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THE LAW SOURCES CONCERNING THE PRIVATE LABOUR RELATIONS IN THE PUBLIC ADMINISTRATION

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1. PRIVATISATION

In Italy, at the beginning of Nineties, the laws governing employment in the public administration were deeply transformed. The regime of the employment relationship has gone in fact, for almost all categories of civil servants[1], from public to private[2].

The rich and detailed special set of rules and the law sources system of unilateral

[1] The categories of employers excluded from privatisation are magistrates, State's lawyers and magistrates, the military, the police, the fire brigade, the diplomats, the prefects, the university professors and researchers.

[2] See S. BATTINI, *Il rapporto di lavoro con le pubbliche amministrazioni*, Padova, Cedam, 2000.

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regulations that until that time defined as "public" the work within an administration, were substituted by a set of rules almost exclusively based on the private right. They are represented by a normative section (civil code and set of rules concerning private work) and a contractual one (collective and individual labour agreements). The normative section still contains several special rules concerning only people working in public administrations; it is based on the decree no. 165/2001. These regulations were kept, in order to guarantee a special discipline in favour of several aspect of the agreement, due to the public nature of the employer. They govern, for instance, the personnel selection by means of public competitive examinations, the career progress, the incompatibility between public and private jobs, the disciplinary responsibility and some few aspects relating to the employee-administration relationship[3].

Differently of the development of privatisation in other European State's public administrations, in Italy the regulations governing the private right is applied also to the public administration's managers.[4].

The public employment was made similar to the private one to the maximum extent firstly by limiting as possible the special rules reserved to the public employees. This aim was suitably represented by the regulation allowing the possibility for the collective agreements to derogate from the laws that establish rules that apply only to the public administration employees. This general condition of derogability was excluded only if law, introducing a special discipline about the public employees, clearly forbids the collective agreements to provide differently..

The transformation of sources of employment for civil servants was also made to correspond to a different legal ways of applying them in concrete management of the

[3] See R. CAVALLO PERIN, *Le ragioni di un diritto ineguale e le peculiarità del rapporto di lavoro con le amministrazioni pubbliche*, in *Diritto amministrativo*, 2003, 119.

[4] On management see F. MERLONI, *La dirigenza in Italia*, Rapporto annuale 2011, in this network section, as well as, *Dirigenza pubblica e amministrazione imparziale*, Bologna, Il Mulino, 2006.

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employment relationship. Under the public law, the relationship with the worker was governed by public law provisions (administrative provisions); after privatisation, the acts of management of the relationship are made by managers with the same legal capacity of the private employer[5].

The public managers have also been endowed with the ability to make decisions about the offices' organization. It is a relevant task as it represents the sole point of contact between the discipline of the administrative organization (public level) and that one governing the labour relationship with a public administration (private level).

Differently from those ones concerning the labour relationship, the sources of organization are almost completely public rights law sources. At the top there is law, whose task is to state the "general principles" of the offices' organization; the organizational acts adopted by each administration, that is statutes, regulations and general administrative acts, derive from it. The sequence of the sources about organization, which thus far belongs to public law, ends, however, as mentioned above, with the acts adopted by the managers in the exercise of powers under private law. To the managers compete organizational choices of detail, those involving mainly the distribution of operational tasks between offices and therefore have an impact on the management of employment[6].

2. THE COMPETENCES OF STATE AND LOCAL ADMINISTRATIONS

In order to complete the above described picture, the competences concerning

[5] See art. 5, paragraph 2, decree no. 165/2001.

[6] See P. CERBO, *Potere organizzativo e modello imprenditoriale nella pubblica amministrazione*, Padova, Cedam. 2007; A. PIOGGIA, *La managerialità nella gestione amministrativa*, in F. MERLONI, A. PIOGGIA, R. SEGATORI (eds), *L'amministrazione sta cambiando? Una verifica dell'effettività dell'innovazione nella pubblica amministrazione*, Milano, Giuffrè, 2007, 117.

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offices organization and concerning the management of labour relationship have to be taken into consideration as they belong to the different bodies of the Italian republic [7].

