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The Right to Work in the Italian Constitution and in the European Union

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L'8 Maggio 1999, Massimo D'Antona apriva a Napoli la conferenza organizzata per celebrare il 50° anniversario della Rivista Giuridca del Lavoro e della Previdenza Sociale. Dodici giorni dopo Massimo cadeva vittima della insensata violenza terroristica delle Brigate Rosse. L'intervento pronunciato in quella occasione costituisce dunque l'ultima manifestazione del suo pensiero ed è con questo che vogliamo inaugurare i Working Papers del Centro Studi intestato alla sua memoria.

On May 8th 1999, Massimo D'Antona was the opening speaker at a conference held in Naples to mark the 50th anniversary of the Rivista Giuridica del Lavoro e della Previdenza Sociale. Twelve days later, he was assassinated with senseless violence by the Red Brigades. We are pleased to inaugurate the Working Paper series of the Research Centre dedicated to his memory with this last paper he presented in Naples

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The Right to Work in the Italian Constitution and in the European Union

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1. The right to work "taken seriously"

Of the fundamental principles of the Italian Constitution, the right to work (Art. 4) is the one that has been most affected by the weight of historical development. In the early days of the Constitution, its binding nature was the subject of excessive debate because, as G.F Mancini remarked in the *Commentario Branca* in the mid 1970s, it derived from an ideological juxtaposition between a planned economy and market economy. Although some of the points put forward in the debate were developed by subsequent legislation (including the connection between the right to work and protection against unfair dismissal), the right to work has not achieved its aspired-to status as the cardinal norm of the labour law system. Beyond the ideological polarisation of that time, the constitutional provisions deserve to be reconsidered and "taken seriously" nowadays, at a time when the issue of work has become a focal point in all plans for a future society, and a new collocation of public powers in the economy, centring round the European Union, requires reconsideration of the role of the nation state.

2. Two great transformations: the difficult relationship between development and employment and the disarticulation of the State in the process of European integration.

In order to be "taken seriously", the right to work has to be seen in the framework of two great ongoing transformations. The first concerns the position of work in the process of European economic and monetary integration. The second concerns the position of fundamental social rights, including the right to work, in the process of integration between Community law and the legal systems of the Member States.

As regards the former, it is a fact that European economies have been heavily affected by the consequences of a worrying phenomenon directly linked to the way in which economic and monetary integration is being achieved: growth without employment. From the *White Paper* presented by Jacques Delors to the recent *Manifesto against Unemployment in the European Union* signed, among others, by Modigliani, Fitoussi and Sylos Labini, there seems to be a certain convergence of opinions, at least as regards the fact that unemployment in Europe derives from a "misdirection" in the building of the European Union, a process which is otherwise valid and of fundamental importance for the future of European societies. The Manifesto indicates errors in the policy of aggregate demand, i.e. in macroeconomic policies, attributable to a rigorously

financial interpretation of compliance with the Maastricht parameters, which has caused a drop in investments, above all in strategic sectors and infrastructures (insufficient growth from both a quantitative and a qualitative point of view); and errors in policies affecting the supply of labour, due to delays in updating European welfare systems, which tend heavily towards protecting workers and providing income supplements for the unemployed (too rigid a labour market and expensive, inefficient income support).

As far as the latter is concerned, European constitutions represent a suture, and therefore a point of tension, in a process of disarticulation affecting nation states both in an upward direction, towards the European Union, and in a downward one, towards territorial governments. This disarticulation concerns both the economic role and the normative authority of the State, two crucial functions for social rights, the protection of which requires both economic action by the State (state intervention and performance in the economy) and normative action (the attribution of rights and obligations in relationships between private parties). The constitutional tension also concerns values: the constitutive principles of the European Union highlight the central role of the market with respect to social rights, which in the Italian Constitution are not subordinate to economic freedoms (a different value being attributed to the "possible and reasonable" reservation, i.e. the limits of the financial resources of the State as a measure of the achievement of social rights).

3. The juridical profile of the right to work as enshrined in the Constitution

The fact that the right to work is enshrined in the Constitution is in itself something to be "taken seriously". To do so, however, it is necessary to remove the sediment of a debate excessively polarised around the alternative models of a planned economy (oriented towards safeguarding the right to work) and a market economy (oriented towards accumulating and increasing productivity) and update its juridical profile in the constitutional system.

