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Questo numero inaugura una nuova serie pubblicata dalla *Rivista* formata da *Special Issue*, la cui numerazione è indipendente rispetto agli altri fascicoli. In questa serie, saranno pubblicati autonomi volumi monografici. In futuro, altri numeri speciali potranno essere pubblicati, seguendo un criterio di numerazione progressiva. La Direzione sarà lieta di raccogliere proposte in tal senso.

This issue inaugurates a new series published by the *Rivista*, formed by Special Issues, whose numbering is independent from the other issues of the Journal. In this series, autonomous monographic volumes will be published. In the future, other special issues may be published using a progressive numbering system. The Editorial Committee will be happy to receive proposals to this effect.

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Economic Crisis and rights of women in the Labour Field: The Crisis as a Trigger For the implementation of social rights? *

Irene Pellizzone

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1. Introduction

The core idea of the paper is that the economic crisis can be interpreted as a trigger for the implementation of measures aimed at protecting women's social rights in Italy.

Constitutional principles in matter of gender equality and right to work (Artt. 3¹, 4², and 37³ It. Constitution) as well as similar principles of the European Union law (and moreover of Art. 23 of the Charter of Fundamental Rights of the European Union)⁴ are still far from being enforced.

* *Double-blind peer reviewed in accordance with the Journal guidelines.*

¹ Principle of formal and substantial equality.

² Right to work.

³ Rights of working women.

⁴ About art. 23 of EUCFR, for the point of view of Italian legal scholars, see M. D'Amico, *Commento all'art. 23*, in *La Carta dei Diritti dell'Unione europea. Casi e materiali*, edited by G. Bisogni, G. Bronzini, V. Piccone, Taranto, 2009.

It is not possible to list here all the numerous EU legal acts, but it is important to recall at least: directive 2006/54/CE of the European Parliament and Council Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), implemented in Italy with the Equal Opportunity code, legislative decree n. 198 of 2006); directive 2010/18/UE of 8 March 2010, implementing the revised

Equal pay, equal promotions, equal working conditions, overcoming of the gender segregation in the labor market: these are only some examples of measures necessary for gender equality, not yet achieved in the Italian legal order⁵.

Therefore public authorities are often exhorted to enhance their policies supporting working women⁶.

The starting point of this essay is that the adoption of measures in favor of working women and protection of maternity is absolutely necessary for the achievement of gender equality and that they cannot be renounced in consequence of the worsening economic context: the economic crisis shall not become an excuse to reduce or abolish such measures.

So said, the paper focuses on the protection of women's rights in the labor market during the Italian economic crisis started in 2008, as an emblematic area of the complex relation between women's rights and economic crisis.

The presentation will ground on the analysis of statistical data and the involvement of Parliament, Italian Constitutional Court and supranational Courts in the matter.

At the end, the paper will try to demonstrate that the resistance or even the reinforcement of measures in favor of women in the labor field in time of economic crisis can be interpreted as a sign that the path for the protection of women's rights is slowly going on regardless the economic context and moreover the economic crisis.

Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.

⁵ About this very important topic from the perspective of Italian Constitutional Law, see above all M. D'Amico, *La lunga strada della parità fra fatti, norme e principi giurisprudenziali*, in *Rivista Aic*, 3/2013 (26 July 2013); M. D'Amico, *Il difficile cammino della democrazia paritaria*, Torino, 2011.

⁶ F. Bettio, M. Corsi, C. D'Ippoliti, A. Lyberaki, M. Samek Lodovici and A. Verashchagina, *The impact of the economic crisis on the situation of women and men and on gender equality policies*, Synthesis Report, EU Commission, December 2012.

2. Struggle for the conciliation of work and family life: some data

Italian official data show that the economic crises did not affect the female occupational rate, while the male occupational rate lost some percentage points⁷. But at the same time, we have to be aware that Italy is one of the EU member States with the lower female occupational rate⁸.

