www.upo.es/revistas/index.php/lex_social/index
enero - junio 2018
Vol. 8 núm. 1/ 2018
Revista jurídica de los Derechos Sociales
Lex Social

THE RELEVANCE OF ARTICLE 24 OF THE EUROPEAN SOCIAL CHARTER AS <<INTERPOSED STANDARD>> IN THE ITALIAN LEGAL SYSTEM. FOOD FOR THOUGHT ON THE MARGINS OF THE CONSTITUTIONAL RELEVANCE QUESTION RAISED BY THE LABOUR COURT JUDGE OF ROME (TRIBUNALE DI ROMA – SEZIONE LAVORO, ORDINANZA JULY 27, 2017)

LA PERTINENCE DE L'ARTICLE 24 DE LA CHARTE SOCIALE EUROPÉENNE EN TANT QUE «NORME INTERPOSÉE» DANS LE SYSTÈME JURIDIQUE ITALIEN. MATIÈRE À RÉFLEXION EN MARGE DE LA QUESTION DE PERTINENCE CONSTITUTIONNELLE SOULEVÉE PAR LE JUGE DU TRIBUNAL DU TRAVAIL DE ROME (TRIB. ROME – SECT. TRAVAIL, ORD. 27 JUILLET 2017)

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Artículo recibido el 17 de noviembre de 2017
Artículo aceptado el 26 de noviembre de 2017

ABSTRACT

The reduction of protections in the event of an unlawful dismissal, made by the c.d. The Job Act issued in 2014-2015 by the Italian Parliament and Government, with a particular focus to workers hired after March 7, 2015, was the subject of an

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order submitted by the Labor Court of Rome to the Italian Constitutional Court, on suspicion of unconstitutionality. The legal construction used by the Judge highlights the violation of Article 24 ESC as an <<interposed (standard)rule>>. It is the first time that an Italian Labor Court has raised this issue so clearly. The comment aims to identify the different plans of protection measures in this kind of hypothesis.

KEY WORDS: Dismissal, labour market reform, Italy, European Social Charter (ESC), interposed standard rule, unconstitutionality, European Committee of Social Rights (ECSR).

RESUME

La réduction des protections en cas de licenciement illégal, faite par le c.d. Job Act promulguée en 2014-2015 par le Parlement et le Gouvernement italiens, en particulier les travailleurs embauchés après le 7 mars 2015, a fait l'objet d'une ordonnance du Tribunal du Travail de Rome devant la Cour constitutionnelle italienne, soupçonnée de inconstitutionnalité. L'interprétation juridique utilisée par le juge met en évidence la violation de l'article 24 CSE en tant que «règle interposée (standard)». C'est la première fois qu'un Tribunal du Travail italien soulève cette question si clairement. Le commentaire vise à identifier les différents plans de mesures de protection dans ce type d'hypothèse.

MOTS-CLES: Licenciement, réforme du marché du travail, Italie, Charte Sociale Européenne (CES), règle standard interposée, droit international, inconstitutionnalité, Comité européen des Droits sociaux (CEDS).

SUMARIO

1.Introduction to the question case

The decision - reported in the full text - is of considerable interest by virtue of the logic followed by the remitting Judge.
The Labour Court Judge of Rome (Tribunale di Roma – Sezione Lavoro – Judge: Maria Giulia Cosentino) raised an interlocutory procedure for the review of constitutionality : of art. 1, paragraph 7, letter c), of Law no. 183/2014 and of the articles 2, 4 and 10 of Legislative Decree no. 23/2015 (Editor's note: the combination of the two rules is for simplicity defined by the Judge with the expression "Jobs Act"); in the opinion of the Roman Judge << ***the normative innovation deprives today's appellant of most of the protections still in force for those who have been hired indefinitely before March 7, 2015. The legislation precludes any judging discretion of the judge, previously exercisable even if anchored to the criteria of art. 8 of the Law no. 604/1966 and art. 18 of the Statute of Workers (Editor's note: Law No. 300/1970) as amended by law no. 92/2012, imposing on the same (judge) an automatism on the basis of which the worker is entitled, in case of ascertained illegitimacy of the dismissal, the small sum of compensation (now) provided.***>>.

But let's proceed by order ... in the Italian legislative "selva oscura"...

In the last fifty years, in the Italian legal system the protection against illegitimate (i.e. unlawful, as not supported by adequate justification) dismissal has undergone a continuous evolution.

Before 1966 the dismissal was "entirely free" (even in the form, which could be oral; i.e. *ad nutum*) and without necessary justification; the only economic protection was constituted by the indemnity of non-notice (established even today by collective agreements), however, not due to the hypothesis of "just cause" of dismissal (negative event of an essentially fiduciary nature, which does not allow even temporary prosecution of the employment relationship).

With the Law no. 604/1966 (thanks to the evolution of collective bargaining whose contents were incorporated into the Law) were introduced: the obligation of the written form and the motivation of dismissal, and an economic protection (commensurate with a number of salary payments, variable from 2.5 to 6, according to the prudent evaluation

of the Judge). However, the scope of this economic protection was linked to the size of the employer's organization (number of employees).
The Law no. 604/1966 introduced the following "legal entities" of dismissal:
"***just cause***": behavior of the worker who constitutes a serious violation of his contractual obligations, such as to irremediably harm the necessary relationship of trust between the parties and that does not allow the temporary or even continuation of the employment relationship (civil code, article 2119). Therefore, the "just cause" represents, in fact, the disciplinary dismissal *par excellence*; such as to immediately terminate the employment relationship without even paying the notice. Dismissal as disciplinary sanction must necessarily be preceded by the activation of the compulsory disciplinary procedure and in particular by the prior communication of the "objections to charges" in order to allow the employee to defend himself against unfounded accusations. Collective agreements normally list hypotheses and facts deemed to constitute a "just cause" for dismissal.

"***justified subjective reason***" : it is represented by disciplinary behavior of the employee but not such as to result in dismissal for "just cause" (i.e. without notice). Even the "justified subjective reason" dismissal therefore falls within the disciplinary category, still constituting a sanction related to behaviors considered such as to incur in an irreparable manner in the regular continuation of the employment relationship. The figures of the poor performance and / or negligent behavior of the employee are also included in the "justified subjective reason" of dismissal. It constitutes a condition of legitimacy of dismissal the prior "challenge of charges" with the right of the employee to adequately perform their defense, possibly covered by the assistance of a trade union representative.

"***justified objective reason***" : it is represented by reasons relating to the organization of work (for example: the company crisis, the termination of the activity and, even if only, the loss of the duties previously assigned to the worker, without it is possible its "*repechage*", or the relocation of the same in other tasks existing in the company and compatible with the level of classification). Are also hypotheses of "justified objective reason" those in which the worker loses, not through his own fault, the skills necessary to perform the tasks for which it was hired.

"oral (verbal)" dismissal : this is the case in which the worker is removed from the workplace without any formal act (letter or other similar communication) by the employer.

In 1970 the Law no. 300 (Workers' Rights Statute) introduced (for employers - limited to "entrepreneurs for profit" - only and with an organizational dimension of more than 15 employees) the obligation of reinstatement in the workplace (by order of the Judge)

with the consequent right to receive all salaries from the day of the dismissal to that of the actual reinstatement ("full-restoring" protection).

In 1990 (to avoid a popular referendum of "expansionist" sign, aimed at extending the "full-restoring" protection also to employees of employers who are not entrepreneurs and in any case of less organizational size) the Law no. 108 it was issued. Economic protection was strengthened for redundant workers already employed by smaller work organizations (the measure of compensation was raised in the new range of 5 to 12 monthly salaries); it was clarified (actually reiterated) that the person affected by a dismissal for discriminatory reasons always had the right to "full-restoring" protection (reinstatement in the workplace plus current salaries form the dismissal date to the effective return to work).

The Law no. 92/2012 (issued on the inspiration of the <<Troika>>), has completely remodeled the protection against illegitimate (unlawful) dismissal (with a degree of considerable complexity, according to four different regimes, hardly restricting - firm the "full-restoring" protection in cases of discriminatory dismissals - the possibility that a worker can to be reinstated). The maximum amount of the indemnity was raised to 24 months of salary and the minimum amount to 2.5; however, the judge has a certain space to determine the measure by adapting it to the specific case.

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The legislative innovation that goes under the name of "Jobs Act" has introduced a further restriction of protection (always excluding and in any case - except for the discriminatory dismissal - the "full-restoring" protection), creating an automatic mechanism for determining the indemnity linked to the illegitimate-unlawful dismissal, removing any space for the prudent appreciation of the Judge.

In particular, for **workers hired on permanent contracts before March 7, 2015**, the following guarantees apply:

° in the event of dismissal "nullity" (because it is discriminatory, or because it is imposed in the course of a marriage or in violation of the protections provided for maternity or paternity or in other cases provided for by law) or "ineffective(ness)" (because it is requested in oral form), to all workers (regardless of the number of employees employed by the employer), is entitled to be reinstated into the workplace and to receive a compensation equal to the remuneration accrued from the day of the dismissal until the effective reinstatement (so-called "new full-restoring" protection). More specifically, in these cases, the judge, declaring the dismissal "invalid" or "ineffective", orders the employer to reinstate the worker in the workplace and condemns the employer to compensation for the damage suffered for the period following the dismissal and until the effective reinstatement, and (more) the payment of

social security and welfare contributions for the entire period between dismissal and reinstatement. The compensation for the damage is represented by an indemnity commensurate with the last "overall remuneration in fact" matured from the day of the dismissal to the day of the actual reinstatement and can not in any case be less than 5 months (a maximum limit is not provided). From the amount must be deducted what may be perceived, during the period of exclusion, for the performance of other work activities (s.c. *aliunde perceptum*).
Without prejudice to this compensation, the worker has the possibility - within thirty days from the notification of the filing of the sentence - to ask the employer, in place of the reinstatement in the workplace, an indemnity equal to 15 months of the "last overall remuneration in fact", whose request determines the resolution of the employment relationship.
Apart from the aforementioned hypotheses, the protections vary according to : the size of the employer's organization and the type of defect that renders the expulsion provision illegitimate(unlawful); in particular:

°° if the dismissal is ordered by an employer who exceeds the dimensional thresholds established by art. 18 of the law 300/1970 (production unit with more than 15 workers, or more than 5 if it is an agricultural entrepreneur, or more than 60 employees in total), the protection regimes established by this rule (as amended by reform of the labor market in 2012 by the Law no 92), are applicable and, in some specific cases, include the possibility that the employer is condemned to reinstate the worker in the workplace.

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Before this legislative innovation, in fact, there was a single protection (so-called <<tutela reale>>), which entailed the reinstatement of the worker and a (really) full compensation of the damage (with the payment of salaries and contributions from dismissal until the actual reinstatement and, in any case , to a minimum of 5 months).
The new (2012) text of art. 18 of the Law no. 300, however, provides the following protection schemes, which change depending on the defect found (by the judge) in the dismissal.

When the terms of the <<***justified subjective reason***>> or of the <<just cause>>, for the absence of the disputed fact do not occur or because the fact falls within the conduct punishable by a conservative sanction, the judge applies the so-called <<tutela reale attenuata>> (reinstatement in the workplace and a compensation commensurate with the 12-month salary limit, in addition to the payment of social security contributions for the entire period from the day of the dismissal to that of reinstatement).
The protection of <<tutela reale attenuata>> also applies in cases of: (i) "manifest non-existence of the fact based on the dismissal for justified objective reason"; (ii) dismissal ordered for objective reason consisting in the physical or mental inability of the worker; (iii) termination of dismissal during the period of consignment (Editor's

note: period - regulated by collective agreements - for the retention of employment in the event of illness, accident or other absence from which the suspension of the employment relationship derives).

In the other cases in which any "***just cause***", "***justified subjective reason***", "***justified objective reason***" do not occur, the judge applies the s.c. <<tutela obbligatoria standard>> (compulsory standard protection); i.e. condemns the employer to the payment of a compensation (indemnity) commensurate between 12 and 24 months of the "last overall remuneration in fact" de facto, taking into account the worker's seniority, the number of employees, the size of the economic activity and of the behavior and conditions of the parties). The prudent appreciation of the Judge is therefore valued.

In cases of illegitimate (unlawful) dismissal due to lack of motivation or failure to comply with the procedural obligations laid down for disciplinary dismissal or for a justified objective reason, finally, the judge applies the so-called <<tutela obbligatoria ridotta>> (compulsory reduced protection); the judge orders the employer to pay an indemnity variable between 6 and 12 months of the "last overall remuneration in fact" (*de facto*). The exact amount of compensation is established in relation to the gravity of the formal or procedural violation committed by the employer. Also in these cases the prudent appreciation of the Judge is valued.

°°° below the above dimensional thresholds, instead finds application the milder protection regime provided by art. 8 of the Law no. 604/1966 (as replaced by Article 2 of Law no. 108/1990), which gives the worker who is illegitimately (unlawly) fired only the right to receive purely financial compensation. Regardless of the defect identified, the judge annuls the dismissal and condemns the employer to summarize the employee within the period of three days, or, failing that, to pay him/her a compensation amount, the extent of which is determined between a minimum of 2.5 and a maximum of 6 monthly payments (taking into account the number of employees employed, the size of the company, the length of service of the worker, as well as the behavior and condition of the parties). The indemnity can be increased up to 10 months for the employee with seniority of more than ten years, and up to 14 months for the employee with seniority over 20 years. Also in these cases the prudent appreciation of the Judge is valued.

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We must necessarily examine the protection regimes applicable in the event of **the unlawful dismissal of a worker hired after 7 March 2015** (i.e. the specific case examined by the Roman Judge).

Legislative decree no. 23/2015, has introduced in the Italian legal system the s.c. << contratto di lavoro a tempo indeterminato a tutele crescenti>> (permanent employment contract with increasing protections), implementing the s.c. "Jobs Act" (Law No. 183/2014), and provides a(n addictionally) new protection regime for the hypothesis of illegitimate (unlawful dismissal), intended first to support and then replace the system of protection provided for by art. 18 of the Law n. 300/1970 (as modified in 2012).

According to the new regulations, an unfairly dismissed worker will have the right, in most cases, to receive only an economic indemnity; the reinstatory protection is instead limited to a few residual hypotheses (in the case of discriminatory dismissal, void and ineffective because in oral form), with respect to which the Judge, with the pronouncement with which declares the nullity or ineffectiveness of the dismissal, condemns the employer for the reinstatement of the worker in the workplace, the payment of compensation and the payment of social security and welfare contributions. In such serious cases, the indemnity is commensurate with the last salary and is payable from the day of the dismissal until that of the actual reinstatement (subtracting what was perceived by the worker during the period of exclusion, for other work activities: s.c. *aliunde perceptum*); in any case, the indemnity cannot be less than 5 months of salary. Without prejudice to the right to receive the aforementioned indemnity, the worker is given the faculty to replace the reinstatement in the workplace with a further economic compensation, equal to 15 months of the last salary, provided that he makes the request within 30 days from the communication of the filing the ruling or by the invitation of the employer to resume service, if prior to the communication. The replacement compensation for the reinstatement is not subject to social security contributions.

The protections applicable to workers of "larger employers" (above the thresholds of 15 or 5 employees) in the event of unlawful dismissal are instead the following.

In the cases of dismissal for "justified subjective reason" or "just cause", in respect of which the non-existence of the material fact contested to the worker is proven in court, the employer is condemned to reinstate the worker into the workplace and the payment of social security and welfare contributions. The employee is also entitled to receive compensation indemnity commensurate with the last salary, from the day of the dismissal until the effective reinstatement.

