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THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: A TOOL TO STRENGTHEN AND SAFEGUARD THE RULE OF LAW?

Posted on 3 Marzo 2016 by Giuseppe Bronzini

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1. Fifteen years after the European Charter of Fundamental Rights' proclamation in Nice and six years after its transformation into a text of EU primary law, now may be the right time to rationally assess its impact on the European legal order (covering both the EU institutions and the Member States when acting under the EU Treaties) in order to evaluate the critical tensions it gives rise to, as well as its unfulfilled potential.

First and foremost this could apply to the Charter as an instrument to implement the principle of the rule of law, which is currently under strain at both the supranational level (see the lack of transparency and democracy in EU economic governance) and at the national level, as emerged recently in the Hungarian and Polish cases, which have drawn the attention of the media and the European Commission.

Despite its current limits, which will be discussed in detail, we must recognise that the Charter Project is, to date, the most significant attempt to upgrade the integration process in the European Union (mainly developed previously in the economic sphere) in order to achieve a deep connection between the European Institutions and European citizens through the constitutionalisation of their rights.

The Charter and the new complementary rules in the Treaties now enable the European Institutions, as well as national governments acting within the EU framework, to be legitimated, at least insofar as the substantial aspect of respect for fundamental rights is concerned. The mere fact that now the legitimacy of public action at a supranational level may derive from the safeguard of fundamental rights which, in modern democratic legislatures, is accompanied by the legitimation deriving from (parliamentary) delegation of political will procedures, criteria of accountability for government bodies, mechanisms for direct public discussion and participation for citizens, could be a basis to overcome the current weaknesses of EU action.

Having stated this, we should not forget that the Charter was first conceived in the 2000 Convention as a "Bill of Rights" which, even without a wider constitutional charter, would operate primarily in the judicial field rather than the political arena. However, even in this ancillary position, the Charter has been incorporated into a successful story involving the gradual establishment of an integrated supranational judicial system. Increasing numbers of national judges work directly as guarantors of European law, under the indirect control of the Court of Justice of the European Union, enacting principles envisaged for decades by the European legal order (which render it independent from national self-protection mechanisms). These include the principles of the direct effect and the primacy of EU law, the duty of compliant interpretation of EU law and, when necessary in specific cases, the possibility of not applying national rules and access to preliminary ECJ rulings.

On the latter aspect of preliminary rulings, it appears that the ECJ wants to add a duty to review national judgements which do not comply

with supranational law (even by sanctioning non-compliant national judges) and it is even creating “temporary remedies” which were not originally envisaged to protect the lives of defendants while judgements are pending. Such measures demonstrate a clear effort aiming to force rebel or recalcitrant national jurisprudences to abide with EU law.

These are extremely powerful and consolidated tools. Hence, the Charter’s success has been wisely entrusted to the functioning of these typically European remedies which were clearly not created for this purpose, but are now part of the European judges’ toolbox, used on a daily basis by national (local) judges who people turn to in order to obtain justice.

Well, my view, considering the 1999 *Simitis Report* which settled the institutional base of the codification process, is that the Charter was meant to have four main institutional objectives. Firstly (objectives 1 and 2), to offer visibility and legal certainty to *fundamental rights* which were previously only protected on a case-by-case basis by the Court of Justice. The third principle was to make these Charter rights autonomous from the judges of the Luxembourg Court, thus fully legitimating it, so that they may not be accused of creating rather than applying EU law anymore. In this sense, the Charter is allowed to act as a real “Bill of Rights”, that is, as a parameter of the substantive

legitimacy of European Law *(constitutional review)* and of national legal systems when they come into contact with it. Fourth, and finally, the Charter was meant to grant an autonomous legal *status* to social rights to make them equivalent to first- and second-generation fundamental rights, leading to their protection *per se*, beyond an ancillary rationale which subordinated them to the pursuit of the main economic goals of the integration process, used in past Court of Justice jurisprudence to guarantee them.

The legal doctrine also envisaged a *cross fertilizing effect* in view of the Charter’s ability to function as a coordination point and as a factor, in the medium term, for convergence between internal and supranational constitutional horizons beyond the limits imposed by predefined

competences, up to the point of issuing judgements for “failure to act” resembling those by the main European Courts. A positive outcome of the Charter was widely attributed to its so-called “inductive effect”, a concept coined by Habermas, as a means of strengthening European citizenship. By acting to preserve this citizenship’s rights, it would have contributed to developing a European public sphere, which would become the foundation for subsequent constitutional development.

2. As far as the visibility of fundamental rights is concerned, it has clearly been achieved during the Charter’s first six years, as has the full legitimation for the Court of Justice to use the semantics of fundamental rights.

By making over 500 explicit references to the EU Charter in its post-Lisbon rulings (apart from indirect references), the ECJ has shown that the Charter can function as an essential element of the constitutionality parameters or “*bloc de constitutionnalité*” with which any EU-related act should comply.

However, problems remain when looking at two other objectives of the codification of fundamental rights by the Charter, for convergent reasons. The key element of this discussion is art. 51 of the Charter, which is linked to the art. 6 of the TEU, regarding the principle of attribution and the allocation of competence at the European and national levels.