It is inevitable to state, albeit in a summary fashion, certain interpretative options, in part taken from the wealth of comments made on the issue, and in part provoked by evolution of the (material) economic constitution.

- a) First of all, the right to work laid down by the first clause and the duty of working by the second have different objects. The right to work enshrined in the first clause means work in a historical and social sense, the remunerated use of personal activity (even though

recent trends suggest adding, not necessarily in the traditional form of subordinate, permanent employment). Viewed in this sense, work is firmly collocated in the sphere of the economy. The duty of working laid down by the second clause, on the other hand, concerns any activity that is useful to society: it does not qualify the nature and purposes of the activity and above all does not imply any connection with the economic sphere.

- b) Article 4 contains a social right and a social freedom. The freedom is that choice of a form of employment cannot be imposed from the outside. The social right, however, does not represent a claim on the state. The very structure of the norm suggests a distinction between the right to work that the Republic "recognises" to citizens and the commitment to "promote the conditions which will make it effective". In short, the right to work does not boil down to employment policies but has a nucleus that can be enjoyed by all citizens, irrespective of employment policy.
- c) The right citizens enjoy by the first clause of Article 4 is the right to work, that is, to access and maintain a job without being subject to unlawful or discriminatory interference on the part of the state or private individuals. In this sense, as the right to have a job, the right to work is a personal right enjoyed by the "social individual". It is not the same as the right to obtain a job via state intervention nor does it guarantee job stability. Legislation can obviously progress in this direction, variously graduating levels of protection, as has happened up to now. But the right to work, as a right enjoyed by the "social individual", irrespective of the policies needed to make it effective by increasing job opportunities, consists of guaranteeing formal and substantial equality between individuals within the limits of the amount of jobs available, an equality that means balanced competition between people and protection against unlawful action linked to personal qualities, both in the labour market and in the workplace. This equality with respect to the amount of work available (the equal right to work) surely requires general legislation regarding dismissals, preventing abuse of authority on the part of employers, like the legislation in force in Italy since 1990 (but not necessarily the remedy of reinstatement, as the legislator's task is to indicate the level of effectiveness of the remedies provided); it justifies specific anti-discrimination measures concerning both access to and maintenance of employment, as well as measures for selective re-balancing via positive action; in certain labour market conditions, it also justifies imposing measures on the demand side. Finally, it justifies measures that are at one and the

same time of a limiting and promoting nature, such as compulsory education or vocational training until the age of eighteen which, although mainly affecting the state, also affect relationships between private parties and provide a concrete basis for the attempt to rebalance the points of departure regarding work..

- d) As far as the "claim to" is concerned, achievement of the conditions that will make the right to work effective, i.e. work and employment policies, can be developed in any mixed-economy historical situation accepted by the economic constitution (and so they do not postulate either models of planned economy or the functionalisation of enterprise to social utility) and may take the form of a mixture of intervention by both the supply and the demand sides, before, during and after employment. However, involuntary unemployment (i.e. affecting those who have lost their jobs or those who are in search of their first job) remains constitutionally alarming and immediately configures a subjective position of expectation towards the state (a different position from the one based on Art. 38 of the Constitution, related to social security rights). The State's response to these expectations does not necessarily have to be in the form of actual provision of State-paid employment. It can take various forms and is not necessarily directed to the single individual: on the demand side, a policy of economic development, possibly territorial, oriented towards the creation of jobs; on the supply side, the provision of benefits and the means and knowledge needed to increase workers' chances of returning to work. But however varied the response may be, if there is no response, that is, if the State remains inactive, it is failing its duty (which, as Paolo Barile claims, may well lead to a resumption of individual claims and entitle the "abandoned" unemployed to sue the State for damages).

4. The Constitutional right to work and the European Union

The effect of the process of EU economic-monetary and juridical integration on the right to work as enshrined in the national Constitution is a complex one: in part it is an aspect of a more complex process of transformation of the role of the nation state in the economy, and in part it takes on a specific dimension, at least since employment policy was put on the EU agenda.

The effect of European integration on the role of the state in the economy - a role that is being re-dimensioned as various forms of

sovereignty (from monetary sovereignty to market regulation) are transferred to supranational organisms or levels - is felt in different ways.