This allowance should be subtracted from the amount received by the worker for the performance of other work activities (s.c. "*aliunde perceptum*") and the amounts that the worker could have received by accepting a suitable job offer (s.c. "*aliunde percipiendum*", according to the criteria indicated in art. 4, paragraph 1, letter c), of the legislative decree no. 181/2000: the proof must be acquired at the employment office). Furthermore, the indemnity cannot be higher than 12 months of salary (while there is no

minimum entity, as established for the other cases of null or ineffective dismissal). Also in these cases the prudent appreciation of the Judge is valued.

In all other cases of unjustified individual dismissal or noticed in violation of the procedures prescribed by the law (e.g. in terms of disciplinary dismissal), the employment relationship is terminated and the employee is only due an indemnity that ranges between 4 and 24 monthly payments (from 2 to 12, if it is a procedural violation). Also in these cases the prudent appreciation of the Judge is valued.

More specifically, the art. 3, co. 1, of the legislative decree no. 23/2015 establishes that in case of dismissal for << ***justified objective reason*** >>, for << ***justified subjective reason*** >> or for << ***just cause*** >>, when the judge ascertains the illegitimacy of the dismissal, declares the extinction of the employment relationship and sentence the employer to pay an indemnity, **not subject to social security contribution**, of an amount equal to 2 monthly salary for each year of service (the basis of calculation is constituted, also in this case, by last pay). **In any case, the indemnity cannot be less than 4 months, nor can it exceed 24 months**. Also in these cases the prudent appreciation of the Judge is valued.
Pursuant to art. 10, the same sanctioning regime (indemnity equal to two months for each year of service, in any case between 4 and 24 months) is also applicable in cases of unlawful collective dismissal for violation of the procedure prescribed by law (in particular, the procedures referred to 'article 4, paragraph 12, Law no. 223/1991) or for violation of the selection criteria (article 5, paragraph 1, Law no. 223/1991). Also in these cases the prudent appreciation of the Judge is valued.

The employee is entitled to a mere economic indemnity even in the case of illegitimate unlawful dismissal for **violation of the requirement of motivation** (Article 2, paragraph 2, Law no. 604/1966. In this case, however, the compensation is halved: it will be equal to 1 monthly salary for each year of service, with a **minimum limit of 2 months** and a maximum limit of 12 months.

Even more diversified are the protections applicable to employees of smaller employers in the event of an unlawful dismissal.

With regard to employees in organizations that do not reach the known numerical thresholds (15 employees or 5), the art. 9 of the legislative decree no. 23/2015 establishes that, in respect of these workers, the same protection regime applies to employees of larger employers, with two significant differences: reinstatement in the hypothesis of disciplinary dismissal is excluded declared illegitimate due to the absence of material fact and economic protection is substantially halved.

That is to say, in the event of an illegitimate dismissal of a worker employed by a "minor employer", reinstatement will only apply in cases of discriminatory, null and oral dismissal for reasons of physical or mental disability of the worker.

In other cases, the worker will be entitled exclusively to an economic indemnity, calculated as follows:

° in the case of dismissal ordered for "just cause", for "justified subjective reason" or "justified objective reason", if the judge ascertains the illegitimacy of the dismissal, the worker is granted compensation (not subjected social security contribution) of an amount equal to 1 monthly salary for each year of service; in any case, the indemnity **cannot be less than 2 months, nor can it exceed 6 months**;

°° in the event of an unlawful dismissal for "violation of the obligation to state reasons" pursuant to art. 2, paragraph 2, of Law no. 604/1966, or, in the hypothesis of disciplinary dismissal, for << violation of the procedure >> provided for by art. 7 of the Law n. 300/1970 (Editor's note: and from the applicable collective agreement, must be considered), the employee is entitled to an indemnity (not subject to social security contribution) equal to half a month for each year of service, with **a minimum limit of 1 month and a maximum limit of 6 months**.

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Conciliation offer (really a masterpiece of cynicism…)

Legislative decree no. 23/2015 provides for a new conciliation procedure, aimed at speeding up the definition of the dismissal dispute, which provides for the immediate payment of compensation by the employer.

In particular, the art. 6 of the decree establishes that, in the event of dismissal, the employer, in order to avoid judgment, within the terms of extrajudicial appeal of dismissal (60 days), may summon the worker to one of the conciliatory offices indicated in the fourth paragraph of the 'art. 2113 of the Italian Civil Code (including, in particular, conciliation commissions at the territorial labor departments and those established by art. 76 of the legislative decree no. 276/ 2003, as certification commissions according to the conciliation body), and to offer him/her a cashier's check for an amount equal to one month's salary for each year of service, and in any case not less than 2 months and not more than 18 months.
To encourage this type of solution, **the legislator has provided that such compensation does not constitute taxable income for the employee and is not subject to social security contributions**.

The acceptance of the check by the worker entails the termination of the employment relationship on the date of dismissal and the waiver of the challenge of dismissal even if the worker has already proposed it.

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The new regulations introduced in 2015 concern all workers hired with a permanent employment contract with effect **from** the date of entry into force of the decree (March 7, 2015).

Workers already hired before this date will continue to benefit from the protection regimes provided for by art. 18 (Law no. 300/1970 as modified in 2012), provided that, of course, they are assumed in structures that exceed the numerical thresholds required by law (production unit with more than 15 workers, or more than 5 if it is an agricultural entrepreneur, or more than 60 employees in total). In the immediate term, therefore, for these workers nothing changes.

In the event that the employer, as a result of new open-ended hiring after 7 March 2015, reaches the size thresholds provided for by art. 18 (15 or 5 employees), all the workers (old and new hired) will fully apply the new rules of the << contratto a tutele crescenti>>, and the related sanctions regime envisaged in the event of an illegitimate unlawful dismissal.

Likewise, the new regulations will also be applied in the cases of conversion, after 7 March 2015, of a fixed-term employment contract or an apprenticeship contract, into a permanent employment contract.

Workers already hired indefinitely before March 7, 2015, although not affected by regulatory changes to date, may still be in the future, when they change jobs, transitioning into the condition of "new hires" with a different employer.

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This (not brief) premise was necessary to understand (*forgive the headache but the Italian legislator is sometimes really harmful …*) the real meaning of the choice of the Roman Judge.

It should be noted, first of all, that the Judge has - in a dispute characterized by the default of the employer - relieved *ex officio* the question of constitutionality of the aforementioned rule.

This circumstance, in concrete procedural dynamics, suggests that the Judge had for some time "metabolized" the legal construction of the profiles of suspected unconstitutionality of the rule and, at the first useful opportunity, formalized it in terms that can easily be appreciated in the full text of the ordinance.

The focal point (which highlights the unreasonable "imbalance" of economic protection in the event of unlawful dismissal) is as follows (using the same words of the Judge): << ***Believes this judge that, given the extreme generality of the motivation alleged and of the absolute lack of proof of the merits of some of the circumstances laconically mentioned in the expulsion, the visible vice is the most serious among those indicated,***

namely the "non recurrence of the details of the dismissal for justified objective reason" (in the language of legislator of 2015), or the "manifest lack of the fact made on the basis of dismissal for justified objective reason. In short, if it had been hired before 7 March 2015, the applicant would have enjoyed the reinstatement protection and an indemnity commensurate with twelve monthly payments (having passed after 12 months between expulsion and the first hearing), or, applying paragraph 5 of the art. 18 of the Law no. 300/1970, only for indemnity protection between 12 and 24 months; whereas, to be hired after that date, she is only entitled to four monthly payments, and only because the defendant's default allows for the presumption of the size requirement to be presumptuous, otherwise the amount of compensation would have been two months pays. Even if a mere defect of the motivation was found, the protection in the vigor of the art. 18 would have been much more substantial (6-12 months of compensation for 2). >>

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Delimited the *thema decidendum* in terms of reconstruction of the *quantum* of economic protection linked to unlawful dismissal in the specific case, the Judge outlined the different profiles of unconstitutionality of the rules applied (Article 1, paragraph 7, letter c) of the Law (delegated by Parliament) n. 183/2014; Articles. 2, 4 and 10 of the Legislative Decree (delegate, issued by the Government) n. 23/2015), in light of the different parameters of constitutional rank (articles 3, 4, 35, 76 and 117, of the Constitution of the Italian Republic, *breviter*: CostRI)

The relevance of the question of suspected unconstitutionality is based on the unreasonableness of the regulatory innovation introduced in the period 2014-2015 by the Italian legislator; in fact the new discipline deprives the recurring worker << ***of most of the protections still in force for those who have been hired indefinitely before March, 7 2015. The legislation precludes any judging discretion of the judge, previously exercisable even if anchored to the criteria set forth in art. 8 of the law no. 604/1966 and art. 18 of the Statute of Workers*** (Editor's note: Law no. 300/1970) ***as amended by Law no. 92/2012, imposing to the same (judge) an automatism on the basis of which the worker is entitled, in case of ascertained illegitimacy of the dismissal, the small sum of compensation provided.*** >>.

In the Italian legal system the parameters of constitutionality interested in the case referred to in the ordinance of the Roman Judge are:

° Article 3 - CostRI ("***All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions. the obstacles of an economic and social order which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic***

and social organization of the country. "), as the amount of the compensation indemnity drawn up by the provisions of the s.c. "Jobs Act" is **neither compensatory nor dissuasive** and **has discriminatory consequences**; furthermore, the total elimination of the judge's discretionary judgment ends up in a uniform way to regulate very dissimilar cases (violating the principle of reasonableness, mirroring the principle of equality);

°° article 4 - CostRI ("***The Republic recognizes all citizens the right to work and promotes the conditions that make this right effective." Every citizen has the duty to perform, according to their possibilities and their choice, an activity or a function that contributes to the material or spiritual progress of society.*** ") and article 35 - CostRI (" ***The Republic protects work in all its forms and applications, it takes care of the training and professional development of workers. and international organizations aimed at affirming and regulating labor rights . Recognizing the freedom of emigration, except for the obligations established by law in the general interest, and protecting Italian work abroad.*** "), as - in the opinion of the Roman Judge - << **to the right to work, the founding value of the Charter** (Editor's note : the Judge refers to the CostRI), **a monetary countervalue In a derisory way and in a fixed amount is attributed** >>;

°°° article 117 - CostRI ("***The legislative power is exercised by the State and the Regions in compliance with the Constitution, as well as the constraints deriving from the community and international obligations. (...)***") and Article 76 - Costri (" ***The exercise of the legislative function can not be delegated to the Government except with the determination of principalities and managerial criteria and only for limited time and for definite objects.*** "), as - in the opinion of the Roman Judge - << **the "sanction" for the illegitimate unlawful dismissal appears inadequate compared to what has been supranational sources such as the Charter of Nice and the European Social Charter, while compliance with EU regulations and supranational conventions was a precise proxy, which is was therefore violated.** >>. In this regard it should be noted that the Law (proxy) no. 183/2014, article 7, paragraph 1, with explicit reference to "dismissal for justified reason" indicates as a general criterion the "***consistency with the regulation of the European Union and international conventions***".

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With less consistency of argumentation, the Roman Judge identifies the supranational rank standards violated (in terms of "non-compliance") by the 2014-2015 reform:

i) Article 30 of the Nice Charter (2012/C 326/02 - CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION - CFREU), where it requires Member States to ensure adequate protection in the event of unjustified unlawful dismissal : << ***Protection in the event of unjustified dismissal. Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.***>> ;

ii) **ILO C158 - Termination of Employment Convention, 1982 (No. 158):** it requires that << ***Article 10 If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.>>.***

(It should be noted that **Italy has not ratified this Convention**, see:

http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102709);

iii) **Article 24 of the European Social Charter (ESC)** which establishes:<< ***The right to protection in cases of termination of employment. With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognize: a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service; b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief. To this end, the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body.***>>.

In this last regard, with great methodological correctness, the Roman Judge has identified the "**living law**" which defines the characters of << appropriateness >> of the compensation and << adequacy >> of the relief, guaranteed by the ESC to the workers, in **some decisions** of the European Committee of Social Rights (**ECSR**).

In these rulings, the Committee, while acknowledging that the restorative measure may not be of a recurring nature but merely indemnity, has affirmed that the relief must be

adequate (from the worker's point of view) and dissuasive (from point of view of the employer).

With two separate decisions of January 31, 2017 (Complaints : No. 106/2014 and No. 107/2014, both with regard to Finland), the Committee interpreted Article 24 of the ESC (Editor's note: in the Revised (1996) text), solicited thanks to collective complaints promoted by the Finnish Society of Social Rights (which had complained of the violation of Article 24 of the Charter in relation to the Finnish national provisions which provided, on the one hand, the conditions for ordering a dismissal for justified objective reasons, and on the other , the employer's responsibility in case of illegitimate unlawful dismissal), to identify the limits that the national legislator must not go beyond.

The ECSR (in particular in points 45 to 54 of the decision on complaint no. 106/2014), has in fact clarified (**with expressions valid for all countries that have joined the ESC without explicit reservations on the formula of Article 24, in the revised text of 1996**) that, under the Charter, << ***to employees dismissed without justified reason adequate compensation or other appropriate remedies must be granted; the compensation mechanism is considered appropriate*** (point 45) **when it provides:**

- reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;
- possibility of reinstatement;
- compensation at a level high enough to dissuade the employer and make good the damage suffered by the employee. >>.

In the decision on Complaint n. 106/2014 the ECSR has affirmed other fundamental evaluation criteria :
<<(46.) ***Any upper limit on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive is in principle, contrary to the Charter. However, if there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation) (Conclusions 2012, Slovenia).***
i) Adequate compensation
(47.) ***As regards the allegation that Finland is in breach of Article 24 of the Charter on the grounds that the Employment Contracts Act provides for a limit on the amount of compensation that may be awarded in the event of an unlawful dismissal the Committee recalls that in Conclusions 2008 it found that the situation in Finland was not in conformity with that provision of the Charter on the ground that compensation for unlawful dismissal was subject to an upper limit of no more than 24 months pay. However, in its subsequent conclusions (Conclusions 2012) it noted that in certain cases of unlawful dismissal compensation may also be awarded under the Tort***

Liability Act, and requested information on cases where an employee has successfully sought compensation under the Tort Liability Act in a case of unlawful dismissal. Meanwhile, it found the situation to be in conformity with Article 24 of the Charter (Conclusions 2012, Finland). The Finnish Society of Social Rights maintains that the Tort Liability Act is only applicable if real harm or damage has been inflicted on the employee.

(48.) ***The Government states that employees may in addition to the Employment Contracts Act seek compensation for unlawful dismissal under the Non-Discrimination Act and the Act on Equality between Women and Men. However, the Committee notes that only persons who were dismissed on discriminatory grounds may seek compensation under these pieces of legislation. In a case of unfair dismissal, not having a discriminatory element, it is not possible to claim compensation under them.***

(49.) ***The Committee considers that in some cases of unfair dismissal an award of compensation of 24 months as provided for under the Employment Contracts Act may not be sufficient to make good the loss and damage suffered.***

(50.) ***The Government highlights that employees, who have been unlawfully dismissed, may seek compensation in addition under the Tort Liability Act.***

(51.) ***The Committee also notes that the Government in its submissions on the merits has provided no examples of cases where compensation has been awarded for unfair dismissal under the Tort Liability Act. In its 11th report under the reporting procedure the Government cites a judgment of the Helsinki Court of Appeal upholding an District Court decision awarding compensation under the Tort Liability Act in a case of discriminatory dismissal, where compensation had also been sought on the basis of the Employment Contracts Act and the Non-Discrimination Act. The Committee notes that this case concerned discriminatory dismissal. The Committee notes that the Tort Liability Act does not apply in all situations of unlawful dismissal, and may only be applicable in restricted situations. In particular, it notes that the Tort Liability Act does not apply in respect of contractual liability or liability provided for in another act, unless otherwise specified.***

(52.) ***The Committee finds that the Tort Liability Act does not provide a fully-fledged alternative legal avenue for the victims of unlawful dismissal not linked to discrimination.***

(53.) ***The Committee considers that the upper limit to compensation provided for by the Employment Contracts Act may result in situations where compensation awarded is not commensurate with the loss suffered. In addition, it cannot conclude that adequate alternative other legal avenues are available to provide a remedy in such cases.***

(54.) ***Therefore the Committee holds that there is a violation of Article 24 of the Charter.***

Conclusions

- by 7 votes to 4, that there is a violation of Article 24 of the Charter, <u>on the issue of compensation</u>;
- unanimously, that there is a violation of Article 24 of the Charter on the issue of reinstatement.>>.

