PIETRO ICHINO

JOB SECURITY AND THE VALUE OF EQUALITY

1. A crucial question about equality: is it fair to dismiss an inefficient worker?

A few months ago a decision of the Italian Court of Cassation was published, about dismissal for economic reasons, which lends itself as a starting point for a *law and economics* approach to the notion of "good economic reasons for dismissal" and for a discussion about the role played by the equality principle in the labour law ([1]). The case can be summarized as follows: the chambermaids of a large hotel are normally able to tidy up 30 rooms each, every day; one of them, through no fault of her own, for some time has been (and still is to-day) able to tidy up only 15 rooms; for this reason she is dismissed. Can the dismissal be considered fair, in the light of the principle of justification of dismissals established by all the European national laws?

If we search in the case-law books of the last decade for a rule on which to base the solution to the problem, we can find several, each of them in contrast with the others. We can schematically classify them in the five types of maxims that follow:

A. the dismissal is *justified* if it is necessary in order to reduce a business loss of the company as a whole; *not justified* if it is aimed at increasing profit ([2]);
B. the dismissal is *by all means justified*, because the employer cannot be obliged to maintain a loss-making relationship ([3]); and, from this point of view, also the "opportunity cost" – that is, in our case, the productivity difference between the chambermaid considered and the best one available and willing to substitute her - constitutes a loss;

([1]) Cass. 5 marzo 2003 n. 3250, which can be read in *Rivista italiana di diritto del lavoro*, 2003, II, p. 689.

([2]) My knowledge is limited to the Italian and the French case-law, but I think that it would be easy to find similar decisions also in the Austrian, Belgian, British, Dutch, German, Spanish or Portuguese case-law books. See, substantially in the same sense indicated in the text, among the most recent other Italian decisions, Cass. n. 6067/1994 and Cass. n. 11646/1998; among the French ones, ********** ********** **********.

([3]) See, substantially in the same sense indicated in the text, among the most recent other Italian decisions, Cass. n. 6067/1994 and Cass. n. 6621/1995.; among the French ones, ********** ********** **********.

C. the dismissal is *by all means justified*, because the worker's output is markedly lower than the normal one, which is the performance by contract due to the employer ([4]);
D. the dismissal is *by no means justified*, because the risk of output reductions without fault is born by the employer ([5]);
E. the dismissal is *justified* if the employer eliminates the job, inside the organization; *not justified* if he substitutes the worker with another ([6]).

These juridical maxims accord quite well with the common sense maxims followed by the man in the street in order to settle the question, these too contrasting with each other. When right wing ideas prevail in him, we hear usually him saying: "the undertaking is not a welfare institution: it cannot be obliged to work at a loss"; or: "if I can substitute a worker by an engine, why on earth should it be forbidden for me to substitute him by another more efficient worker?"; or again: "the firm offers a standard treatment in order to obtain a standard contractual performance; if the performance is below the standard, the firm must be entitled to dismiss, otherwise it will go bankrupt". On the contrary, when left wing ideas prevail in him, we hear him saying: "the employer cannot judge workers as if they were animals; he cannot choose the strongest worker, the most intelligent, the most beautiful, the smartest one"; or: "to substitute a worker by another means to put workers in competition with each other: it is fair that the law prevents one worker from undercutting the other".

If common sense supplies diametrically opposed indications for the solution of our problem, we don't get more help by referring to the legal norms that governing this matter. Looking at the Italian ones (quite similar to the corresponding norms governing the same matter in the other European countries ***and at the norm about job protection contained in the new E.U. Constitution), they seem, at first sight, to support the argument in favour of the most permissive maxims; but it is easy to be convinced that this argument proves too much and is based on a wrong interpretation of the norm.

Sect. 3 of the Italian Statute n. 604/1966 foresees, in its first part, that "dismissal with notice can be caused by an important breach of the worker's contractual duties": if in the notion of important breach to which the norm refers there could be by all means included also the breach without fault, this part of the norm could supply a solid support for maxim C. But the same norm can also supply support for maxim B: the second part of the legislative text permits dismissal for "reasons concerning the productive activity, the work organization and its regular functioning": therefore – one could deem – the worker can be dismissed also in all the cases in which the relationship works at a loss for the employer, because this cannot be considered consistent with the firm's "regular functioning". Except that it is easy to object that – once we exclude the dismissal for unlawful causes (discrimination, retaliation, or caprice), which is specifically forbidden by art. 4 of the said Statute, and the dismissal for disciplinary causes – if the employer fires an employee, he *always* does so because he judges that the balance of the relationship continuation would be at a loss. So, if *whatever* loss, even one of the most trivial amount, were sufficient for the justification of the dismissal, this would remove all juridical meaning from the norm under

