Health and safety at work: the prevention model in Italy*

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* Previously published as WP C.S.D.L.E. "Massimo D'Antona".IT – 408/2020

1. The protection of fundamental rights.

The whole set of legislation regarding protection of working environment reflects a stratification of models, where the focus on prevention[24] appears prevalent; moreover, should not be ignored the combination of protection under civil law – operating at the level of employment contracts and enforced through compensatory sanctions based on private law – and protection under public law assisted by "public" criminal and administrative sanctions[25]. In the case of both of these macro paradigms it is possible to perceive seeds of prevention: the current model of Legislative Decree 81/2008 is public in character and envisages a veritable organisation "for prevention"[26].

Said evolution[27] has seen the progressive unveiling of fundamental legal rights which have finally been placed in the spotlight of protection. Awareness of the insufficiency of compensatory protection[28] in assuring effective protection of workers' rights has brought the model of prevention, considered as a primary right, back to the centre of attention[29].

As regards secondary protection of a compensatory character, it appears true, paradoxically, that "the scant familiarity" of labour law "with the personal injury of workers derives directly from its familiarity with personal rights" [30] which express the personal implication of the worker in the relationship. As has been written, life, health and physical and mental integrity "cannot be adequately protected through compensation"[31] which has an *ex post* connotation, only coming into play when the damage has already occurred[32].

In other words, it is understood that the best way to fully and primarily preserve the integrity of the personal participation of workers in the employment relationship is to eliminate or reduce the risks for their health and safety. This means "directly imposing modifications of employer's organisational decisions" to ensure effective satisfaction of the interest[33].

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[24] A preventive component may also be found in punitive models of protection, or ones based on civil sanctions, where a sanctioning function is combined with a preventive-deterrent effect; these aspects will remain in the background of the analysis proposed here.

[25] PASCUCCI (2017), *La tutela della salute e della sicurezza sul lavoro: il titolo I del d. lgs. n. 81/2008 dopo il Jobs Act,* Fano: Aras Edizioni, p. 54.

[26] DEL PUNTA (2011), *I molti modelli di tutela del sistema sicurezza: una partitura riuscita?,* in *Decreto legislativo 81/2008. Quale prevenzione nei luoghi di lavoro?,* edited by B. Maggi, G. Rulli, Bologna: Tao digital library, p. 19.

[27] As for the models of protection that have been adopted over time, reference, for the main features, will be made to Art. 2087 of the Italian Civil Code, Legislative Decree 626/1994 and Legislative Decree 81/2008.

[28] For an excursus on civil law aspects (also case law) related to a plurality of labour issues, see SCOGNAMIGLIO (2015), *La funzione della condanna risarcitoria: la prospettiva del civilista e gli apporti del diritto del lavoro,* in *Il danno nel diritto del lavoro,* edited by A. Allamprese, Roma: Ediesse, p. 15 ff.

[29] GHERA (1979), *Le sanzioni civili nella tutela del lavoro subordinato,* in *DLRI,* p. 305; FERRAJOLI (2001), *Diritti fondamentali: un dibattito teorico,* Roma: Laterza; AVIO (2001), *I diritti inviolabili nel rapporto di lavoro,* Napoli: Jovene.

[30] DEL PUNTA (2006), *Diritti della persona e contratto di lavoro,* in *DLRI,* p. 196; GRANDI (1999), *Persona e contratto di lavoro. Riflessioni storico-critiche sul lavoro come oggetto del contratto di lavoro,* in *ADL,* p. 309.

[31] ALBI (2003), *Adempimento dell'obbligo di sicurezza e tutela della persona,* in *LD,* p. 688. See MONTUSCHI (2007), *Verso il testo unico sulla sicurezza del lavoro,* in *DLRI,* p. 1200 for a discussion on the application of a particularly "limited" real protection; the compensatory technique, moreover, has been coloured by "singular afflictive undertones".

