employment contract is a *technologically sophisticated device* that is genetically destined to ensure the integration of service and organisation: to this purpose, it legitimises (and therefore limits) the employer's unilateral power in the framework of a lasting relationship. In this perspective, labour law has shaped the industrial revolution in its various stages, acting as a tool to manage the typical total institution that the factory was (and still is) as well as to rationalise the capitalistic production system. Hence the organisational logic imbues or should imbue the construction, interpretation and application (especially in judicial settings) of legal rules; also because of this, the cause of an employment contract can be better identified in the possibility to organise the service rather than in the mere availability of workforce. On the other hand, it should be admitted that the very construction of the cause ("causa del contratto" in italian language) as the function (or functional synthesis) of the contract is such that it inhibits any attempts to affirm a necessary separation between the legal dimension (having to be) and the economic-organisational one (being), so much so that the cause usually appears as an instrument of (public and, in Betti's perspective, authoritarian) control over (private) economic operations. In other words, for a variety of reasons, I do not think that *the labour law's genetic code could be exclusively related and reduced to the worker's protection* by means of the configurative or ablative effects stemming from the principle of mandatory rule, so much so that this approach becomes incompatible with the economic and organisational reasons. Conversely, that code appears to be much more complex, for at least two reasons: on the one hand, because of the combination of the *in-company* dynamics legitimising and limiting organisational powers and the *out-of-company* function to manage the labour market; on the other hand, because the worker's protection itself cannot be identified with the deprivation of autonomy but rather, as I tried to discuss elsewhere, with the strengthening of that autonomy by means of appropriate, variable consolidation legal strategies. As was recently observed, "*Labour law may be implemented for a variety of goals, some of*

which may not be protective of workers interests"; hence the following remark *"the adoption of a broader perspective is crucial to the future health and vitality of labour law scholarship*"[54]. In this perspective, an analytical approach following the category of Macneil's *relational contracts*[55] can be fruitful for labour law scholars, just as what Macneil more recently defined *relational thinking*[56], meaning "*the complex patterns of human interaction that inform all exchange*"[57]. In this perspective, it is well known that the crucial economic function of a relational contract is to reduce the transaction costs that may derive from the constant re-negotiations that should be needed to adapt the service to the changing organisational structure of the production[58]. A typical example is the discipline of tasks, whose unilateral variability makes it possible to reduce the transaction costs that may derive from the application of the norm of *ius commune* to the change of the object in a concrete case (art. 2013 civil code) This is also true if and when one wishes to agree with those who deem it necessary to revise relational theories on the basis of the specific nature of individual contracts, in particular concerning the employment relationship due to the power asymmetry between the parties[59]. In judge Stevens' words, "*a contract is not just a piece of paper; just as a single word is the skin of a living thought, so is a contract evidence of a vital, ongoing relationship between human beings*"[60]. It is precisely this relational aspect – the fact that not only is the service not limited to one act alone but must also occur within a dynamic context – that explains the need to re-think *regulative contents and regulating sources*. It is sufficient to mention, here, the complicated

[54] HOWE, *The broad idea of labour law: industrial policy, labour market regulation and decent work*, in DAVIDOV, LANGILLE (eds), *The Idea of Labour Law*, Oxford University Press, 2011, who continues: "*The broader perspective assists in conducting more complete, long term analysis of regulation which pertains to the person dependent upon their labour for subsistence. It is less prone to crises related to avoidance of traditional labour law and changing work relationships, because the subject matter is not tied to a particular form of work relationship, and allows for analysis of variation in working arrangements by industry*".

[55] Reference is made to MACNEIL, *Contracts: Exchange Transaction and Relationships*, Foundation Press, 1971.

[56] MACNEIL, *Relational Contract: what we do and do not know*, in *Wis. Law Rev.* 1985, 483 ss.

[57] MACNEIL writes: "*To have even a glimmer of hope of understanding relational contract we must overcome the impact hundreds of years of history have had on our minds. We must start with exchange viewed broadly. By now, we are so brainwashed as to be almost unable to conceive of exchange except in terms of markets and discrete transactions. But exchange is not the product simply of social relations so organized. Rather, exchange is the inevitable product of specialization of labor, however that specialization of labor may occur. Whether in a factory, in a commune, within a corporation, between discrete entities in markets, or within a family, exchange will occur as long as specialization exists. Understanding this is the first step towards freeing ourselves of the Hobbesian and utilitarian intellectual blinders which prevent us from understanding contract behavior and with it relational contract*" (p. 485).

[58] Cf. HVIID, *Long-term contracts and relational contracts*, in BOUCKAERT, BOUDEWIJN, DE GEEST, GERRIT (EDS.), *Encyclopedia of Law and Economics, Volume III. The Regulation of Contracts*, Elgar, 2000, p. 46 ff. for a more comprehensive distinction between the two contract types mentioned in the heading of the entry quoted and for the closing remark "*The main contribution of the relational contract theory so far would appear to be to highlight the potential importance of the relationship between the contracting parties and the social groups to which these belong, including the importance of norms and non-legal sanctions*".

[59] BRODIE, *How relational is the employment contract?*, in *Ind. Law Journ.*, 2011, p. 232.

