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The Community Charter of Fundamental Rights as a founding nucleus of a European statute on flexible work: the value of the rules and the interpretation of jurisprudence

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SUMMARY

1. Social and employment rights in the European Community: old and new sources of inspiration

The original commercial inspiration for European Community Law is reflected in the intrinsic ambivalence of social -economic rights regarding employment. These rights have the double aim of both ensuring protection but also of making sure it does not affect competitiveness between companies. The E.U., which originated as a Community with the aim of rationalising competition between national economic systems has, little by little, made great advances in employment law : the European Social Charter of 1961, the Community Charter of the Fundamental Social Rights of Workers of 1989, the provisions of the Treaties of Maastricht and Amsterdam and the ever increasing community regulation (rules and directives) on employment law issues.

2. The Welfare Crisis and job precariousness in national legislation.

Whilst the supranational system has been evolving in such a positive way, national legislatures have greatly modified traditional employment protection chiefly by acting on atypical forms of work, thereby increasing the risks of precariousness and social exclusion connected to jobs which are already highly "flexible". Workers employed in this way need more rights and democracy also in view of the fact that this trend of individualisation/competition in work relations and the labour market is joined by a political-cultural marginality of the trade union – collective structure. The European Parliament (Resolution A5-0283 September 20, 2001) on the specific phenomenon of " workplace bullying " has also recognised the existence of a clear connection between these forms of oppression in the workplace and stress at work caused by increased competition, less job security, uncertainty as to professional tasks, the continuous increase in short term contracts and, in general, job precariousness (especially as regards women).

3. An antidote: the Law, fundamental rights, regulated flexibility.

There has, for some time, been an “explosion “ in the theme of fundamental rights, the political and technical answer to deregulation (Reagan and Thatcher), to the new frontiers of financial capitalism, to that “ single thought “ whose only reference point is the market and its *animal spirits*.

In the age of “ *à la carte* “law, of stand by law, there is an urgent need to find “firm points”, to rediscover ethical and basic values and make them universal , that is the law of necessity, even transnational , in a strong cultural discontinuity in comparison with the order which has been constructed so far.

Another way of regulating flexible and post-Fordist employment must be found in order to draw up alternatives to mercantile economies challenging, first of all, the view that the end of Fordism entails the end of Welfare. We have to open up a path towards credible forms of “ regulated “, and not one-way, flexibility, to understand that the value of “the rules” also applies to the market which is an institution as human as others. We have to find responsible and “ selected “ ways of being flexible “: the “right to be flexible” as opposed to the loss of rights in the name of economic competitiveness. Today, therefore, the challenge is to be able to draw up – through " the rules of law “ – supranational cohesion between moments of social (even strict) protection and moments of promotion more suitable to the new (mobile and flexible) conditions driven by the crisis of the state – nation and its regulating function.

4. The Community Charter of Fundamental Rights as a first step towards the creation of a different social model.

The Nice Charter, from this point of view, acts as a brake on the Europe of “ markets and bankers”. It re-balances the European system of law, rectifying the course of integration which has so far favoured economic liberty to the detriment of equality and social cohesion, the historical background to the social issues of Europe.

Although there is a problem regarding the general legal value of the Charter, it must not be exaggerated.

The approach of those who study constitutional theory to the Charter is loaded with positive suggestions. In fact, the binding nature of the Charter is recognised by some both

as a measure of shared values, (atypical source, indicative of the interpretation of jurisprudence) and as a pre-constituting federal act.
Reasoning not in terms of source theory but rather in terms of interpretation theory allows us to downplay and partially solve the problems of the legal/binding nature of the Charter, emphasising the aim of Articles 51,52 and 53 to ensure the maximum of usable protection through the " mixing " of concurrent regulations. Therefore, it would not be exaggerating to state that the Charter fully enters the circuit of Article 6 of the Treaty of Amsterdam, also by simply making visible " the fundamental rights of the common constitutional traditions of Member States " for which Article 6 affirms observance by the Union.
Thus the Charter represents a new system of rights. Applicable perspectives entrusted to the work of interpretation and harmonisation characteristic of jurisprudence. Through, but not only, the work of the Court of Luxembourg , the Charter regulations will have at least indirect results regarding the subjective positions of European nationals.
Employment judges and scholars have already shown how the European Court of Justice had, for some time, been providing for the introduction of the principles, now contained in the Charter of Fundamental Rights, as general principles of Community Law.
What is more, it is not just the catalogue of rights given to the working citizen which is innovative, but rather the fact that such a càtalogue has formed the contents of a fundamental Charter.

5. The " strong " nucleus of employment rights.

It is impossible to deny that there is some ambiguity and inadequacy within the Charter also in comparison to the concrete specifications of single rights provided by the constitutional charters of each Member State.
The global approach must be stressed. All the principles refer just to workers and not to the different types of working relationship , although undoubtedly they focus chiefly on employees.
We are in the presence of the first structure of " European Citizenship ".
The group of principles dedicated to this issue enables us to perceive and begin to draw up a general statute of substantial unbreakable guarantees for all workers living and employed within the E.U.
There are at least three fundamental and central rules.