[32] SCOGNAMIGLIO (2015), *La funzione della condanna risarcitoria: la prospettiva del civilista e gli apporti del diritto del lavoro,* in *Il danno nel diritto del lavoro,* edited by A. Allamprese, Roma: Ediesse, p. 39.

[33] See Ghera 1979, p. 333. The author highlights a particular use of the rules governing labour unions; in fact, in the 1970s the courts "in order to affirm judicial implementation of workers' right to health in a specific form" relied on Art. 9 of the Workers' Statute, which

There is thus an essential correlation between the protection of rights – of a primary rank – and legislative choices designed to ensure the fullness, intangibility and full effectiveness of fundamental rights and, on the other hand, compensatory solutions and protections of a secondary nature.

When a risk is allowed to arise, the fundamental right to health is downgraded to a "mere compensatory obligation", being transformed into a secondary claim "aimed at obtaining health or pecuniary substitutes from the social security and welfare system"[34]; this means failure to achieve the primary objective of primary prevention, as damage to the personal sphere of the worker has already taken place.

A "bland" protection of the fundamental right to health is described by Luigi Montuschi as dating back to the pre-Statute period when collective labour agreements included clauses intended to monetise health by means of a "risk allowance" or allowance for "uncomfortable" working conditions. In such cases it was conceived as a sort of "compensation in advance", with essentially no provision being made for satisfaction of the primary right[35] which should not be "made subordinate or weakened in the impact with the company organisation"[36].

Against this background, the public system of prevention as outlined in Legislative Decree 81/2008 is aimed at avoiding injuries and even the danger of injury; it thus supersedes a model in which "acceptance of illegality, of risk (…) and the sacrifice of rights prevail as the only irreparable prospect of the employment relationship, at the end of which one will find (…) the monetary exchange assured by compensation for damage". There is, indeed, a "natural vocation" or "essential mission" of labour law to achieve to primary aim of protecting workers' interests, such as the right to dignity, health and personality, preferably without incurring the "loss of effectiveness" of the so-called "secondary" instrument[37].

It is thus important to distinguish between prevention and protection, and it is essential to do so right from the start given the close connection between fundamental rights and the instruments of protection.

Although in a broad sense both terms imply the ultimate aim of guaranteeing fundamental rights, it is worth examining the elements of meaning that best qualify them. Both have a connotation of defending fundamental rights; however, in a working context attention should be focused on the moment in which they have relevance; prevention, where "primary", is a particular form of protection of fundamental rights; it acts before risks arise, when the organisation is being set up. Protection, by contrast, intervenes "when at the source it was not possible to radically eliminate risk, but at most only reduce it, it thus being necessary to deal with the inevitable effects"[38];

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recognises the right of workers to control the conditions of the work environment and promote its improvement, "obliging the employer not to oppose the activities of verification, research and experimentation conducted by their representatives". He notes, however, that unlawful conduct "prejudicial to safety and health conditions is substantially different from unlawful anti-union conduct".

[34] MONTUSCHI (1987), *Ambiente di lavoro,* in *Digesto IV Comm.,* I, p. 3.

[35] MONTUSCHI (2006), *La corte costituzionale e gli standard di sicurezza del lavoro,* in *ADL,* p. 5.

[36] MONTUSCHI (2007), *Verso il testo unico sulla sicurezza del lavoro,* in *DLRI,* p. 1197.

[37] RIVERSO (2015), *Il ruolo della giurisprudenza del lavoro per una tutela effettiva del diritto al risarcimento,* in *Il danno nel diritto del lavoro,* edited by A. Allamprese, Roma: Ediesse, p. 128.

[38] Cf. PASCUCCI (2019), *L'infortunio sul lavoro tra prevenzione e protezione,* manuscript, p. 7; the author emphasises the "specific meaning" that differentiates "prevention" and "protection".

protect is the verb pertinent to today, to the present defence, whilst prevent comes earlier and has a broader scope of action. These are two terms that go hand in hand and, although we cannot conceive a "unity" between them, they share the space of their guarantee with fundamental legal interests.

