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Editoriale

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Peoples' "Decent Work" and "Capacitation" in the Detention System

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Summary: **1.** Introductory Remarks: Detention, "Decent Work" and People's Capacitation. – **2.** Detention, Vulnerability and Poverty. – **3.** Detention, Forced or Compulsory Work and "Decent Work". – **4.** Detention and "Capability Approach": Problematical Aspects. – **5.** Inmates' Work, "Capability Approach" and Enterprise.

1. Introductory Remarks: Detention, "Decent Work" and People's Capacitation

The World Commission Report *Work for a Brighter Future*, promoted by the ILO, makes no explicit reference to inmates' labour and its discipline.
However, the document highlights the new technologies, climate change and demographics challenges and calls for a collective global response to their impact on the world of work.
The Commission outlines a person-centred plan based on investment in human potential, labour market institutions and decent and sustainable work. The plan consists of three pillars of action that aim to drive growth, equity and sustainability.
The pillars are:

(1) increasing investment in people's capabilities, moving beyond the concept of human capital to broader dimensions of the development and advancement of living standards;

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(2) increasing investment in institutions for workers, establishing a universal labour charter, and ensuring respect for fundamental rights (such as the right to work itself), adequate subsistence wages, maximum time limits, health and safety;
(3) increasing investment in decent and sustainable work in line with the UN Agenda 2030.

The point about investment in people's skills expressly refers to Sen ([1]) and Nussbaum ([2]) studies and opens by stating that «investing in people's capabilities will provide them with the opportunity to realize their full potential and to achieve the lives that they have reason to value».
A further point of immediate contact between "work" and the "capability approach" is found in the 2015 Human Development Report, titled *Work for Human Development*, in Goal 8 of the ILO Agenda 2030, which aims to promote sustained, inclusive, and sustainable economic growth, full and productive employment, and decentralised work for all ([3]).
Also, the Goal 8 of Agenda 2030 fails to expressly refer to persons detained or interned or who, in any case, are in a state of conditional freedom.
The only passages that can -to some extent- open up a conceptual relationship with the field of detention are in Goals 8.5 and 8.7.
Goal 8.5 expressly includes persons with disabilities among the target persons («By 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value»).
Goal 8.7 takes a different approach, calling for measures to eliminate forced labour («Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour,

([1]) A. SEN, *Development as freedom*, Anchor Books, New York, 1999.
([2]) M.C. NUSSBAUM, *Human Capabilities, Female Human Beings*, in M.C. NUSBAUM, G. GLOVER (eds.), *Women, Culture, and Development: A Study of Human Capabilities*, Oxford University Press, Oxford, 1995, 495-542; M.C. NUSSBAUM, *Women and human development: The capabilities approach*, Cambridge University Press, Cambridge, 2000.
([3]) About this topic see B. LANGILLE (eds.), *The Capability Approach to Labour Law*, Oxford University Press, Oxford, 2019.

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including recruitment and use of child soldiers, and by 2025 end child labour in all its forms»).
The category of condemned prisoners, therefore, is never expressly mentioned, nor are objectives or operational indications related to the specific needs of the work of prisoners.
Nevertheless, it cannot be assumed that prisoners should be excluded from the horizon of internationally promoted investment plans. This can be taken for granted as long as the specific procedures required by "detention" from the point of view of "decent work" are not investigated.
About this point it is necessary to take into consideration the ILO Centenary Declaration on the Future of Work, adopted in Geneva on 21 June 2019.
The Declaration strongly insists on strengthening the capacity for all to benefit from the opportunities of a changing world of work in particular by means of effective measures to help people through the transitions «they will face throughout their working lives» (Article III. A. iv).
Even the Centenary Declaration does not mention the detainment sector. However, the extreme breadth of the reference (relating to the promotion of decent work) to all would seem to extend to inmates as well. If we interpret the Declaration in broad and general terms, it is necessary to reflect on the enhancement of "skills" in relationship to ensuring equal opportunities and treatment in the world of work not only for persons with disabilities, as is strictly intended, but also for persons «in vulnerable situations» (Article II. A. viii).
Therefore, the first issue that needs to be investigated concerns the concepts of vulnerability and poverty to verify how detention assumes importance from the perspective of the centenary declaration: the need for inmates' "rehabilitation" can be qualified in terms of promotion and management of a very particular form of employment transition.
It should not be forgotten that imprisonment puts the detainee in a situation of prolonged and dissonant interruption of the experience of external life ([4]), causing increased hostility to others, social introversion and upheaval of family structures ([5]).

([4]) D. CLEMMER, *The Prison Community*, The Christopher Publishing House, Boston, 1941.
([5]) R. MAERAN, M. MENEGATTO, A. ZAMPERINI, *Il lavoro in carcere: significato psicologico*, in M.G. MATTAROLO, A. SITZIA (eds.), *Il lavoro dei detenuti*. Padova

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In any case, the general low level of education, the previous low level of regular employment or the sporadic nature of previous work experience, together with the personal criminal history, make obtaining a stable job when an inmate is released from prison extremely difficult and complex ([6]).

Sen suggested that poverty means a lack of opportunities: poverty is considered in the juxtaposition of the detainee with the other members of the community in determining a positive change of prisoners (who are considered transgressors) and of their fundamental behaviours, in transition from a state of poverty towards a reintegration into society and their families, «so that they can once again function as a proper union» ([7]).