Until the constitutional reform that in 2001 reorganised the relationships between State, regional and local administrations, the State law had been stating uniform regulations about the employment in the public administration as well as, in general terms, about the offices organization.

The changes introduced in the Constitution at the beginning of the 21st century deeply modified the situation. The State law competence concerns the matters ruled by the second paragraph of art. 117, while the remaining matters are governed by the regional laws[8].

Since the labour relationships and the offices organization are strictly connected, the competences about both the matters have to be explained in detail.

The labour relationships regulation is under the State's competence concerning the civil regulations (art. 117, second paragraph, letter 1), interpreted by the Constitutional Court as concerning the "uniformity in the national territory of the fundamental rules governing the relationships among private citizens"[9]. The private nature of the rules concerning the labour relatioships allows defining the matter as relating to the relationships governed by the civil law[10].

[7] See A. TROISI, *L'impiego regionale: fonti e spazi di competenza legislativa delle regioni*, in *Le istituzioni del federalismo*, 2009, 819.

[8] See E. CARLONI, *Lo Stato differenziato*, Torino, Giappichelli, 2004.

[9] See the sentences no. 95 and no. 189 both of them dated 2007.

[10] In order to assign the State the competence of regulating the labour agreement in the public administration, art. 117, paragraph 2, Constitution, rules not only the matter concerning the "civil legal system" but also other matters. They are: "immigration", determination of the essential levels of civil and social rights to enjoy services in the entire national territory and "national insurance" (matters of exlusive State's competence), as well as "labour guarantee" (matter of State and regional administrations' competence). See L. ZOPPOLI, *La riforma del*

As far as the offices organization competences are shared by different government levels. Constitution assigns the State law the competence to regulate statal administration and the national public bodies' administrative organisation (art. 117, paragraph 2, letter g) as well as of regulating the government bodies of the local administrations (art. 117, paragraph 2, letter p). As far as the last competence is concerned, it has to be intended as referring to those bodies of direct or indirect political representation, only. Therefore the administrative offices organization in the local administrations falls within their competence. Constitution indeed assigns them the qualification of autonomous administrations provided with their own statutes (art. 114, paragraph 2) and allows them adopting regulations concerning their function organisation (art. 117, paragraph 6). Therefore, the regional law, even if in general terms has jurisdiction in regulating the matter excluded from the State's competence, is limited by the organisational autonomy of the local administrations. This is the reason why the regional administration can regulate its own administrative organisation only[11].

This situation stresses that, in presence of a uniform regulation of the employment relationship in the public administration by the State law, the offices organization falls within the competence of each government level that could manage it even in different ways. As far as organisation is concerned, the sole common rules able to oblige State and regional and local administrations are those ones belonging to Constitution and deriving from it.

The strict connection between organisation and employment regulation implies the presence of a "hazy area", where the individuation of the competent law source is not easy to be found. There are indeed some aspects, as the managers' appointment, the

titolo V della Costituzione e la regolazione del lavoro nelle pubbliche amministrazioni; come ricomporre i "pezzi" di un difficile puzzle?, in *Lav. pubb. amm.*, 2002, 156.

[11] By issuing the sentence no. 372/2004, the Constitutional Court has nevertheless admitted that the regional administration can promulgate rules about the local administration, even if only exceptionally and when there would be specific "unitary needs".

definition of their tasks, the personnel assessment or the access to work are, ruled by the discipline concerning the employment and the administrative organisation contemporarily. The Constitutional Court has no well-defined position towards the matter and therefore answers time by time the autonomy or the uniformity needs[12]. For example, in the case of personnel selection by means of public competitive examinations in a public administration, the Court assigned to regional or local administrations the possibility of independently regulating the matter[13], even if in full obedience of the Constitution's provisions[14]. However, the Court itself has recognized the possibility of the state to fix the economic constraints that apply to regions and local authorities, thereby limiting their autonomy [15].

3. THE LEGAL REFORM OF 2009

The most recent reform concerning the public administration as a whole was promulgated by the Minister of the Public Administration Innovation. It is the law no. 15 and the consequent legislative decree no. 150, both of them dated 2009.