Not coincidentally, Legislative Decree 81/2008 sets them on the same plane when outlining the functions of the "prevention and protection service", as emerges in particular in Article 31 of the decree, but also in further provisions governing this area.

Now, where the focus is on prevention – primary prevention in particular – as a model for the protection of fundamental rights, this means addressing – with the vocabulary of Legislative Decree 81/2008 – the subject of guaranteeing rights.

In the transition from the Civil Code to the 1990s, and from the latter to the present day, we have witnessed what has been defined as a veritable "Copernican" revolution, not so much in the principles underlying the system, but rather in the "prevention techniques", or "concrete" protections. Whereas in the first phase, everything combined to uphold the principle of employer liability for compensation, in the second phase there was a shift towards guaranteeing effective levels of prevention against risks of injury and occupational diseases[39].

The system of rights, in other words, reinforces the theoretical premises of reflection where prevention becomes a model and catalyst for the interwoven set of rules as well as the operational approaches to the subject.

2. Health and wellbeing: meanings and potentialities.

When we talk about wellbeing we first of all have to distinguish among its meanings: wellbeing *tout court* refers to a state of physical, psychological and social health; organisational wellbeing, by contrast, may be considered as the "necessary and essential substrate for guaranteeing all around the health and safety of workers" [40], where emphasis is laid on the relevance of organisational actions for both legal interests, in a complementary fashion.

A teleologically oriented interpretation might lead one to affirm, in other words, that, taken together, the actions, procedures and techniques designed to jointly guarantee and improve "safety and health" constitute organisational wellbeing. These two terms recur together in all of the provisions laid down in Directive 89/391/EEC and may be found in the "general principles concerning the prevention of occupational risks", the actions aimed at the "protection of safety and health", the "elimination of risk and accident factors", the "balanced participation in accordance with national laws and/or practices", and the "training of workers and their representatives" (see Article 1(2) of Directive 89/391/EEC). The "general principles of prevention", as obligations of the employer, are geared towards "avoiding risks" and "combating the risks at source", "evaluating the risks which cannot be avoided", "adapting the work to the individual", "adapting to technical

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[39] NATULLO (2014), *Il quadro normativo dal Codice civile al Codice della sicurezza sul lavoro. Dalla massima sicurezza (astrattamente) possibile alla Massima sicurezza ragionevolmente (concretamente) applicata,* in *WP Olympus,* p. 4.

[40] PASCUCCI (2008), *Dopo la legge n. 123 del 2007. Prime osservazioni sul titolo I del decreto legislativo n. 81 del 2008 in materia di tutela della salute e sicurezza nei luoghi di lavoro,* in *WP CSDLE Massimo D'Antona. IT, n. 73,* p.1.

progress", "developing a coherent overall prevention policy", and "giving collective protective measures priority" (v. art. 6 par. 2). In any event, it appears clear that organisational wellbeing consists in the combination of actions designed to guarantee health and safety at work and manifests, on the one hand, aspects tied to the promotion of the legal interests in question and, on the other hand, the effort to transcend the sanctioning/punitive logic as the prevalent approach relied on with a view to prevention[41].

In the legal literature we encounter, albeit less frequently, the further expression wellbeing "at work", meaning "the broad, overall result of the observance of technical safety standards". One might, in this respect, draw a distinction between organisational wellbeing as a cause (the set of promotional measures) and wellbeing at work as the effect (the result of the combination of such measures).

Certainly, it seems hard to define the substance of the "right to health" without considering the means concretely deployed for its protection[42], which is why – in the absence of additional legal categories[43] – considering overall organisational wellbeing to be closely related to the right to health,[44] as a fundamental right, appears to be logical and we shall proceed with our analysis accordingly.