The first problem is that Italian working mothers do not have access and remain in the labor market after the birth of their sons⁹. The second one is that the rate of temporary jobs increases and that the majority of temporary workers are women and young¹⁰. The third one is that involuntary part-time jobs (i.e. not related to real need of reconciling work and family life) have increased and that workers accepting such condition are moreover women.

⁷ 2015 Report of the Italian National Institute of Statistics (ISTAT) about the Italian labor market in 2014 (Chapter 4, *Mercato del lavoro: soggetti, imprese, territori – Quadro d'insieme*, p. 148 ff.). This date is confirmed by Istat in the 2016 Report, regarding 2015 (Chapter 3, *Le dinamiche del mercato del lavoro: una lettura per generazione*, § 3.2, *La dinamica di occupazione e disoccupazione per età dai primi anni Novanta a oggi*, p. 124 ff.). The report affirms that “while the female participation to labor market increased, there has been a worsening of the male working condition following the crisis started in 2008”.

In Italy, the female occupational rate is constantly increasing since the end of the economic crisis in 2013: see *Eurostat Statistic Explained - Employment and activity by sex and age - annual data*, Last update: 24-04-2019 (most recent data 2018).

⁸ At the end of the crisis, Italy is the second EU member state after Greece under this respect. See Eurostat DATA, *Employment and activity by sex and age - annual data*, August 2015.

⁹ 2014 Report of ISTAT (Chapter 3, *Il mercato del lavoro negli anni della crisi: dinamiche e divari - Essere donne e madri al tempo della crisi*), 123 ff. and spec. 127.

¹⁰ European Parliament resolution of 19 October 2010 on precarious women workers 8 2010/2018(INI).

The reasons of these phenomena are evident¹¹: the contraction of public resources for the third sector, as well as for public employment, in which the presence of women is prevalent; the contraction of public resources to be allocated to the support of the family, which indirectly affects the female condition due to the tasks of caregiver traditionally fulfilled by women in the family, such as social assistance, services for children, health services for people with disabilities, which allow women to reconcile work time with that of family care, still today prevalently performed by women.

3. The obstacles met by Courts in giving their opinions

So said, it is worthy to attention the relevant judgments of the Italian Constitutional Court and European Court of Justice.

There are two questions to be addressed at this aim, which guide the analysis: why the judgments on this subject are so few? Are they decreased during the economic crises, because the Courts are afraid to affect the balanced-budget principle?

First of all, it should be noted that, for the reasons that will be said, there are no cases in the Italian constitutional jurisprudence in which the Court has ruled on the reduction of resources destined to working woman or to the family, with reference to arts. 3 and 37 Cost.

Compared to what happened regarding the limitation of resources destined to the social rights of disabled and foreigners, there are differences¹². In fact, the legislator has sometimes limited the resources available for services destined to these subjects, or directly used the citizenship to exclude the access of these subjects to health services, scholastic, to the means of transport. This reduction or exclusion from welfare benefits has a negative impact on the condition of the working woman, Italian or foreign, as in most cases in charge to

¹¹ See the European Parliament resolution on the impact of the economic crisis on gender equality and women's rights (2012/2301(INI), 12 March 2013.

¹² See M. D'Amico and F. Biondi (a cura di), *Diritti sociali e crisi economica*, Milano, 2017, and the articles here collected (especially Arconzo and Siccardi).

reconcile time for the family and for work. The austerity measures mentioned, however, first of all are problematic from a constitutional point of view because they arbitrarily exclude the weak subjects from the performance they need in first person; the constitutional parameters evoked are therefore constituted by the norms violated directly by the legislator, which excluded weak subjects from the welfare state.

Highlighting the difference compared to other categories of weak subjects, it can be interesting to verify if there are cases of rules that have reopened or simply aggravated those problems that typically, if one can say so, meets the working woman and that imposes a special and adequate protection not only (but all the more so) in times of crisis, but more in general in consideration of the unfinished path towards equality.

