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Work Performance and Organisational Flexibility: At the Core of the Employment Contract

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Introduction

Rapid technological development, new ways of offering services on the market through websites, digital platforms, online providers, the fragmentation of the employer's roles into groups or nets of companies that share decisions and processes often outside formal relationships of control or of capital sharing, the mechanisation of working activities through new technologies, and the increased level of skills required of workers in the labour market: all these factors seem to have caused a crisis regarding the traditional legal parameters of the classification of work, challenging the dogmatic categories of subordinate and autonomous work.

The problem of the **classification**—between **subordination** and **autonomy**—of working relationships between companies that are

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increasingly disintegrated (Collins 1990; Davidov 2004; Barbera 2010; Weiss 2016; De Luca Tamajo 2007; Voza 2017) and their "collaborators" is certainly not new (De Stefano 2016; Biasi 2017). Legal scholars and case law have long addressed this issue with reference to relationships that can hardly be described in terms of the archetype of an employee who is subject to the precise direction and penetrating control of a unique and clearly identifiable employer (Prassl 2015; Prassl and Risak 2016).

However, the legal problems caused by the **technological and economic changes** have often been viewed exclusively from an external perspective: the labour market has been analysed by considering the different contractual models used by the economic subjects to exchange work and remuneration from a point of view that has mainly stayed outside the boundaries of the employment relationship. Issues related to the need to move beyond the subordinate employment relationship, to enlarge its scope of application and to identify new contractual forms to regulate non-standard work have been addressed from different perspectives, and various solutions have been offered.

Nevertheless, the very same factors which are shaping the labour market, driving it to articulate itself in different sub-markets that relate to different non-standard forms of work, are influencing the employment relationship itself. Even "inside" the most regular and clearly **subordinate employment contract**, such factors are profoundly changing the ways that employers and employees execute their relationship. Therefore, such phenomena create the necessity to rethink the scope of application of employment law and the non-standard forms as work, as to adjust the employment contract to meet the needs of organisational flexibility, for example, with reference to the working time, but also, and—I would say—before anything, with reference to the duties the employee is required to perform, the evaluation of such performance, and the connection between the working activities and the employer's organisational prerogatives recognised by the law.

In the current rich theoretical and media debate, the need to adopt an approach aimed also at focusing on the core of the employment relationship has not been left with much space, given the growing *vulgata* that the overwhelming evolution of information technology is destined

to produce the overthrow of the very concept of subordination and stable work, instead giving space to work that is structurally detached from the organisation of the enterprise.

Consistent with this key of interpretation, a substantial body of literature—developed especially in the Anglo-Saxon world—has addressed "on demand" work over the past few years (Davidov 2017; Prassl and Risak 2016; Codagnone et al. 2016; Berg 2016; Tullini 2016; Dagnino 2015; Donini 2015; Aloisi 2016a, b; Ratti 2017; Voza 2017; Biasi 2017; Cherry and Aloisi 2017; Finkin 2016; Cherry 2016; Stafford 2016; Holloway 2016; Rogers 2016; Carboni 2016; Cunningham-Parmeter 2016).

The first aim of this paper is to provide evidence of the fact that **subordination** is not inconsistent with the changes that are deeply influencing our society and ways of living and work. Instead, it is my opinion that the **employment contract** was originally conceived and still is one of the most flexible legal tools for the regulation of work relationships: a tool that has internalised **organisational flexibility** as a core feature of the employment relationship.

Pursuant to this view, reconsidering the employment contract and its relationship with the concepts of organisation and of performance might be one of the keys for examining the new forms of work as well.

In this context, I believe that the Italian reform introduced by means of different pieces of legislation between 2015 and 2017 is a good example. The first choice of the Italian lawmakers was to re-centralise the classic model of employment (i.e. the open-ended subordinate employment relationship) by updating the regulatory framework to adapt it to the transformation of the economic and productive context in which companies operate.