As has been written, "the protection of health takes on particular relevance in labour law", given that work represents not only "one of the moments of greatest exposure to risk" but also the "utmost expression of individual personality". This notion gave rise to the interpretative approach of the Italian Constitution, which identifies labour as the foundation of the Republic (Article 1) and as a social duty (Article 4) and enshrines the right to protection of mental and physical integrity (Article 32). The formulation of Article 32 of the Constitution solemnly attests that health is not only a subjective right of the individual but is also a collective interest[45]. In other words, it has a social connotation: from the community of citizens to the work community, in a circular space[46].

Linking the protection of health and guarantees provided to production activity means coming up against a potential conflict, that is, a permanent and arduous critical situation. This represents another of the problematic issues: indeed, "any activity of prevention in itself implies a limitation of the employer's organisational power"[47].

Let us thus look at health and safety in the mirror: they share a position "upstream of the production of harmful events" and their consideration is thus at the basis of so-called prevention

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[41] BUOSO (2019), *Definire e qualificare il benessere organizzativo,* in *DSL,* p. 5.

[42] LUDOVICO (2001), *Lo stress lavoro-correlato tra tutela prevenzionistica, risarcitoria e previdenziale,* in *RDSS,* p. 421.

[43] The reference is to a legal-conceptual autonomy attributed to the notion of organisational wellbeing.

[44] Health or wellbeing *tout court*, according to the meaning given at the beginning of this paragraph.

[45] The citations are drawn from SMURAGLIA (1991), *Salute. Tutela della salute - diritto del lavoro,* in *EGT,* p. 1.

[46] RICCIO (2018), *Il potere di scelta del datore di lavoro: la dimensione collettivo-relazionale del lavoro subordinato,* Canterano: Aracne, p. 20.

[47] See LUDOVICO (2001), *Lo stress lavoro-correlato tra tutela prevenzionistica, risarcitoria e previdenziale,* in *RDSS,* p. p. 412, in this respect, "there is no difference between the limitation of stress and the prevention of other risk factors".

law[48].

Among the primary legal rights, health "introduces" prevention into the constitutional system of rights protection: an image of this is the correspondence, in some way "symbiotic", between prevention and health; between the two terms it is possible to identify an authentic relationship of coexistence, in which prevention clearly has a serving role, but one that is no less significant for the purpose of achieving the full extent of the fundamental right to health.

Now, Article 32 of the Constitution represents the "privileged normative point of reference"[49] of a system of protections oriented towards putting the individual at the centre,[50] as is emblematically expressed in Articles 2 and 3.

Constant constitutional jurisprudence has defined the right to health as "primary and absolute"[51] against every threat coming from the outside environment and has portrayed all its possible "faces"[52]; on various occasions, moreover, it has been stated that this right can be limited only after being balanced against other constitutional interests of equal rank[53].

The definition of health[54] worth referring to is the one in Article 2(o) of Legislative Decree 81/2008, i.e. the "state of complete physical, mental and social wellbeing, consisting not only in an absence of illness or infirmity"; a definition that echoes the contents of the text of the 1946 Constitution of the WHO, but with a focus on the dynamic aspect. This assumption is drawn from the phrase "consisting not only", which shifts the attention onto the first part of the statement. Indeed, it is not enough absence of illness or infirmity in order to have health in a full sense; rather, the aim must be a "complete" and "integrated" state of wellbeing in the physical, social and mental dimensions. Completeness and the interrelation among the various individual dimensions are recognised as elements that must undoubtedly be present in order to have an authentic state of wellbeing, in which the balance among them is the resulting condition.

The term "safety" as well can be found in the second paragraph of Article 41 of the Constitution, in reference to the limits to conducting a business activity, together with "liberty" and "human

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[48] NATULLO (2011), *Sicurezza del lavoro,* in *EDD,* p. 1073; here a distinction is made between the "upstream" part relative to health and safety and the "downstream" part aimed at providing workers with the necessary social security protections (no longer prevention measures) "for the health and financial needs resulting from harmful events".

[49] D'ARRIGO (2001), *Salute (diritto alla),* in *EDD,* p. 1009 ff.