([4]) See, substantially in the same sense indicated in the text, among the most recent other Italian decisions, Cass. n. 3633/1994; among the French ones, ********** ********** **********.
([5]) This is the principle that can be read in the Italian decision Cass. n. 3250/2003, cit. in footnote 1, with the sole qualification of the legitimacy of the dismissal in the case of total and absolute impossibility of the worker's performance; substantially in the same sense v. Italian Cass. n. 1421/1996.
([6]) This is the maxim that occurs with much the greatest frequency in the decisions concerning dismissals for economic reasons: see, among others in the Italian case-law, Cass. n. 3899/2001 and Cass. n. 88/2002; in the French case-law see Cass. April 5th, 1995 n. ***.

examination. We must therefore admit that the dismissal cannot be justified by an expected loss of *whatever* amount ([7]).

If Art. 3 of Italian Statute No. 604/1966 - as well as similar norms in other national laws and in the new E.U. Constitution - does not supply an unambiguous argument in favour of maxims B and C, it is no less difficult to derive from it an argument in favour of maxim A, because the norm refers only to the productive organization and not to the economic – positive or negative - financial situation of the whole company. And it is even more difficult to draw any argument from the same norm in favour of maxims D and E.

These latter, we may note, are those which occur most frequently in the decisions of our courts; we must then discuss the reasons for this dominant orientation of our jurisprudence. A possible answer can be found considering one of the main *effective* functions of labour law: the guarantee of equality among workers.

2. The protection against dismissal as a guarantee of equality. The employment contract as an insurance policy.

Some labour law institutions - and particularly the Italian ones of the Sixties and Seventies, most of which are still in force - seem to be created with the principal aim of producing an equality effect among workers: when the individual relationship is negotiated, they assure that the initial determination of the worker's treatment, ignores as far as possible his/her effective productivity; and they protect, as far as possible, the weakest ones against subsequent reductions of the same treatment, caused by the emergence of a lack of productivity. In particular, these institutions as a whole take advantage of the asymmetry in information, which causes the employer, at the moment of hiring the worker, scarcely to know his/her capacity (especially - but not only - when the latter is a young person in his/her first job). We can see the protective mechanism as aimed - so to speak - at cultivating that information asymmetry, hindering everything that can reduce it, in the phase of constituting the work relationship (with the effect that the contractual treatment must be fixed *ex ante*, on the basis of the average expected productivity of the professional category); and at preventing the subsequent adjustment of the stabilized relationship.

If considered in this light, the work contract functions as a sort of insurance policy, making the employer responsible for the risk of the future worker's lack of efficiency (not caused by observable fault), and in this way producing an effect of equalization among workers.

This function of preventing the predictability of worker's productive qualities is exerted, to greater or lesser extent:

- by the *pre entry* or the *labour pool* closed shop rule, or by the *"collocamento numerico"* rule - in force in Italy until 1991 as a general rule, except for professional employees, and still in force in this country for the special placing procedure of disabled persons - that

([7]) A more extended argumentation in support of this thesis is developed in my treatise *Il contratto di lavoro*, vol. III, Milano, Giuffré, 2003. There (chapt. XVI, § 516) I criticise the recurrent court decisions in the field of economic justification for dismissals, stressing their lack of logical foundation, and I propose a new interpretation of the juridical notion of good economic reason for dismissal, founded on the economic notion of expected loss (inclusive of opportunity costs) consequent upon the continuation of the individual work relationship. The legal or contractual rule of justification for dismissal makes sense only if it is interpreted as forcing the employer to bear - without dismissing the worker - the expected loss, within a reasonable limit. The limit of the expected loss that must be borne by the employer coincides with the insurance content of the work relationship: the bearable expected loss is the mishap, the accident to which the "insurance policy" typically contained in the work contract refers. The determination of such a limit can be entrusted to the courts; but it can also be indirectly fixed by imposing on the employer a severance payment, or a firing cost of a different nature.

allows only the public employment service (and not the employer) to select the workers to be hired, on the basis of number of dependents and length of unemployment;

- the mandatory limitation of the *probation period*;
- the mandatory limitation of the *fixed term contract* and of the *temporary help service agency activity*, which prevents utilizing the temporary work contract as a substitute for the probation period;
- the prohibition of the *employer's inquiries* about worker's opinions and private life, his criminal and health record;
- the career and compensation mechanisms related only to the seniority commonly foreseen by collective contracts.