The Italian legal system reacted to the recent trends by introducing deep changes in the regulation of the subordinate employment contract in order to allow for the complete development of the permanent employment relationship beyond the organisational model of the Fordist-type enterprise. This enables employers to unilaterally adjust the contract's object to their variable business needs and enables employees to work ordinarily outside the company's premises and the pre-defined working hours, thus also regardless of the time made available to the entrepreneur.

In particular, the most relevant changes, which reflected the need to increase organisational flexibility, were introduced by Article 3, decree No. 81/2015 on the regulation of the employers' managerial prerogative to unilaterally change the duties for which the employee has been hired (*jus variandi*).

Such normative interventions highlight the basic assumption that organisational flexibility is no longer inconsistent with the regular standard subordinate employment contract.

The organisational needs to enter the contract, which becomes changeable under conditions no longer set by the law, but rather by collective bargaining agreements or by the parties themselves.

In such a renewed legal context, subordination continues to be the answer to the need for the regulation of the working relationship, even in a market that is rapidly evolving and expanding outside of national or continental boundaries, but still reflects a capitalistic system in which the capital itself and the labour belong to different subjects that meet in a free market.

Employers' Managerial Prerogative to Unilaterally Change the Employee's Duties (*Jus Variandi*)

Employers' managerial prerogative to unilaterally change the duties for which the employee has been hired (***jus variandi***) is acknowledged in most of the countries where legislation on the employment relationship exists. Such prerogative allows employers to adjust their employees' **performance** to their changing business needs according to different organisational schemes that represent the results of the employers' choices.

This fundamental legal tool has unquestionably been disregarded or underestimated within the analysis and legal research regarding fair flexibility in the employment relationship, especially in an economic context in which technology is changing dramatically and in which professional skills need continuous updating to keep up with the evolution of robotics.

The concept of flexibility has been analysed in the scientific literature by several legal and economic scholars in recent years, especially in terms of outgoing and incoming flexibility. Also lawmakers' approval of labour market reforms over the past decades focused their attention on the identification of contractual instruments that allow an easy entrance into the enterprise, such as, for example, the possibility to hire employees using non-standard forms of employment. Secondly, lawmakers focused most of their attention on dismissal regulations, and rethinking and loosening the limits thereof, in order to develop legal solutions that would allow companies to benefit from greater flexibility.

Within this broad debate, the analysis of functional flexibility or flexibility "inside" the employment relationship, namely the possibility to rapidly adjust the business activities of a firm to its changing needs, has largely been disregarded.

In this context, the paper aims primarily at studying the employment agreement from an internal point of view—namely, the possibilities for the parties to change and modulate the content of the agreement—instead of an external point of view—the possibilities for the parties to enter the relationship by means of an atypical contract and the possibilities, particularly for the employer, to easily terminate the employment contract.

In the background of such reflections is the role of **collective parties** and their reciprocal relationships. **Collective bargaining agreements** appear to be the most suitable legal tool for regulating the parties' reciprocal positions and, at the same time, for keeping the regulation updated with respect to the newest technological evolutions.

The new Italian regulation of *jus variandi* represents an interesting way to insert into the functional flexibility of the employment relationship an underestimated path towards employability and the protection of employees by stressing the role of collective parties and their reciprocal relationships.

Italian lawmakers have found that extending the role of collective parties in defining the duties and rights of the parties to an employment contract leads to "controlled flexibility" in which managerial prerogatives are exercised within the limits of the collective bargaining agreements.

In this sense, such agreements appear to be the most suitable legal tool for regulating the parties' reciprocal positions and, at the same time, for keeping the regulation updated with respect to the newest technological evolutions.

A Premise

The legislative regulation of *jus variandi* prior to the 2015 reform did not in itself constitute a limit on the pursuit of an efficient business organisation by changing the roles and tasks required of workers. The "equivalence principle" provided for by Article 2103 of the Italian Civil Code, as introduced by the Workers' Statute (Law No. 300/1970)—according to which an employee could have been assigned to the duties established in the employment contract as to any other duty equal to those ones—was, in fact, a limit which was also open and flexible, because—perhaps not by chance—the lawmakers had not specified which profiles between the tasks of origin and those of destination should be taken into account for the purposes of judging their *equivalence*. This is borne out by the fact that the interpretative solutions to the problem of defining the concept of equivalence have been many and varied.