[50] Art. 32 Const. describes health as "a fundamental right" of the individual and a collective interest, fully operative also in the relations between private individuals, cf. *inter alia* Constitutional Court judgments n. 88/1979 as well as n. 184/1986.

[51] Although it is a social right, the right to health also embraces the structure of the rights to freedom; thus towards the holder of a right, "all other members of the community are obliged to refrain from behaviours giving rise to danger or harm", cf. BALDASSARRE (1997), *Diritti della persona e valori costituzionali,* Turin: Giappichelli, p. 200.

[52] TRIA (2015), *Salute e occupazione, Relazione tenuta al convegno nazionale del CSDN,* Matera 8-9 maggio, p. 26.

[53] See, by way of example, Constitutional Court judgments n. 307/1990 and n. 455/1990. It is not a matter, therefore, of "downgrading the primary protection assured by the Constitution to a purely legislative one, but it rather implies that the implementation of protection, constitutionally mandatory, of a given interest (health) will take place gradually on the basis of a reasonable balancing against other interests or rights that enjoy equal constitutional protection and with the real, objective possibility of having the resources necessary for such implementation: balancing that is however always subject to the scrutiny of this Court in the forms and manners typical of the use of legislative discretion."

[54] European law, in Art. 168 of the TFEU, establishes that "A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities", without providing, however, any guidelines for such definition.

dignity"[55], but it is not mentioned among the definitions of Legislative Decree 81/2008.

In the constitutional text, safety imposes a limit on the scope and extent of private economic initiative, as the latter is not an absolute right, but rather geared towards a social aim. The assumption whereby free enterprise cannot be pursued in such a way as to prejudice safety may be understood according to two perspectives: one where it is considered in relation to fellow citizens as a whole, the other with reference to the specific relationships through which an internal organisation of production is created. Therefore, we should look first of all at the respect "for the constitutional rights of others and the definition of legal positions attributable to individuals by norms of constitutional value in view of the fulfilment of the mandatory duties of economic, social and political solidarity"; on the other hand, for the sake of protecting the constitutional order, preventive and subsequent actions can be taken to defend the general public order, but so can measures of prevention and repression of factors disrupting the "peaceful enjoyment of rights and the performance of the duties assigned to workers"[56]. The conception of safety as "certainty of the freedom guaranteed to the individual"[57] is in fact different from the one that sees it as a "condition of prevention that insures against the risks threatening fundamental legal rights" such as health and work; the meaning adopted in this essay is clearly the latter.

According to the Treccani dictionary, safety is "the condition that makes one and makes one feel to be free of danger, or which provides the possibility of preventing, eliminating or rendering less severe harm, risks, difficulties, unpleasant circumstances, and the like". This definition, taken in a legal context, causes us to reflect on two interpretations of safety: one related to status, the other as a pre-condition of prevention; in an unsafe environment, prevention, too, is undermined. Safety means reducing risks to a minimum, though it cannot mean eliminating them, as this is impracticable. The risks can be selected and excluded one by one, the reason that makes us appreciate even more that a precise knowledge and description of them is fundamental[58].

3. The impact of European Union law.

European rules have undoubtedly contributed to a better conceptual definition of what constitutes prevention – and above all primary prevention – so much so that protection of the working environment probably represents one of the most important chapters in the history of European social law[59]; emphasis is laid on the function of prevention of the general norm "in which the compensatory element is to be considered wholly residual", while attention is focused "on the qualitative content of the safety obligation, whose purpose is to satisfy" workers' fundamental

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[55] The second part of Art. 41 Const. evokes the features of the "continuous challenge" and the "humble function of labour law" in safeguarding and defining the limits of safety, liberty and human dignity when a person engages in an economic activity in society; see Balandi 2018, p. 1309.

[56] The quotations are drawn from BALDASSARRE (1971), *Iniziativa economica privata,* in *EDD*.