The function of preventing the *ex post* adjustment of the worker's treatment to his productive qualities, the knowledge of which the employer acquired in the course of the relationship, is exerted by:

- the *mechanisms of automatic compensation increase* related to the worker's seniority, these too broadly foreseen by collective contracts;
- in general, all the *rules that attribute predominant weight to the seniority* in the choice of workers to be laid off in case of redundancy (and in particular the "last in first out" rule): these are the rules that have the greatest diffusion on a world scale;
- the legal or contractual limitation of the workers' dismissal, insofar as it prevents the employer from substituting the worker who shows himself to be less able to adjust his performance to the technological shocks, or from replacing the one who in whatever other way shows himself to be or becomes less productive owing to causes deriving from his person, as happens to the unfortunate chambermaid in the case from which we started.

The last two types of judicial decisions singled out in the first paragraph, in the field of the just cause of dismissal (D: it is forbidden to dismiss the inefficient worker, if her inefficiency is not imputable to fault; E: it is forbidden to dismiss the worker in order to replace her by an other worker), are perfectly coherent with the mechanism aimed to guarantee the effectiveness of the preventive choice for equality. This – until another more satisfactory one is found – can be indicated as their fundamental *ratio*, which is transformed into justification on the positive juridical level, in the light of the egalitarian principle set by Sect. 3 of the Italian Constitution: the one which imposes on the Republic the duty to remove the obstacles to effective equality among citizens, which means to build equality among unequals.

This interpretation of labour law shows some remarkable similarity to the theory of justice based on the "*a priori* preference for equality", proposed by John RAWLS at the beginning of the Seventies ([8]). The American philosopher moves from the idea of a basic situation in which individuals ("under the veil of ignorance") are ignorant of their position, i.e. do not know the endowment and the social position reserved to each of them by the "natural (and the social) lottery", but know well their aversion to the risk of finding themselves among the poorest and the socially excluded: in such a situation they will be induced - by their own egoistical interest, apart from ethical considerations - to make the contractual choice of a social order inspired by a principle of equality. The concrete expression of this principle is that of the most even distribution of fundamental rights; it permits or even imposes possible inequalities in the distribution of rights and resources only when these favour the disadvantaged, i.e. effectively operate for the reduction of their

([8]) J. RAWLS, *A Theory of Justice*, 1971.

handicap. The legal and social order founded on this principle pursues equality notwithstanding the differences in endowment and social positions which show up day by day, in fact countering such diversity at its origin, or countering its effects of differentiation of wealth and welfare.

We can conceive the labour law as a juridical mechanism that - by means of the institutions and the rules that we have considered above - tends to create a system where the terms and conditions of the work relationship are negotiated, with stable effects, in a situation of ignorance or forced indifference to the endowment and quality of each worker: something like the situation that RAWLS, in his paradigm, assumes as the "original" one, characterized by the "veil of ignorance". Assimilating, for this aspect, the above outlined old protective mechanism to the Rawlsian paradigm leads us to single out the *a priori* preference for workers' equality as a rational justification of the part of labour law that we are here considering, in addition to the other rational justifications singled out by modern labour economics ([9]). This *a priori* preference derives from the risk aversion that characterizes the generality of mankind; and it manifests itself in human beings' tendency - when they are under the "veil of ignorance" about their future position and endowment - to deal with uncertainty problems by means of solutions modeled on an insurance pattern.

