

GOVERNANCE AND THE DEVELOPMENT OF FLEX-SECURE LABOUR LAW

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I. INTRODUCTION

It is widely acknowledged that social security and labour rights protection systems are increasingly beginning to fail, even in Europe where they initially began. During the three Keynesian decades, these systems have both achieved constitutional status and proved to be extremely successful in tempering the excesses of capitalistic accumulation; however, many authors suspect that the so-called post-Fordist era holds little more for labour than an unforeseen growth in lawlessness. An impressive array of literature¹ has pointed out the disruptive effects of delocalisation in countries with a low standard of social protection² and a particularly flexible labour market: the more competitive multinational firms currently practise “forum shopping” across differing social legislations, which, twinned with the transparency of national borders, means that even the most virtuous countries are forced to fall in line with the “rogue states” that cynical practice social dumping in order to attract foreign investment and resources.³ While economic interests are becoming increasingly supranational, the institutional venues are losing the capacity to manage and direct social exchanges. The European Union (which shall be the focus of my analysis) has, in the course of its gradual and at times controversial construction, not only directly encouraged this process by creating a quasi-federally organised common market and a single currency, but also indirectly given rise to this state of affairs by giving authority on social matters (to a large extent) to its member States.⁴ As a result, the welfare state’s political institutions are disconnected from the other economic and productive decision-making centres.

It goes without saying that a “national” response to this situation would be quite ineffective, whether on a European or a global scale. The nation-based security policies (such as Zapatero’s measures against *temporalidad*)

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¹ B. Hepple “Labour laws and global trade” (Oxford, Oxford University Press, 2005)

² L. Gallino “L’impresa irresponsabile” (Torino: Einaudi, 2005)

³ See J. Stiglitz “La globalizzazione e i suoi oppositori” (Torino: Einaudi, 2002) and N. Chomsky, V. Shiva & J. Stiglitz, eds., “La debolezza del più forte. Globalizzazione e diritti umani” (Milano: Mondadori, 2004)

⁴ With the exception of the partial communitarisation of labour law during the 1980s.

can only attempt to cope temporarily with the most urgent social imbalances. In the long-run, however, they can neither deal with the pressures exerted by the market nor restore – in the present-day context – the compromise between social and systemic integration known as the welfare state. Still, on closer inspection, the difficult balance between economic and social politics is not solely a result of the novelty of a supranational context, which hampers the creation of new paradigms of social legislation capable of regulating the various European singularities. We must also consider what the 1999 *Supiot* report on the prospects for European labour law termed the “crisis of subordination” within a society that is now “au delà de l’emploi”.⁵ This crisis did not just stem from the objective decline of the Fordist model of production, based on the employer’s decision-making powers and on the strict enforcement of contractual rules regarding working hours, tasks and places; rather, and from a subjective perspective, this crisis also stemmed from the long wave of the Sixties revolts, which undermined the subordinate employment model with its hierarchical labour organisation and its lack of autonomy, and led to ever more evident claims for different work conditions, more in terms of freedom, flexibility and creativity than of job security.⁶

The new rules, therefore, will require at least a continental scope, and must be in accordance with the trends of younger generations in Europe, who now question a life-long, stable, full-time and markedly disciplined employment model. Even the Charter of Nice acknowledges – not the traditional right to work (that is earning a wage and entering the productive process) – but the wider right to engage in work, that is, the opportunity for workers to choose as far as possible their tasks, conditions and hours. From this perspective, serious consideration should be given to the rather incomplete and unsatisfactory attempts to build a European system of social guarantees capable of meeting individual expectations and current production mechanisms. This is an active process, which includes two aspects: in the first place, the creation of an arena of dialogue and debate (involving civil society in addition to national States and the European Union) focused on the construction of an “European welfare” model and on post-Fordist individual and collective labour rights; in the second place, the creation, with the increasing convergence of the various nationally based social politics, of a common ground of “multilevel” jurisdictional guarantees, founded on the Common Bill of Rights arduously achieved in Nice in 2000.