For example, it can be interesting to check whether the Constitutional Court has ever identified, possibly exploiting the art. 37 of the Constitution, cases of indirect discrimination perpetrated by the legislator, which struck categories of workers who were mainly women (for example precarious or part-time) with restrictive measures.

And, secondly, it can be interesting to check whether these rulings have been issued, even without mentioning them, even in times of negative economic times, when the Court is more conditioned by budgetary requirements.

4. Judgments in which the Courts have indirectly pronounced in this area and their classification

Given the reasons of the difficulty of the Italian Constitutional Court to focus on law explicitly and directly excluding women from social assistance, I will divide the judgments in three categories:

- a) Judgments focused on indirect discrimination against women caused by the present outline of the actual labour market.
- b) Judgments related to discriminations which represent the immediate “defence” reaction of the employer about specific costs

related to the female condition (i.e. risk of maternity) or related to discriminations which take place because the employer take advantages of the weak position of women (i.e. gender pay gap).

In such cases, the task of the Courts is difficult, because they have to take into account the special needs of women and of family in the real life.

Of course, Italian Constitutional Cort can not enact new acts aimed at protecting women or fill up empty rooms in the regulations, but only verify the constitutionality of acts in force.

c) cases where only some categories of working women are protected, but other categories are irrationally excluded, or fathers are irrationally excluded, while they could play the same role of the mother in the family.

Under sub a), judgments of the Italian Constitution lack, while it is worthy of attention a judgment of the European Court of Justice related to Spain and part-time jobs (2012)¹³. In fact the European Court of Justice detects an indirect discrimination against women in consideration of the statistics related to the female occupational rate with part time jobs, which exceeds the male occupational with the same contract. Foremost, the European Court of Justice considers that the disproportionately lower amount of pensions for part time workers is not justified by the economic context: more precisely, the Spanish Government contends that the measure is essential for the financial equilibrium of the retirement system, but the European Court of Justice values such aim as irrelevant because the measure affects women disproportionately. Furthermore, although there are not explicit references to the economic crisis affecting Spain, the European Court of Justice is surely also aware of this.

The case concerns the calculation of the retirement pension for part-time workers, which are treated in a less favourable manner than comparable full-time workers.

¹³ ECJ, 12 November 2012, C-385/11, *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social* (INSS).

According to this system, on the basis of a part-time contract of 4 hours a week, Ms Elbal Moreno would have to work for 100 years to complete the minimum necessary qualifying period of 15 years which would give her access to a pension of EUR 112.93 a month.

Firstly, on the ground of the referring Court allegation, the European Court of Justice notes that in Spain working women are at least the 80%.

In consideration of this, the European Court of Justice answers “*that Article 4 of Directive 79/7 must be interpreted as precluding, in circumstances such as those of the case before the referring court, legislation of a Member State which requires a proportionally greater contribution period from part-time workers, the vast majority of whom are women, than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work*”.

Moreover, for the European Court of Justice “*there is nothing in the documents before the Court to suggest that, in those circumstances, the exclusion of part-time workers, such as Ms Elbal Moreno, from any possibility of obtaining a retirement pension is a measure genuinely necessary to achieve the objective of protecting the contributory social security system [...], and that no other measure less onerous for those workers is capable of achieving the same objective*”.

As for the cases sub b), it is necessary to mention two decisions of the Italian Constitutional Court regarding the problem of the so called “resignation due to marriage” or “resignation due to maternity and after the birth of the child”, which are not released in a period of economic recession (but, as we have seen, the abandonment of the workplace by women in the first year of life of the child has grown sharply in conjunction with the crisis).

First, with the sent. n. 27 of 1969, the Italian Constitutional Court has focused on the absolute presumption that the resignation presented by the woman within a year of marriage falls into the category of resignation due to marriage; the law at stake introduces a prohibition of this kind of resignation (the dismissal is also void) as a

reaction to the increasing number of resignations forced by the employers which want escape from some costs of maternity protection. The Court is required to verify whether such limitations clash with Art. 41, paragraph 1 of the Constitution, for violation of the freedom of private economic initiative.