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For intellectual honesty it must be said that the decision of the Committee has recognized the violation of article 24 also with reference to the question of reinstatement. This issue is not placed in the foreground in the order of the Roman judge. Moreover, the reference to the decision on Complaint n. 107 is not relevant because the Committee's conclusion is : << there Is no violation of Article 24 >>.

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According to the Roman Judge:<< **It follows that, in principle, any compensation limit that precludes a "compensation" commensurate with the loss suffered and sufficiently dissuasive is contrary to the Charter. In the present case, the Finnish legislation provided for a limit of 24 months of pay as the maximum limit for compensation for the damage from unlawful dismissal. In this context, the Committee notes that the maximum limit of compensation provided by law can lead to situations in which compensation awarded is not commensurate with the loss suffered: it follows that the *plafonnement* of compensation complements a violation of Article 24 of the Charter.** >>.

To this fundamental passage of the motivation of the Roman Judge order binds the successive one that specifically concerns the Italian legislative evolution (situation before the reform 2014-2015).

It also detects that: << **Also in the 2016 conclusions** (Editor's note: National Report of the Committee on Italy, whose horizon stops in 2014, see in: https://rm.coe.int/activity-report-ecsr-2016-final-17-03 -2017/1680701072, page 37) **concerning the Italian legislation in force in 2014 (and therefore to Law No. 92/2012), the Committee has recalled that any ceiling such as to determine the recognized allowances not to be related to the prejudice suffered and sufficiently dissuasive.**>>.

Nonetheless - argues the Roman judge - **the ESC must be considered, like the ECHR, as an "interposed source"** (and in this sense, see: Italian Constitutional Court, ruling No. 178/2015); in any case, as mentioned, the alleged violation of supranational principles is to support the assessment of the contrast of the legislation under examination with the articles. 3, 4 and 35 of the CostRI, on the justification of the unequal treatment of workers seeking employment and workers already employed in

March 2015 and violation of the commitment to promote international agreements and organizations aimed at establishing and regulating the rights work (third paragraph of Article 35 CostRI).

The contrast with the CostRI (it should be noted) << **does not occur because of the elimination of reinstatement protection** - if not for the null dismissals, discriminatory and for specific cases of disciplinary dismissal (Article 1, paragraph 7, letter c), Law (proxy) n. 183/2014) - **and therefore because of the full "monetization" of the guarantee offered to the worker**: indeed the Italian Constitutional Court has already repeatedly ruled that reinstatement protection is not the only possible paradigm for the implementation of the constitutional precepts set forth in Articles. 4 and 35 (see Italian Constitutional Court, rulings No. 46/2000 and No. 303/2011).>>.

The suspicion of unconstitutionality says the Roman Judge << **is here formulated, instead, by reason of the concrete discipline of compensation which, in compensating only for the equivalent of the unjust damage suffered by the worker, is now also destined to take the place of the concurrent compensation in a specific form constituted from reinstatement protection (which has become a protection for a few cases of exceptional gravity) and therefore should have been much more substantial and adequate**.>>.

The Italian Constitutional Court has indeed stated on several occasions, most recently in the aforementioned ruling No. 303/2011, that "***the general rule of completeness of the reparation and equivalence of the same to the damage caused to the injured person has no constitutional cover" (ruling No. 148/1999) provided that the adequacy of the compensation is guaranteed (rulings No. 199/2005 and No. 420/1991)***".

And this is precisely the specific profile with respect to which the legislation in question does not escape the doubt of constitutionality.

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2. Some reflections on the way followed by the Roman Judge …

§.1. Of the three sources of supranational law, **only Article 24 ESC** appears to be effective for resolving the specific case.

Indeed the ILO 158 convention has not been ratified by Italy; it cannot have the character of an interposed standard.

In fact, Article 30 of the Charter of the fundamental rights of the European Union (CFREU) does not have the characteristics of a preceptive rule but at the most it has the nature of a principle with a programmatic function; in its formula echoes the fear of not disrupting national laws and practices

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§.2. Significantly, the Roman Judge has not indicated as a parameter of constitutionality violated the art. 10 of the Italian Constitution (Article 10, par. 1, CostRI - << ***The Italian legal system conforms to the generally recognized norms of international law*** >>). And perhaps this in the fear that the Italian Constitutional Court would not focus on the specific theme governed by Article 24 of the ESC which is still an International Treaty …

Indeed the "interpretative experience" of the article 10 CostRI by the Italian Constitutional Court is rather "conservative", and the Roman Judge has considered observing the rule clarified by the same Italian Constitutional Court which states the following: << ***The common judge is responsible for interpreting the internal law in accordance with the provision international, within the limits in which this is permitted by the texts of the rules. If this is not the case possible, or doubt the compatibility of the internal standard with the conventional provision "Interposed", he must invest this Court of the relative question of constitutional legitimacy with respect to the parameter of art. 117, first paragraph*** (ruling No. n. 349/2007). >>

3. Scenarios of the case solution and the alternative paths

As a result, the Roman Judge decided to follow the "quieter" route : to present the question on the table of the competent constitutional body.

What could be the approach of the Italian Constitutional Court to the question raised?

Let's try to outline some hypotheses, also using the *ad excludendum* technique …

§.a. with almost absolute probability the Italian Constitutional Court (ICostC) will not invest the CJEU court of justice of the European union, since the legal basis (article 30 CFREU) appears too uncertain and indeed suitable to provoke aporìa and tautology in the search for the applicable legal background and the limits of its application.

§.b. the ICostC could apply the criteria indicated in the ECSR Decision on complaint no. 106/2014 and "baptizing" them with a "license of constitutionality" (a sort of compatibility with the Italian Constitution … even if it seems a paradoxical nostalgic tribute to the idol of sovereignty …) and to declare the question of constitutionality

raised by the Roman judge well founded, with a double possibility: declare the immediate cancellation of the rules reported (by contrast with Article 76 CostRI, for violation of the limits of legislative delegation), or invoke a warning to the legislator to identify urgently a normative solution (assuming that the Government, as the delegated legislator still has the power to make corrective to the legislative decree No. 23/2015 ...) that guarantees compliance with the supranational rank rule (art. 24 o the ESC).

§.c. the ICostC could reject the question, as groundless, motivating in the sense that the legislator has correctly used its normative power, in defining the monetary protection level (quantum) granted (to) the dismissed workers after having been hired after March 2015. Such a ruling could be hardly criticized because it seems unreasonable to establish a "wall" between protection levels only discriminating on the basis of an event not dependent on the wishes of the worker but rather from its counterpart: the date of employment. Moreover, it should not be forgotten that in the spring of 2018 parliamentary elections will be held in Italy and that some political groups have included in their program the abrogation of the s.c. "Jobs Act".

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In a different perspective …

§.A. could the Roman judge directly evaluate and affirm the non-conformity of the Italian Law with Article 24 of the ESC ?

In the opinion of the IConstC itself, such direct assessment would be precluded only in the case in which << If this is not the case possible, ***or doubt*** the compatibility of the internal standard with the conventional provision "Interposed", he must invest this Court of the relative question of constitutional legitimacy with respect to the parameter of art. 117, first paragraph >> (ruling No. n. 349/2007).

This means that **the referral to the Constitutional Court is necessary only when the judge of merit's doubt is real and concrete**.

Therefore **the Italian legal system does not strictly forbid the judges of merit to decide directly on the non-conformity of a national rule with respect to a supranational sourced standard**.

This seems to be the path taken by the Spanish labor judges, with appreciable results in terms of effectiveness and speed of resolution of non-compliance issues, in many trials in the last years, although Spain has not ratified the additional ESC protocol on collective complaints (see: SALCEDO BELTRAN Carmen, *Les litiges en matière*

d'emploi au regard de la Charte Sociale Européenne – Speech-paper at the international Conference "Social rights in Europe today: the role of national and European courts ", organized in Nicosia on February 24, 2017 by the Supreme Court of Cyprus and the Council of Europe, at: https://rm.coe.int/16806fe3b3 ; more recently : SALCEDO BELTRAN Carmen, *Derechos sociales versus medidas de austeridad: jurisprudencia del guardian europeo de los derechos sociales*, Speech-paper at the international Conference "*La Carta Social Europea. Pilar fundamental de las politicas sociales regionales in Europa*", organized in Valencia on November 16, 2017 by the Spanish Section of RACSE-ANESC and the Direction for UE relationship of the Generalitat Valenciana).

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4. Last remarks : ESC, CFREU and supranational scope of paths of protection of social rights

What's at stake : : ζωή με ευρωπαϊκή διάσταση ; neither more nor less than life with an European dimension … with an "European breath".

In a context of extreme socio-economic emergency that widens the gap between "formal" statements (including constitutional status in many countries of the enlarged European area) of social rights and measures of drastic revision of the levels of protection of national welfare ad labour law systems, the provisions contained in the two Charters they constitute the legal foundation of the control of the effectiveness of the enjoyment of the rights in question.
The two distinct (but mutually permeable) models of regulation represented by the two Charters suggest paths of protection of supranational scope, in which, through different but not idiosyncratic "remedies", the real behaviors of individual member Countries can be brought "to emergence" adherents, in a unitary and dynamic vision - in an evolutionary sense - of the level of protection of each element of the *genus* "social rights" (obviously interpreted in light of the constitutional traditions of the member Countries themselves).
The collective complaint procedure before the European Social Rights Committee (ECSR) and the EU infringement procedure (due to the formal and substantial insertion of the CFREU into the EU Treaty system, pursuant to Article 6 of the TEU) can well represent the "window" from which to observe (and recall) the member Countries for the adoption of "non-regressive" policies regarding the actual enjoyment of social rights in the relevant territory.

The scientific debate (and the path of virtuous implementation, on the political-institutional level) related to the relations between the two sources of regulation placed at the center of our attention seems focused - perhaps excessively formalistic - on the

genetic aspects of the legal relations between the two systems (Council of Europe and European Union), with particular reference to the situation of subjective impasse (see: GUIGLIA Giovanni (2011); more recently: GUIGLIA Giovanni, *Alcune proposte per favorire le relazioni e le sinergie tra il diritto dell'Unione europea e la Carta sociale europea*, Speech-paper at the international Conference "La Carta Social Europea. Pilar fundamental de las politicas sociales regionales in Europa", organized in Valencia on November 16, 2017).

From the substantive point of view (the one that most interests in order to fill the protection of social rights in the European legal space with content (see: HÄBERLE (2003), 199 ss.; POLI (2014)) the question that has almost monopolized the attention of the experts is perhaps a τόπος that can be overcome with a strong call to the principle of effectiveness (FONTANA (2014)), looking at the original intention of the founders of the Council of Europe and the European Communities.

This rediscovery of the inspiration of the overall design of "a life with a European breath" (ζωή με ευρωπαϊκή διάσταση ..., it would be to declaim this verse ...) is in the sign of the Lisbon Treaty and in the wake of the very idea of social cohesion called in the TEU, in full harmony with the common commitment to harmonize welfare systems (as set out in the European Social Security Code - ECSS, issued in 1964), which led to the subsequent drafts of the European Social Charter.

Therefore, if it is certainly not to neglect any effort to achieve the formal adhesion of the European Union to the ESC (and in any case to give new impetus to the institutional relations between the European Union and the Council of Europe), we must also strongly recall the value (non-nominal) of the formulas chosen in the Preambles of the two Charters (ESC and CFREU).

These formulas (even the twelve tables, after all were formulas ...) constitute the plot on which the juridical-social relations between Person and State must interweave (as well as between States and between these and the supranational reference organizations, in a choral spirit free from egoisms and reservations) in the model of "life with European breath", that is, a life worth living.

Maximum convergence in the implementation of the two regulatory systems must therefore be sought in the concrete legal-social experience of each Country concerned.

If it is true that the subjective effectiveness of the two Charters is largely coincident, it should be noted that many States - which also play a very important role in the political and institutional life of the European Union - have not, so far, intended to sign the Protocol addition to the ESC on collective complaints.

In recent years, in fact, the ECSR, which has the task of examining such acts of impulse / control (really fundamental for achieving the objectives of effective protection of social rights in the vast European sphere), has assumed an increasingly incisive role in the assessment of the overall behavior of each of the member states (both as legislator and as a public administrative authority, on this last aspect, see: MONACO (2012)).

The type of assessment that is carried out by the ECSR in the examination of collective complaints is of a different nature from that made by the institutions of the European Union in the areas of competence, with reference to the different legal sources that express the will of the Union itself.
And in fact, not by chance, the entire Title VII of the CFREU is dedicated to a sort of *actio finium regundorum*: the obvious concern is that - on the one hand - not to overflow from the confines of the law of Union, united with that - on the other hand - not to provoke "disharmony" with respect to the "common" constitutional traditions of the member States.

The ambiguity of this formula (Article 52, paragraph 4) is not too hidden, although it must be read in the light of the fifth paragraph of the Preamble (which refers to the reaffirmation of "*the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights*", significantly silent on the role of the ECSR …

And more (Article 52, par. 5) : "*The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality*.".

And, with an accent that is still "prudent" (Article 52, par. 6) :"Full account shall be taken of national laws and practices as specified in this Charter.".

This "prudence" also echoes in the TUE formulas (Article 6): "*1.The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and*

application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.".

On the front of "justiciability" (which must always be remembered, it is only one element of the effectiveness of any source of any level, see: PICCHI (2012); TEGA (2012); CHIARELLA (2011)) it is evident the concern of in any case guarantee a certain degree of homogeneity.
And in fact, the same Article 52 provides: "*7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the Courts of the Union and of the Member States.*".

It should be noted, however, that this provision remained empty of substance as the institution holding this hermeneutic task (not properly ispired to nomofilachìa, which is the prerogative of the CJEU), namely: the Praesidium mentioned in the Preamble of the Charter itself recited the part of the mute Sibilla.
The reasons for this overall attitude on the part of the institutions of the Union (and in particular the Praesidium who edited the CFREU) have been masterfully illustrated by Klaus Stern in a Seminar (June 2014) held at the University of Verona and dedicated to young scholars participating in the interdisciplinary research doctorate in public relations coordinated by Alessio Zaccaria; the illustrious speaker, taking up the analysis already formulated with absolute rigor in previous writings (STERN 2005 and STERN 2006) highlighted the intrinsic limits of the Charter in comment, as a legal "tool".
Basically, the embankment represented by Title VII prevents "expansive" readings of its formulas, which, therefore, must always be traced back to the positive law of the Union, with every known limit, especially in the normative genesis of individual acts (Directives, Recommendations, etc.).

In particular, the real meaning of the following expression contained in the CFREU Preamble must be well understood: "*Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations*.".

The identification of the subjective scope of CFREU cannot ignore the answer to the fundamental question: who are the "*others*"?

It is to be excluded that these are other Member States of the Union, since the common legal framework of the formulas contained in CFREU (they concern both "rights", "freedom" and "principles") involve the relationship between the Person and the Member State. as well as that between Person and Institutions of the Union.