⁵ See A. Supiot, *Il futuro del lavoro* (Roma: Carocci 2003); G. Bronzini “Generalizzare i diritti o la subordinazione?” in *Democrazia e diritto* 2 (2005)

⁶ See S. Giubboni “Il primo dei diritti sociali. Riflessioni sul diritto al lavoro tra Costituzione italiana e ordinamento europeo” W.P. Massimo D’Antona 46 (2006)

II. EUROPEAN GOVERNANCE AND THE OPEN METHOD OF COORDINATION (OMC)

There are many different ways to define “governance” in the European Union. To put it simply, we may say that “governance” – in contrast to government – is not tightly bound to the electoral system-based mechanisms of representative democracy. While government is “from the people, for the people” and relies mostly on competence and decision, governance, on the other hand, is result-oriented and consequently relies mainly on procedure. A nostalgic literature assumes that the decline of “government” as a hegemonic mode of regulation coincides with the beginning of the post-democratic⁷ era, which is taken to mean the advent of technocracy and of a corresponding weakening of democratic control. On the contrary, and as can be seen in the approach of Christian Joerges and Karl-Heinz Ladeur (of the innovative school of “New European Constitutionalism”⁸), communication, dialogue, negotiation and exchange of experience are simply innovative resources which “differ” from the classical instruments of parliamentary politics. Although expert committees can hardly be considered exciting, this is no reason to cry for the demise of professional political representation.

There is, however, a mode of governance I would like to insist on, this being the “open method of coordination” as promoted by the Treaty of Amsterdam in 1997 and successively revived by the Lisbon Agenda in 2000. The OMC differs sharply from traditional mechanisms of regulation, which include, *mutatis mutandis*, the so-called community method carried out through directives, regulations and harmonisation of national rules.⁹ As for the three main topics of the Lisbon Agenda: employment, social security and the fight against social exclusion, it should be noted that the OMC has simply been put in brackets and not abolished by the community method. Actually, we should begin by acknowledging that the various social legislations differ greatly – these differences could conceivably be overcome through authoritative decisions, but with what results and in which direction? In short, there is something of a wager on collective and open learning procedures, and on the type of competition that is the outcome of a confrontation between differing experiences and practices. These learning procedures, in the opinion of Manuel Castells,

⁷ C. Crouch, *Post-democrazia* (Bari: Laterza, 2003)

⁸ See O. Eriksen, C. Joerges & F. Rödl, eds., “Law and democracy in the post-national Unione” Arena report 1 (2006) Oslo, Arena

⁹ M. Barbera, ed., *Nuove forme di regolazione: il metodo aperto di coordinamento* (Milano: Giuffrè, 2006); L. Torchia, *Il governo delle differenze* (Bologna: Il Mulino, 2006)

himself an apologist of European governance, are typical of the net-society and the knowledge economy.¹⁰

Institutions are now involved in a process of learning, rather to one of dictating, and find themselves being more *reactive* than proactive. The European multilevel context allows them to learn not only from nations and the Brussels bureaucracies, but also from regions and from the wide net of civil society (trade unions, foundations, universities, NGOs). The instruments of “soft law” and procedures such as benchmarking, peer review, best practises and mutual learning – originally adopted by corporation strategies and rewritten in a quasi-political contest – have brought the European public sphere to gradually converge on a common view of the Lisbon Agenda goals. This is also a template for the adoption, when necessary, of more forceful measures, such as the recommendations of the European Council, or the framework directives: it is a fact, however, that discussion based on quantitative data and graduated goals has proved its validity. This articulated discussion has brought flex-security to the fore as the emerging model for a further socialisation of the welfare state, beyond the crisis provoked by the decline of the long-term employment. This promising situation was largely anticipated by the Charter of Nice, which opted for labour protection obtained both through contracts and the operation of the marketplace, and particularly through the novel rights pertaining to the concept of “industrious citizenship”, such as “basic income” and the right to a lasting and continuative education, which have no basis today in many European constitutions. These outcomes should be pursued by means of the OMC, because a continental Bill of Rights must be fleshed out by an open, multilevel dialogue, involving nations, experts, European or inter-European committees, trade unions, NGOs, regions, municipalities and citizens’ forums. The suggestion has been raised that this is a more advanced model of deliberative democracy. In all events, I would like to insist on the originality of this experience, which entails dialogue rather than decisions, inducements rather than orders.¹¹ Now that the Charter of Nice’s¹² immediate validity has been widely acknowledged, the recommendations, stemming from OMC procedures for a generalisation of the best practises of Northern Europe, need not count only on the moral sanctions of naming and shaming the less cooperative