[57] The connection between freedom and safety is a feature of the liberal State, cf. LOI (2000), *La sicurezza: diritto e fondamento dei diritti nel rapporto di lavoro,* Torino: Giappichelli, p. 25 for a broad discussion of a philosophical character aimed at interpreting safety from a plurality of viewpoints: reference may be made, by way of example, to the area of fundamental rights, social safety and occupational stability.

[58] BALANDI, BUOSO (2019), *From safety to wellbeing, which paths to follow?,* Paper presented at the LLRN international conference in Valparaiso (Chile), 23-25 June 2019, manuscript.

[59] CARUSO (1997), *L'Europa, il diritto alla salute e l'ambiente di lavoro,* in *DLRI.*

rights[60].

The promotion and improvement of the working environment to protect workers' safety and health (see Article 118 A of the Treaty, which, as is well known, enabled the adoption of acts by a qualified majority, now Art. 153(2)(b) of the TFEU) represented a priority area of harmonisation: a technique for aligning national legal systems through the use of hard law instruments. The previously mentioned framework Directive 89/391/EEC lays down guidelines for prevention, whereby it is possible to identify the objective of "improving" the legislative systems of the Member States. This particular – and not necessarily foreseeable – focus on prevention can be seen in the initial recitals of the directive, which imply an "obligation" to adopt and improve preventive measures "without delay" to "ensure a higher degree of protection" (see recital n. 10); such measures are implemented above all through action carried out at an "intra-company and industrial relations level", where the collective element predominates[61]. The directive is divided into two sections, dedicated, respectively, to the obligations of employers and workers: both are important, though the first one constitutes the "fundamental core of European rules"[62].

Though the term "prevention" receives a definition in Article 3, it is Article 6 – concerning the general principles of prevention – that goes into the actual heart of the prevention policy and we are also enlightened as to what kind of prevention is at issue. The nine points set forth in paragraph 2 of Article 6 constitute the general principles of prevention, namely: "avoiding risks", "evaluating the risks which cannot be avoided", "combating the risks at source", "adapting the work to the individual", "adapting to technical progress", "replacing the dangerous by the non-dangerous or the less dangerous", "developing a coherent overall prevention policy", "giving collective protective measures priority over individual protective measures" and "giving appropriate instructions to the workers".

A combined reading of these points will erase any doubts as to what option of prevention we are talking about: it is the model of primary prevention which, just to highlight a few of the policy guidelines, seeks to combat risks at the source, is aimed at avoiding risks and evaluating those that cannot be avoided. Thus, what is called for is not just prevention of any type whatsoever, left unspecified, but rather primary prevention which, precisely, is founded on adapting work to human beings and puts the individual and his or her rights at the forefront; in other words, we have gone from an objective conception to a subjective one based on the relationship among workers, the environment and risk factors.

In the text of the directive, therefore, prevention is qualifiable as primary, general, planned and integrated into the conception of work situations[63].

The evaluation of risks, among the general obligations of employers, takes on a central role, not only because it is qualified with reference to risks that cannot be avoided – without taking away from the "higher" objective of eliminating them – but also because said evaluation is an integral

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[60] ALBI (2003), *Adempimento dell'obbligo di sicurezza e tutela della persona,* in *LD,* p. 677.

[61] NATULLO (2011), *Sicurezza del lavoro,* in *EDD,* p. 1076.

[62] ROCCELLA, TREU (2016), *Diritto del lavoro dell'Unione europea,* Padova: Cedam, p. 374.

[63] MAGGI (2011), *Introduzione,* in *Decreto lgs. 81/2008. Quale prevenzione nei luoghi di lavoro?,* edited by B. Maggi, G. Rulli, Bologna: Tao digital library, p. 2.

part of the organisation of the workplace; it remains and acts as a *trait d'union* with reference to prevention activity and working and production methods.