Labour enters into this dynamic as a «complete human activity» ([8]).

The discipline of inmates' labour maintains, at least as far as Italy is concerned, a significant difference (now partly blunted by the elimination of the reference to work as an obligation for prisoners) between work for the prison administration and work for private parties.

University Press, Padova, 2017, 149-159, Available at http://www.padovauniversitypress.it/publications/9788869381027 (Accessed: 23 March 2020); H. STRYDOM, *Psychological Needs of the Children of Incarcerated Parents*, in *Acta Criminologica: South African Journal of Criminology*, 2009, Vol. 22, n. 2, 99-117; C. HANEY, *The Psychological Impact of Incarceration: Implication for Post-Prison Adjustment in Prisoners Once Removed: The Impact of Incarceration and Re-entry on Children, Families and Communities*, Urban Institute Press, Washington DC, 2003.

([6]) T. SCOTT, *Offender perceptions on the value of employment*, in *Journal of Correctional Education*, 2010, Vol. 61, n. 1, 46-67; P. AUVERGNON, *Le travail en prison en l'absence d'un droit substantiel: la situation française*, in M.G. MATTAROLO, A. SITZIA (eds.), *Il lavoro dei detenuti*, *supra* note 5, 235-257 (Accessed: 23 March 2020).

([7]) M.N. KHWELA, *A Need to Re-integrate Prisoners to the Community: A Case of Polokwane Medium B Prison, South Africa*, in *Athens Journal of Social Sciences*, 2014, vol. 1, n. 2, 145-156.

([8]) P. CARNITI, *La risacca. Il lavoro senza lavoro*, Altrimedia, Matera, 2013; G. DE SIMONE, *La dignità del lavoro tra legge e contratto*, paper, Giornate di Studio AIDLaSS, Udine, 13-14 June 2019. Available at https://www.aidlass.it/giornate-di-studio-aidlass-2019-relazione-prof-ssa-gisella-de-simone/ (Accessed: 23 March 2020); A. Vallebona, *Lavoro e vita*, in *Mass. Giur. Lav.*, 2016, n. 6, 330-333.

Thus, it is necessary to verify whether and to what extent the recent reform of the Italian prison system ("ordinamento penitenziario", hereinafter "o.p.") has intervened effectively in "rehabilitation".
From a literal point of view, the Legislative Decree 123/2018 has modified Art. 13 of the o.p. to state that «prison treatment must respond to the particular needs of the personality of each subject, encourage attitudes and enhance the skills that can be of support for social reintegration».
This statement is, as we will see, a clear sign of a "capacitational" approach.
The question is whether this principle translates into effective measures or whether it can have effective interpretative consequences.

2. Detention, Vulnerability and Poverty

As noted, the ILO Declaration for the Centenary aims to ensure «equal opportunities and treatment in the world of work» for people with disabilities and, equally, for other people who find themselves «in vulnerable situations».
The concept of "vulnerability" has been the subject of philosophical and legal analysis for some years and tends to be used «with reference to prevention, support and protection measures aimed at individuals and groups, susceptible to offense, damage, discrimination, unjustified inequality of treatment. It is understood now as a universal condition, now as a characteristic of specific categories of subjects» ([9]).
The ILO Declaration does not define the term "vulnerability" either formally (there being no reference to selected categories of subjects) or substantially (there being no identification of the abstract characteristics that subjects or groups of persons must possess to be considered "vulnerable").
Therefore, the category is used in open terms, with an expansive function with respect to a single given parameter, disability, with which, evidently, vulnerability has been conceptually associated in the specific context of the "future of work". The purely defining aspect, considering that the Centenary Declaration is not a normative act with direct legal effects, is not of crucial importance.

([9]) B. PASTORE, *Introduzione*, in *Ars Interpretandi*, 2019, Vol. VII, n. 2, 7-11.

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However, it is interesting that the notion of "vulnerability" lacks a specific definition, both in the European Convention on Human Rights (ECHR) and in the case law of the Court of Justice of the European Union ([10]), which also often attributes importance to the vulnerability of individuals or groups of individuals ([11]).
The absence of a strict definition of vulnerability is likely intended to avoid the double risk of under- and over-inclusion. A "stereotyping" regulatory would penalise the need to ensure an individualised assessment of each person's capabilities and needs to achieve a greater or lesser level of protection ([12]).
With regard to the specific problem of detention, the ECtHR has often considered detainees vulnerable and weak and has even admitted that detention itself is a vulnerability factor, dependent (unlike other risk factors) on legal regulation. In the Court's reasoning, detention (as well as any other vulnerability factor) is valued for verifying whether each Member State takes account of a specific vulnerability, dependent on being disadvantaged in relationship to others, in the context in which a higher level of protection is required by the appellant (see, in particular, ECtHR, 29 May 2012, app. no. 16563/08, *Julin* c. *Estonia*).
Regarding the case of inmates, the Court tends to consider that a condition of vulnerability exists because of the possible violation of certain rights (in particular in relationship to Article 3 of the Convention, to clarify the meaning of the terms "torture" and "inhuman or degrading treatment or punishment").
In the Centenary Declaration, which identifies a line of development of global labour policies in the context of "decent work", the reference to vulnerability takes on a somewhat different relevance.
It is not a question, in fact, of setting up a protection model against the possible violation of the subject's specific rights, but of emphasising that from the perspective of the valorisation of individual