It must be immediately stressed that the assimilation of the above juridical mechanism to the Rawlsian paradigm is possible only at the price of a trivialisation or even obliteration of some important aspects of the theory of justice proposed by the American philosopher. First of all, he builds a theory of a system that can, rather than a parity in the distribution of material resources, guarantee an equitable parity in opportunity distribution, that is a parity of the expectations that each individual can reasonably and actively cultivate. Moreover, an essential part of that theory is the "difference principle" by which he justifies a differentiation of treatments aimed to reward the difference of productivity of the better endowed workers, when this greater productivity consistently redounds to the advantage of the less endowed ones ([10]). In other words, the Rawlsian option for equality cannot be understood in a static sense: it must be viewed in a dynamic way, taking into account the mechanisms that bring about the counterthrust of the economic system to the rules that we try to impose on it; in the original situation to which RAWLS refers, the "veil of ignorance" covers only the results of the natural and social lottery, not the general mechanisms that determine the functioning of the economic system ([11]). We will return to this point in the last part of the paper; in this initial part the assimilation of the labour law mechanism to the Rawlsian paradigm – however imprecise and censurable it can be from the point of view of the correct reading of the American philosopher – is useful in order to single out and underline a fundamental *ratio* of the continental European labour law, in its peculiar configuration that has prevailed through the second half of the XXth century.

3. Equality vs. parity of treatment

The principle of equalization that can be seen to be implied in the above described labour law mechanism is only one of the fundamental principles to which the labour law has intended to give application in the last half century. Quite another and quite different is the parity of treatment principle, which has been assimilated by the international law, by the

([9]) I tried to offer a brief vision of them in the essay *The labour market: a lawyer's view of economic arguments*, in *International Labour Review*, 1998 (3), 299-311.

([10]) The "difference principle" is meant by RAWLS in the sense of **********

([11]) In a recent seminar organized by the Department of Labour Studies of the Milan University M. FERRERA, referring to this argument, used the expression "an ignorance enlightened by the knowledge supplied by the social sciences".

European Community and by all the modern national legal systems, and that is comprehended in the expression "equal treatment for work of comparable worth". While the equalization principle pursues the equality among persons as such, independently of their productivity, the parity of treatment principle pursues, on the contrary, the precise commensuration of treatment to performance: this is the principle that in the Italian Constitution is laid down by Sect. 36, in the part in which it precisely foresees the proportioning of worker's wages to the quantity and the quality of his/her work.

In other words, the principle of equal treatment for work of comparable worth generates an *inequality*: an effect that conflicts with the one pursued by the traditional labour law mechanism. This inequality is not consistent with the Rawlsian "difference principle", as it is pursued even if no beneficial effects derive from it for the disadvantaged.

The fact is that all the national labour law systems, on close examination, adopt both principles, though contrasting with each other, and postulate a balance between them. Each law system combines them in a different way, favouring in different measures one or the other, according to choices that often have a pendular trend; but the trade-off between them is always there and easily observable. It is easy to see in the same trade-off the sense of the debate between the left and right tendency of labour law scholars: the left tendency – be it inspired by ideals arousing from a marxist matrix, or from a Catholic one, or a different one – has traditionally lined up in defence of mechanisms producing an *a priori* equality, therefore limiting the competition between workers on the level of productivity; the right tendency has traditionally lined up in defence of the commensuration of treatment to the quantity and quality of the performance, as well as of the management prerogatives in this field.

4. Equality and parity of treatment vs. freedom of enterprise

A third fundamental principle which we must confront in our field is the principle of freedom of enterprise, by which the Italian Constitution (Sect. 41) and homologous constitutional norms in other countries anchor the whole system within the western market economy. A principle from which the labour jurisprudence very firmly deduces, at least on the abstract and theoretical level, the rule of the exemption from judicial control of management's choices, that is their unquestionableness and non-censurability.

The freedom of enterprise principle is not, in itself, incompatible with the equalitarian principle set out by Sect. 3 of the Italian Constitution and many homologous constitutional norms in other countries; in particular, it is not incompatible with the above labour law mechanism, which is inspired by the equalitarian principle. That mechanism nevertheless enters into tension with the freedom of enterprise principle if and when it activates a judicial control over the expected loss deriving from the continuation of the work relationship, in order to ascertain the good economic reason for the dismissal: the more this control overlaps the discretionary managerial evaluation of the profitability of the work relationship, the more the managers' choice non-censurability rule proves to be disregarded.

Some tension occurs also between the freedom of enterprise principle and the principle of parity of treatment, i. e. commensuration, when the implementation of the latter entails a judicial comparative evaluation of the worker's performance productivity (quality and quantity) overlapping that of the entrepreneur.

5. The inefficient worker's dismissal in the light of the three constitutional principles

Let's come back to the five juridical maxims about the justified economic reason for dismissal, from which we started our discussion.