However, a particularly rigid interpretation of the provision—interpreted in terms of protecting the **professional skills** already acquired by the worker—has clearly prevailed, without contemplating any openness towards new skills. This interpretation, anchored in the protection of the worker's "know how", produced the rigidity of the regulation, against which the only alternative has been that of the (creative) construction of hypotheses for the derogation from the same provision.

The jurisprudence, ignoring the warnings of the doctrine on this point and with few exceptions, settled on a notion of equivalence such as to prevent any movement that could compromise, even partially, the already matured competences of the worker in a static and completely anachronistic vision of companies' **organisation**, and on the basis of a hermeneutical approach that did not allow openness, almost as if the acquired professionalism was a natural and indisputable concept.

In view of this approach, which undermined the very subjective position of the worker in the face of changes in the structure and needs of the undertaking, the case law only occasionally allowed a rethinking of its interpretative findings, believing that the route of derogation from a clearly mandatory rule was easier to follow. It was precisely by following this path that the so-called "demotion pact" was first accepted and the legitimacy of the clauses that allow for fungible set of duties, created by collective bargaining was subsequently recognised.

Taking into account the pre-reform landscape, its distance from the "new" organisational needs of companies was clearly perceived. This has been confirmed, not for the construction of the legal discipline—which was limited to a boundary, that is, equivalence, which could be interpreted in different ways and which could well have reconciled the requirements aimed at the protection of the worker's person with those aimed at flexibility—but rather, for the way in which this discipline has traditionally been applied by judges.

In particular, the case law only partly recognised the central importance of the contribution that collective bargaining could have made to the regulation of tasks. Not only did judges for employment traditionally hold that the place of the duties in the same professional classification could not be said to be sufficient to consider the condition of equivalence as integrated, they also considered that the imposition of the nullity of contrary agreements, referred to in the second paragraph of Article 2103 of the Italian Civil Code, should be extended to collective agreements.

In light of the foregoing, it emerges that the regulation structure was particularly rigid, despite the continuous demands of the scholarship and despite the attempts to modernise the models for the classification of personnel in collective bargaining.

It was therefore the lawmaker which had to take on the requirements for flexibility in relation to ***jus variandi*** by means of a radical amendment to Article 2103 of the Italian Civil Code. The amendment acknowledged that internal flexibility constitutes an inevitable reflection of the dynamic structure of an organisation, which must constantly respond to the demands of the market, technological innovation, the external environment, trade union pressure and other elements,

the most important of which is connected to the fact that a productive organisation generally has a predominantly human component (Liso 1982).

The Ordinary *jus variandi*: The New Role of Collective Bargaining Agreements

The recent reform of Article 2103 of the Italian Civil Code seems to have identified the appropriate instrument for balancing the parties' interests in the governance of employers' prerogative to unilaterally change their employees' duties in the **collective bargaining agreement** (Liso 2015), which is essentially entrusted with the task of regulating that power (Zoli 2015).

This was a response to a longstanding call from a large part of the scholars (Liso and Rusciano 1987; Liso 1982, 1987; Magnani 2004; Ichino 1992; Brollo 1997; Pisani 2013; Ghera 1984; Treu 1989; De Luca Tamajo 2008; Zoli 2014; Liebman 1993), which have mostly welcomed the decision to place collective agreements at the centre of the discipline (Zoli 2015; Liso 2015), while not failing to highlight the critical aspects of the new provision.

The rule certainly maintains the principle of the contractual nature of the **working duties**, which is confirmed by the first part of the new wording of Article 2103 of the Civil Code, which states that "*the worker must be employed for the tasks for which he has been engaged*", and therefore, for the tasks crystallised in the employment contract at the time of recruitment.