¹⁰ M. Castells, *Volgere di millennio* (Milano: Università Bocconi, 2004)

¹¹ See S. Sciarra, *The Evolution of Labour Law 1992-2003* (Luxembourg: Office for Official Publications of the European Communities: 2005) and “La costituzionalizzazione dell’Europa sociale” in *QC* 2 (2004)

¹² G. Bronzini, “La Carta di Nizza: dal *Bill of rights* europeo alla costituzionalizzazione dell’Unione?” in H. Friese, A. Negri & P. Wagner, eds., *Europa politica* (Roma: Manifestolibri, 2002)

nations (including Italy). Through the OMC, we have achieved a contamination/competition between differing social models and experiences, an initial approach to horizontal government (bottom-up rather than top-down), while alluding to a cooperative federalism based on information, dialogue and, sometimes, negotiation.

Long ago, in 1997, Ladeur wrote:

“The European Union should take the lead in experimenting with self-organized and flexible forms of regulation, based on the creation of a public-private network. In this way, the European Union could be a sort of laboratory for the much needed modernisation of the State. In this respect, the still unfinished structure of the Community could be considered an opportunity, to the extent that it usefully sidesteps the strict benchmarks of the state-based model.¹³”

I think that this concept still shows great promise, particularly in reference to the OMC. In fact, the OMC consists of fluid, semi-legal procedures, which are open, by definition, to outside influences. Moreover, these procedures are not representation-based; consequently, they could lead to forums, which could be open to social movements, subject to the acceptance of a dialogue, which does not, however, imply their “capture” by the final decision-making processes. On the contrary, because they voice issues that are not represented through the institutional organisations, social movements would, as the European Union explicitly maintains, play an essential role in ensuring both transparency and participation. It is a fact that NGOs find themselves more at ease in dealing with the European Committees or the OMC procedures than trade unions or political parties. It is still necessary, however, to bring pressure to bear on the institutional context and on the existing power allocations. This does mean that the more radical social movements (the ones, for instance, who voted against the European Constitution)¹⁴ must free themselves as quickly as possible from the mental constraints that have prevented them from accepting the new realities, shedding the trite rhetoric on the “peoples that count”.

III. THE EUROPEAN MULTILEVEL SYSTEM OF PROTECTION OF RIGHTS

¹³ K-H Ladeur, “Towards a Legal Theory of Supranationality – The Viability of the Network Concept” in *European Law Journal* 3/1 (1997) 33–54

¹⁴ See the 2005 referenda on the European Consitution.

The slow and uncertain construction of a Europe of rights, fostered by the CGCE in the Sixties (with the invention of a judicial safeguard of fundamental rights, which was not contemplated by the Treaties), has brought about an unprecedented situation which finds no analogies elsewhere. In Europe there are no less than two supranational Courts, the various national constitutional Courts, the ordinary jurisdictions and, in a few nations even regional Courts: these all watch over the fundamental rights. Judges in ordinary Courts but can bypass national law and apply Community law directly, while also being required to be cognizant of the decisions of the CGCE and of the Court of Strasbourg.¹⁵ In this way, national and supranational superior and ordinary Courts may be considered as competing in a virtuous cycle. The Charter of Nice provides a complete and updated list of first, second and third-generation rights. All claims, even the most peculiar ones, can be easily included in the protected area of the Nice Bill of Rights, the general and abstract formulations of which should now be considered as providing the necessary positive scope for jurisprudential adjustment. This gives rise to a juridical hybrid, which collects and integrates various juridical traditions: the common law, with its diffuse judicial review; the Spanish and German traditions, in which the superior Courts provide direct protection for fundamental rights; the unique Strasbourg tradition, with its reparative and “moral” aspects and so on. This sophisticated construction, which according to the Charter of Nice¹⁶ must apply the most favourable norm, has led to extremely progressive and important decisions, but lacks a clearly defined supreme court of appeal – in fact, several national constitutional Courts, along with the Court of Luxembourg¹⁷ and the Court of Strasbourg, aspire to this role. Nevertheless, the multilevel system of protection has spontaneously assigned a fundamental constitutional position to the non-discrimination principle. This principle was initially invoked only in sexual and racial matters, but its scope has since been broadened and it can now be employed as a wide-ranging argument in contrasting diverse Community or national norms, which run from labour law to political rights. However, social movements and civil society have not yet fully availed themselves of the novel opportunities provided by the multilevel system of protection, though some of the stronger NGOs – Greenpeace or Amnesty for instance – operate in the European multilevel judicial field with increasing success.