There is only one answer: the "*others*" are all the subjects to whom it is possible to attribute responsibilities of legal importance in terms of effectiveness (Union institutions, Member States and other bodies governed by public law, private entities, both individual and collective); the English text bears, incidentally, the expression "regard to other persons" ...
Especially since the active subjective gradient of responsibility involves (none other) that the "human community" and "future generations" ...

This is not the place to carry out a complete analysis on the degree of awareness in the use of the different semantic expressions in the work of drawing up the Charter (and in particular, the expressions often used in a fungible way: "rights", "freedom", "Principles") by the editors of CFREU; nevertheless, it should be excluded that the "responsibility" and the "duties" mentioned in the CFREU Preamble are attributable only to the category of "rights" understood in a formal sense; this is because "liberties" escape the right / obligation schema, to say nothing of the programmatic (but effective on the ontological) function of the "Principles".
And it cannot in any case reasonably be maintained that even from these last legal figures do not descend "responsibility" and "duties"

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In any case, the time has truly come to overtake the traditional "static" visions of the normative system of social rights in the European legal space, as this approach risks favoring - even without intending to be a former professed - or otherwise endorsing a "resigned" and “depressed vision of social Europe” (DI STANI (2014), GIUBBONI (2014), POLI (2014), FONTANA (2013)).

In other words: Europe is, even before a market, a "***place of the spirit***"; this vision corresponds to the feeling one feels when entering and walking in a familiar and not hostile place, where the human being is considered a Person and not a mere recipient of goods and services.

For this reason it is necessary to start and strengthen a flow of paths, of different provenance and technical-legal motivation, but all converging to give reason and solution to the problems that are posed in the various competent institutions7Bodies; the polar star (the simplest and brightest in the firmament) consists of a pure question: ***repugnat aut non repugnat*** (to the European feel – i.e. Ευρωπαϊκή αίσθηση , to the European breathe – i.e. Ευρωπαϊκή αναπνέουμε) what I am reading, what I am seeing and what I am listening to?

This is the question that every juridical-institutional operator has to ask when he/she reflects on any problem of "compatibility" of a given (normative, of practice, etc.) that arises from the comparison between the individual national experience and the formulas expressed in the two Charters.

The mention (more than an "external reference") contained in the second "*considering*" of the TEU Preamble to the ESC, in conjunction with that of the Community Charter of Fundamental Social Rights of Workers of 1989 (*sic* ... and not to the CFREU ..., but must be of a typo in the work of drafting the consolidated version (2012) of the TUE ..., as in Article 6 the reference to the latter is correctly performed also from the formal point of view ...), it would be little more than a "nodded hello" to the patient activity carried out in the Council of Europe, if the formula of Article 6 TEU had not been issued, which provides: "*1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*".
From which it could be inferred that (at least in a mediated way) we would be faced with a "reference" to the ESC, through the formulas contained in the Preamble of the CFREU.

However, the formula of Article 6 TEU goes on: "*The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*" (Editor's note: of the EU).

And even more emphasizing the groove in the attempt to establish the boundaries beyond which not "overflowing", adds : "*The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.*".

It is even more regrettable that, in practice, these "explanations" are left to the CJEU and not to the Praesidium ...
There is also a concern to clarify that: "*2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*".

This clarification seems to be directed, indeed, precisely to the CJEU, as well as to the EU legislator.

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A greater awareness of the importance of the virtuous interaction between the two Charters, in terms of effectiveness, is undoubtedly expressed in the formula of Article 151 TFEU:
"*The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.*".

There is no doubt that the expression "*having in mind*" is something (from the point of view of the quality of legal commitment) of a far lesser extent than formal adhesion or even a formula of possible emanation on the theoretical level, such as: "*undertake to respect*"; at the same time, looking at the substance (in teleological function), however, the expression that identifies the common objectives (to the Union and to the Member States, this is expressed in the text very clearly) must be fully exploited: "*the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour*".

These objectives are clearly functionalized for improving employment and fighting social exclusion : "*a view to lasting high employment and the combating of exclusion.* ".

It is not a simply coincidence that the entire Title X of the TFEU is dedicated to identifying the tasks and responsibilities of both the Union and the Member States in this huge job, of ultragenerational relevance.

Now, to consider the real meaning of the formulas adopted by the various subjects (European Union and Council of Europe) in the various acts analyzed, we can see that there is no longer any alibi for a "lukewarm" attitude towards social rights in the European legal area (and system).
The formulas (especially the Preambles of the two Charters and those of the Titles X (Social Policy) and XI (European Social Fund) of the TFEU), read in synopsis, are very similar, however "convergent" (also because they are the result of "cultural contamination" stratified over time, albeit with uncertainties and rethinking, witnessed precisely by the reference to the "competitiveness" contained in section 2, and the

"declaration of faith" in the invisible hand of the market, contained in par. 3 of Article 151 TFEU).

5. The achievement of objectives and the modulation of protection paths

The premise (due to a superficial approach) is that the difference (not really essential, in a general and abstract sense) between the two Charters is the "quality" of the formulas adopted; in the ESC, in fact, under the same paragraph dedicated to the same social law (eg: the right to social security, recognized under Article 12 ESC and Article 34 CFREU) we find in the first Charter a systematic list (not mandatory) , but "parametric") of actions and measures, while in the corresponding formula of the second Charter we find a timid reference to the great general themes of the positive law of the Union on the subject, against the background of the most immediate fundamental freedoms enshrined in the TEU: freedom circulation in the physical space of the territory of the Union, to which the prohibition of discrimination on a national basis in access to the social security system in force in the "destination" country is functional.

But there is more.

The formula of paragraph 3 of Article 12 of the ESC is rich and inspired by a "dynamic" vision of the protection of social rights.
The reference to the solemn undertaking signed by each member State “to endeavour to raise progressively the system of social security to a higher level “ it is not empty rhetorical formula.

It is something measurable, in economic-monetary and statistical terms.

The ECSR has shown to be aware of it, in the now well-tested technique of analysis and drafting of national reports (on the new perspectives of the role of the ECSR, see: STRAZIUSO (2012)).
What has happened again in the last years is that the Committee, thanks to the experience and sensitivity gained during the periodic audit (whose only imperative is: “provide us with reliable and accurate data because it is our job to understand and suggest“, certainly not to impose upon the States Parties percentages and "magic numbers" or “golden ratio” …), offered a "dynamic" reading (and therefore faithful to the founding rationale of the ESC) of these formulas.

The linguistic expressions contained therein have been used as a paradigm useful for measuring the degree of achievement of the objectives set by the ESC.

Moreover (it should be noted strongly in today's reflections) paragraph 3 is inseparably linked to paragraph 2, whose formula constitutes the "closing" mechanism of the legal perimeter of the commitment assumed in the specific subject by the acceding Country (each State undertakes, indeed : "*to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security* ".

In fact (it should be noted even more in the context of "regressivity" of the protection of social rights in each Country included in the European legal area), this legal source (European Social Security Code - ECSS), drafted in 1964 after the birth of the ESC in the previous version of 1961, is equipped with a Preamble with the following content:

"***The member States of the Council of Europe, signatory to this Code, Considering that the aim of the Council of Europe is to achieve a greater unity between its members in order to promote, in particular, social progress;***

Considering that one of the objectives of the social program of the Council of Europe is to encourage all members to further develop their social security system;

Recognizing the opportunity to harmonize the social security contributions of the member countries;

Convinced of the advisability of creating a European Code of Social Security to a level higher than the minimum standards set out in the International Labour Convention n. 1023 (1952) concerning minimum standards of social security,

They established the following provisions which have been developed in collaboration with the International Labour Office. ".

In elementary terms: the formulas contained in the ECSS represent the *an* and the "indefectible" *quomodo* to be respected for entering the "ESC club"; the formulas of the art. 12 ESC represent the tracks on which each State must be willing to be "measured" (also in the ***quantum*** ... of protection provided, according to the various legal institutions analyzed from time to time) by the ECSR, during its journey in view of the achievement of the objectives of the ESC; the choice to start and continue this journey was carried out in full freedom and sovereignty (with the seal of each national parliament in the ratification of the act of accession, if required …) but with full awareness of the solemnity of the commitments made in the European legal area.

It should also be noted that the panel of Parties' signatures of the ESC additional Protocol on collective complaints is narrower (13) than that of subscribers to the ECSS (20).

From this gap there are undoubted negative consequences on the implementation path of the ESC.

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Returning to the legal scope of paragraph 3 of Article 12 ESC, in light of what has just been considered on the genesis of the ECSS, it should be noted, in fact, that the access point to the signing of the ESC Treaty is "modular" (menu, with some constraints, much lighter than the Fiscal compact and so on ...).

And in fact, we read in the ESC :

<< Part III - Article A - Undertakings

1. Subject to the provisions of Article B below, each of the Parties undertakes:

a. to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that part;

b. to consider itself bound by at least six of the following nine articles of Part II of this Charter: Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20;

c. to consider itself bound by an additional number of articles or numbered paragraphs of Part II of the Charter which it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles or sixty-three numbered paragraphs.

2. The articles or paragraphs selected in accordance with sub paragraphs b and c of paragraph 1 of this article shall be notified to the Secretary General of the Council of Europe at the time when the instrument of ratification, acceptance or approval is deposited.

3. Any Party may, at a later date, declare by notification addressed to the Secretary General that it considers itself bound by any articles or any numbered paragraphs of Part II of the Charter which it has not already accepted under the terms of paragraph 1 of this article. Such undertakings subsequently given shall be deemed to be an integral part of the ratification, acceptance or approval and shall have the same effect as from the first day of the month following the expiration of a period of one month after the date of the notification.

4. Each Party shall maintain a system of labour inspection appropriate to national conditions. >>

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This particular genesis (quite innovative compared to the OIL_ILO paradigm, and it is significant that the genesis of the Code has actively participated in this international organization of "global" breath) is functionalized to the main objective: to give effect to

the commitments assumed by the Parties (States), given the character of "dynamic" participation in the "life of the club", with a single constraint: back (i.e. at a lower qualitative-quantitative level of protection of social rights, compared to the time of accession to the Treaty) we cannot return ... (see: Section III - Article A, paragraph 3).

This is the semantic value of the expression "encourage" contained in the ECSS Preamble …

Those who conceived the normative architecture (at a modular intersection, as in a shipyard ...) of the ESC (and in technical-legal function, of supporting specification, of the ECSS) were well aware of the gravity of the tasks required by the art. 12 ESC.

For this a "filter" was created for the specific subscription of the Article (since it does not seem - on the theoretical level - to configure a menu subscription within article 12, but we cannot know the historical dynamics of adherence to the different drafting of the Treaty ESC over the years ...): it has the function of "encouraging" the choices of "conscious adherence" by the Parties (States).

It is not surprising, at the outcome of the systematic analysis of the formulas contained in ESC, ECSS and CFREU, the different degree of specificity of the same.

Those in CFREU represent a measure for the Community institutions (they do not seem frankly conceived neither for use by the Member States, nor for "direct" protection of individual subjective positions, in light of the clear ancillary nature of Title VII to the genesis and characteristics of "positive law" of the Union).

Those in ESC constitute, instead, an "external limit" to the exercise of the power (legislative and / or administrative) of the Parties (States), by virtue of the solemn commitments made at the time of accession.

There are well-known obstacles to an effective dialogue between ESC and EU law, not only and not so much at the level of Charters, but because the differences in the logic of orientation in the normative dynamics.

The overcoming of these distances and the achievement of the maximum degree of convergence possible are in fact the objectives of the <<Turin Process>> pursued by the Council of Europe which the EU institutions seem to be now sensitive to (see: BONET PEROT Silvia Eloisa, *El Proceso deTurín: fortalecimiento de los derechos sociales en Europa,* Speech-paper at the international Conference "La Carta Social Europea. Pilar fundamental de las politicas sociales regionales in Europa", organized in Valencia on November 16, 2017; and GUIGLIA (2017)).

Firstly, the "reserves" must be overcome in terms of substantive law: they can be read, limited to the EU member countries, with a view to "respect" national ("internal") constitutional traditions. For these countries the formulation of "reserves" of substantive (at constitutional level, often) law does not preclude, however, the verification of the degree of satisfaction of the envisaged requirement ("common" traditions), although still within the ("living") EU law (that is, the resulting from the application of EU sources in the judicial experience of the CJEU.
Secondly, the (implicit) "reserves" on the procedural law level must also be overcome: this attitude is evidenced by the failure to sign the Protocol on collective complaints by Countries belonging to the ESC, which are also Members of the EU.

It should be stressed that the same CFREU (Article 54) establishes a prohibition on regressivity; it is in fact not an empty "stilema" the following expression: "*Prohibition of the abuse of right - No provision of this Charter must be interpreted in the sense of entailing the right to exercise an activity or to perform an act that aims to destroy rights or liberties recognized in this Charter or to impose more extensive restrictions on these rights and freedoms than those set forth in this Charter.* "
It should also be noted that, in any case, the **duty of collaboration to achieve the objectives** indicated in the ESC, in the ECSS and in the CFREU obliges the Members/Parties States to respect the commitments solemnly assumed by them; **this duty constitutes an unavoidable element of assessment by the National Judges in the resolution of the individual disputes to be examined in the matter of social rights, especially when they are focused on the respect of the principle of adequacy of social protection measures, and, from the point of subjective view, when the actor belongs to a group "at risk of social exclusion"** (i.e. in substance, "*marginalized*"), often because of the regulatory contradictions and / or the administrative action of the State.

With this we want to underline the **circular nature of the process of focusing on legal cases** whose (possible) "patrimonial" connotation is only of a phenomenological nature being functional to the realization of the specific measure of social protection.

Borrowing a typical figure of classical Roman law, it can be said that **a negative assessment made by the ECSR towards a State-Party of the ESC** - both in the periodic national report and in the decision on one or more collective complaints - **is fully suitable for establishing a reliable, serious, impartial and homogeneous legal basis** (with a view to harmonizing the European legal area), almost as an ***edictum praetoris***. This suggestion arose in our mind listening a speech-paper of Luis JIMENA QUESADA, Il ruolo del Comitato Europeo dei Diritti Sociali nella definizione della dimensione sociale dell'Europa, May 9, 2014, Università di Verona – Scuola di Dottorato di Ricerca in Scienze giuridiche europee ed internazionali).

In the ancient Rome, the *edictum praetoris* was a particular form of programmatic edict as indicative of the activity of the *praetor*.
In fact, the magistrate could apply both existing law and introduce new instruments of procedural protection, sometimes even in derogation from the *ius civile*, through the creation of a right "generated" by the process.
It should be noted that the "praetorian law" thus formed was still anchored to current law (which was still the *ius civile*), in which however the various magistrates intervened *adiuvandi, supplendi vel corrigendi iuris civilis gratia* ("with the grace to succurr, substitute or correct civil law"), or rather some of its gaps or inaccuracies.
The purpose of the *praetor* was in fact to maintain the *aequitas* ("fairness"), or to guarantee equal conditions for citizens in the trial.
The magistrates had the faculty of the *ius dicere inter cives romanos* ("to judge between Roman citizens"): they were in fact entitled to decide on private disputes within the city of Rome (*Praetor urbanus*) and not (*Praetor peregrinus*).
The trial took place first in front of the judge who already decided the rule to be applied and then before an *iudex unus* (i.e. before a private individual with a single-judge function) that applied the rule.
When, during the average Republic (III century BC), the magistrates introduced the formulation procedure into the proceedings, in which, to define the question concerning a case before the *iudex*, a set of rigid prescriptive formulas was used, the *edictum praetoris* became in practice a collection of formulas to be used in the proceedings.