The reference to the tasks identified by the individual employment contract was essential in the framework of the previous regulation, in which this represented the parameters of the relationship in order to anchor the assessment of the equivalence of the new tasks to which it was lawful to assign the worker in the exercise of *jus variandi*. However, today, this reference has lost its role as the "lower limit", as it is accompanied by the widest reference to the "*tasks ascribable to the same level of the collective bargaining and legal category of the last ones*".

The duties indicated in the contract at the moment of the hiring define the initial classification of the worker. The employer may, in fact, legitimately assign the worker to all the tasks included in the same level of the collective agreement as the initial tasks and included in the same legal category, which are articulated in Article 2095 of the Italian Civil Code (so far unchanged) (Brollo 2015; Tiraboschi 2015).

The reform essentially entrusts to the national, territorial or company **collective bargaining agreements** entered into by the trade unions, which are comparatively more representative at the national level, or to the company collective bargaining agreements entered into by the company's union representatives (according to the definition, valid for the entire decree given by Article 51 of Decree No. 81/2015), ultimately, the identification of the employee's boundaries for fulfilling the employment contract, and specularly, the identification of the employer's **power** to change the object of the contract. The collective agreement is thus placed at the centre of the system as an instrument to limit the employer's power to modify the tasks, in relation to which the law merely acts as a source of delegation, but is not concerned with regulating cases in which there is no collective agreement.

At a first reading, as argued by the doctrine addressing the point, the new provision seems to mark a radical break with respect to the previous discipline (Carinci 2015; Ferrante 2015; De Feo 2015). In fact, it eliminates the condition of legitimacy laid down in the Workers' Statute (Law No. 300/1970) of the equivalence of the new tasks to the previous ones, instead merely requiring that they have the same level of contractual classification (Gargiulo 2015).

There are, however, those who have considered that the absence of an express reference regarding the parameter of equivalence does not imply that it will no longer act as a limit on the power of employers, because equivalence will continue to represent the parameter, albeit implicit, to which the exercise of *jus variandi* must continue to anchor itself. According to this thesis, in view of the fact that the employee might be assigned to tasks not expressly covered by the collective agreement, the interpreter will in any case have to use an evaluation criterion which takes into account the value of new tasks compared to the "last ones actually performed", thus applying again the principle of equivalence which,

accompanied by the legislator's little politeness to the door, is destined to be overbearing from the window of the judge (Gargiulo 2015).

On this point, it has been pointed out that while judicial control certainly cannot be excluded in the event of a gap in the collective agreement over the actual correspondence between the tasks actually performed by the worker and the contractual framework formally recognised, this cannot prevent the recognition of the obvious fact that the **principle of equivalence** in terms of **professional skills** acquired by the worker has been abandoned and gives way to the mere traceability of the tasks at the same level of the collective bargaining agreement (Zoli 2015; Liso 2015; Brollo 2015).

Faced with the rigidity of the provision set forth in the Workers' Statute—or, better still, with the particularly restrictive interpretation of the limit on equivalence provided by the case law—the question has arisen of adapting the guarantee of Article 2103 of the Italian Civil Code to the need for greater flexibility deriving from the increasingly penetrating integration of production systems. Faced with this need, the courts moved in a direction which, even before the 2015 reform, appeared to be more and more difficult to justify from the point of view of consistency with the wording of the norm.

From this point of view, the reform of Article 2103 of the Italian Civil Code is in line with the policy of law which, in response to the demand for flexibility in the regulation of employment relations, can be seen in the so-called "controlled flexibility" or "negotiated flexibility" (Tursi 2013), which is the best instrument for regulating relationships, as an alternative to the simple reduction or repeal of the protective legal discipline: the technique used to implement this policy of law is the legal reference to collective bargaining.

Of course, the new Article 2103 of the Civil Code has created a number of new problems. When the reference to equivalence was eliminated, a qualitative parameter disappeared which, although difficult to apply, nevertheless identified a guiding criterion for the interpreter. The oracle of the law is now the collective agreement, to which the primary legislation has delegated the identification of the category of the tasks to which the worker can be validly assigned; this identification must be carried out through the contractual classification of the tasks.