Not surprisingly, in this decision the Court appreciates the purpose of the contested provision, which wanted to protect the working woman, the family and motherhood, and declare the question unfounded.

In fact, the Constitutional Court takes into account that “*from the preparatory work of the reform - and in particular from the Government's report and the opinion expressed by the National Council of Economy and Labor in the session of 24 May 1962 - it appears that before the issuance of the challenged law was the practice of dismissal of women in the event of marriage was widespread and that this phenomenon had assumed even more serious dimensions following the entry into force of the law of 26 August 1950, n. 860, on the physical and economic protection of working mothers and because of the inconveniences and burdens that this had imposed on entrepreneurs*”.

In this judgment, a particular role was played by the articles. 3 and 37, first paragraph, of the Constitution, which are the basis of the subject matter of the question.

It is also worth mentioning the decision n. 61 of 1991, on the effects of dismissal during maternity leave.

In the judgment, the Italian Constitutional Court declared unconstitutional the provision that provided for the temporary ineffectiveness instead of the nullity of the dismissal ordered to the working woman in the gestation and puerperal period, for violation of the art. 37 of the Constitution, which, “*read in connection with art. 3, second paragraph, requires the woman to be granted the special and most strong protection measures necessary to remove the serious discrimination that in fact affects her in relation to the tasks connected with motherhood and the care of children and the family, from whose discharge moreover the whole community benefits*”.

As for the cases under sub c), it should be noted that there are judgments involving additional public costs, adopted by the Court even in times of crisis. Recently, the constitutional judge has in fact intervened to eliminate the discriminations existing between categories of female workers, some of whom were excluded from particular benefits connected to maternity.

An emblematic example is the judgment n. 257 of 2012¹⁴, where the Italian Constitutional Court extended to female self-employed, who have adopted or had a minor in pre-adoptive custody, the maternity allowance for a period of five months, as for female employees, rather than three months, leveraging above all on the art. 3 of the Constitution, violated by the arbitrary exclusion of a category of female workers from a very important benefit for the purposes of the implementation of the articles 31 and 37 Cost. (on the protection of maternity and working women)¹⁵.

The result is that under sub b) and c), the Italian Constitutional Court contributed in outlining limits, which the Parliament could not now simply trespass, without violating constitutional rules¹⁶; as for the category sub c), the extension is proclaimed also in time of economic crisis.

4. Legislation on reconciliation between work and family: paternity leave and parental leave expand during the crisis

Constitutional jurisprudence, though attentive, was not capable of putting sufficient barriers to stop discriminations against disadvantaged women in the labour market, which have exacerbated

¹⁴ For a similar judgment see Italian Constitutional, 22 October 2015, n. 205.

¹⁵ See R. Bifulco - A. Celotto - M. Olivetti, *Commentario alla Costituzione*, Torino, 2006, Sub art. 31 and Sub art. 37.

¹⁶ See judgments 27 of 1969 and 61 of 1991 about blank resignation letters, which was a quite widespread phenomenon in Italy, where pregnant women were obliged to resign because of the pregnancy. See the European Parliament Question E-000233/2012. Rules in Italy have changed and the phenomenon is decreasing (l. d. 151/2015).

during the economic crisis, when private companies and public employment see their resources shrinking and therefore they struggle more to bear the costs of motherhood¹⁷.

Something, to be honest, was done by the legislator to reverse the direction of travel, despite the crisis.

The measure at stake involves the sphere of the reconciliation of work and family, to the role of parental leaves, to the involvement of the father in the functions of care.

Significant as the Government Monti, known for being the executive symbol, in Italy, of the policies of austerity, had, in 2012, in full economic crisis, adopted some measures in favour of the division of care roles between mother and father and, in general, of the stay in the worker's market¹⁸: a) compulsory paternity leave for one day in the first month after the birth and other two optional days; and b) voucher for babysitting services for the mother (law n. 92 of 2012, Art. 4, § 24).