According to the Roman jurist Papiniano (Dig 1.1.7.1), the *edictum* was used to complete, explain, and improve the *ius civile*, becoming an important vehicle for the evolution of Roman civil law.
From 67 BC, then, a lex Cornelia required the magistrate to respect his edict in the exercise of his functions.
The *edictum praetoris* issued by the magistrate could be of two types:
• *perpetuum*: Publicly published edict that was valid for the entire office of the magistrate;
• *repentinum*: edict that was issued to make up for special occasions.

More frequently, the *edictum praetoris* took the form of perpetual edict: in it were defined the rules that would govern the administration of justice by the *praetor* during his (annual) office. Every time a new magistrate was elected, he issued his own perpetual edict in which he listed what actions the actor could ask, or, following the establishment of the formulation process, which formulas he protected from the actor and which situations he instead protected by the defendant (through the legal status of the *exceptio*); the edicts were issued publicly to make them known to the people.

On the praetor's side there was the custom of reproducing part of the edict of his predecessor; so in every new perpetual edict there was always something of the

previous ones. Over time a nucleus was formed which was called *edictum tralaticium* ("edict transmitted", almost inheritance) from a praetor to his successor, who would then integrate and renew it.

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Reflecting in a transgenerational perspective, this is the task of the ECSR (enabled by the ESC to issue something different and more than *responsa prudentium* … being something different from the *Consilium Principis* …), in the alternation of reporting and decision-making activities on collective complaints.

The expression of this incessant work (fruit of the meeting on a collective basis of independent personalities) should not remain *vox clamans* in the desert ... of European life

Therefore, the National Judge (in particular the one operating in that country "concerned" by the evaluation of the Committee) can well justify his decision by referring to (similarly to what happened in the relations between *praetor* and *iudex unus* ...) - as if it were an *edictum tralaticium* - to the "precedent" well highlighted, analyzed and "decided" or "reported" by the Committee.
Such a reasoned motive could easily be subtracted from censures of a subsequent degree (of "merits") at national level, since it could not easily be argued against the *ratio decidendi* of the Committee itself.
Moreover, it would be very easily confirmed in the scrutiny by the (possible) Judge of legitimacy (e.g. the Italian Court of Cassation or the Italian Constitutional Court to which the last question of interpretation could be submitted incidentally - or not - by a Judge of merits).

Such a path of protection would be much more rapid and effective (i.e. virtuously inspired by the principle of effectiveness) of those traditionally known in the experience of the last decades (limited, of course, to EU member Countries): the signaling for activation of the procedure of infringement before the EU Commission (for violation of the "living law" of the EU, and therefore always in compliance with the Preamble and Title VII of the CFREU ...) or the proposition before the national judge for a preliminary reference to the CJEU (under Article 267 TFEU- former: Article 234 TEC).

In fact, we can read:
" *The Court of Justice of the European Union has jurisdiction to give preliminary rulings:*
a) on the interpretation of the treaties;
b) the validity and the interpretation of the acts carried out by the institutions, bodies or bodies of the Union.

When such a matter is raised before a jurisdiction of one of the Member States, such jurisdiction may, if it considers it necessary to issue its judgment a decision on this point, ask the Court to rule on the matter.
When such a matter is raised in a judgment pending before a national jurisdiction, against whose decisions cannot propose a judicial review of domestic law, such jurisdiction is required to refer to the Court.
When such a matter is raised in a judgment pending before a national jurisdiction concerning a person in custody, the Court shall act as quickly as possible. "

It should be noted in this connection that the "remedy" of the proposition, before the National Court of last instance, of a request for a preliminary ruling ("necessary") to the CJEU will be increasingly implemented.
It should also be noted that, in the Italian judicial experience, this "remedy" is poorly known and (consequently) little used.
On closer inspection, this entails an undeniable advantage for the person who complains of the violation of a social right: from the lack of reference (i.e. from the unjustified reasoning of the refusal of the reference for a preliminary ruling) comes an objective responsibility of the Member State (to which administrative organization belongs the "insensitive" Judge ....). It follows an objective liability (of the State) which is substantiated by a right of the protected subject to compensation for damages (also by the possibility of protection, nothing seems to exclude it ...), thanks to the proposition of a judicial action (in front of the functionally competent national judge (according to the general criteria of attribution of jurisdiction); this is by making analogical recourse to the provisions on the matter contained in an Italian law of "supranational" inspiration: (the s.c. "Pinto Law" of March 24, 2001, No. 89), not by chance issued to remedy a lack of social protection related to a protracted process over time.

In fact, it must be remembered that, pursuant to art. 3 of the "Pinto Law" "*the request for an equitable reparation is proposed by appeal to the president of the district court in which the competent court has its headquarters in accordance with article 11 of the code of criminal procedure to judge in proceedings concerning magistrates in whose district the proceeding in which the violation is assumed is concluded or terminated with respect to the degrees of merit. Article 125 of the Code of Civil Procedure applies. The appeal is brought against the Minister of Justice when it comes to proceedings of the ordinary judge ...* ".

In the Italian legal experience, it should be remembered that, pursuant to Law no. 117 of 1988 (Compensation for damages caused in the exercise of judicial functions and civil responsibility of magistrates), the conditions for the compensation protection in this area **were** formulated as follows:

"*Art. 2.Responsibility for fraud or gross negligence*

1. Anyone who has suffered unjust damage as a result of conduct, of an act or of a judicial order instituted by the magistrate with malice or gross negligence in the exercise of his functions or for denial of justice may act against the State for obtain compensation for pecuniary damages and also for non-pecuniary damages deriving from deprivation of personal freedom.

2. In the exercise of judicial functions it cannot give rise to responsibility for the activity of interpretation of legal norms or the evaluation of facts and tests.

3. Constitute serious fault:

a) the serious violation of the law caused by inexcusable negligence;

b) the statement, determined by inexcusable negligence, of a fact whose existence is incontrovertibly excluded from the proceedings of the proceedings;

c) the negation, determined by inexcusable negligence, of a fact whose existence is incontrovertibly confirmed by the deeds of the proceeding;

d) the issue of provision concerning the liberty of the person outside the cases permitted by law or without motivation.

Art. 3. Denial of justice

1. The refusal, the omission or the delay of the magistrate in carrying out acts of his office is constituted refusal of justice when, after the expiry of the law for the fulfillment of the deed, the party has lodged an application to obtain the provision and have passed uselessly, without justified reason, thirty days from the date of filing at the registry. If the deadline is not foreseen, they must in any case run for thirty days from the date on which the request was filed with the request to obtain the provision.

Art. 4.Competence and terms

1. The action for damages against the State must be exercised against the President of the Council of Ministers. Competent is the court of the district capital of the court of appeal to be determined in accordance with article - art. 11 c.p.p. "

2. The action for compensation for damage to the State can be exercised only when the ordinary remedies or other remedies provided for by the precautionary and summary measures have been exhausted, and in any case when the modification or revocation of the provision or, if such remedies are not provided, when the degree of the proceedings in which the event that caused the damage occurred is exhausted. The application must be submitted under penalty of forfeiture within two years starting from the moment in which the action is available.

3. The action may be exercised after three years from the date of the event which caused the damage if in this period the degree of the proceedings in which the event itself has not occurred has not been concluded.

4. In the cases provided for in Article 3, the action must be brought within two years of the expiry of the deadline by which the magistrate should have provided for the application.

5. In no case does the term run against the party who, due to the confidentiality of the preliminary investigation, has not been aware of the fact. "

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In this way, the clear obsolescence of the Italian legal system in reference to the commitments assumed or requested in the supranational context is highlighted, in order to guarantee the principle of effectiveness of the provisions contained in the sources of protection of social rights, and this is the requirement fixed (having experienced all degrees of justice) is too burdensome, both because the objective limitation) exclusion of the error of law) is clearly elusive of the principle itself.
This is all the more true since the CJEU criticized - in the context of the transposition of the infringement procedure for non-compliance with the previous judgment of 13 June 2006, made by the Court in Case C-173 / 03 (Mediterranean Ferries) - the Italian Republic precisely because the Law n. 117/1988 excludes the existence of any "responsibility" of the Italian judge in case of "error of law" (including that deriving from or related to the lack of "familiarity" with EU law).

The Court of Justice of the European Union - Section III, with sentence of November 24, 2011, n. 379, made in case C379/10, concerning the appeal for non-compliance, pursuant to art. 258 TFEU, proposed on 29 July 2010 by the European Commission, so decided against the Italian Republic:
"***1) The Italian Republic, excluding any responsibility of the Italian State for damages caused to individuals following a violation of EU law attributable to a national court of last instance, if such violation results from an interpretation of legal norms or from the evaluation of facts and tests carried out by the court itself, e***
limiting this responsibility only to cases of willful misconduct or gross negligence, pursuant to art. 2, paragraphs 1 and 2, of the law of April 13, 1988, n. 117, on the compensation for damages caused in the exercise of judicial functions and on the civil liability of magistrates, has failed in its obligations under the general principle of responsibility of the Member States for violation of EU law by one of the their own courts of last instance.
2) The Italian Republic is ordered to pay the costs. "

It is remarkable that in its appeal to the CJEU, the European Commission, in demanding the interpretation, also condemns the non-fulfillment of its obligations, by virtue of the general principle of the responsibility of the Member States for infringements of EU law by its own court of last resort degree.

The CJEU had already amonished at regard the Italian Republic in a previous decision (C 173/03, in particular: paragraphs 33 to 37).

The Italian legislator provided to reform the Law no. 117/1988 (by Law no. 18/2015) ; in fact :

"*Art. 2. Responsibility for fraud or gross negligence*

1. Anyone who has suffered unjust damage as a result of conduct, of an act or of a judicial order instituted by the magistrate with malice or gross negligence in the exercise of his functions or for denial of justice may act against the State for obtain compensation for patrimonial and non-patrimonial damages

2. ***Without prejudice*** *to paragraphs 3 and 3-bis and cases of willful misconduct,* ***in the exercise of judicial functions cannot give rise to the responsibility for the interpretation of rules of law*** *or the assessment of facts and evidence.*

3. The ***manifest infringement of the law*** *as well as* ***the law of the European Union*** *is a serious offense* (…)".

In this paper it is sufficient to pointing out that in the Italian legal system the ESC(revised 1996) is (also in a formal sense) a **law** of the Italian Republic (ratification Law no. 30/1999.)

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Returning to the profile of the preliminary ruling to be asked to the CJEU, it should be recalled that the EU Commission itself recently issued a special formal act (such as to constitute "living law of the Union") in this area.

The **Recommendations to the attention of national judges, concerning the presentation of references for preliminary rulings** (2012 / C 338/1) of 6 November 2012 (with immediate entry into force since its publication on the same date in the GUUE), it is hardly applicable to a case in which the social right violated is not ruled by a "derivated" form of EU law (e.g. Directives, Regulations); in fact the degree of inference between a standard of protection governed by the ESC and its "twin" established by EU law could be very high, even if it is not obvious that the two disciplines go in the same direction.

In case of doubt it is not obvious that the most effective way is the preliminary reference to the CJEU (or the activation of an infringement procedure before the EU Commission).

In my opinion the ECSR preserves a holistic approach to the submitted questions ; while the CJEU behavior is more focused to the safeguard of the fundamental freedoms of EU.

Quid juris ? and … above all : ***quis judex ?***

In order not to remain “prisoners of the present case” we must always imagine new and different circular and modular protection routes.
We will have the undoubted advantage of not finding on our way the usual procedural obstacles, often abused by the national legislator to "discourage" the person (and his/her family) - made weaker by the loss of work - to start the “path of protection” towards the place *ubi jus audire*.

It is important to underline that these "paths of protection" are not antithetical and can be crossed simultaneously: the request to a Court of merit for a cross-reference to the National Constitutional Court, or the request for a preliminary ruling to the CJEU (both discussing the trial before a court of merit or before a national court of last resort); the activation of a infringement procedure for violation of the EU living law (including, of course, the CFREU and, through it, with the well-known limits, the ESC itself); the activation of a collective claim through an NGO in front of the ECSR (also a documented non-compliance report that can be used in the preparation of the national periodic report).
They are all useful tools to be modeled to offer the marginalized subjects the best possible social protection to make Europe better, that Europe that is made by all of us who do not want to stop breathing its air of freedom and peace.

Bibliography

ABBIATE (2014) Ancora in materia di misure anti-crisi. Il distinguishing della Corte, in http://www.federalismi.it/ www.federalismi.it/ApplMostraDoc.cfm?Artid=24704

ABBIATE (2014) Le Corti costituzionali di fronte alla crisi finanziaria: un soluzione di compromesso del Tribunale costituzionale portoghese, in Quaderni cistituzionali, 146 ss.

°ALAIMO (2013) Presente e futuro del modello socaile europeo. Lavoro, investimenti socaili e politiche di coesione, Rivista giuridica del lavoro, I, 253 ss.

AA.VV. (a cura di: FIERRO, NEVOLA, DIACO, FULGENZI, NORELLI) (2013), La tutela dei diritti e i vincoli finanziari, Quaderno di giurisprudenza costituzionale, in https://www. cortecostituzionale.it/documenti/convegni_seminari/tuteladiritti.pdf

BALBONI (2008) La tutela multilivello dei diritti sociali, Jovene-Napoli

BALDASSARRE (1997) Diritti Della persona e valori costituzionali, Giappichelli-Torino

BENVENUTI (2102), Diritti sociali (digesto pubbl. Aggiornamento, Vol V, 219 ss.

BIFULCO (2011) Il custode della democrazia parlamentare. Nota a prima lettura alla sentenza del Tribunale costituzionale federale tedesco del 7 settembre 2011 sui meccanismi europei di stabilità finanziaria, in http://www.rivistaaic.it/il-custode-della-democrazia-parlamentare-nota-a-prima-lettura-alla-sentenza-del-tribunale-costituzionale-federale-tedesco-del-7-settembre-2011-sui-meccanismi-europei-di-stabilit-finanziaria.html

BIFULCO, ROSELLI (a cura di) (2013) Crisi economica e trasformazione della dimensione giuridica, Giappichelli-Torino

BONOMI (2012) Brevi note sul rapporto tra l'obbligo di confrormarsi alla giurisprudenza della Corte di Strasburgo e l'art. 101, c.2 Cost., in http://www.giurcost.org/studi/Bonomi.pdf

BRONZINI (2011) Le Corti europee rimettono in gioco i diritti del personale ATA, in Rivista giuridica del lavoro, II, 491 ss.

BRONZINI (2012) Le tutele dei diritti fondamentali e la loro effettività: il ruolo della Crta di Nizza, in Rivista giuridica del lavoro, I, 53 ss.

BUCCI (2010), l'Unione Europea tra tecnocrazia e "modello sociale", in RIVOSECCHI, ZUPPETTA (a cura di), Governo dell'economia e diritti fondamentali, Cacucci-Bari, 190 ss.

CALVANO (2013), La tutela dei diritti sociali tra meccanismo europeo di stabilità e laglità costituzionale europea, in http://www.costituzionalismo.it/articolo/462/

CAROLI CASAVOLA (2012) Le protezioni sociali alla prova, in NAPOLITANO (a cura di) Uscrie dalla crisi. Politiche pubbliche e trasformazioni istituzionali, Il Mulino-Bologna, 293 ss.

CES-ETUC (2012) proposta di "Patto sociale per l'Europa"

CHIARELLA (2011) Esistenza, esigibilità e giustiziabilità dei diritti sociali, in Tigor: rivista di scienze della comunicazione, 54 ss.

CINELLI (2012) La riforma delle pensioni del Governo tecnico : appunti sull'art. 24 della legge n. 214 del 2011, in Rivista italiana di diritto del lavoro, 385 ss.