The Extraordinary *jus variandi*

The new provision provides for the possibility of a unilateral prerogative of the employer to assign the employee to tasks at a lower level of classification than those in the recruitment or those last performed, provided that they fall within the same legal category. The first condition for the legitimacy of the "downward" movement is the existence of a change in the company's organisational structure that affects the position of the worker. The provision specifies the limits and conditions that must be met: first, the employee must be notified of the change in duties in writing; otherwise, the act will be null and void. The written form must also be understood as requiring the explicit specification of the changes in the **organisational structure** that justify the demotion in order to allow the verification of its legitimacy. Secondly, the worker has the right to maintain the level of the collective bargaining agreement (which identifies more generally the economic and normative treatment applicable to the employment contract) and the remuneration in use, with the exception of the compensation elements of the wage linked to the particular methods of performing the previous duties. Employers are therefore obliged to bear the cost of the demotion, because they cannot reduce their employees' level of remuneration.

The **demotion**, moreover, can only extend to the level of classification immediately below that in which the last job performed is placed; the descent of further steps in the level of contractual classification is not allowed under these conditions. Moving outside the boundaries of the legal category to which it belongs, as defined by the Article 2095 of the Italian Civil Code, is also not allowed.

In this case, a fundamental role is also played by the collective agreement, which, in articulating the boundaries between the different levels, will condition *jus variandi* in the sense of whether or not the further internal limit of the necessary objective justification is imposed on it.

A second, alternative condition for the legitimacy of the demotion is represented by the set of further hypotheses for the assignment to tasks belonging to a lower level of classification, although within the same legal category, which can be provided for by collective agreements (Zoppoli 2015). Also with reference to these further hypotheses, the regulation

specifies that the change in duties must be communicated in writing, on the pain of nullity of the decision. Further, the worker has the right to maintain the level of remuneration in use, with the exception of the elements of remuneration linked to the particular modes of performance of the previous work. Even with reference to these hypotheses, the demotion may not extend beyond the level of classification immediately below that of the last job performed or beyond the boundaries of the legal category.

Collective bargaining is ultimately entrusted with the task of defining the limits of *jus variandi* which has been defined as ordinary and is located within the boundaries of the classification of the tasks established in the employment contract or those actually performed in the last job (Article 2103, paragraph 1 of the Italian Civil Code) and of regulating *jus variandi* which has been defined as extraordinary, in that it is entitled to move towards the lower contractual classification (Article 2103, paragraph 4 of the Italian Civil Code).

As a result of the silence of lawmakers, collective bargaining is free to regulate the further hypotheses for demotion (Voza 2015), because it may well exceed or otherwise regulate the condition of a change in the company's organisational structures that affects the position of the worker, as per paragraph 2 of Article 2103 Civil Code.

This confirms the legislature's willingness to recognise the collective agreement as the main regulator of the power of *jus variandi*.

The third and last hypothesis for a lawful demotion, regulated by the sixth paragraph, is that in which the individual parts underwrite, in one of the so-called "protected situations" referred to in Article 2113, paragraph 4, of the Civil Code, or before the certification committees pursuant to Article 76 of Legislative Decree No. 276/2003, agreements amending the duties, which may also involve changes in the legal category and the level of remuneration, where stipulated in the abovementioned places and in the interest of the worker to maintain employment, acquire a different professional status or improve her living conditions.

The widening of the boundaries for the possible demotion, which can extend to all levels of classification that are lower (and not only to the one immediately below), and which may also involve a change in the legal category and, above all, in remuneration, have been accompanied

by two types of limits. A formal limitation requires that the agreements must be concluded in a protected forum. A substantial or objective limitation requires that the agreement must be concluded in the interests of the worker to maintain employment, to acquire a different level of professionalism or, ultimately, to improve her living conditions.

This is certainly the most complex norm within the provision in question, which also stems from the difficult distinction between the situation referred to in the sixth paragraph and that referred to in the second paragraph—described above—in which demotion is allowed in the face of changes in the organisational structure of the employer (Liso 2015).