[60] Epigraph to BIRD's essay *Employment as a relational Contract*, in *Un. Pa. Jour. Lab.Empl.*, 2005, p. 149.

story of fixed-term contracts during seasonal activity peaks or of week-end contracts for the motorway toll collectors to realise the harmful consequences of the prejudices on the indefeasible otherness of the legal and economic logics and of the widespread belief, in Italy, that the rules of law (and deriving bureaucratic regulations) are the solution *par excellence*. Again, in this perspective, labour law shows its own specific nature, being it impossible to attribute to it the contract's conditions of allocative efficiency which civil law has recently adopted as the instrument to explore the contract's juridical theory. It is stated that "its main function cannot but be to determine the factual circumstances that are best suited to guarantee the subsistence of (…) conditions" [my translation] of allocative efficiency (or Pareto optimality: negative externalities, information, competition, cooperation)[61].

The awareness of the consequences of (regulative or interpretative) choices in complex contexts – organisational or more generally economic – should therefore lead to a *carefully-designed, aware balance of decisions* (legislative or interpretative, above all in the jurisprudence), also in order to avoid well-known negative effects. An emblematic case is the discipline of the nullity of contrasting agreements concerning change of tasks, whose strict application has abstractly led to a situation in which it justifies losing a job rather than maintaining it, albeit in a de-qualified form[62]. This considered, it is reasonable to hope that the legislator will give up the pretension to coordinate the action of the social and economic actors in a binding way, trying to focus instead on better defining the set of protections that might best prevent opportunistic behaviours limiting the aspirations to freedom of the individual contracting parties.

At the same time, looking through the prism of the market, labour law or, in a wider sense, the public regulation of the labour market (which is made up of rules as well as of administrative agencies and services) is required to put in place the best conditions for an optimal allocation of the workforce, in order to promote (not ensure, of course) the growth of employment or, at least, to prevent the increase of unemployment, thus implementing Art. 4 of the Constitution. It is no coincidence that the most significant observations on the relationship between law and the market have been made on this particular aspect, considering that the protective and distributive rules of labour law objectively have the function of creating and governing the labour market: just think of the monopolistic function of public employment centres or, by way

[61] DI CIOMMO, *Efficienza allocativa e teoria giuridica del contratto*, Giappichelli, 2013.

[62] Cf. the different perspectives of Cassation no. 8527 of 14 April 2011 ("The provision of art. 2103 c.c. which forbids a worker to be destined to lower tasks is an imperative rule that cannot be disregarded even by the parties' agreement") and of Cassation no. 17095 of 8 August 2011 ("The ban on assigning a worker to lower tasks does not apply in the cases when such assignment is made on the worker's request, based on the latter's exclusive choice, where the worker has made this unilateral decision without any urge – even indirect – from the employer"), both in *Massimario Giurisprudenza Lavoro*, 2012, 7, p. 540.

of example, of the affirmation of the principle of equal treatment between immigrant and autochthonous workers[63], whose justification and raison d'être lie in the protection of autochthonous work rather than in the mere acknowledgement of personal dignity (in which case one should explain why immigrants are not allowed to find work with lower pays, but still with a remarkable gain compared to their personal starting situations).

From this particular point of view, I will only point out that today labour law has to find a balance between acknowledging the plural, specific nature of local markets and the growing standardisation of treatments, which derives from the general, abstract law (even when it is autonomous, not only heteronomous). It is not possible to go into much detail here, since the issue is quite complex due to the risk of a regulatory de-structuring and of a balkanisation of competition. However, to the purposes of this paper, I would like to remark that the variety of regulations highlights the paradox and limitations of a regulation (even more than a rationality) that is not able to combine the focus on principles with the awareness of consequences and to avoid, at the same time, the ineffectiveness of commendable statements of principle and the widespread instrumentality of a law without a history. This dilemma is probably one of the main challenges for labour law, whose goal is to bring the needs of a *controlled differentiation of the rules, including at the local level*, back into the juridical logic, also re-thinking the relations with trade unions we were used to in the 20th century. I am referring not so much to the (almost non-existing) proximity contracts provided for by Art 8, Decree-Law no. 138 of 13 August 2011 converted into Law no. 148 of 14 September 2011, as to the derogation agreements established by the latest interconfederal agreements (as an example, Art. 4-bis of the Collective Agreement of metal workers and Art. 25 of the Collective Agreement of chemical workers – the latter undersigned also by CGIL).

In conclusion, it should be stressed that new types of synthesis are necessary, bringing together law and the market, so that the former may see the values it conveys implemented, and the latter work fruitfully. In my perspective, at least *three pre-conditions* must be satisfied to this purpose: a) giving up the regulatory (and authoritarian) obsession of modernity and enhancing the social partners' ability to work on common interests; b) suggesting a reorganisation of the sources of discipline to enable an appropriate regulatory differentiation based on the principle of subsidiarity and following transparent negotiation processes; c) adopting regulatory resilience strategies enabling labour law to act as a system able to adjust to the cultural and economic evolution and to the variety of local labour markets. This does not mean to neglect the power

[63] Please see VISCOMI, *La disciplina delle migrazioni economiche tra protezione dei mercati e promozione dei diritti. Spunti per una discussione*, to be published in *Scritti in memoria di M. G. Garofalo*.

asymmetries existing in the relationship and on the market; conversely, it means to identify instruments suited to ensure that the reduction of asymmetries does not lead itself to the greatest asymmetry, that is the failure for labour supply and demand to meet.