([10]) S. BESSON, *La Vulnérabilité et la structure des droits de l'homme. L'exemple de la jurisprudence de la Cour européenne des droits de l'homme*, in L. BURGORGUE LARSEN (dir.), *La vulnérabilité saisie par les juges en Europe*, éd. Pedone, Paris, 2014, 59-85.
([11]) E. DICIOTTI, *La vulnerabilità nelle sentenze della Corte europea dei diritti dell'uomo*, in *Ars Interpretandi*, 2019, Vol. VII, n. 2, 13-34.
([12]) R. CHENAL, *La definizione della nozione di vulnerabilità e la tutela dei diritti fondamentali*, in *Ars Interpretandi*, 2019, Vol. VII, n. 2, 35-55.

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competencies/skills, it is necessary to take into account the generic situation of disadvantage represented by disability and vulnerability.
These two factors of disadvantage, which exist in a mutual relationship of genus (vulnerability) to species (disability), must be taken into account by the political decision-maker for elaborating and implementing employment policies.
Thus, the Centenary Declaration draws heavily on the normative version of the Capability Approach ([13]), valuing the part relating to «control of one's own material environment» ([14]) that includes «the right to seek work on an equal basis with others» and «to be able to work in a way worthy of a human being».
Work does not play a central role in the theory of Sen and Nussbaum ([15]), unlike issues such as disability and poverty.
This last observation, however, makes it possible to connect the Centenary Declaration to the subject of detention.
The Capability Approach concerns how to address the needs of detainees to better prepare them for possible release, as a step towards improving the negative effects of detention.
Detention can be linked to poverty.
Two terms are used in the literature to define poverty: "absolute poverty" and "relative poverty".
Absolute poverty was considered primary poverty until 1995 (World Summit for Social Development in Copenhagen). Absolute poverty exists independently of any target group ([16]).

([13]) M. TIRABOSCHI, *Mercati, regole, valori*, paper, Giornate di Studio AIDLaSS, Udine, 13-14 June 2019. Available at https://www.aidlass.it/giornate-di-studio-aidlass-2019-relazione-prof-tiraboschi/ (Accessed: 23 March 2020) and ID, *Persona e lavoro tra tutele e mercato. Per una nuova ontologia del lavoro nel discorso giuslavoristico*, Adapt University Press, 2019; B. LANGILLE (eds.), *The Capability Approach to Labour Law*, *supra* note 3.
([14]) M.C. NUSSBAUM, *Creating capabilities: The human development approach*. Harvard University Press, Cambridge, 2013.
([15]) A. PERULLI, *Valori e diritto del lavoro*, in M. Tremolada, A. Topo (eds.), *Le tutele del lavoro nelle trasformazioni dell'impresa. Liber amicorum Carlo Cester*, Cacucci, Bari, 2019, 747-76; B. LANGILLE (eds.), *The Capability Approach to Labour Law*, *supra* note 3.
([16]) M. NOBLE, A. RATCLIFFE, G. WRIGHT, *Conceptualizing, Defining and Measuring Poverty in South Africa: An Argument for a Consensual Approach*, Oxford University Press, Oxford, 2004.

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Another part of the doctrine argues that inadequate income alone does not adequately describe poverty. Hence, the most recent definition of poverty is based on lack of opportunity.
Thus, poverty is not understood exclusively in terms of lack of adequate income and basic human needs; rather, it is considered to be the tacit/factual denial of opportunities that push people into unemployment, with consequent loss of income and, finally, the inability to satisfy basic needs ([17]).
"Relative poverty" means that individuals, families and groups are considered poor when they lack the resources that other families or groups of the same population are able to obtain. Poverty is, therefore, the consequence of the non-functioning (or failure) of some basic capabilities.
This perspective highlights the capacity-based approach, which works first of all to evaluate which basic capacities are relevant in relationship to the concept of relative poverty.
Nussbaum ([18]) identifies ten basic skills that should be supported by all democracies, among which is the worker's freedom to choose between "alternative lives" ([19]).
Human abilities exert a moral claim ([20]) that should act as a pretence on society to develop those abilities. Regarding prisoners, we have to consider the Nussbaum's ([21]) central idea «of the human being as a free and dignified being who forms his own life».
Although inmates are not necessarily free beings in the traditional sense, they could be free within the prison, their current "environment and context" ([22]).
Therefore, the "imprisoned", despite having violated certain criminal proscriptions, remain human beings and thus retain their dignity, need for care and moral claim to develop their abilities ([23]).
Relative poverty and detention are intertwined because imprisonment not only concerns prisoners individually, but also affects «the children of people who are locked up and their families; it affects community

([17]) A. SEN, *Development as freedom*, *supra* note 1.
([18]) M.C. NUSSBAUM, *Women and human development*, *supra* note 2.
([19]) B. LANGILLE (eds.), *The Capability Approach to Labour Law*, *supra* note 3.
([20]) M.C. NUSSBAUM, *Women and human development, supra* note 2.
([21]) M.C. NUSSBAUM, *Human Capabilities, Female Human Beings*, *supra* note 2.
([22]) *Ibidem*.
([23]) M.C. NUSSBAUM, *Women and human development*, *supra* note 2.