Maxim A – the one which singles out the good economic reason for dismissal in the debit balance of the company as a whole - doesn't appear to be referable to any of the three above constitutional principles: the company has a balanced or credit budget only if the entrepreneur constantly acts in order to eliminate the sources of loss inside the firm; and there can be no juridical principle that prevents the entrepreneur from taking, at the right time, appropriate actions aimed to avert the loss, nor any principle that permits him to take action only when the debit balance has become apparent.

Maxim B – according to which the good economic reason for dismissal lies in the deficit balance of the single work relationship – finds its ground in the freedom of enterprise and commensuration of treatment principles: the entrepreneur can do what he/she believes necessary in order to reduce costs and increase profit; this will reward employees' efficiency. But the same maxim brings a clear-cut sacrifice of the equality principle, in the sense that we have specified in the second paragraph, i.e. in the sense of "equalization".

Maxim C – according to which dismissal is lawful when the worker's performance is not up to the normal level, so constituting in all cases a breach of contract – finds its main ground in the commensuration principle: it is lawful to dismiss the objectively defaulting worker, by which is meant the one whose performance stands below the standard normally due. But here too with a clear-cut sacrifice of the "equalization" principle.

Conversely, precisely in the "equalization" principle, as we saw in the second paragraph, stands the constitutional ground for maxims D and E, according to which, respectively, dismissal is lawful only if the lack of efficiency is caused by a worker's fault, and it is forbidden to dismiss the worker in order to replace him/her with a more efficient one; the commensuration principle is here applied only with reference to the worker's voluntary effort (since the lack of effort with fault can be punished with contract termination); freedom of enterprise is strongly limited as far as the human resources selection is concerned: the entrepreneur is not allowed to choose better workers and discard the less efficient ones.

The fact is that none of the above five maxims, on close examination, thoroughly reflects the logical itinerary followed by the court in the decision of the concrete case. If we look at the substance of each judicial decision, without focusing only on the theoretical part of its grounds, it is easy to observe that none of the above maxims is ever considered by the court as the sole rule which can be applied for the solution of the concrete case: all the courts know well that none of the three constitutional principles involved can assume an absolute value; and that none of them, in any case, can be totally ignored. On careful consideration, the good reason for dismissal foreseen by the "law in action", in the sense of the law as it is interpreted and applied by the courts, consists in a balance between those three principles.

In other words, all the courts, even when they don't say it in the grounds of their decisions, on one hand are convinced that the dismissal cannot be justified by an expected loss of *whatever* gravity (so they never apply the maxim B as the sole rule); on the other hand they know that there must always be a threshold, beyond which the employer is not answerable for the expected loss and therefore the dismissal is justified (so they never apply either maxim D or maxim E as the sole and absolute rule). Where that threshold is set, in the present Italian law system (but also – I think – in other European national law systems), it depends on the weight that, in the view of the court, must be attributed to the "equalization"

principle, compared to the other two principles. The higher the threshold is, the higher the level is at which the workers' equalization is guaranteed; and correspondingly:

- the higher the insurance content is of the work relationship;
- the more serious the sacrifice is of the commensuration principle;
- the more serious the sacrifice is of the entrepreneur's freedom in the choice and management of human resources inside the firm.

In the case of the chambermaid that we assumed as a test-bed for our reasoning, therefore, the existence of a minimum number of rooms that must be tidied up by the worker, if she wants to avoid dismissal, cannot be denied. We can thus conclude that the prohibition of replacing the chambermaid by a more efficient one cannot be an *absolute* prohibition: the legitimacy of the substitution depends on the productivity difference between the two workers, i.e. on the opportunity cost that can be foreseen as incurred by the hotel keeper as a consequence of the continuation of the work relationship.

6. Job protection as an inequality factor

Precisely in reference to the equalization principle, the old egalitarian labour law mechanism, which hinged – as we have seen – on the notion of good economic reason for dismissal, shows some immediately obvious defects:

- firstly, the mechanism operates in different ways from one zone to another, due to the discretionary power left to the courts in the determination of the threshold, *i.e.* of the limit of the expected loss that can justify the dismissal;
- secondly, even when the decision is taken by the most egalitarian court, as we have seen, it can always happen that the threshold may be exceeded (because the prohibition to replace the inefficient worker cannot be absolute) so that the blameless worker may be therefore dismissed; and according to some national laws, in particular to the Italian one, this happens without any indemnisation. Coming back to the case of the chambermaid: for one more or one less completed room, the worker can save everything or lose everything. From the standpoint of the "*ex ante* preference for equality", by which that mechanism should fundamentally be inspired, here clearly is something that doesn't work properly: the most unfortunate chambermaid, the one who loses most badly in the lottery of life, is just the one who is abandoned to her own devices. The cost accruing to her from the loss of the job is by no way internalized in the company finances.