It should be noted that initially some of these measures, defined as “experimental”, should have been applied only in 2015; after the end of 2015, their effectiveness was subject to the adoption of specific legislative decrees. The rules in question have however been adopted as for the measure a), with the d. lgs. n. 208 of 2015¹⁹ and again with the Budget laws of 2016 n. 232 and of 2018 n. 135, which actually increased its duration (now the compulsory days of paternity leave are five).

¹⁷ See for all the Report of the European Parliament on the impact of the economic crisis on gender equality and women's rights (2012/2301(INI), 28 February 2013.

¹⁸ Law n. 92 of 2012, art. 4, § 24.

¹⁹ Art. 1, § 205.

On this legislation, see D. Gottardi, *Riforme strutturali e prospettiva europea di Flexicurity: andata e ritorno*, in *Lavoro e diritto*, 2015, 251, which stigmatizes the limits of the reform, which address only few causes of the low female occupational rate.

Although the measures are conditioned to the allocation of public funding by the Budget Law²⁰, from these provisions emerges with all its force the character of financially conditioned services that, however, are still adopted despite the crisis.

On the contrary, in this last regard it seems important to remember, incidentally, that the limitations on the right to reintegration in the workplace, as per art. 18 of the Workers' Statute, approved with l. n. 92 of 2012, on the initiative of the Monti's Government, and then with the d. lgs. n. 23 of 2015, aimed at making the labor market more flexible in times of crisis, retained the right to reintegration in the workplace in the event of discriminatory redundancies and explicitly provided that it follows the redundancies by law, such as those due to marriage or within a year of a child's life.

Paradoxically, therefore, in moments of economic crisis the rights of the mother worker are not touched by the legislator, but, if ever, strengthened: such measures are not reinforced, but they resist and this is more evident in consideration of the restriction addressed to other social rights.

5. Conclusion

At this point, we might ask whether and to what extent the Parliament could go back on the adoption of the measures described above, strictly linked to the implementation of a balanced reconciliation of work and family life, for purposes of budget balance. The question goes perhaps a little too far, not being at stake, in this case, the essential core of a social right or gender discriminations, but additional measures in favor of family which indirectly but concretely enforce equality²¹.

²⁰ The public funding for the second measure (voucher for babysitting) was reduced and quite completely abolished in the succeeding budget laws (see the message n. 1353, 3 April 2019, of the Italian Institute of National Welfare, INPS).

²¹ As I tried to demonstrate in § 1 and § 3 in relation to the lack of jurisprudence.

However, it seems important to point out another aspect: the last legislative interventions in this area, even if insufficient or inadequate, occurred precisely in times of crisis and it is therefore natural to ask ourselves the reason for this coincidence.

Together with the institutional and cultural pressure coming from the European Union²², which played an important role, a specific attention must be paid to the positive effects that are expected from the greater participation of women in the labor market, which could have been implicitly taken into account by the Italian Parliament²³. The goal of conciliation, in fact, should not be pursued only by keeping in mind the constitutional and European Union legislation on gender equality in the world of work, but also other constitutional interests. Emblematic of the reasons why it is necessary to support women in the world of work in times of crisis is what was stated in three resolutions of the European Parliament, dedicated precisely to the gender aspects of the recession and crisis, which endorsed the thesis that the female gender at the workplace has a positive effect on economic growth²⁴. More precisely, it is possible to read in these resolutions that “*according to some studies, if the employment rates, part-time employment and productivity of women*

²² In addition to footnote 2, see the Strategy for equality between women and men 2010-2015 of the European Commission (2010).

²³ See the arguments of the Italian economists A. Casarico and P. Profeta, *La diversità di genere: un valore economico*, Milano, 2014.