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infrastructure – the relations among people in the communities and the capacity of a community to be a good place to live, work, and raise children – and it affects how to safe a community is to live in» ([24]).
If we want to take this approach into account, as a consequence, we must consider rehabilitation in terms of bringing about a positive change to offenders and their fundamental behaviour.

3. Detention, Forced or Compulsory Work and "Decent Work"

At this point, further consideration must be given to the absence of any reference to detention in the Report *Work for a Brighter Future*, in the international documentation cited at the beginning of this essay and in the ILO Declaration of the Centenary. The simplest (and probably most necessary) conclusion is that prisoners should be considered subjects who must be included among the beneficiaries of the social policy targets outlined by the ILO.
The target group is not the workers themselves, whether they are free or in prison, but people in general.
Thus, prisoners can be counted among the vulnerable, which helps justify a broad and all-encompassing reading of the indications from the ILO.
The corresponding absence in the 1950 European Convention on Human Rights of an explicit reference to the status of a "person deprived of his liberty" as a beneficiary of specific protection also helps.
The doctrine points out that «the original intuition not to devote a specific rule to the prisoners, but to consider them as potential holders of all the rights laid down in the treaty, has had a significant effect, that is, it has not ghettoised the prisoners within the penitentiary framework. The detainees have not been confined to a kind of protected and excluding normative subset» ([25]).

([24]) T.R. CLEAR, *The Effects of High Imprisonment Rates on Communities*, in *Crime and Justice*, 2008, Vol. 37, n. 1, 97-132; M.N. KHWELA, *A Need to Re-integrate Prisoners to the Community*, *supra* note 7; R. MAERAN, M. MENEGATTO, A. ZAMPERINI, *Il lavoro in carcere*, *supra* note 5.
([25]) P. GONNELLA, *I diritti dei detenuti (diversi dalle condizioni di detenzione) ancora non riconosciuti*, in F. BUFFA, M.G. CIVININI (eds.), *La Corte di Strasburgo*, Quaderni

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In any case, however, detention as a vulnerability factor has never been linked to the subject of labour, not even by the case law of the ECtHR.
The reason for this silence is likely found in Article 4(3)(a) of the ECHR, which states that the expression "forced or compulsory" labour (subject to prohibition under paragraph 2 of the same Article) does not include «work required to be done in the ordinary course of detention» (under the conditions laid down in Article 5 of the Convention for defining the legislation in question; see ECtHR, Grand Chamber, judgement of 7 July 2011, *Stummer v. Austria*, Application No 37452/02) or during conditional release from such detention.
In order to determine which activities are regarded as «work required to be done in the ordinary course of detention», the Court takes account of the prevailing criteria in the Member States, including the aim of reintegration into society (cf. ECtHR, Grand Chamber, *Stummer c. Austria*, quoted above, § 121 ([26])).
About the subject of compulsory work, the ILO's approach is similar to that of the ECHR (which is chronologically subsequent), with a peculiarity that may be stressed.
Article 2(2)(c) of ILO Convention No 29 of 1930 on Forced and Compulsory Labour (subsequently followed by the ECHR and by ILO Convention No 105 of 1957) allows forced or compulsory labour when it is required of a person «as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority».
Thus, conventional international law makes it possible to believe that the scope of Goal 8.7 of Agenda 2030 (which, it should be remembered, requires the adoption of «immediate and effective measures to eradicate forced labour») implicitly excludes the work of prisoners employed by the prison administration.
It is more difficult to understand whether this specific sector of employment, characterised by the peculiarity of the employer, may also

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di Questione Giustizia,, 2009, 504-508. Available at http://questionegiustizia.it/speciale/2019-1 (Accessed: 23 March 2020).
([26]) On this topic, D. HARRIS, M. O'BOYLE, E. BATES, C. BUCKLEY, *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 2014; C. Favilli, *Articolo 4*, in S. BARTOLE, P. DE SENA, V. ZAGREBELSKY (eds.), *Commentario breve alla Convenzione europea dei diritti dell'uomo*, Cedam, Padova, 2012, 89-106; F.G. JACOBS, R. WHITE, C. OVEY, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2010.

be excluded from the scope of Goal 8.5, which aims at achieving «full and productive employment and decent work for all women and men».
The residual space of admissibility of forced labour in the system of international conventions is limited to what can be called "ordinary" in the context of rehabilitation policies because it aims at helping the prisoner reintegrate into society (ECtHR, plenary session, judgement 18 June 1971, *De Wilde, Ooms and Versyp v. Belgio*, Application No 2832/66, 2835/66 and 2899/66, § 90).
This is a serious question.
Goal 8.5 uses three adjectives (two related to the noun "employment" and one to the noun "work") that have a problematic relationship with the concrete reality of the work of prisoners employed by the prison administration.
"Full", "productive" and "decent" are qualifications for a job typically characterised by entrepreneurship, and they do not fit a job (in particular the one performed for the prison administration) in which «the administration does not set itself either profits or gains, it makes use of unorganised workforce, sometimes unqualified, uneven, variable for punishments and transfers from prison to prison; the products are not always cared for and always finished; they, most of the time, are sold below cost» (Italian Constitutional Court, judgement 30 November 1988, No 1087).
Generally, in this dynamic, the condemned person, «far from being subjectively involved in a business project with strategic objectives of production, budget, becomes objectively included, because it is absolutely fungible, in a closed mechanism, like a welfare type» ([27]).
It is work, therefore, that actually is not "full", considering the endemic scarcity of opportunities for employment, is not "productive" and is not