The first is the rigorous constraints imposed on financial resources, which represent an insuperable limit to any social policy that involves expense. The State can no longer count upon monetary policies and cannot stimulate the national economy by exchange-rate manoeuvres, nor can it rely on monetary tricks such as tolerated inflation or financing of the national debt with currency. In this situation social policies, including employment policies, have to be directly funded by the taxpayer. Who foots the bill, who reaps the benefits, and what the cost-benefit ratio is, are crucial issues in the provision of social rights enshrined in the Constitution such as the right to work (in such a context, the "possible and reasonable" reservation used by the Constitutional Courts takes on a political significance as well as an institutional one) .

The second is the rigid Community market regulation principles, which prevent the State from recourse to occult forms of support for employment via state aids for enterprises. The principle of transparency in social expenditure, for example, forbids state financing of unproductive enterprises for the sole purpose of maintaining employment levels (the dominant form of employment policy in Italy, especially the South), considering it to be State aid. But in more general terms, the regime of state aid subordinates employment policies to a careful choice of the means whereby incentives are provided: they must not involve a differential advantage for certain categories of enterprises (which is not always the case in Italy, as demonstrated by the continuous dispute with the European Community, from the promotion of work and training schemes to that of realignment contracts as a way to emerge from black economy). .

5. Employment policy in the Amsterdam Treaty and national employment policy

The White Paper on "Growth, Competitiveness and Employment" represents a turning point at least as regards awareness of the dramatic nature, not only at present but also in the future, of unemployment in Europe, its causes and the possible action to defeat it. The political acts came later and although they are not such as to allow the EU to be considered to be the subject of employment policies, which within limits remain the responsibility of the member states, they have given national policies a new character.

The important institutional datum is the insertion in the Amsterdam Treaty of a chapter on employment (Articles 125 - 130). If we add that

the Treaty has incorporated the Agreement on social policy, we notice an innovation on the market and monetary-based approach which had been prevalent up to then in Treaties and elsewhere.

The role of the Community is, however, only one of co-ordinating and evaluating the policies of the single member states, and not an active role (even though Art. 127 contemplates support for and possibly integration of the policies of the single states). The aims of Community action are not recognition of the right to work but the promotion of a "competent, qualified, adaptable workforce and labour markets that are capable of responding to economic change" (even though the Community "contributes towards a high level of employment"): a prospect which is more generic and less prescriptive than Art. 4 of the Italian Constitution.

However, the procedures whereby the Community performs its task of co-ordination not only stimulate national policies but also favour convergence. In short, they require the Commission and Council to establish each year "the orientations to be taken into account by Member States in their respective employment policies"; each Member State to transmit a report on the measures taken to comply with the Community orientations; the Council to perform an annual review of implementation of the Member States' policies in the light of the orientations deliberated; and finally the possibility for the Council to address majority recommendations to Member States.

The national plan of action for employment (Nap, to use the Anglo-Saxon acronym) is the significant part of this process from the point of view of the Member States. Dispositions for verification of the quality and effective implementation of these plans, which are based on cross-checks between States and the identification of good national practice to be used as a comparison parameter, as well as the drafting of quantitative and performance indicators that are beginning to make policies and their effects measurable, have rendered the experience of co-ordination important, despite its lack of any legal cogency. What is above all important, at a political level, is the reciprocal collective judgement to which Member States are submitted, through Council evaluation of the contents and effective implementation of the national plans.

The experience gained so far provides indications of the features of Community employment policy.

- a) The basic inspiration, stated in Art. 125, is that of employment policies focusing on the supply of labour, promoting qualification and adaptability in the workforce and the efficiency of labour markets. The other pillar, i.e. development policies capable of creating employment, is absent or at least remains in the shadow (but was present in the White Paper by Delors in the form of a

broad programme of investment in European networks and communication systems).

- b) Given this basic inspiration, the experience of the last few years has shown that Community guidelines on employment have adopted a different approach, even though it is by no means incompatible with that of Art. 4. The European ideal is a more active society but not necessarily a society of workers. This means that the development of small and medium enterprises, which are closer to individuals than to capital, is considered to be an employment-related objective in itself. As far as the rest is concerned, however, judging by the employment guidelines expressed in 1999 (Council Resolution of 22nd February 1999), the Community appears to be driving national policies in the direction covered by Art. 4 of the Constitution.