The new, extremely wide latitude of the principle of non-discrimination (Article 21) is an unfailing frontier in the defence of the formal equality of the individual, connected to and completed by the principle contained in Article 23, paragraph 2 which provides for the formation and use of **adfirmative action** (expressly sanctioned only for inequalities of this kind) and marks an important step towards the substantial conception of equality.
Article 23 is not nécessarily limited to the relations between gender , but can be used as a prototype for action in favour of groups which are at a disadvantage. It is these groups, inside and outside the labour market, which are the main “protagonists” of the “new” flexible and precarious employment (women, immigrants, the unemployed young and the long term unemployed).
The other two rules are the right to protection against unjustified dismissal (Article 30) and the right of every worker to fair and just working conditions (Article 31).
Unquestionable principles of civilisation such as the protection of human dignity also in the field of relations between private individuals, which is what the employment contract is.
Article 30 concerns employer-employee relations. Nevertheless it is symptomatic of the choice of protection against the will of “ private powers “. In fact, generally speaking, requesting the justification of the exercise of power means a compulsory motivation of its use and the possibility of it being checked as regards the reasonableness and congruity and respect to the causal connection.
(to the aims for which the same power is attributed.)
Evene article 31 is a general rule with global reference for all the institutes indicated in the Charter, as a benchmark for the minimum conditions offered to each worker. Paragraph 1 refers to “ every worker, also to ‘ non-employees ‘, thus giving shape to an initial nucleus of protection for all forms of working activity by means of which individuals may provide for the needs of their families and themselves, also as regards salary protection (see also Article 33). Therefore, not only is it necessary to have health and safety rules in the workplace, but also rules governing moral issues (sexual harassment etc ..) and the minimum guarantees to ensure a decent existence (Article 34).
Other important declarations complete the picture. Article 29 deals with the right of access to free placement services, consolidating protection against discrimination and social exclusion. Article 14 guarantees the right to professional training for all in order to access the labour market and obtain a permanent position in all spheres of employment. Article 15 is connected to this rule in the part concerning “ the right to engage in work “.
Article 28 establishes the right to negotiate and take collective action.

6. To what extent is the Charter legally binding.

The Nice Charter does not play a constitutive role (as) to the rights defined as fundamental, while its non-inclusion in the Treaties means that its legally binding nature has to be reconstructed.
The Nice Charter is formally applied to E.U. member states and this entails some difficulty in finding interpretative certainty in its direct applicability as regards domestic institutions. However, the interpretative proposal founded on the doctrine of incorporation appears plausible in virtue of which fundamental rights, now found in the Charter, not only expressly engage E.U. institutions and bodies , but are also binding on domestic institutions when they ratify Community obligations.
A " multilevel protection of fundamental rights " has been achieved thanks to the rights asserted in the Charter,because the Community protection penetrates domestic legislation and binds national institutions through incorporation.
Particular stress has been given to the approval of the Commission on the Prodi-Vitorino Agenda. This involves the Commission checking the consistency of national legislation with the contents of the Charter whilst promoting legislation.
We finally need to remember that the employment law of each state is now, for the most part, " communitarised ": see the legislation dictated by regulations and directives on various aspects of the work relations and the labour market. National institutions, therefore, are undoubtedly bound by E.U. bodies both in fact and in law.

7. Possibility of having rights recognised and the role of jurisprudence.

At this point the role of the judicial mediation appears central and irreplaceable. Its task is to immediately apply the protection offered by fundamental social rights. The considerations and reasoning the Court of Justice gives regarding the principles of the Charter will be crucial, as will the ensuing development in the relationship between the E.U. and national legislation , through dialogue between judges on a " bilateral" level. This communication will, above all, regard the clause of Article 52 concerning limitations on rights and freedom sanctioned by the Charter, but whose " essential contents " must be assured and respected.

Thus the essential contents act as a barrier to any national laws which limit the established subjective positions by making it necessary to check on the " proportionality" of limits. Article 54 also introduces a real and proper " balancing " principle of values when it establishes the prohibition of abuse of rights. Therefore, the Charter must be considered as " the safeguard level " for the protection of rights.

The first decisions of the European Courts following the declaration of the Nice Charter seem to be cautious but not disappointing. Decisions favourable to the legally binding effects of the principles ratified by the Charter as fundamental rights, were given by the Advocates General – Tizzano in Bectu and Bowden; Stix-Hackl in Italian Republic - Commission, Jacobs in the Netherlands - Parliament and Council.

The Court of Justice, First Instance , in the case of Mannesmannroehren, ruled out the possibility of using the Charter, on the grounds – questionable but unequivocal in the future – that the Charter had not been declared at the time of the case in question. The European Mediator decided a case of maladministration on the part of the Commission, using Article 41 of the Nice Charter which provides for the right of European nationals to good administration.

Therefore, at least in a mediating way, the work of the Court of Justice will pass to national courts and judges who will have at their disposal regulations to be taken into consideration and emphasised in the approach to Community legislation.(see Decision 292/2000 of the Spanish Constitutional Court in a case of invasion of privacy).

Domestic courts, according to the consolidated jurisprudence of the Court of Justice, must give analogous interpretation, i.e. they must interpret their national law in the light of E.U. Directives and other regulations in the same way as they have been interpreted by the Court of Luxembourg, regardless of direct effects which are only vertical (certainly also valid for the Charter ex Article 51) or also of the horizontal effects of the supranational source: Decisions Van Colson 1984 and Marleasing 1990.

The national courts must apply E.U. Law as it is formed – through the interpretation of the Court – also by the principles established in Nice. The rights recognised in the Charter will always be " liable to be executed ", albeit indirectly.

Starting off from the interpretation of jurisprudence it will therefore be possible to attribute an embryonic nature to the Charter, a first form of transnational law, having a certain political-symbolic value but of necessity pressing at the interpretative level, if we do not want to deny the evidence that it is the first step of a long and elaborate process in the formation of Europe.