([27]) A. BERARDI, *La funzione del lavoro dei detenuti*, in in M.G. MATTAROLO, A. SITZIA (eds.), *Il lavoro dei detenuti*, *supra* note 5, 23-28 (Accessed: 23 March 2020). The doctrine underscores that for prisoners, it is the experience of "real work" to be "transformative", since it «allows inmates to interact on a regular basis with conventional others»: cf., on this point, *inter alia*, M. Warr, *Life-course transitions and desistance from crime*, in *Criminology*, 1998, Vol. 36, n. 2, 183-216; G. PERA, *Aspetti giuridici del lavoro carcerario*, *Foro it.*, 1971, V, 53-68; G. NEPPI MODONA *La storia infinita del non lavoro carcerario*, 2015. Available at http://guardiamocidentro.compagniadisanpaolo.it/wp-content/uploads/2015/03/Carceri-2015-storia-infinita-non-lavoro-1.pdf (Accessed: 23 March 2020).

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"decent" if we consider a job an occupation «that meets people's basic aspirations, not only for income, but for security for themselves and their families, without discrimination or harassment, and providing equal treatment for women and men» ([28]).
However, there are no serious legal reasons for excluding the work of prisoners, even if we exclude that part of it that is admitted under the mandatory regime from the horizon of the "decent work".
Thus, such work, although characterised by elements of strong specificity as far as the convicted subjects are concerned, is always part of a treatment process, within which it must be considered an educational and therapeutic tool ([29]).
The same case law of the ECtHR, which interprets Article 4, paragraph 2 of the Convention about (compulsory) work to encourage the prisoner to reintegrate into society, leads to the exclusion from the horizon of compulsory lawful work a job that is not "productive" and "decent".
Nevertheless, the general objective set by the ILO should be co-ordinated with the concrete complexity of inmates' work.
Therefore, the concepts the ILO uses are oversimplified.
Indeed, in literature it has been recently underscored the need to deepen those areas of work «characterised by weakness, precariousness and fragility when placed outside of wage-earning and productive work and that is, the traditional perimeter of labour law» ([30]).
The work of inmates, especially when employed by the prison administration, is inevitably outside the ordinary perimeter of waged and productive work and should be taken seriously in relationship to that part of it that is "market-free" or otherwise devoid of a "market value" ([31]).
Only partially similar considerations can be made about the work of inmates employed by private parties.

([28]) J. SOMAVIA, *ILO Director-General highlights need for "Decent Work"*, ILO Press release, 2000. Available at https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007916/lang--en/index.htm (Accessed: 23 March 2020).
([29]) Cf. R. MAERAN, M. MENEGATTO, A. ZAMPERINI, *Il lavoro in carcere*, *supra* note 5; R. SCOGNAMIGLIO, *Il lavoro carcerario*, in *Arg. Dir. Lav.*, 2007, n. 1, I, 16-40.
([30]) See M. TIRABOSCHI, *Mercati, regole, valori*, *supra* note 13, and ID, *Persona e lavoro tra tutele e mercato*, *supra* note 13, by framing the specific (and possibly special) protections or recognitions that are necessary.
([31]) For these concepts, M. TIRABOSCHI, *ibidem*.

ILO Convention No 29 of 1930, in much more precise terms than the ECHR, makes the exclusion from the prohibition of forced or compulsory labour conditional upon the person «not hired to or placed at the disposal of private individuals, companies or associations» (Article 2(2)(c)).
This profile has central importance because it requires the work of convicted prisoners employed by private individuals to be considered free labour.
Therefore, forced/mandatory labour is partially admitted by international labour law, and this explains why – consistently – the ECtHR does not recognise «the normalization of labour as a binding principle deriving from Article 4 of the Convention and of the European prison rules, but only as a standard adopted by the majority of the legislations of the States» ([32]).
The reason for this reading of the conventional system is the systemic diversity with which inmates' work is considered according to the legal nature of the employer's counterpart.
The ILO Committee of Experts on the Application of the Conventions (CEARC) has repeatedly stressed that «the employment of prisoners by private employers is compatible with the Convention only in the case of a free employment relationship, i.e. not only with the agreement of the person concerned, but also where there are certain guarantees, in particular as regards the payment of a normal wage» ([33]).