4. Safety obligation or prevention obligation?

I thus mean to arrive at the central theme of these reflections: in relation to the right to health, there has been broad debate around the substance of what has been defined as a "safety obligation", "prevention obligation" or "protection obligation" – as per Article 2087 of the Italian Civil Code[64]. Over time, this provision has taken on not only a general guarantee function but also one of "opening, integration and closure" of labour law in this area[65]. As has been written, Article 2087 is endowed with a "double spirit", which has also previously been pointed out in relation to models: i.e., it is "a provision that is sufficiently elastic to lend force, from a contractual perspective, to rules of a public law nature, without being devoid, for this reason, of its own autonomous prescriptive effectiveness"[66].

According to legal scholars, it has come to be considered "inherent" to the functional structure of the employment relationship as "part of the contractual *synallagma*"[67] and has qualified "the fulfilment of fundamental obligations"; in other words "the insecurity of working conditions, which affect the individual, translates into a defect in the contractual scheme". There thus appears to be an "osmosis" of the subjective element to the objective one. The three keywords distinguishing Article 2087, "particularity of the work", "experience" and "technology", are intended as a basis for defining the scope and contents of the employer's obligations, according to an integrated perspective; it almost goes without saying that the internal parameter of the particularity of the work is associated with the external parameters of experience and technology.

In Balandi's theorisation it is possible to derive the subject matter of the "safety obligation" as per Article 2087 of the Civil Code, taking into account the relationship between the "apparently" opposing interests driving the parties to the employment contract, in the framework of reference of the "applied technology"; in order to define this obligation, in other words, absolute and relative parameters need to be considered: the technology applied and the economic cost tied to the maximum technologically feasible safety and maximum reasonably practicable safety. An apparent contrast, therefore, due to the fact of there being contiguous systems that can coexist. Balandi further clarifies that Article 2087 has a very significant "capacity of systematic conformation" which, however, cannot be bent "to production needs", meaning that the maximum technologically feasible safety is prevalent.

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[64] See the essay by BALANDI (1994), *Il contenuto dell'obbligo di sicurezza,* in *DLRI,* p. 79, who discusses the "content of the safety obligation"; GHERA (1979), *Le sanzioni civili nella tutela del lavoro subordinato,* in *DLRI,* p. 332 uses "safety or prevention obligation" without distinguishing between the two; GRANDI (1999), *Persona e contratto di lavoro. Riflessioni storico-critiche sul lavoro come oggetto del contratto di lavoro,* in *ADL*, p. 333 defines it as an "obligation to protect".

[65] NATULLO (2011), *Sicurezza del lavoro,* in *EDD,* p. 1080.

[66] FRANCO (1995), *Diritto alla salute e responsabilità civile del datore di lavoro,* Milan: Franco Angeli, p. 88; cf. DE SIMONE (1993), *Malattia professionale e infortuni sul lavoro,* in *Digesto*. 1993, p. 6, who references Persico 1982, p. 492, according to whom Art. 2087 of the Civil Code is "a provision in which the general interest is linked to the particular, giving rise to notions of "super-protected" subjective rights.

[67] AIELLO (2015), *Il danno alla salute della persona del lavoratore. Il danno cosiddetto differenziale tra responsabilità civile e tutela previdenziale,* in *Il danno nel diritto del lavoro,* edited by A. Allamprese, Roma: Ediesse, p. 158, in the context of a broad reflection on the prejudice to the health or personal injury of workers. The "contractual" formulation of the obligation concerned leads to recognition of the right to raise an objection of non-fulfilment under Art. 1460 C.C.

In the light of this fundamental contribution to research, a few other elements must be added: if absolute safety, like the elimination of risk, is impossible to achieve, the limit of acceptability which, among other things, may bring about a convergence between the (possibly) different positions of the parties to the relationship, can be identified precisely in the action of prevention, especially when a collective relevance is attributable to it.

There are two aspects I intend to dwell on further: the possible transcending of the conflict between the interests of the parties to the employment contract and the systemic, as it were, interpretation of Article 2087 of the Civil Code.