CIOLLI (2012) I diritti sociali alla prova della crisi economica, in ANGELINI, BENVENUTI (a cura di), Il diritto costituzionale alla prova della crisi economica, Jovene-Napoli

COSTANZO (2012) Il sistema di protezione dei diritti sociali nell'ambito dell'Unione europea - Relazione alle Primeras Jornadas Internacionales de Justicia Constitucional (Brasil-Espana-Italia), Belém do Parà (Brasil), 25 e 26 agosto 2008, in https://www.giurcost.org/studi/CostanzoBelem.htm

°CROUCH (2013), Making capitalism fit for society, Cambridge Polity Press

°DEAKIN, KOUKIADAKIS (2013), The sovereign debr crisis and the evolution of labour law in Europe, in COUNTURIS, FREEDLAND (eds.); Resocialising Europe in a time of crisis, Cambridge University Press, 163 ss.

DEFRAIGNE et al. (a cura di) (2012), Les mòdeles sociaaux en Europe. Quel avenir face à la crise ?, Bruylant-Bruxelles

DELLA CANANEA (2014) Lex fiscalis europea, in Quaderni costituzionali, 7 ss.

DE MICHELE (2014) Il dialogo tra Corte di giustizia, Corte europea dei diritti dell'uomo, Corte costituzionale e Corte di Cassazione sulla tutela effettiva dei diritti fondamentali dei lavoratori a termine: la sentenza Carratù-Papalia della Corte del Lussemburgo, in http://www.cde.unict.it/quadernieuropei/giuridiche/60_2014

DICKMANN (2013), Governance economica europea e misure nazionali per l'equilibrio dei bilanci pubblici, Jovene-Napoli

ESCANDE-VARNIOL et al. (2012), Quel droit social dans une Europe en crise ?, Larcier-Bruxelles

EVERSON, JOERGES (2013), Who is the guardian of the constitutionalism in Europe after the financial crisi ? London School of Economics – LEQS paper No. 63/2013, in http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper63.pdf

FABBRIZI (2014) The Euro-Crisi and the Courts: Judicial Review and Political Process in Comparative perspective, in Berkeley Journal of International Law

FERRANTE (2014) Diritto al giusto salario e lavoro pubblico, in http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2013/0037_nota_310_2013_ferrante.pdf

FERRARESE (2000) Il linguaggio transnazionale dei diritti, Rivista di diritto costituzionale, 78 ss.

FERRARI (2001) I diritti tra costituzionalismi statali e discipline transnazionali, in (a cura di FERRARI), I diritti fondamentali dopo la Carta di Nizza, Giuffrè-Milano, 66 ss.

FONTANA (2014) Crisi Economica ed effettività dei diritti sociali in Europa, in http://csdle.lex.unict.it/docs/workingpapers/Crisi-economica-ed-effettivit-dei-diritti-sociali-in-Europa/4774.aspx

FUCHS (2013) Il ruolo del diritto del lavoro e della sicurezza sociale nella crisi economica, relazione alle Giornate di studio A.I.D.La.S.S. 16-17 maggio 2013 – Bologna, in http://www.aidlass.it/news/convegni/archivio/2013/Fuchs_Aidlass_2013.doc

GIOVANNELLI (2013) Vincoli europei e decisioni di bilancio, in Quaderni costituzionali, 933 ss.

GIUBBONI (2014), Diritto e politica nella crisi del "modello sociale europeo", in Previdenza Sociale, 12 ss.

GIUBBONI (2014), I diritti sociali alla prova della crisi: L'Italia nel quadro europeo, in Giornale di Diritto del lavoro e delle relazioni industriali, 269 ss.

GIUPPONI (2014) Il principio costituzionale dell'equilibrio di bilancio e la sua attuazione, in Quaderni costituzionali, 51 ss.

GROPPI, SPIGNO, VIZIOLI (2013) The Constitutional Consequences of the Financial Crisi in Italy, in Contiades X (ed.), Constitutions in the Global Financial Crisi. A Comparative Analisys, Asbgate, 89 ss.

GUASTAFERRO (2013) La Corte costituzionale ed il primo rinvio pregiudiziale in un giudizio di legittimità costituzionale in via incidentale: riflessioni sull'ordinanza n. 207 del 2013, in http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2013/0028_nota_207_2013_guastaferro.pdf

GUAZZAROTTI (2012) Giurisprudenza CEDU e giurisprudenza costituzionale sui diritti sociali a confronto, in http://www.gruppodipisa.it/wp-content/uploads/2012/05/trapaniguazzarotti.pdf

GUIGLIA (2011) Le prospettive della Carta sociale europea, in www.forumcostituzionale.it

GUIGLIA (2011A) L'eguaglianza tra donne e uomini nella Carta Sociale Europea, in http://www.rivistaaic.it/l-eguaglianza-tra-donne-e-uomini-nella-carta-sociale-europea.html

GUIGLIA (2011B) Il diritto all'abitazione nella Carta Sociale Europea. A proposito di una recente condanna dell'Italia da parte del Comitato Europeo dei diritti sociali, in http://www.rivistaaic.it/il-diritto-all-abitazione-nella-carta-sociale-europea-a-proposito-di-una-recente-condanna-dell-italia-da-parte-del-comitato-europeo-dei-diritti-sociali.html

HABERMAS (2011), Questa Europa è in crisi, Laterza-Bari

HÄBERLE (2003), Cultura dei diritti e diritti della cultura nello spazio costituzionale europeo, Giuffré-Milano

JOERGES (2012), Europe's Economic Constitution in Crisi, zantra Working Paper – Transnational Studies, in https://papers.ssrn.com/sol.3/papers.cfm?aaabstract_id=2179595

JOERGES, GIUBBONI (2014), Diritto, politica ed economia nella crisi europea, in ALLEG, BRONZINI (a cura di), Il tempo delle costituzioni, Manifestolibri-Roma, 107 ss.

KILPATRICK, DE WITTE (eds.) (2014), Social rights in times of crisis in the Eurozone: the role of fundamental rights challenges, EUI Working Papers, LAW 2014/05, in http://www.cadmus.eui.eu/haandle/1814/31247

LO FARO (2014) Compatibilità economiche, diritti del lavoro e istanze di tutela dei diritti fondamentali. Qualche spunto di riflessione sul caso italiano, in Giornale di Diritto del lavoro e delle relazioni industriali, 279 ss.

LO FARO (2014) Europa e diritti sociali: viaggio al termine della crisi, in CORAZZA, ROMEI, Diritto del lavoro in trasformazione, Il Mulino-Bologna

LOLLO (2012) Prime osservazioni su eguaglianza e inclusione, in http://www.giurcost.org/studi/Lollo.pdf

LUCIANI (2012) Conclusioni, in ANGELINI, BENVENUTI (a cura di), Il diritto costituzionale alla prova della crisi economica, Jovene-Napoli, 571 ss.

LUCIANI (2012) Costituzione, bilancio, diritti e doveri dei cittadini, in https://astrid-online/rassegna/Rassegna-214/06-02-2013/Luciani_Varenna 2012.pdf

LUCIANI (2013) L'equilibrio di bilancio e i principi fondamentali: la prospettiva del controllo di costituzionalità, in https://www.cortecostituzionale.it/documenti/convegni_seminari/Seminario2013_Luciani.pdf

MAZZARESE (2006), Ragionamento giudiziale e diritti fondamentali. Rilievi logici ed epistemologici in COMANDUCCI. GUASTINI (a cura di), Analisi e diritto. Ricerche di giurisprudenza analitica, Giappichelli - Torino, 2007; anche in www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi.../10MAZZAR.PDF

MEZZANZANICA, OLIVELLI (2005) A qualunque costo?: lavoro e pensioni: tra incertezza e sicurezza, Guerini e associati – Milano

MONACELLI (2007) La protezione sociale degli anziani in Italia tra previdenza e assistenza: un`analisi retrospettiva in una prospettiva di riforma, in Politica economica, 289 ss.

MONACO (2012) Spunti sulla tutela dei diritti sociali innanzi al giudice amministrativo, in http://www.gruppodipisa.it/wp-content/uploads/2012/07/TrapaniMonaco.pdf

MORRONE, Teologia economica vs. Teologia politica. Appunti su sovranità dello Stato e «diritto costituzionale globale», in Quaderni costituzionali, 833 ss.

MORRONE (2013), Pareggio di bilancio e Stato costituzionale, Lavoro e Diritto, 357 ss.

MORRONE (2014), Crisi economica e diritti. Appunti per lo Stato costituzionale in Europa, Quaderni costituzionali, 79 ss.

OLIVERI (2012) La Carta Sociale Europea come "strumento vivente". Riflessioni sulla prassi interpretativi del Comitato Europeo dei Diritti sociali, in https://www.juragentium.org/topics/rights/oliveri.pdf

PANZERA (2011) Per i cinquant'anni della Carta Sociale Europea, in https://www.gruppodipisa.it/content/uploads/2012/panzera.pdf

PERSIANI (2013) Crisi economica e crisi del Welfare State, Diritto del lavoro e delle Relazioni
industriali, 641 ss.

PEZZINI (2001) La decisione sui diritti sociali: indagine sulla struttura costituzionale dei diritti sociali, Giuffrè_Milano

PICCHI, L'effettività dei diritti sociali: la via della partecipazione, in http://www.gruppodipisa.it/wp-content/uploads/2012/05/trapanipicchi.pdf

PINELLI (2013) Le misure di contrasto alla crisi dell'eurozona e il loro impatto sul modello sociale europeo, Rivista giuridica del lavoro, I, 231 ss.

PIROZZOLI (2011) Il vincolo costituzionale del pareggio di bilancio, in http://www.rivistaaic.it/il-vincolo-costituzionale-del-pareggio-di-bilancio.html

PITRUZZELLA (2014) Crisi di governo e decisioni di governo, Quaderni costituzionali, 29 ss.

POGGI (2014) I Diritti delle persone. Lo Stato sociale come Repubblica dei diritti e dei doveri, Mondadori-Milano

POLI (2014) Diritti sociali ed eguaglianza nello spazio giuridico europeo, in https:// www. amministrazioneincammino.luiss.it/wp-content/uploads/2014/01/Poli_Diritti-sociali-spazio -giuridico- europeo.pdf

POLITI (2006) i DIRITTI SOCIALI, (a cura di NANIA, RIDOLA), I diritti costituzionali, vol III, 1019 ss. Giappichelli-Torino
PUPO (2014) Principi relativi ai diritti sociali, in https://www. forumcostituzionale.it/documenti_forum/paper/0471_pupo.pdf

RAFFIOTTA (2013) Il governo multilivello dell'economia. Studio sulla trasformazione dello Stato costituzionale in Europa, Bononia University Press-Bologna

RAZZANO, Lo "statuto" costituzionale dei diritti sociali, in http://www.gruppodipisa.it/wp-content/uploads/2012/05/trapanirazzano.pdf

RENGA (2006) La tutela sociale dei lavori, Giappichelli - Torino

RICCI (2012) Il diritto alla retribuzione adeguata. Tutele costituzionali e corsi economica, Giappichelli-Torino

RIZZONI (2011) Il "semestre" europeo fra sovranità di bilancio e auto vincoli costituzionali. Germania, Italia e Francia a confronto, http://www.rivistaaic.it/il-semestre-europeo-fra-sovranit-di-bilancio-e-autovincoli-costituzionali-germania-francia-e-italia-a-confronto.html

RODRIGUEZ (2014) Labour Rights in Crisi in the Eurozone: the Spanish Case, in KILPATRICK, DE WITTE (eds.), Social rights in times of crisis in the Eurozone: the role of fundamental rights challenges, EUI Working Papers, LAW 2014/05, in http://www.cadmus.eui.eu/haandle/1814/31247

RODRIGUEZ PINERO Y BRAVO FERRER (2013) Globalizzazione, flessicurezza e crisi economica, in Rivista giuridica del lavoro, I, 521 ss.

ROMAGNOLI (2013) Diritto del lavoro e quadro economico: nessi di origine e profili evolutivi, Diritto del lavoro e delle relazioni industriali, 585 ss.

RUGGERI (2011) La Corte costituzionale "equlibrista", tra continuità e innovazione, sul filo dei rapporti con la Corte EDU, in Diritto pubblico comparato ed europeo, 1757 ss.

RUGGERI (2012) La Consulta rimette abilmente a punto la strategia dei suoi rapporti con la Corte EDU e, indossando la maschera della consonanza, cela il volto di un sostanziale, perdurante dissenso nei riguardi della giurisprudenza convenzionale ("a prima lettura" di Corte cost. n. 264 del 2012), in http://www.giurcost.org/studi/Ruggeri23.pdf

RUGGERI (2012) Crisi economica e crisi della Costituzione, in http://www.giurcost.org/studi/Ruggeri19.pdf

RUGGERI (2012) La Corte di giustizia marca la distanza tra il diritto dell'Unione e la CEDU e offre un puntello alla giurisprudenza costituzionale in tema di (non) applicazione diretta della Convenzione (a margine di Corte giust., Grande Sez., 24 aprile 2012), in http://www.giurcost.org/studi/Ruggeri15.pdf

RUGGERI (2012) Costituzione e CEDU, alla sofferta ricerca dei modi con cui comporsi in "sistema", in http://www.giurcost.org/studi/ruggeri14.pdf

RUSSO (2013) I vincoli internazionali in materia di tutela dei diritti sociali: alcuni spunti dalla giurisprudenza recente sulle "misure di austerità", in http://www.osservatoriosullefonti.it/component/docman/doc_download/618-d-russo

SALAZAR (2000) Dal riconoscimento alla garanzia dei diritti sociali: orientamenti e tecniche decisorie della Corte costituzionale a confronto, Giappichelli-Torino

SALAZAR (2013) Crisi economica e diritti fondamentali - Relazione al XXVIII Congresso dell'AIC, in http://www.associazionedeicostituzionalisti.it/articolorivista/relazione-al-xxviii-convegno-annuale-dell-aic-crisi-economica-e-diritti-fondamentali

SANDULLI (2012) Il sistema pensionistico tra una manovra e l'altra : prime riflessioni sulla legge n. 214/2011, in Rivista del diritto della sicurezza sociale, 1 ss.

SANDULLI (2013) Le "pensioni d'oro" di fronte alla Corte europea dei diritti dell'uomo, alla Corte costituzionale e al legislatore, Rivista di Diritto della sicurezza sociale, 683 ss.

SCAGLIARINI, «L'incessante dinamica della vita moderna» I nuovi diritti sociali nella giurisprudenza costituzionale, in http://www.gruppodipisa.it/wp-content/uploads/2012/05/trapaniscagliarini.pdf

SCIARRA (2013) l ?Europa e il lavoro. Solidarietà e conflitto in tempi di crisi, Laterza-Bari

SERINO (2014) La tutela dei diritti sociali in Europa tra Corte di Giustizia e Corte Europea dei Diritti dell'uomo, in https://www.duitbase.it/articoli/la-tutela-dei-diritti-sociali-in-europa-tra-corte-di-giustizia-e-corte-europea-dei-diritti-dell-uomo

STERN (2005) Dalla Convenzione europea dei diritti dell'uomo alla Carta europea dei diritti fondamentali. Prospettive di tutela dei diritti fondamentali in Europa , in La Carta europea dei diritti fondamentali nella Costituzione confronto valutativo (a cura di: STERN, TETTINGER), Berliner Wissenschafts-Verlag, Berlin, 13 ss.

STERN (2006) Costituzione europea e la Carta dei diritti fondamentali dopo il No francese e olandese , in Costituzione europea in divenire (a cura di: STERN, TETTINGER), Berliner Wissenschafts-Verlag, Berlin, 25 ss.; anche in: Teoria del Diritto e dello Stato – Rivista europea di cultura e scienza giuridica 2005, 97 ss.