([32]) G. CAPUTO, F. MARINELLI, *Dagli stati generali dell'esecuzione penale al varo della legge delega per la riforma dell'ordinamento penitenziario: quale futuro per il lavoro carcerario?*, in *La legislazione penale*, 29 Jan. 2019. Available at http://www.lalegislazionepenale.eu/wp-content/uploads/2018/01/Caputo-Marinelli.-Dagli-stati-generali-dellesecuzione-penale-al-varo-della-legge-delega-per-la-riforma-dell-ordinamento-penitenziario.pdf (Accessed: 23 March 2020); A. TOPO, *Obbligo di lavoro e libertà di lavoro: quando lavorare è un dovere "sociale"*, in M. BROLLO, L. MENGHINI, C. CESTER (eds.), *Legalità e rapporti di lavoro. Incentivi e sanzioni*, Edizioni Università di Trieste, Trieste, 2016, 177-203. Available at https://www.openstarts.units.it/handle/10077/13078 (Accessed 23 March 2020).
([33]) See the CEARC reports about the application of Convention No 29 in France for 2011, 2012 and 2014; examination of a 2018 report on France in relationship to this issue is still on the agenda for 2020 and 2023. On this issue, see P. AUVERGNON, *Le travail en prison en l'absence d'un droit substantial*, *supra* note 6. Unlike France, Italy received only one comment in 1990

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Therefore, it follows that the work of prisoners employed by private subjects (inside or outside prisons) certainly falls under the goals of Agenda 2030.
The systems of the states adhering to the ILO are required to increase their investments in the capacities of the people ("people's capabilities"), taking into account the subjective vulnerabilities, among which detention falls.

4. Detention and Capability Approach': Problematical Aspects

The ILO provisions translate into a very general guideline, with a systematic meaning that does not provide any precise and sectorial comment regarding inmates' work as a specific sector of the labour market. The specificities of inmates' work are manifold.
It is a sector in which work participates in the treatment function both in the case in which it is provided to the prison administration and to a private employer.
Therefore, it is not sufficient to consider it, sic et simpliciter, free work, just as it is not sufficient to equate, conceptually, the labour market of prisoners with that of free work.
Such a liquid equalisation would even collide with the ILO comments if it resulted in not recognising adequate relevance to the peculiar situation of vulnerability that characterises the detention factor.
Detention inevitably affects the labour market of prisoners, and the challenges posed by new technologies, climate change and demographics (to use the language of the ILO Report) have a particular impact on prison and the world of prison ([34]).
Data on prisoner employment show that this is, in fact, a «market without market» (as described by Tiraboschi ([35])), and the law cannot fail to take this into account.
The Capability Approach can certainly play an important role by drawing attention to the subjective peculiarities of inmate-workers and the underlying problem that characterises the detention sector, requiring

([34]) P. AUVERGNON, *Le travail en prison en l'absence d'un droit substantial*, *supra* note 6.
([35]) M. TIRABOSCHI, *Mercati, regole, valori*, *supra* note 13.

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taking into account the specific poverty that characterises the subjective profile of prisoner-workers.
The Capability theory can also contribute to considering work part of a path of "re-education" within a perspective of "employability" and of «a path of integral growth and development of the person through that action […] that helps to mature awareness of who we are and what we want, our potential and our talents as our limits and gaps in the relationship with others» ([36]).
On the other hand, the theory of capabilities, in its fundamental declination of enhancement of the pure freedom of the subject, risks entering into conflict with the counter-interest, the object of the traditional balancing by labour law, represented «by the interest of the company/organization, which is a hierarchical structure governed by an authority whose economic function […] basically excludes the freedom of the worker to choose between "alternative lives" (combinations of operations). Such a freedom, translated into terms of alternatives of functioning in the context of the employment relationship, would be tantamount to handing over the governance of the enterprise to the workers, while labour law could, at best, condition the power of organization from the outside […] to make it compatible with human freedom/dignity» ([37]).
All this must be taken into account not only in the interpretation of supranational standards, but also in the interpretation of national laws.
A very relevant example is the recent reform of the Italian penitentiary system (Legislative Decree No 123 of 2018), which includes numerous indications of the conceptual implementation of an idea of "rehabilitation" strongly inspired by the "capability approach".
From a literal point of view, the legislature has modified Article 13 of the o.p., introducing the principle that «prison treatment must respond to the particular needs of the personality of each individual, encourage attitudes and enhance the skills that can be of support for social reintegration».
This statement is clear evidence of a "capacitational" approach that seems to imply the awareness of a vulnerability sub-layer that must be taken into account and from which the intervention of the legislature must move.

([36]) *Ibidem*.
([37]) A. PERULLI, *Valori e diritto del lavoro*, *supra* note 15.

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An immediate corollary of the reform of Article 13 of the o.p. is the suppression of the obligation, for the inmate, to work.
In this way, the implicit declaration of the prisoner's freedom «to seek work on an equal basis with others» (to use Nussbaum's lexicon) seems to emerge ([38]).
Instead, the Italian legal system preserves, in Article 15, paragraph 2, o.p., the obligation of the penitentiary administration to ensure work through the stipulation of «appropriate employment agreements with public or private subjects or social cooperatives interested in providing employment opportunities to prisoners or internees» (as expressed in Article 20, paragraph 8, o.p., in the amended text).
The removal of any reference to the obligatory nature of prisoners' work was anticipated by a broad reflection on the subject by the *General States on Criminal Execution*, which concluded their work by proposing to replace the rule of mandatory work with that of "opportunity".
"Providing job opportunities" is the way the Italian legislator has implemented the constraint of "capacitational" politics and social justice deriving from supra-national sources.