¹⁵ See I. Pernice e R. Kanitz “Fundamental rights and multilevel constitutionalism“ in WHI paper 7 (2004)

¹⁶ See G. Bronzini & V. Piccone, “La Carta di Nizza nella giurisprudenza delle Corti europee” in *I diritti dell'uomo* 2 (2006)

¹⁷ See G. Bisogni, G. Bronzini & V. Piccone, *I giudici e la Carta dei diritti fondamentali dell'Unione europea* (Taranto: Chimienti, 2006); G. Bronzini, “Il rilievo della Carta di Nizza nella crisi del processo costituzionale europeo“ in *Democrazia e diritto* 2 (2006)

Two questions, then, arise: Is it possible to rethink the theory of social disobedience - which has been developed in the USA - in the European context, where the federal political institutions are still incomplete, while the judicial ones are on the contrary well developed? What are the prospects for a grassroots “constitutionalisation” of the European Union, a process capable of injecting social content and claims in the courtrooms, while seeking out a new institutional project?

This perspective has been completely eclipsed in the course of the French debate on the European constitution. Clearly, “government by judges”, or a return to the natural law tradition are not credible options. However, it hardly seems productive to contrast the tradition of parliamentary democracy with the wealth of safeguards that have already been implemented in Europe.

IV. CONCLUSIONS

I have just enough time to outline a further aspect of the construction of a set of guarantees capable of overcoming national boundaries in a global scope. The adoption by the ILO of the 1998 Declaration on Core Labour Rights¹⁸ is an event which deserves careful consideration. Its three meta-rights (abolition of forced labour and child labour, the right to collective bargaining and the abolition of discrimination) have been finally recognised as universal, irrespective of social and productive contexts. While the Declaration affirms these meta-rights somewhat generically, the ILO Conventions (at the basis of the Declaration), on the contrary, clearly specify their content. The ILO’s historic contribution has been the recognition of features of labour law, so fundamental and so related to human dignity, that they must be held as universally valid.¹⁹ As a result, the ILO bypassed all questions related to the legitimacy of these fundamental rights, linking them firmly to the abolition of inhuman and demeaning treatment (such as child labour) sanctioned by the United Nations Charter. These rights, consequently, according to a vast literature, constitute an actual international *ius cogens*, enforceable by any Forum or national and international Court.

¹⁸ A. Perulli, *Diritto del lavoro e globalizzazione* (Padova: Cedam, 1999); S. Sanna, *Diritti dei lavoratori e disciplina del commercio nel diritto internazionale* (Milano: Giuffrè, 2004); B. Hepple *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005); P. Alston, ed., *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005)

¹⁹ See G. Bronzini, “La dichiarazione del 1998 sui core labour rights e la rinascita dell’OIL” in *Democrazia e diritto* 1 (2006)

Let me ask, now, to what extent have social movements furthered the onset of a new “Pinochet case” in labour law? Why not promote a grassroots Court for labour rights, based on the Russell Tribunal, which was the model for the Rome Statute and of the International Criminal Court? Could it be that it is more comforting to repeat the misdeeds of globalisation and neo-liberalism than to employ method and conviction in using the tools already available in the European legal systems in order to assist the construction of a new social order?

In my opinion, the rather embryonic and unexplored options that I have outlined²⁰ will prove their validity only when they are travelled by social movements, particularly the so-called alter-globalist ones, on condition that they cease from pining inconclusively for the restoration of the traditional, merely protective, social state, and commit themselves decisively to a European dimension of conflict. Nevertheless, a debate, however significant, that merely involves jurists or political institutions will never achieve the power and the ideal energy required to force a novel compromise on the elements of profit and accumulation, now free from their classic constitutional constraints.

²⁰ See J. Dine & A. Fagan, eds., *Human rights and Capitalism* (Cheltenham: Edward Elgar Publishing, 2006)