STRAZIUSO (2012) La Carta sociale del Consiglio d'Europa e l'organo di controllo: il Comitato europeo dei diritti sociali. nuovi sviluppi e prospettive di tutela, in http://www.gruppodipisa.it/wp-content/uploads/2012/06/trapanistraziuso.pdf

SUPIOT (2010) L'esprit de Philadelphie. La justice social face au marché total, Seuil-Paris

TEGA (2007) Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la Cedu da fonte ordinaria a fonte "sub-costituzionale" del diritto, in http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2007/0013_tega_nota_348_349_2007.pdf

TEGA (2012) I diritti sociali nella dimensione multilivello tra tutele giuridiche e politiche e crisi economica, in http://www.gruppodipisa.it/wp-content/uploads/2012/06/trapanitega.pdf

TEGA (2014) Welfare e crisi davanti alla Corte costituzionale, in Giornale di Diritto del lavoro e delle relazioni industriali, 303 ss.

TOSATO (2013) La riforma costituzionale del 2012 alla luce della normativa dell'Unione: l'interazione fra i livelli europeo e interno, in https://www. cortecostituzionale.it/documenti/convegni_seminari/Seminario2013_Tosato.pdf

TREU (2013) Le istituzioni del lavoro nell'Europa della crisi, Diritto del lavoro e delle relazioni industriali, 597 ss.

TRUCCO (2012) Livelli essenziali delle prestazioni e sostenibilità finanziaria dei diritti sociali, in

TUORI, TUORI (2013) The Eurozone crisis. A constitutional analysis, Cambridge University Press

VALENTINI (2012) Il futuro dei diritti sociali tra garanzie essenziali e garanzie ragionevoli, in https://www. juragentium.org/topics/rights/valentini.pdf

VALERIANI (2014) I limiti costituzionali alla revisione dlele pensioni: le prospettive per il futuro – Working Paper n. 152/2014, ADAPT

VETTORI (2011) Diritti fondamentali e diritti sociali. Una riflessione fra due crisi, in https://www. principi-ue.unipg.it/Documenti/Bibliografia/VETTORI.pdf

VITERBO, CISOTTA (2012) La crisi del debito sovrano e gli interessi dell'UE: dai primi strumenti finanziari al Fiscal compact, in Il diritto dell'Unione Europea, 323 ss.

YANNAKOUROU (2014) Challenging Austerity Measures Affecting Work Rights at Domestic and International Level, in KILPATRICK, DE WITTE (eds.) (2014), Social rights in times of crisis in the Eurozone: the role of fundamental rights challenges, EUI Working Papers, LAW 2014/05, in http://www.cadmus.eui.eu/haandle/1814/31247

TEXT OF THE
REMISSION ORDER TO THE ITALIAN CONSTITUTIONAL COURT
THE COURT OF ROME
III Labour Division
In the person of the designated judge, dr. Maria Giulia Cosentino
in the case
between
F.S. (Lawyer Carlo de Marchis Gomez)
Appellant
And
S.S. SRL, in the person of the legal *pro tempore* representative
defendant contumacious
dissolving the reserve taken at the hearing on 10 June 2017, has pronounced the following
ORDER

1.Facts of the case, the illegitimacy of the dismissal and its consequences

The appellant challenged her dismissal imposed on December 15th 2015, a few months after she had been formally employed on May 11th, 2015; the dismissal was based on this motivation: "*following growing economic-productive problems that do not allow us the regular continuation of the employment relationship, Your work can no longer be profitable for the company. Having noticed that it is not possible, within the company, to find another job position in order to place You , we are forced to dismiss You for justified objective reasons pursuant to art. 3 of the law n. 604 of 15 July 1966* ".

In the declared default of the defendant company, it is to be noted that this has not fulfilled the charge of proving the validity of the adduced motivation, moreover extremely generic and adaptable to any situation, thence unsuitable to fulfill the purpose for which the motivational charge is intended (see Cass. Labour Division n. 7136/2002); nor has the defendant contested the employment dimensions indicated by the applicant and therefore the protection applicable by law to the worker in this case.

This protection is established by the articles 3-4 of the Legislative Decree n. 23/2015, result of the proxy contained in the law n n. 183/2014, and in particular:

Article. 3 provides: "*1. Except as provided in paragraph 2, in cases in which it is established that the details of the dismissal do not occur for justified objective reason or*

for justified subjective reason or just cause, the judge declares the employment relationship terminated on the date of dismissal and condemns the employer to pay an indemnity not subject to social security contributions for an amount equal to two months of the final reference salary for the calculation of the termination indemnity for each year of service, in any case not less than four and not more than twenty-four monthly salary ";

Article 4 provides: "*1. In the case in which the dismissal is ordered with violation of the motivation requirement referred to in Article 2, paragraph 2 of law no. 604 of 1966 or of the procedure referred to in Article 7 of Law no. 300 of 1970, the judge declares the employment relationship extinguished on the date of dismissal and condemns the employer to the payment of an indemnity not subject to social security contribution of an amount equal to one month salary of the last reference salary for the calculation of the termination indemnity treatment for each year of service, in any case not less than two and not more than twelve month salaries, unless the judge, on the basis of the worker's request, ascertains the existence of the conditions for the application of the protections referred to in Articles 2 and 3 of this decree* ".

In the event that the employer does not reach a certain level of employment, then, the measure of the indemnity is halved pursuant to Article 9: "*Where the employer does not meet the dimensional requirements referred to in Article 18, paragraph 8th and 9th of Law no. 300 of 1970, article 3, paragraph 2 shall not apply, and the amount of compensation and of the amount provided for in article 3, paragraph 1, by article 4, paragraph 1 and article 6, paragraph 1is halved and can not in any case exceed the limit of six month salaries*".

Furthermore, the applicant implicitly attached that the defendant had the dimensional requirements set out in Article 18 of the law n. 300/1970, when she invoked the protection referred to in Article 3 of Legislative Decree 23/2015 and also the subsequent Article 9, and in documents there are no indicative elements of a lower level of employment.

All this is because the appellant was hired after 7 March 2015: as that for the employed up to that date, the protection against the unlawful dismissal is constituted by the Article 18 of the Law 300/1970, as amended by Law 92/2012, which provides for the two corresponding hypotheses:

Paragraph 7: for the case of absence of objective reason (defined as lack of justification, manifested inexistence of the fact on which the dismissal is based), that recalls paragraph 4 and paragraph 5 depending on the severity of the defect: "*The judge applies the same discipline referred to in the fourth paragraph of this article in the hypothesis in which he ascertains the defect of justification of the dismissal ordered, also pursuant to articles 4, paragraph 4, and 10, paragraph 3, of the law 12 March 1999, n. 68, for objective reason consisting in the physical or mental inability of the worker, or that the dismissal was ordered in violation of article 2110, second paragraph, of the civil code*".

He can also apply the aforesaid discipline in the hypothesis in which he ascertains the evident non-existence of the fact on which dismissal is based for justified objective motive; in the other hypothesis in which he ascertains that the details of the aforementioned justified reason are not met, the judge applies the discipline referred to in the fifth paragraph. In the latter case, the judge, for the purposes of determining the indemnity between the minimum and maximum required , he considers, in addition to the criteria referred to in the fifth paragraph, the initiatives taken by the worker for the search for a new employment and the behavior of the parties within the procedure referred to in Article 7 of the law of 15 July 1966, n. 604, and subsequent modifications. If, in the course of the judgment, on the basis of the application formulated by the worker, the dismissal is determined by discriminatory or disciplinary reasons, the relative protections provided for in this article are applied:

- in turn the fourth paragraph *quoad poenam* provides that: "*annuls the dismissal and condemns the employer to reintegration in the workplace referred to in the first subparagraph and to the payment of a compensatory allowance commensurate with the last overall pay from the day of the dismissal until that of the actual reintegration , deducted what the worker has received, during the period of exclusion, for the performance of other work activities, as well as the amount the worker would have perceived dedicating himself diligently to the search for a new occupation. In any case, the compensatory allowance measure may not exceed twelve month salaries of total de facto remuneration. The employer is also sentenced to the payment of social security contributions from the day of the dismissal until the effective reintegration , plus the interest in the legal measure without the application of penalties for failure or delayed contribution, for an amount equal to the contribution differential existing between the contribution that would have accrued in the employment relationship resolved by the illegitimate dismissal and the one credited to the worker as a result of the performance of other work activities* ";
- and the fifth paragraph *quoad poenam* provides that: " *declares terminated the employment relationship with effect from the date of dismissal and orders the employer to pay an all-inclusive compensatory allowance determined between a minimum of twelve and a maximum of twenty-four month salaries of the last pay* (Editor's note: global monthly pay *de facto*), *in relation to seniority of the worker and taking into account the number of employees employed, the size of the economic activity, the behavior and conditions of the parties, with a specific motivation in this regard*";
- paragraph 6 for the case of lack of motivation (of dismissal): "*in the hypothesis in which the dismissal is declared ineffective for violation of the motivation requirement referred to in Article 2, paragraph 2, of the law of 15 July 1966, n. 604, and subsequent modifications, of the procedure referred to in Article 7 of the present law, or of the procedure referred to in Article 7 of the Law of 15 July 1966, n. 604, and subsequent modifications, the regime referred to in the fifth*

paragraph applies, but with the attribution to the worker of a determined all-inclusive compensatory allowance , in relation to the seriousness of the formal or procedural violation committed by the employer, between a minimum of six and a maximum of twelve monthly payments of the final remuneration , with the charge of specific motivation in this regard, unless the judge, on the basis of the worker's request, ascertains that there is also a justifying defect of the dismissal, in which case he applies, instead of those provided for in this paragraph, the protections referred to in the fourth, fifth or seventh paragraphs ".

This judge considers that, given the extreme generality of the alleged motivation and the absolute lack of proof of the validity of some of the circumstances laconically mentioned in the expulsion, the recognizable defect is the most serious among those indicated, namely the " *non recurrence of the extremes of dismissal for justified objective reason* " (in the language of the legislator of 2015), or the " *manifest inexistence of the fact on which the dismissal for justified objective reason is based* ".

In short, if employed before 7 March 2015, the appellant would have enjoyed reinstatement protection and an indemnity commensurate with 12 months' salary (having passed more than 12 months between expulsion and the first court hearing), or applying paragraph 5 of the art. 18, of the only indemnity protection between 12 and 24 months; while, having been employed after that date, she is only entitled to 4 month salaries, and only because the defendant's default allows you to presume presumptively proved the dimensional requirement , otherwise the compensation monthly salaries would have been 2.

Even if a mere defect of the motivation was found, the protection in the vigor of the art. 18 would have been much more substantial (6-12 months of compensation compared to 2).

2. The suspicion of unconstitutionality and the parameters of judgment

This judge believes that it is not to be doubted the relevance of the issue of the constitutionality of Article 1, paragraph 7, letter c) Law no. 183/2014 and of the Articles 2, 4 and 10 of Legislative Decree no. 23/2015: the legislative innovation in question deprives today's appellant of most of the protections still in force for those who have been hired indefinitely before March 7, 2015. The legislation precludes any judging discretion of the judge, previously exercisable even if anchored to the criteria set forth in Article 8 of the Law no. 604/1966 and Article 18 of the Statute (Editor's note: Law no. 300/1970) as amended by Law no. 92/2012, imposing to the same an automatism on the basis of which the worker is entitled, in case of ascertained illegitimacy of the withdrawal (Editor's note: dismissal), the small amount of compensation provided.

The non-manifesting groundlessness of the issue fully emerges from the following considerations, focused on the considered contrast of the legislation with:

A) Article 3 of the Constitution, as the amount of compensation indemnity drawn by the provisions of the so called "Jobs Act" is neither compensatory nor dissuasive and has

discriminatory consequences; and furthermore, inasmuch as the total elimination of the judge's discretionary judgment ends up regulating in a uniform way very dissimilar cases;

B) Articles 4 and 35 of the Constitution, as regards the right to work, founding value of the Charter (Editor's note: the Italian Constitution) , is given a derisive and fixed monetary counter-value;

C) Art. 117 and the art. 76 of the Constitution, since the sanction for illegitimate dismissal seems inadequate compared to what is established by supranational sources such as the Nice Charter and the Social Charter, while respect for community regulation and supranational conventions was a precise proxy criterion, which is was therefore violated.

It should be noted that the contrast with the Constitution, does not occur because of the elimination of the reintegration protection - if not for the null and discriminatory dismissals, and for specific cases of disciplinary dismissal (Article 1, paragraph 7, letter c of the law delegation) and therefore because of the full monetization of the guarantee offered to the worker: indeed the Constitutional Court has already repeatedly ruled that reintegrating protection is not the only possible paradigm for the implementation of the constitutional precepts referred to Articles. 4 and 35 (see paragraphs 46/2000, No. 303/2011).

The suspicion of unconstitutionality is here formulated, instead, by reason of the concrete discipline of compensatory allowance which, in compensating only for the equivalent of the unjust damage suffered by the worker, is today also destined to take the place of the concurrent compensation in a specific form constituted from reinstatement (which has become a protection for a few cases of exceptional gravity) and therefore should have been much more substantial and adequate.

The Constitutional Court has indeed stated on several occasions, most recently in the aforementioned order no. 303/2011, that "*the general rule of completeness of the reparation and equivalence of the same to the damage caused to the injured person has no constitutional cover*" (judgment No. 148 of 1999), provided that the adequacy of the compensation is guaranteed (judgments No. 199 of 2005 and No. 420 of 1991): and this is precisely the specific profile with respect to which the legislation in question does not escape the doubt of constitutionality.

2.A. Contrast with Article 3 Const.

The prevision of an allowance modest , fixed and increasing only on the basis of length of service does not constitute adequate relief for workers hired after March 7, 2015 and unfairly dismissed and it violates the principle of equality. In other words, the regression of protection for how unreasonable and disproportionate violates the Article 3 of the Constitution, differentiating between old and new hired workers, therefore does not satisfy the test of the balancing of the opposing interests at stake imposed by the judgment of reasonableness.

In fact, we reflect on the following symptomatic circumstances of lack of compensatory character of the indemnity:
- the employment of the applicant allowed the employer to benefit from a 36-month contribution relief provided for by Law no. 190/2014 of a much higher amount than the conviction that will be received here: in fact, the legislator encourages, with these measures, opportunistic behavior and social dumping; while the applicant in return for a few months of work and a modest compensation will have much more difficulty in finding a new occupation as she will no longer carry with her the "dowry" of the relief.
- the fixed compensation measure does not allow the judge to assess in practice the suffered prejudice, neither with regard to the free riding phenomenon of the defendant described above, nor with regard to the seriousness of the defect (the motivation, though present, is tautological and generic at most) nor with regard to the duration of the process, arriving to order identical protection in situations very dissimilar in substance; as we will recall, the existence of evaluation margins referring to the criteria set out in Article 8 of the Law no. 604/1966, significantly constituted foundation, of the rejection ruling of the issue of constitutionality of the Article 32 of the Law no. 183/2010 with reference to Article 3 of the Constitution (ruling No. 303/2011).
These circumstances are also symptomatic of the lack of deterrent character of the sanction, since, as we have said, the illegitimate dismissal ordered after a few months of work assisted by the use of the contribution relief constitutes a "bargain" for the employer who incentives, instead of deterring, free-riding behavior without risk, since, in fact, the indemnity that the employer will have to pay to the outcome of the trial is fixed, predetermined and regardless of the gravity of illegitimacy, so a "pseudo-motivation" like the into examination (we can paraphrase it as: "*I dismiss you because there are conditions to fire you*") equals, *quoad poenam*, any other reason found in the facts as unfounded.
It is known, incidentally, that the legitimacy judge considers outdated the already dominant orientation, which excluded the sanctioning nature (other than compensatory-restorative) of the civil liability and considers this aspect fully compatible with the general principles of our legal system (see Cass. S.U. n. 9100/2015): lastly the United Sections on 5 July 2017 (sent No. 16601), in declaring compatibility, on the occurrence of certain conditions, of the institute of US origin of the so called "Punitive reparations" have established that "*In the current legal system, to civil responsibility is not assigned only the task of restoring the patrimonial sphere of the person who suffered the injury, since the deterrent function and the sanctioning of the civil liability are internal*": offering an overview of compensatory hypotheses with effects also dissuasive of recent institution in which appears also the Article 18, paragraph 2 of the Law no. 300/1970, where it provides, for cases of unlawful dismissal subject to reinstatement protection, also a minimum amount equal to five month salaries of the total remuneration as compensatory allowance paid by the employer;
as well as the flat-rate indemnity for the illegitimacy of the stipulation of the term applied to the employment contract as per Article 32 of the Law no. 183/2010 that the

aforementioned ruling of the Constitutional Court n. 303/2011 has assessed immune from defects of constitutionality (as well as the possibility of an evaluative discretion on the *quantum*, as mentioned) also on the basis of its "clear sanctioning value", highlighted by the elimination of the possibility to subtract the *aliunde perceptum.*

Therefore, if it is not only a compensation but also a sanction, the adequacy judgment prevails because a ridiculous quantification, as in this case, results in an incentive for non-fulfillment, rather than its opposite.