Again from the point of view of the equalization principle, the old labour law mechanism shows some other failures, which are less immediately evident, but in fact not less serious than those above singled out:

- economists' opinions differ about the effects of job protection on the unemployment rate, but all of them agree on the point that the steadier employment is, the more difficult it is for the unemployed, the irregular or the temporary worker to leave his/her position; in other words, job protection risks generating the phenomenon of a dual labour market, divided into compartments with insufficient communication, if any, between each other;
- furthermore, the less efficient worker who, notwithstanding the job protection offered by the law system, loses his/her job, finds him/herself in the labour market negotiating a performance of which at this point it is easy to know the defective quality: thus negotiating a performance that places itself in the lower part of the category; in this case the minimum mandatory standard, which has been established with reference to the category average productivity, turns against the worker, exposing him/her to the risk of long-term

unemployment; in other words, the old equalization mechanism turns into an exclusion mechanism;

- a last remark, with reference to the above described general information asymmetry about the quality of offered work performances (§ 2): in a market mainly characterized by such asymmetry, if workers (who know that they are) more efficient are allowed to place themselves outside the area within which the protection is applied, they tend to do so, because they have a strong incentive to escape the egalitarian mechanism: this phenomenon can show itself in the form of a worker's transfer from the subordination area to the self-employment area ([12]), or in the form of workers' transfer from the country with a higher job protection rigidity rate to the one with a lower j.p.r. rate; when this happens, the egalitarian mechanism reduces itself to a solidarity mechanism inside the poorest workers' segment, while the inequalities between this segment and the professionally stronger one tend to increase ([13]).

The conclusion is that in a market in which the legal system is not able to offer an absolute guarantee against the risk of unemployment or irregular employment, and to prevent the flight of the strongest workers from the protected area, the old job protection pattern can produce effects that correspond very badly to the egalitarian ideal. How wide this phenomenon can prove, it is not the purpose of this essay to investigate; but it is, however, quite important to recognize that the phenomenon exists and that it can assume not negligible dimensions.

7. The crisis of egalitarian labour law

The fact is that in the most developed countries in the last fifteen years we have witnessed a general tendency to the more or less marked weakening of the egalitarian labour law institutions. As far as the Italian legal system is concerned, this tendency has now characterized labour law evolution for a quarter of a century:

- from the first half of the '80s the rule of quotas in placing procedures (s.c. "collocamento su richiesta numerica") began to be gradually abolished, until the total abrogation in 1991;
- since the end of the '70s the limitative discipline of fixed-term contracts has began to be gradually made more flexible; in 2001 a reform of the matter with strong liberalising intentions was promulgated;
- since 1997 temporary work supply by specialized agencies has been allowed; since 2003 this has been allowed in all the cases in which the fixed-term contract is allowed; in fact the temporary work through an agency is widely utilized as a replacement of the trial period;
- since the beginning of the '80s the law has foreseen a fixed-term contract – be it called apprenticeship or by other names– as the normal form of access of young people to the labour market;
- the centre of gravity of the collective bargaining system has tended to shift from the national level to the periphery, with the development of a company level bargaining aimed at matching the standards of workers' treatment to the effective productivity levels; and the system looks with favour upon this trend, offering since 1993 a waiver of welfare contributions – though this is for now very limited – with reference to the part of the

([12]) A strong correlation between the employment protection rigidity rate and the self-employment rate is in fact observed: see OECD, *Employment Outlook*, ****, chap. **.

([13]) This is the phenomenon that has been described by G.A. AKERLOF, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, in *The Quarterly Journal of Economics*, 1970, pp. 488-500.

remuneration which is negotiated on the basis of the productivity or profitability of the individual company.

It is easy to foresee that, as a result of these reforms, if the dismissal discipline remains rigid, the dual character of the labour market will be accentuated; this means that we will witness an increase in the division between the labour-force which enjoys the old protective system and the one which pays the cost of it in terms of exclusion, or which in any case is engaged in non-stable forms of work.