These effects are stressed by Ban Ki-moon, the 8th Secretary-General of the United Nations in 2015 (quoted in *UN Secretary-General announces first-ever High-Level Panel on Women's Economic Empowerment* – UN Women, 21st January 2016, available at: <https://www.unwomen.org/en/news/stories/2016/1/wee-high-level-panel-launch> accessed 25th January 2017) and at the World Economic Forum, 2016 (The World Economic Forum. (2016). The global gender gap report. World Economic Forum. Retrieved from http://www3.weforum.org/docs/GGGR16/WEF_Global_Gender_Gap_Report_2016.pdf); see also the Goal 5 of the 2030 Agenda for Sustainable Development of United Nations.

²⁴ See M. Smith, F. Bettio, *Analysis Note: The economic case for gender equality*, EGGE, 2008.

were similar to those of men, GDP would increase by 30%²⁵. Furthermore, the European Parliament later reiterated that “*in Europe the great economic potential of women must be unlocked and that the right conditions must be created for women to advance in their careers and achieve higher positions in companies or start their own businesses*”²⁶.

It is interesting to devote some considerations on the Italian law n. 120/2011 on gender quotas for boards of directors of companies listed in the stock exchange market, which is a costless measure.

Moreover, the Italian Council of State (ICS), in an opinion rendered, in the middle of the economic crisis, on a problem of interpretation of the mentioned law, has stated that gender balance represents the “solution to an economic problem, related to the best distribution of human resources” and that the clauses of l. n. 120 of 2011 are based on a criterion of efficiency, rather than fairness, favoring better competition among candidates: for this reason, the ICS itself considered it correct to proceed with an extensive interpretation of the law and apply it also to the bodies of the companies of a public or mixed nature controlled by more than one public administration, as well as those explicitly indicated by law²⁷.

With reference to this last instrument used by the legislator, with a view to the constitutional framework, it is opportune to highlight the role played by the limit of social utility, set by art. 41, second paragraph, of the It. Constitution, to the freedom of private economic initiative. From this perspective, then, the economic crisis

²⁵ European Parliament resolution of 17 June 2010 on gender aspects of the economic downturn and financial crisis (2009/2204(INI)), 12nd point.

²⁶ European Parliament resolution of 10 September 2015 on creating a competitive EU labour market for the 21st century: matching skills and qualifications with demand and job opportunities, as a way to recover from the crisis (2014/2235(INI)), 30th point.

²⁷ ICS, I Section, opinion n. 594 del 2014, 4 June 2014, 14 ff. On gender and political representation, see S. Leone, *L'equilibrio di genere negli organi politici. Misure promozionali e principi costituzionali*, Milano, 2013; S. Leone, *Sulla conformazione delle Giunte degli Enti locali al canone delle pari opportunità: alcune riflessioni alla luce delle innovazioni legislative e della giurisprudenza più recente*, in www.forumcostituzionale.it (8 January 2015).

could be considered as an opportunity, because the negative conjuncture could offer a push towards equality, as a possible response to the crisis, to be pursued also with measures that, like the gender quotas, do not accept not even new costs to the public budget. In order to make the crisis a real opportunity for the rapprochement towards a real equality, however, and in the light of the poor results that paternity leave and parental leave have given so far²⁸, other instruments, also legislative, will be outlined, which allow to overcome the cultural obstacles still subsistent and untouched by the crisis to a greater involvement of the male figure in the care of the family²⁹.

Abstract: the Author focuses on the female condition during economic crises with particular attention to the discriminations in the access and permanence in the job market. Although women experiment an extra-charge of duties at workplace in consideration of their flexibility as in the family in consideration of the reduction of public funding for caregivers, the Author demonstrates that the economic crises is a chance for a better identification of the economic collective value which participation of women to the job market brings to the society.

Keywords: economic crisis, gender equality, social rights, women's rights.

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²⁸ See A. Donà, *Donne e lavoro: quali i risultati delle politiche di conciliazione in Italia?*, in *Rivista Italiana di Politiche Pubbliche*, 2009, 109 ff.

²⁹ For a brilliant picture of cultural aspects which empair women in Italy to work, see V. Solesin, *Allez les filles, au travail*, in *www.neodemos.info* (October 2013 first publication - November 2015 second publication).