With reference to the limits of a formal, or rather procedural, nature, the law entails the nullity of all agreements that are entered into outside the protected locations that lead to a worsening of the classification beyond the level immediately below or beyond the limits of the legal category, or even if they fall within these boundaries, are not justified in light of the collective provisions. The restrictions on the purposes laid down by the provision have also been interpreted as alternative preconditions for the validity of the agreement, which is null and void within the meaning of the ninth paragraph of Article 2103 Civil Code if it is concluded for the pursuit of employee interests other than those expressly stated (Voza 2015).

In any case, the meaning to be attributed to these constraints has raised a number of concerns. In particular, it has been noted that the "worker's interest in maintaining employment" (paragraph 6) in itself implies a "change in the company's organisational structure which affects the worker's position" (paragraph 2): the latter situation certainly occurs when the job ceases, so that a demotion is the only alternative to dismissal as a justified objective reason (Zoli 2015; Brollo 2015). Hence, the difficulty in distinguishing this hypothesis from that provided for in the second paragraph of the provision, which nevertheless legitimises, as we have seen, a unilateral act by the employer of an assignment to lower management duties and does not require compliance with any formal condition.

With reference, then, to the worker's interest in acquiring a different professionalism, a reference to the case law attempt (rather isolated, for

the truth) to enhance the possibility that the worker may be assigned to lower tasks within the framework of an on-the-job retraining process might be imagined (Voza 2015), although it is not clear what the advantage could be for the worker, in the face of a permanent demotion which may also involve the reduction of pay, in the stipulation of such agreement.

Given the type of interests that the agreement must pursue under penalty of nullity (Voza 2015), it will be particularly complex to define both the role assigned to the parties called upon to assist the worker's will in concluding the agreement and, above all, the role that the judge may be called upon to play in the face of an appeal against the agreement. In the writer's opinion, the examination of the legitimacy of the pact must be limited to the profile of the abstract compatibility of the content of the agreement with the declared aim, because the verification of the actual achievement of the same purpose—by its nature, not necessarily its immediate realisation—may not have a positive outcome, even in cases involving a virtuous agreement.

The Sanctions

The ninth paragraph of Article 2103 of the Italian Civil Code provides that, unless the conditions set forth in the second and fourth paragraphs are met, and without prejudice to the provisions of the sixth paragraph, any agreement contrary to the provision is null and void (Fontana 2015). An illicit demotion will occur whenever the employer exercises her *jus variandi* outside the limits and conditions set forth by the law.

It should be noted that the principle that employees are generally entitled to be classified in the legal category and the level of employment that correspond to the specific duties they have actually performed remains generally firm, now, as in the past. This is the principle of the so-called "effectiveness of the tasks" (Pisani 2013; Ghera 1984), which certainly cannot be said to be affected by the new regulation of *jus variandi*, which makes specific exceptions to this principle (demotion following the existence of changes in the company's organisational structure or provided for by collective bargaining), however, in

a direction favourable to the worker, because an assignment to perform lower tasks will not achieve a downgrading of the worker, who will continue to have the right to the economic and regulatory treatment provided for. With this exception, however, the rule requiring the necessary correspondence between the specific duties and the management is confirmed. An unlawful demotion will therefore occur whenever the worker is actually assigned to tasks included in a lower classification level than that which is formally recognised for him/her and which does not fall within one of the cases expressly regulated by the new Article 2103.

The consolidated case law, according to which the logical-legal procedure aimed at determining the classification of an employee is developed in three successive phases, i.e. ascertaining the actual work activities carried out, identifying the qualifications and grades provided for by the collective agreement and comparing the results of the first investigation with the texts of the contractual regulations identified in the second, is therefore of ongoing relevance.

Conclusions

The old regular standard employment contract is often perceived, at the same time, as a virtuous model to which one can aspire and as a phenomenon in the process of exhaustion (Del Conte 2015).

The labour law of the last twenty years has been subject to numerous reforms, during which the legislature has concentrated on different aspects of the labour market, without ever changing the regulation of the employment relationship itself.