8. A mechanism hostile to the less fortunate

Under the "veil of ignorance" about his/her own personal endowments and effective position in the market, but not about the general mechanisms of the market functioning ([14]), what protection system can be preferred by the western XXIst century worker, who fears to lose in the lottery of life and wants to reduce his/her risk to the minimum, in a productive system that is continuously moving and is exposed to upheavals of every kind?

He could perhaps prefer a system which offers the weakest workers a guarantee of absolute permanence of the job, even at the cost of a very high "insurance premium", provided that the most successful ones are not allowed to escape mutual insurance and that for the least successful ones the risk of unemployment and of irregular work is made negligible. The problem is that nowadays we are not able to build a system with these characteristics, but without the other less desirable characteristics of the collectivistic systems that have been experienced during the XXth century in eastern Europe. And it must be observed that these other characteristics – among which a drastic compression of the possibilities of economic development and of consequent improvement of conditions and expectations of disadvantaged people – make this system quite different from the Rawlsian ideal: in the pattern inspired by that ideal an important role is played by the incentive to the most productive persons, when the wealth that is produced by them can be utilized for the improvement of the most disadvantaged people's conditions ([15]).

What doesn't appear questionable is that our Rawlsian worker cannot prefer a system of the kind today in force in Italy, in the sector of the medium-sized and large enterprises, which offers, doubtless, to the majority of workers a sort of insurance policy with a very high maximum coverage, but is not able to prevent a large unemployment and irregular work area, from which it is difficult to escape (because the steadier regular work is, the steadier the unemployed worker's and irregular worker's positions are, too): this is today in Italy the position of almost one quarter of the labour force, not to speak of the millions of potential workers – women, young or elderly people – who don't even present themselves in the labour market because they have given up hope of finding a really effective work opportunity (the Italian employment rate, for these categories, is markedly below the European average). Neither can our Rawlsian worker prefer a system that, notwithstanding the above insurance mechanism, in any case exposes the weakest worker to the risk of losing the protected job without any indemnization and of visibly placing him/herself, at this point, in the lower half of his/her category, so falling into the trap of long-term unemployment. A system in which, what's more, the probability of this occurrence is higher or lower depending on the personal orientation of the local court.

([14]) See § 2 and there the footnote 11.
([15]) About the "difference principle" see § 2 and there footnote 10.

9. How an egalitarian "Rawlsian" option can take concrete form in the western XXIst century market system

From the point of view of the Rawlsian paradigm, it must be admitted that

- the most unfortunate person is in a better position if it is the law, rather than the local court, which establishes and differentiates the maximum coverage given to the worker by the insurance policy implicit in the work contract, according to general criteria: in other words he/she is in a better position if – without prejudice to judicial control over the disciplinary dismissal and against discriminatory control – the filter of dismissals for economic reasons consists in an adequate compensation (firing cost for the employer) due *in any case* and not in a judicial evaluation of the dismissal ground, to which the loss of the job, without any worker's fault, can follow without any compensation;
- the most unfortunate person is in a better position if the mandatory insurance mechanism offered by the law has a rigorously universal character, bringing together weak and strong workers in a unitary mutual insurance system, without the possibility for the stronger ones of avoiding it and without the exclusion of the weakest ones: he/she can therefore be interested in forgoing a part of the insurance coverage, if this is necessary in order to enlarge the group of insured people upwards and downwards;
- the best guarantee of welfare for the worker who turns out to be the loser in the natural or social lottery is in any case given by a system of education, professional training, information and assistance in the labour market, capable of reducing as much as possible, or even eliminating, his/her deficit of initial endowment or handicap, either pre-existing or acquired.