5. Inmates' Work, Capability Approach' and Enterprise

According to the new Art. 13 Italian o.p., «prison treatment» must, among other things, «encourage attitudes and enhance the skills that can be of support for social reintegration».
Work, in the capacity perspective, is only one of the elements to which recourse is possible; Art. 15 of the o.p. in fact combines work with education, religion, cultural, recreational and sporting activities, and, following the 2018 reform, professional training and participation in public utility projects ([39]).
Prison treatment, according to the express provision of Article 1, par. 2, o.p. (which is essentially unchanged from the past), «tends, also

([38]) The obligation to work was expressed, in the previous Italian text of the Law, in the third paragraph of Article 20 of the o.p.; on this topic see A. TOPO, *Obbligo di lavoro e libertà di lavoro*, *supra* note 32.
([39]) Cf. A. MARCIANÒ, *Dignità e tutele del lavoro dei detenuti alle dipendenze dell'amministrazione penitenziaria*, in *Lav. pubbliche amministrazioni*, 2019, n. 3, 39-70; M. VITALI, *Il lavoro penitenziario*, Giuffrè, Milano, 2001.

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through contacts with the external environment, to social reintegration and is implemented according to a criterion of individualisation in relation to the specific conditions of the persons concerned».
In any case, work within the treatment system plays a central and prominent role, given that the second paragraph of Article 15 of the o.p. still expressly states that «for the purposes of rehabilitation treatment, except in cases of impossibility, to the convicted person and to the interned is ensured work».
Articles 1, 13 and 15 of the o.p. represent the logical and legal prerequisite of the legal prescription according to which «in prisons and facilities where custodial measures are carried out, the destination of prisoners and internees to work must be favoured in any way» (Article 20).
Despite the repeal of the obligatory nature of work for convicted persons, it remains that «the central and territorial bodies of the prison administration shall enter into special employment agreements with public or private subjects or social cooperatives interested in providing employment opportunities to prisoners or internees» (new paragraph 8 of Article 20 of the o.p. ([40])).
The overall picture has not changed significantly.
The adaptation of the legal framework, carried out in 2018, is very limited: the removal of any reference to the compulsory nature of work for prisoners has not been followed by the elimination of the obligation for the prison administration to ensure work, which has retained centrality in the perspective of treatment, albeit with a renewed focus on the "capacitational" aspect.
Labour, therefore, in the prison system, has not been degraded to a mere eventual opportunity to be offered to the condemned person.
We are no longer in the presence of a mandatory treatment ([41]), but work must be considered (in compliance, moreover, with the perspective of Art. 4 Italian Constitution) a right and a duty, even for the detainee ([42]), with the consequent maintenance, in the overall

([40]) G. DE LUCA, *Lavoro dei detenuti ed incentive contributivi e fiscali*, in M.G. MATTAROLO, A. SITZIA (eds.), *Il lavoro dei detenuti*, *supra* note 5, 127-139 (Accessed: 23 March 2020).
([41]) G. DE SIMONE, *La dignità del lavoro tra legge e contratto*, *supra* note 8.
([42]) D. CHINNI, *Il diritto al lavoro nell'esecuzione penale. Principi costituzionali e sviluppi legislativi*, in *Diritto penale contemporaneo*, 15 July 2019. Available at

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system of the o.p., of the disciplinary sanctions that can be imposed in the event of voluntary non-fulfilment of work obligations (see Art. 77, paragraph 1, no. 3, o.p.).
In this perspective is crucial the role of the enterprise.
It is significant that in referring to enterprises (including social enterprises), the legislation continues to use the phrase «interested in providing employment opportunities».
The "Smuraglia Law" (Law No. 193 of 2000) is concerned with identifying the instruments that can encourage companies to meet the world of prison and compensate for the critical issues arising from the entry into the world of treatment/capacity dynamics ([43]).
The persistent specialty of the employment relationship of prisoners, and in particular of those employed by private entrepreneurs, is demonstrated by the caution with which the law takes into account the enterprise.
The Law grasps how there should be an interest of the company in providing job opportunities, i.e. to enter into the dynamics of treatment and how this interest requires the company to adhere to a treatment project that goes beyond the ordinary course of work relationships, with a conceptual proximity of the work treatment more with apprenticeship than with ordinary work.
In fact, the employment relationship with prisoners presents very different complexities compared to those normally faced by the company with free work.
The employer is required here to interact with the prison administration, combining entrepreneurship and sociality ([44]).
To date, this task has been taken on by the social enterprise and not by the world of for-profit enterprises (the figure is confirmed by statistics data).
Prisoners often lack a work culture and sometimes the same work experience (to say nothing of the lack of linguistic and cultural knowledge and cultural and anthropological heterogeneity), all factors

https://archiviodpc.dirittopenaleuomo.org/d/6778-il-diritto-al-lavoro-nell-esecuzione-penale-principi-costituzionali-e-sviluppi-legislativi (Accessed: 23 March 2020).
([43]) G. DE LUCA, *Lavoro dei detenuti*, *supra* note 40.
([44]) See M. BARBERA, *Lavoro carcerario*, in *Dig. Priv., sez. comm.*, Torino, 1992, VIII, 212-225