In the Italian legal system, previous legislative measures initially involved the so-called incoming flexibility, encouraged by the identification of **atypical types of contracts**, whose numbers have increased over time, in the belief that the offer of contractual instruments alternative to the standard employment contract was an effective method of supporting employment. In a second phase, starting with the so-called Fornero reform (Law No. 92/2012) and ending with Decree No. 23/2015, the focus has shifted to outgoing flexibility, through changes in the

regulation of individual and collective dismissals, with the view that a reshaping of the sanctions for unlawful dismissal can result in an incentive to recruit and hire.

The regulation of the employment relationship was, however, definitely neglected. Faced with a felt need for renewal and the adaptation to changing market needs, the response has always been sought in the market itself. Mobility in the labour market was stimulated on the assumption that greater freedom of action for employers in entering and leaving the employment relationship would entail an incentive to take on employees (through contracts other than employment contracts) and, therefore, would lead to an increase in employment.

Such approach has been partially inverted by the latest pieces of reform that for the first time after decades addressed the core of the employment relationship.

The paper analyses the latest innovations of the Italian legal system in the regulation of the employer's *jus variandi*, as amended by Article 3 of Decree No. 81/2015.

The final objective is to provide evidence that a new concept of organisation is emerging: an organisation that becomes part of the very reason that underlies the employment contract, which not only implies an exchange of a certain working activity for remuneration, but rather the exchange of skills and the flexibility to perform different duties for remuneration (Napoli 1997; Alessi 2004; Galantino 1998; Marazza 2002; Guarriello 2000).

Such new concept is made possible primarily by acknowledging that collective bargaining agreements are now entitled to regulate the very object of the employment contract.

A central role might still be played by the employment contract as a tool to reach the organisational needs of the company in order to face the technological changes that are dramatically reshaping the ways of working.

In light of the foregoing considerations, it is evident, first, that there is an undisputed functionality of subordination to meet the need for flexibility in productive organisations.

This does not refer to the "quantitative", i.e. the possibility to adjust the number of workers to the business need, but rather to functional

flexibility, i.e. the ability to quickly adapt one's own production organisation to market requirements.

This type of flexibility, which has always been necessary in the exercise of entrepreneurial activity, is even indispensable in view of the characteristics of the post-fordist production system, in which responding quickly to fluctuating market demands is essential. The employment contract regulation, as now designed by the new legal interventions, which allows the employer to unilaterally adapt and modify the working duties in a way that is precluded from recourse to any other contract, seems necessary in order to obtain functional flexibility.

The employment relationship remains at the core of the labour market as the tool that can efficiently allow those who organise an economic activity to address rapid change, while using technological means.

This is not meant to be an anachronistic statement, far from reality and bound to a non-existing status quo. It is certainly true that work is increasingly precarious and that "having a job" is no longer an insurance against poverty and a mean to reach social safety (*The Guardian*, 23 January 2018, *Post-work: the radical idea of a world without jobs*).

The distinction itself between who owns capitals and who offer her labour is blurred and intangible, given the complex controlling relationships between economic subjects, that can't no longer be exclusively described in terms of property.

However, the distinction between who organises work and takes advantages from it and who offers her working performance is there, clear and still.

Substantially subordinate work is the source of living for most of the world population. And if it is true that work, as we know it, is a relatively recent construction of the modern age meant to decline over time, I believe this time is not here yet, since yet we do not have thought of any better mean to allow people to get their living while being free, learning, changing, associating, bargaining and collectively and individually expressing their will.

We might have to deal with a type of work that stays outside the boundaries of the companies, outside the boundaries of any physical place; a work that travels through algorithms and produces outcomes in different sides of the globe.

However, the subordinate employment relationship cannot be defined as anachronistic and maintains its fundamental regulatory role in the discipline of the working relations.

Paying little regard to issues connected to functional flexibility does not seem justified, since the employees' capabilities of improving their future employment conditions, particularly in terms of employability, largely depends on business organisation models and on the continuous technological changes, rather than on making recourse to non-standard forms of employment or loosened protection against dismissal.

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