In the global economic context in which we find ourselves today, a good prospect for the losers could be guaranteed by a system that, first of all, offers a universal security net consisting in an organisation of educational services, training services oriented to effective occupational opportunities, information and guidance services, assistance to geographic mobility, intensive placing assistance for those who suffer from a social or physical handicap, as well as income support during unemployment periods. As much active and intensive the organisation, the weaker is the position of the person affected; which means an organisation able to act effectively in order to neutralize his/her natural competitiveness deficit, even at the cost of a huge drawing from the gross national product, for the necessary funding of such services. As for the individual work relationship, the legal system should offer everybody who receives most of his/her income from one employer, whatever the juridical type of the relationship; a contract with a smaller insurance content than the one which is today offered by the Italian job protection system, but in a really universal mutual insurance system, capable of being applied at the same time to the stronger section of workers, which today is able to avoid it, as well as to the weaker section of them, which today is often cut out of it. Such a system would be able to guarantee to the totality of workers in a position of substantial dependence on the employer an alternation of relatively long spells of work in a condition of reasonable protection, and relatively short unemployment spells, with intense assistance, preceded by a non-traumatic separation from the employer: that is, a separation accompanied by an adequate compensation, paid in every case and proportioned to the seniority, for the damage intrinsic in the loss of the job, partly convertible into a notice period, the length of which, within a certain limit, could be left to the choice of the worker. In such a protection system the employer's decision to terminate the work relationship would be automatically filtered by the firing cost, consisting in the above indemnity and in the cost of an unemployment benefit system funded by an

employers' contribution which increases with the number of workers dismissed by the company ([16]).

In the case from which we began, if such a job protection system were in force, the lower the chambermaid's seniority had been, the lower would have been the severance payment and the higher would have been the expected loss deriving from the continuation of the work relationship. Hence, a lower job protection for the chambermaid who became inefficient at the beginning of her work-life, a stronger one in the opposite case. But in every case, if the employer decides that the expected loss exceeds the firing cost, the chambermaid would automatically be paid – without the necessity of involving lawyers and judges – an adequate severance payment (something that in the Italian system and in most other European continental systems doesn't happen today), and would be left the choice between collecting the indemnization immediately or converting it in current remuneration, with the corresponding delay of the work relationship termination; she would have the possibility of being enrolled by a manpower services system capable of retraining her in conformity with a new job, in which her disability would be of less importance or of none (switchboard operator, receptionist, doorkeeper, etc.), without a significant income loss during the transition period; it would be much easier for her to find a new job compatible with her disability, in a more fluid labour market.

This is the pattern which has been experienced with great success (even if with high costs for the tax-payers: up to 3% of gross national product in periods of recession) in the last half century in the northern European Countries, and particularly in the Scandinavian ones: the Countries where the least fortunate are better off, in comparison with any other Country in the world. And this is probably today the sole way we can follow in order to build a job protection system capable of reconciling the three fundamental principles that must rule work relationships: equalization, commensuration and freedom of enterprise. Provided that such an option is still on the agenda.

JOB SECURITY AND THE VALUE OF EQUALITY - Summary - The Author moves from the remarkable variety of the courts' decisions about the justification of dismissal for economic reasons; he then examines their legislative basis and points out that it is just the maxim that prevails in the case-law books that is the least coherent with the literal content of the norm regulating this matter in the Italian law. On the other hand, the same maxim appears coherent with the most relevant function effectively exerted by labour law in the last half century: the guarantee of parity of treatment among workers, independently of the differences among their performances. This function, which in the Italian law corresponds to the principle of equalization set by Sect. 3 of the Constitution, must be balanced with the principle of equal treatment for work of comparable

([16]) The most interesting reference to this approach to our problem is the recent proposal for a reform of job protection formulated by O. BLANCHARD and J. TIROLE in reference to the French legal system: (*Contours of employment protection reform*, 2003), which essentially consists in burdening the company with: *i)* the compensation of the worker for the job loss by an adequate severance payment; *ii)* the indemnification of the worker for the damage of remaining unemployed, by means of an insurance mechanism, funded by insurance premiums paid by the employers, varying with the number of dismissals. The Authors stress that the proposed job protection system is not *per se* less protective than other systems – even the most rigid ones - today in force for regular workers in continental Europe: the protection level – *i.e.* the amount of insurance coverage implicit in the work contract – essentially depends on the firing cost (which corresponds to the threshold under which the expected loss deriving from the relationship continuation falls within the risk that must be borne by the company). The higher the firing cost imposed on the company, the higher the job protection level.

worth, which in the Italian law is based on the Sect. 36 of the Constitution, and with the principle of liberty of enterprise, set by Constitution Sect. 41: from this balance, according to the A., the notion of objective justification of dismissal, the keystone of the whole labour law system, arises. On the level of the reform of the matter, the A. observes that the labour market characteristics also cause the old protection mechanism to produce some effects that clash with the workers' equalization principle; and from this observation he draws an argument in favour of a reform of this mechanism, of which the essential contents are outlined in the last part of the essay.