Let us take a brief look at the 1999 Guidelines. They include improving employability, focusing on critical areas such as school-leavers and the long-term unemployed, and at the same time "opening" the labour market up to unfairly treated groups such as the disabled; establishing favourable conditions for the creation of additional employment in expanding sectors such as the service industries and new technologies; modernising the organisation of the labour market and introducing the flexibility needed to make both enterprises and workers more adaptable to market conditions, via methods including flexible contracts, thus increasing competitiveness; strengthening equal opportunities policies by adopting in all employment policies an approach based on gender integration, i.e. on an objective situation which needs correcting, in which women encounter greater difficulties than men in career and job opportunities, reconciling work and family commitments, and returning to work.

6. The right to work, labour law and the European Union

To conclude, taking the Constitutional right to work seriously implies awareness of three points that emerge from the process described above.

- a) The new role of state powers in the economy, in which the EU occupies a central position, robs the constitutional powers of the Italian State of many of the methods used up to now to implement policies for economic growth and promoting employment, which focused on the aggregate demand. This does not mean removing the constitutional constraint placed on the state. Italy will have to achieve its constitutional objectives *uti socius* in the EU context rather than *uti singulus*, because this involves the voluntary

limitation of national sovereignty implicit in EU membership. The issue remains open: the recent joint statement agreed by Italy and France on employment policies, which confirms the need for growth-stimulating action at a macroeconomic level to be accompanied by microeconomic measures affecting the structure and functioning of the labour market, are at the centre of current discussion between Member State governments and the Union.

- b) The economic dynamic generated by economic and monetary integration exposes Italy more than other European countries to "domestic" risks due to its delay in updating labour law and the welfare system as compared with other countries. In Italy, the labour protection and welfare systems still focus heavily on safeguarding the employed and compensating those who lose their jobs (which generates a rigid but increasingly dual labour market and an expensive, inefficient, and unfair system of income support). This is proved by a worrying fact: the distribution of unemployment by age groups, which for adults is below average as compared with that of the best European countries and is mostly concentrated in the younger age groups. It is evident that unemployment in Italy conceals a generation gap.
- c) Unemployment in Italy is also linked to the critical economic and social situation in southern regions, where it is highest. The creation of favourable conditions for investment via territorial pacts and the so-called "contratti d'area" is essential. Another contribution is made by regularisation of hidden economy workers and processes of contractual realignment, at least in the sense of restoring legality which is an incentive in itself. European labour market discipline and the principle of transparency in social expenditure, on the other hand, prevent the implementation of policies providing differentiated support to enterprises by geographical area. But they do not prevent us from concentrating services and resources on people who, given their territorial context and the high unemployment rate existing there, encounter greater difficulty in finding a job, and from selectively improving their employability, to use the current term, by means of extraordinary measures focusing on training, orientation and re-qualification.

7. The right to work from "having" to "being"

In the European society being planned, the right to work preserves and loses something at the same time.

It preserves its link with growth, i.e. with a not merely monetary and/or financial vision of an increase in the productivity of the economic system and thus of wealth. Whereas the connection between growth and employment lay in things in the Fordist industrial society, in the society developing now it is a field for political rather than monetary choices. The fact is that these choices are not, or are only partly, in the hands of the constitutional powers of the Member States. But our State, and it is worthwhile remembering this, has enshrined the right to work in the Constitution, thus removing from the legislative and political discretion of constitutional powers any decision, if not as to how then certainly as to whether to create "conditions which make it effective". .

The right to work also loses something of its dense historical connotations: the heavy orientation towards "having" (stability of work, uniformity of jobs). Having work, i.e. a job, with the guarantee of stability and the accompanying qualification-based status, are historical derivations of the right to work but go beyond the essential current nucleus of the protection provided by the constitution, not least because they refer to a rigid, uniform, lasting model of enterprise and labour organisation that is in decline. Although it maintains its axiological and prescriptive valency, the right to work, both as an expectation and as the right to have a job, seems to be shifting its centre of gravity towards the "being" or person. When we speak of employability, when we stress the indispensability of ensuring those looking for a job or trying to keep one of equal starting points but not finishing lines; when we indicate strategies to support the worker in the labour market as the best that the microeconomic approach can do in areas where unemployment rates are high (it being understood that jobs are not created without development); finally, when we denounce the compensatory nature of our welfare system and the almost complete absence of universal income support oriented towards favouring re-allocation in the world of work and not State-supported self-exclusion by those categories who enjoy social security benefits, then we are "taking the right to work seriously", as a constitutional guarantee for the "social individual", but updating it as a guarantee of being rather than having.