Now, the action of prevention corresponds to an interest shared by workers and employers: the entire working community benefits from the elimination or reduction of risk. The consideration of economic costs – also in the light of EU law, according to which increases in the level of protection cannot depend merely on cost considerations – loses weight for the purpose of rebalancing the system in the field of prevention[68]. If there is an effort towards the elimination of risk, this means that the same will have to be governed, regulated with every possible means. Indeed, it is a matter of evaluating "possibility" or, to borrow the expression used by an authoritative scholar, we could say that safety – and, readapting it, prevention – is "the art of the possible"[69].

The function that Article 2087 performs may be well understood, still, if its contents are read as a "movable frontier", given that external standards are destined to change over time, not only from a technological viewpoint, but also in consideration of experience as far as safety is concerned.

Given that, as mentioned, criteria of realism prevent us from actually being able to talk about "eliminating" environmental risk, the contribution of the cited article and its contents have been essential for the design of a system of prevention, which has moreover largely benefited from European harmonisation enabling it to take a precise shape; according to some, the framework directive, among other things, "rediscovered" the "original" lofty values lying at the heart of Article 2087, so much so that a "close correspondence" between the two sources would very soon become clear[70].

Article 2087 of the Civil Code is the architrave of the system, since said article establishes an obligation whose contents remain open, or more precisely an obligation tied to means and not results. It refers, in fact, to measures that are "necessary" to protect the physical integrity and moral personality of workers, measures that are not left up to chance but are rather closely tied to the particularity of the work, experience and technology[71]. In other words, Article 2087 has positive contents: it is not a simple burden or negative obligation, but rather implies a constant intervention into the complex of organised production. It is worth noting the profound continuity that may also be found in Legislative Decrees 626/1994 and 81/2008.

If the framework directive and its subsequent implementation in our legal system are clearly

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[68] BALANDI (1994), *Il contenuto dell'obbligo di sicurezza,* in *DLRI,* p. 84.

[69] MONTUSCHI (1995), *La sicurezza nei luoghi di lavoro ovvero l'arte del possibile,* in *LD,* p. 413. The author qualifies safety as the art of the possible, given that "maximum effort to eliminate risk is demanded, but reducing it to a minimum is sufficient."

[70] DE SIMONE (1993), *Malattia professionale e infortuni sul lavoro,* in *Digesto*, p. 4.

[71] The criterion of diligence set forth in Art. 1176 C.C. is a parameter for defining the preventive precautions as per Art. 2087 C.C., cf. DELOGU (2017), *Salute e sicurezza sul lavoro,* in *Digesto,* online version.

focused on primary prevention, systematically interpreting Article 2087 of the Civil Code means highlighting the features that make it fit perfectly into the framework of anticipatory protection; reinforcing this *trait d'union* could lead to change of name of what the majority of legal scholars have defined as a "safety obligation" into "prevention obligation": the whole organisation of work is centred on the elimination of risks and reduction of risks that are impossible to eliminate.

This interpretation is supported by the definition of prevention in Article 2(n) of Legislative Decree 81/2008; indeed, from Article 2087 it borrows the parameters that qualify the scope of the employer's measures, namely "the particularity of the work, experience and technology".

The inclusion of part of Article 2087 in the definition of prevention cannot remain devoid of meaning. Rather, it means recognising its strong emphasis on prevention and this is true even if case law has sometimes highlighted its secondary, compensatory element, focusing attention on the right to compensation for damage in view of the failure to adopt the necessary measures, rather than on the employer's obligation to adopt such measures. We can say, therefore, that Article 2087 of the Civil Code really has the merit of being ahead of its time[72].

[72] MONTUSCHI (1987), *Ambiente di lavoro,* in *Digesto IV Comm.,* I, online version. It is also noted, however, that the "seed" of prevention contained in Art. 2087 C.C. has in many circumstances encountered "an arid terrain, still unprepared, not only legally, but also culturally, to enable it to germinate and to render it effective and operative".