In other words, the scrutinized discipline does not induce companies to adopt virtuous conducts, where it codifies that an act contrary to the law and of non-fulfillment of the commitment to stability assumed with the stipulation of the permanent employment contract (only case encouraged on the contributory side) is subject to an indemnity penalty of a limited amount, severed from the actual injury caused, subtracted, in its quantification, to the assessment of the judge, who continues to assess the conditions, and even lower than the related contributory benefit.

It is no coincidence that the first analysis of the evolution of the labor market after the entry into force of the "Jobs Act" (Law No. 183/2014 and related implementing decrees) clearly indicates that, with the weakening of the effects of the advantage contribution (at the expense of the community), the employment push that was intended to be incentivized with these rules has also been exhausted and that today it is again entrusted in effect to the cases that the legislative delegation intended to make less convenient for companies, namely to temporary employment relationships and to work through agencies (see ISTAT report on I quarter 2017, in acts).

The consequences of a system thus designed, differentiating in a totally unreasonable way similar situations, are (and this will be proved over time) discriminating to the detriment of new employees regardless of the quality of their performance: given that in the same organization otherwise protected employees - who stipulated an identical employment contract - will co-exist; it is clear that, in case of necessity to reduce staff, the company will always favor the least expensive and problematic expulsion of workers under the "Jobs Act" regime.

In fact, if it is true, in principle, that " *does not in itself contrast with the principle of equality a different treatment applied to the same cases, but at different moments in time, since the flow of time can constitute a valid diversification element of legal situations, (..), being a consequence of the general principles in terms of succession of laws over time* "(see Constitutional Court, ruling No. 254/2014, on the possible conflict with Article 3 of the Constitution, from the point of view of the unequal treatment, of the new regime of jointly liability applicable to contracts), it is true that the date of employment appears as an accidental and extrinsic datum to each relationship which is not suitable for differentiating one relationship from another, being all other substantial profile equal.

And then, the same theorists of labor law and economics that inspired the reform of the "Jobs Act", in supporting (in the opinion of this judge) that the protection against the unlawful dismissal does not necessarily have to be of reinstatement content, but can be

(and in their opinion it would be more appropriate that it was) constituted by an indemnity of predictable size for the employer who intends to dismiss (so-called firing cost), they did not fail to point out that the degree of protection offered - and therefore the 'extent of the insurance content' of the employment relationship - depends essentially on the cost of the dismissal, which corresponds to the threshold below which the loss expected from the continuation of the relationship is part of the risk by the company. Along the same lines, the XI Labor Commission of the Parliament that in the session of 17 February 2015 approved the draft legislative decree that later became n. 23/2015, but on condition that the Government would revise the measures, "*considered that, for the unjustified dismissals to which the conservative sanction does not apply, it is necessary to increase the minimum measure and the maximum measure of the economic indemnity due to the worker*" : invitation completely disregarded by the Government.

In the intention of the theoreticians who inspired the legislation under consideration and in the first version of the delegation, in fact, the contract "with increasing protections", just to make it compatible with the principle of equality and real disincentive to precariousness, should have facilitated stable integration in the labor market through a mitigation of protection against dismissals of merely temporary nature, and therefore without prejudice to the application of ordinary protection according to the former Article 18 at the end of a first (albeit long) phase of the relationship; the protections of Legislative Decree no. 23/2015, on the other hand, are not "increasing" at all, since with the passing of time they do not increase guarantees but only the indemnity in proportion to the seniority of the worker, who can no longer permanently access the standard protections of the workers hired before March 7, 2015; and that, on the contrary, it meets a maximum indemnity limit after twelve years of service.

The **unreasonable treatment disparity** emerges, finally, smoothly from the comparison:

- not only among workers hired before and after March 7, 2015, even in the same company;
- and not only among workers dismissed with measures affected by macroscopic illegitimacy or by merely formal defects, all unreasonably protected, today, with an indemnity of the same amount;
- but also, for what regards the workers hired after March 7, 2015, between managers and workers without the managerial qualification, since the former, not subject to the new regulations, will continue to receive indemnities of a minimum and maximum amount far more substantial.

2.B. **Contrast with Articles 4 and 35 Const.**

Article 4 of the Constitution ("*the Republic recognizes all citizens the right to work and promotes the conditions that make this right effective*") and art. 35, paragraph 1 ("*the Republic protects work in all its forms and applications*") cannot be said to have been enforced in a legislation such as the one under consideration, which basically "assesses" the right to work, as an instrument for the realization of the person and a means of

social and economic emancipation, with a **quantification that is so modest and evanescent**, in comparison with the legislation *ex lege* 92/2012 still in force, and moreover it is fixed and growing according to the parameter of mere seniority; almost a factual reinstatement of the absolute freedom of dismissal (whose opposition to the Constitution is expressly stated in judgement No. 36/2000 of the Constitutional Court) that cancels the "constraint " effect deriving from the existence of mandatory authorizations (just cause and justified reason).

Moreover, the protections of dismissals have a relevance that goes far beyond the specific affair of the withdrawal and the protection of the stability of income and employment, since they support the contractual strength of the worker in the daily relationship at the workplace. What's more: effective protection against a hypothetically unjustified dismissal - a right that is not by chance **explicitly stated internationally**, as it will be better said - protects the fundamental freedoms of workers in their workplace: freedom of expression and dissent , the defense of dignity when this is threatened by superiors or colleagues, the defense and claim of their rights, the possibility of activating trade union if desired, etc.

The "Jobs Act" system and in particular, as far as we are concerned, the **quantification of the indemnity** in question is, on the contrary, built on a **conscious rupture of the principle of equality and solidarity in the workplace** which cannot explain its own effects also on the other rights of constitutionally protected workers (trade union freedom, freedom of expression, etc.).

2.C. Contrast with Articles 76 and 117 Const.

The adoption of adequate and necessary measures to guarantee the right to work is a specific aim of the social policy of the State that the republic must pursue also through the stipulation of international agreements and participation in international organizations (article 35, paragraph 3 of the Constitution).

In compliance with the provisions of art. 117 of the Constitution, **the Republic accepts, in the exercise of its sovereign legislative power, the constraints deriving from Community law and international treaties** which therefore assume the character of **interposed norms that are nevertheless suitable to represent a parameter of constitutionality of domestic law** (see Const. Court rulings No. 348 and No. 349 of 2007).

Article. 76 of the Constitution, moreover, states that *" the exercise of the legislative function cannot be delegated to the Government except with the determination of guiding principles and criteria and only for a limited time and for defined objects* ", with the consequence that also the respect of these principles and criteria can be discussed in the constitutional legitimacy of legislative decrees.

With reference to the **dismissal for justified reason**, in particular, paragraph 7 of the Article 1 of the Law no. 183/2014 indicates as a general criterion the "***coherence with the regulation of the European Union and the international conventions***".

In the light of the above considerations, the legislation in question **does not appear to be in conformity:**

- with **art. 30 of the Nice Charter** (that requires Member States to ensure **adequate protection in the event of unjustified dismissal**);
- with **ILO Convention n. 158/1982 on dismissals**, which states that, **if the dismissal is unjustified, if the judge or bodies competent to judge the deed of withdrawal** "*do not have the power to cancel the dismissal and / or to order or propose the reinstatement of the worker, or do not believe that this is possible in the given situation, must be authorized to order the payment of an appropriate indemnity or any other form of repair considered to be appropriate* ";
- with **art. 24 of the European Social Charter**, which states: "*to ensure the effective exercise of the right to protection in the event of dismissal, the Parties commit themselves to* ***recognize****: a) the right of workers not to be dismissed without a valid reason related to the their attitudes or their conduct or based on the needs of the company's operation, of the plant or the service; b) the right of dismissed workers without a valid reason, to a suitable indemnity or other adequate reparation ".*

The **congruety and adequacy of** compensation guaranteed to the workers and therefore the respect of the principles set by this last source has been the subject of several rulings by the European Committee of Social Rights (ECSR), which, while acknowledging that the measure may not be of restoring nature but a mere indemnity, has ruled that the compensation must be adequate (from the worker's point of view) and dissuasive (from the point of view of the employer) and therefore, in essence, it constitutes supranational confirmation of what so far has been said.

With two separate decisions of January 31, 2017, complaints n. 106/2014 and n. 107/2014 both against Finland, the ECSR, interpreted Article 24 of the European Social Charter following a collective appeal promoted by the Finnish Society of Social Rights, which had complained about the violation of Article 24 of the Charter in relation to the Finnish national provisions which provided, on the one hand, the conditions for ordering a dismissal for a justified objective reason and, on the other hand, the employer's responsibility in case of illegitimate withdrawal.

The ECSR has specified that, according to the Charter, **adequate compensation or other appropriate remedy** must be granted to the employees dismissed without justified reason; and that **adequate compensation is considered the one that includes**:

– the reimbursement of the economic losses incurred between the date of dismissal and the decision of the appeal;

– the possibility of reintegration;

– "*compensation at a level high enough to dissuade the employer and compensate the damage suffered by the employee".*

It follows that, in principle, any compensation limit that precludes a "compensation" commensurate with the suffered loss and sufficiently dissuasive is contrary to the Charter.

In the present case, the Finnish legislation provided for a limit of **24 monthly pays as the maximum limit for compensation for the damage from unlawful dismissal.**

In this context, the Committee notes that the **maximum limit of compensation** provided by the law can lead to situations in which the awarded compensation is not commensurate with the suffered loss : it follows that the *plafonnement* of **compensation complements a violation of Article 24 of the Charter.**

Also in the **2016 conclusions** (Editor's note: ECSR's 2014 National Report) relating to the Italian legislation in force in 2014 (and therefore to Law No. 92/2012), the Committee recalled that any limit that could determine to the recognized allowances **not to be in relationship with the suffered prejudice and sufficiently dissuasive** is forbidden**.**

It is true that the Social Charter lacks a Court with powers similar to those which, in defense of human rights, are attributed to the Court of Strasbourg, that is a Court able to exercise a real jurisdiction: only collective complaints are provided, governed by the Additional Protocol of the Charter, ie a restricted procedure aimed at monitoring the obligations signed by the States upon ratification and acceptance of the European Social Charter; procedure that gives rise to a report to the Committee of Ministers in which it is established that "*if the Contracting Party in question has or has not done satisfactorily to the implementation of the rule of the Card object of the complaint*", following which the Committee of Ministers, in turn, can adopt a resolution (by a two-thirds majority of voters) containing a recommendation to the Contracting Party in question, if the European Committee of Social Rights has detected "an unsatisfactory implementation of the Charter" (Article 9 of the Additional Protocol).

Nonetheless, the Social Charter must be considered, like the ECHR, as an **interposed source** (and in this sense, see Constitutional Court, ruling No. 178/2015); in any case, as mentioned above, the alleged violation of supranational principles is to support the assessment of the contrast of the legislation under examination with the articles. 3, 4 and 35 of the Constitution from the point of view of the justification of the unequal treatment of workers seeking employment and workers already employed in March 2015 and of violation of the commitment to promote international agreements and organizations aimed at establishing and regulating the rights work (third paragraph of Article 35).

The acceptance of the proposed question of constitutionality would allow, in this case, to recognize to the applicant a compensatory protection for the actual prejudice suffered, that would then be constituted by the protection referred to in Article 18, paragraphs 4 and 7 (in the alternative, paragraph 5) of the Law no. 300/1970 as amended by Law no. 92/2012; and to remedy (broadly sanctionary other than compensatory) to the behavior of today's defendant who evidently

intended to profit the contributory benefit by hiring a worker whom then got rid of with a pseudo-motivated dismissal.

The interpretative option of conformity consisting in widening the sphere of application of full reintegration protection with reference to the *"other cases of nullity foreseen by the law"*, overcoming that orientation (at national level still majoritarian) that requires demonstration by the worker of the unlawful reason determining the conduct of the employer (Article 1345 of the Civil Code) appears an interpretative forcing (permitted only if the Constitutional Court referred to, should indicate such a way with an interpretative ruling of rejection of the question): in essence this option would result in a equalization between retaliatory dismissal, that is in fraud with the law, and (seriously, but only) unjustified dismissal.

In absence of reply in the conclusions of the appeal, it also appears, in this case, to oppose the principle that the *petendi causa* of the action proposed by the worker to contest the validity and effectiveness of the dismissal must be identified in the specific ground of illegality of the act deduced in the introductory application (see Cassation Court Labour Section, ruling No. 7687/2017), for which the declaration of nullity of the dismissal as retaliatory appears to be flawed, even on the basis of emerging circumstances from the acts, when the appellant has only deduced the absence of just cause (see Cassation Court Labour Section, ruling No. 19142/2015)

Lastly, this judge does not recognize itself the power, in the context of a compliant interpretation, to determine, on the basis of its personal conviction, the adequate sanction in the event of an unlawful dismissal, or even the power to apply a rule to the concrete case different than the one provided by the legislator (in hypothesis applying Article 18 Law No. 300/1970, instead of Article 3 of Legislative Decree No. 23/2015), since the conforming interpretation cannot be resolved, as it is known, in an abrogative effect.

In conclusion, and in sight of the above considerations, **this judge considers that he must assume relevant and not manifestly unfounded the issue of constitutional legitimacy of the rules indicated in the device in relation to the profiles mentioned above.**

The trial in progress must therefore be suspended and the acts returned to the Constitutional Court.

P.Q.M.

(Editor's note: for the following reasons)

seen the Article 23 paragraph 2 of the Law March 11, 1953 n. 87 declares relevant and not manifestly unfounded he question of constitutional legitimacy of the Article 1 , paragraph 7, letter c) of the Law No. 183/2014 and of the Articles 2, 4 and 10 of the Legislative Decree No. 23/2015, by contrast with the Articles 3, 4, 76 and 117,

paragraph 1, of the Constitution, read independently and also in correlation between them.

The present trial is suspended.

Sends to the chancellery to notify this order to the President of the Council of Ministers and to communicate it to the Presidents of the two Houses of Parliament.

It has the transmission of the order and of the proceedings of the judgment to the Constitutional Court together with the proof of the prescribed communications.

Dispone la trasmissione dell'ordinanza e degli atti del giudizio alla Corte Costituzionale unitamente alla prova delle comunicazioni prescritte.

Notify the applicant

Si comunichi alla ricorrente.

Rome, July 26th, 2017.

Judge Maria Giulia Cosentino