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that make it necessary to build paths that, in addition to work, include other "re-educational" activities.
The conceptual assimilation of "criminal" work to free work, which assumes such importance in the recognition of the nature of the right to freedom of work, must be completed through the recognition of the profiles of specialties that are also "empirical" of the phenomenon (it must be, in fact, not whatever a job, but a job that is "responsible", which is placed in the pole of teleological work oriented to the promotion of the person and his ability).
Naturally, in entering into the agreement referred to in Article 20, paragraph 8, of the Criminal Code, the enterprise (also a social enterprise) is required to agree with the prison administration about «the object and conditions of carrying out the work activity, training and salary treatment».
This is a central point of the Italian model; the convention can (and must) also regulate and limit the flexibility of the contractual form that is chosen.
The convention, as a contract, is the moment of negotiating the balance between the different needs (and the different interests) that are encountered in the system of prisoners' work. Within the convention of job insertion of prisoners or interned is realised a sort of adhesion of the enterprise to a system in which the job serves as a re-educational paradigm.
The great difficulty can be grasped only if one takes into account the general context, in which the paradigm of free labour (the connotations of which, in terms of organisation and working methods, must be reflected in the work) is changed with respect to the past.
The flexibility of the organisation and the methods of free labour can only have repercussions on the dynamics of «participation-alienation in work in prison», widely described by the sector psychological literature ([45]).
Part of the doctrine has long noted the criticalities of a legal model in which the penitentiary administration remains the person appointed to take charge of the job search on behalf of the prisoners and to manage their release.

([45]) See, in particular, R. MAERAN, M. MENEGATTO, A. ZAMPERINI, *Il lavoro in carcere*, *supra* note 5.

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In this way, labour work as a selective and discriminatory factor, since «the availability of a job selects the convicts considered less dangerous that are destined to alternative measures, while its absence forces the condemned to prison unemployed» ([46]).
The new perspective, which sees work as an opportunity, with the maintenance of the company as a subject interested in offering opportunities for work and prison administration as a custodian promoting the capacity of the detainees, suffers the persistent (and inevitable) absence of a managerial approach and a productive culture in the public administration that is charged with this complex and multifaceted role.
The "capacitational" model, to be effective, cannot be limited to a petition of principle and cannot decline to take into account the characteristics of the current labour market, characterised by the advent of the so called "risk society", in which individuals are required to be the main authors of their personal biographies, to build their work careers and to compete in the market without being able to rely on traditional social institutions ([47]).
The emphasis currently placed both on individual autonomy and on the idea of self-enterprise ([48]) makes difficult to guarantee the effectiveness of a social reintegration of prisoners' model based on work, as well as to put into practice concrete interventions for the realisation of a social justice model oriented to overcoming a peculiar and complex condition of vulnerability such as the detention.

Abstract

Peoples' "Decent Work" and "Capacitation" in the Detention System

Purpose: *The purpose of the paper is to assess if the "capacitational" approach, which supposedly the recent reform of the Italian prison system, actually translates into effective measures or, at least, it can have effective interpretative consequences with special reference to inmates' labour.* ***Methodology:*** *The analysis of inmates'*

([46]) G. CAPUTO, *Welfare state e lavoro dei condannati*, in M.G. MATTAROLO, A. SITZIA (eds.), *Il lavoro dei detenuti*, *supra* note 5, 79-126. (Accessed: 23 March 2020).
([47]) *Ibidem*.
([48]) See C. Cordella, *Il lavoro in proprio nelle carceri*, in M.G. MATTAROLO, A. SITZIA (eds.), *Il lavoro dei detenuti*, *supra* note 5, 63-78.

labour in the Italian legal context takes place within the ILO's "decent work" context and builds on the capability theory and its application to labour law. ***Findings:*** *The analysis shows positives and negatives of inmates' labour in Italy in the prism of capability and the difficulties faced by the implementation of the practices.* ***Originality:*** *While the use of the capability approach in labour law is not new, the declination of analysis focused on inmates' labour and framed in the context of ILO decent work principle allows casting a new light on the penitentiary reform.*

Keywords: *inmate labour, employment, capability, labour law.*

"Lavoro decente" e "Capacitazione" delle persone nel Sistema di detenzione

Obiettivi: *L'obiettivo del contributo è verificare se l'approccio delle "capacitazioni", che sembra aver ispirato la recente riforma dell'ordinamento penitenziario italiano, si traduca in misure effettive o se, quanto meno, possa avere effettive conseguenze sul piano interpretativo, con particolare riferimento al lavoro dei detenuti.* ***Metodologia:*** *l'analisi del lavoro dei detenuti nel contesto giuridico italiano è collocata nell'ambito della riflessione sul "lavoro decente" proposta dall'ILO e si basa sulla teoria delle* capabilities *e sulla sua applicazione nel campo del diritto del lavoro.* ***Risultati:*** *l'analisi evidenzia aspetti positivi e negativi del lavoro dei detenuti in Italia nel prisma delle* capabilities *e le difficoltà emerse sul piano della implementazione concreta.* ***Originalità:*** *mentre l'utilizzo dell'approccio delle* capabilities *non è una novità nell'ambito del diritto del lavoro, la declinazione dell'analisi sul fronte specifico del lavoro dei detenuti e il riferimento al principio di "lavoro decente" dell'ILO consente di gettare nuova luce sulla riforma penitenziaria.*

Keywords: *lavoro dei detenuti, occupazione, capability, diritto del lavoro.*