The decree in hand partially modifies the former legislative decree no. 165/2001 regulating labour in the public administration and the offices organisation; on the other hand, it partially introduces a specific discipline, in particular referring to the regulation of the so-called "performance cycle", concerning the assessment of an administration and the staff (personnel and managers) working in it.

[12] See F. CARLESI, *Riforma del titolo V della Costituzione e lavoro presso le pubbliche amministrazioni nelle pronunce della Corte costituzionale*, in A. PIOGGIA, L. VANDELLI (eds), *Quale amministrazione nella nuova Costituzione? L'immagine dell'amministrazione attraverso la giurisprudenza costituzionale dopo la riforma del titolo V della Costituzione*, Bologna, Il Mulino, 2006.

[13] See sentences no. 95/2008 and no. 380/2004.

[14] See sentences no. 81/2006, no. 252/2009, no. 9/2010 and no. 169/2010.

[15] See sentence no. 4/2004.

As far as the law sources are concerned, this reform is characterised by a relevant re-concentration of the most organisational decisions and the discipline concerning the labour relationships in the State law[16], neglecting the trade unions and autonomies' role.

It has to be stressed that the reform in hand affected the mechanism allowing a collective labour agreement to derogate from the special rules concerning the public administration's employees. According to the modification introduced by art. 2 of the legislative decree no. 165/2001, it is not more possible in general terms, but only if permitted by the law.

In order to strengthen the law's role, all rules contained in the legislative decree no. 165 were defined as "imperative"; therefore, any kind of contract not consistent with them results automatically void and therefore inapplicable to labour relationships..

Also the matters that could be regulated by the agreement were relevantly reduced. In particular, the personnel and managers' assessment was removed from the negotiation between administration and trade unions, resulting today as wholly regulated by the law. The reasons of this change were the difficulty of creating an efficient system of assessment within the public administration and the role of the trade unions representatives until now.

The agreements established in each public administration indeed often disagreed with the spirit of the national agreements as far as assessment was concerned, since they introduced some mechanisms reducing to a minimum (and sometimes eliminating) the possible differences in assessing the personnel and managers' individual performances. The consequence of the reform in hand is also the elimination of the national agreements role that was not inappropriate.

[16] See G. D'ALESSIO, *Le fonti del rapporto di lavoro* pubblico, in F. PIZZETTI, A. RUGHETTI (eds), *La riforma del lavoro pubblico*, Studi Cis Anci, EDK editore, 2010.

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Even on the relationship with the regions and local authorities, the reform shows a lack of confidence in the role of autonomy. As said above, the matter concerning the “labour agreement” (that can be uniformly regulated by State through the civil legal system) and that one concerning “organisation” (provided with its own set of rules) have to be distinguished, even if there is still a “hazy area” between them. The reform of 2009 introduced not only several rules that can be defined as relating to the labour agreement, but also a high number of rules concerning organisation that should be only applied at the State level.

As far as the first ones are concerned, legislator correctly included them in the “civil set of rules” and therefore considered them as uniformly applicable to all government levels. With regard to the other ones, the reform introduces such a mechanism suitable to bind regional and local administrations that would not have a constitutional justification and therefore would seem as potentially damaging the autonomies guaranteed by Constitution.

Article 74, paragraph 2, legislative decree no. 150 contains indeed a series of organizational rules that can be also applied to regional and local administrations as they directly derive from article 97 Constitution; therefore they can be defined as general principles. In general terms, article 97 concerns the administrative organization and provides that it has to be regulated in order to assure the administration impartiality and good performances.

Taking into account the other articles of Constitution regulating regional and local administrations, these principles have to be implemented at each government level through different kinds of management. Therefore the legislative decree no. 150/2009 is not entitled to directly apply article 97 to regional and local administrations, too. Also the Constitutional Court stated that the State law has no claim to state principles binding the regional administrations as far as matters clearly falling within its competence are

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concerned[17].

On the other hand, it appears regional and local administrations do not want to react to the legislator's intention of regulating some matter falling within their competences; they seem to accept this concentration of law sources aiming at regulating the administration management.

[17] Sentence no. 233/2006.

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