When EU competence is undisputed the Court of Justice has already shown on several occasions that the Charter can play its role as a credible parameter of the constitutionality of EU Law. This has been the case, in particular:

1. a) in judgement C-236/09 of 2011 – *Association Belge des Consommateurs Test-Achats* - which partly invalidated Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and servicesbecause of the violation of arts. 21 and 23 of the Charter which state, respectively, that “any discrimination based on sex is prohibited” and that “equality

between men and women must be ensured in all areas";

1. b) in the two historic "*Kadi*" rulings in which the Court, while respecting the UNSC's role to preserve peace at international level, deemed that the primacy of international agreements on secondary law could not be extended *"..to primary law, in particular to the general principles of which fundamental rights form part"* (in **Kadi I**), before confirming the annulment of the relevant EU Regulation in the *Kadi II* ruling which made explicit references to arts. 41 and 47 of the Charter (respectively on access to a person's own file and the right to a fair trial);

1. c) in the triptych of 2014-2015 rulings dealing with privacy and data protection () as protected by arts. 7 and 8 of the Charter. It is worth mentioning that in the third case ("*Schrems*") dealing with the validity of the so-called "Safe Harbor" agreement, the latter was declared invalid in the absence of adequate protection for EU citizens' personal data when on US soil. This principle may constitute an important precedent for other agreements and notably for the TTIP agreement if it will be reached with solutions which could infringe the safeguard of fundamental rights under the Charter.

There have been several Court of Justice judgements in which the Charter has become the "compass" to interpret European directives as happened in the "***Scarlett***" case (dealing with Internet) or the "***El Dridi***" case, which resulted in the immediate release (in 24 hours) of 10,000 unlawfully detained irregular migrants (which made this Ruling the most important reference to set limits to the national legislatures in punishing irregular entry).

In all these sentences, the Court of Justice is playing a role which closely resembles that of a constitutional court by abrogating laws or European measures because they contravene the Nice *Bill of Rights* or by interpreting EU directives in accordance with the Charter.

Thus, although Charter rights are not protected when safeguarding other economic or functional aspects of the EU construction, they are in terms

of being *cornerstones* of the EU integration processes. Thus, the so-called "*counterlimits*" doctrine developed by some Constitutional Courts (the prevalence of fundamental rights over Community law which disregards them) has been successfully integrated into the EU legal order.

Yet, problems arise when the Charter is taken as a reference for constitutional reviews at a national level where the Commission, the Council and the European Parliament are not allowed to pre-emptively assess the impact of new national legislation on the Charter rights. In such cases, a rational and extensive interpretation of the Charter's art. 51 appears indispensable. It is worth recalling that, in the 2013 "*Akeberg Fransson*" **judgment** dealing with the Charter's scope of application, the Court went very close to declaring that Community law overrides national law, not just when national law has a direct link with the EU law, but also when this link is indirect and /or implicit.

I feel that after the *Fransson* sentence, the Court's evolutive approach which favoured use of the Charter subsided somewhat, as the Court is proving increasingly cautious, prudent and pragmatic. More often than before, the Court is asking national judges to demonstrate the practical impact of EU law governing specific cases (as stated by the Court's Judge Sajian (), thus restricting it to a functionalist conception of the Charter's art. 51).

In order to justify protection by the Charter, the Court now requires an explicit connection of the case in question with a supranational competence rather than an abstract and/or potential relationship as may have been the case following the aforementioned *Fransson* and *Zambrano* jurisprudence.

The ECJ's change of approach is now increasingly evident: while in the *Zambrano*, *Mac Carthy*, *Frassons* and *Siracusa* rulings, supranational competence switched from being potential to becoming effective and specific (because it was exercised in practice), more recently the applicability of the Charter and the field of operativity of the Nice text has significantly narrowed, before the Luxembourg judges and national judges alike.

We are certainly still in a “pro-Charter” mood, as its art. 51 refers to the “application” of European law by member states, and this expression suggests a direct relation, as happens regarding the transposition of an EU Directive into national legislation. However, the recent retreat leaves us far away from the wider interpretation of the scope of EU law suggested by the wider “Explanations” of the Charter articles . This change of attitude by the ECJ regarding the Charter’s scope of application under art. 51 is giving rise to new doubts, uncertainties and disputes, discouraging national courts and leading them towards increasingly cautious positions.

Furthermore, the Court has recently raised serious doubts on the enforceability of some articles of the Charter dealing with social rights. In its 2014 “Social Mediation Association” judgment, the Luxembourg judges went so far as to deny the clear link between art. 27 of the Charter with the provisions of the EU directive dealing with workers’ rights to information and consultation in the workplace (art. 27 opens the chapter of the Charter devoted to solidarity).

In the same (depressing) vein we must observe that, apart from the non-discrimination principle, the principle according to which the Charter’s social rights should also have a “horizontal” applicability (and may also be invoked between private individuals) has yet to be settled. Even the principle of non-discrimination is no longer as open and inclusive as it was described in the *Mangold* and *Kükükdevici* rulings, and the latest ECJ judgments show an increasing propensity for art. 21 of the Charter to only play an “operational” role linked to the applicability of specific EU directives.

Even the notion of European citizenship has scarcely been taken into account by the Court as a counterlimit to national legislation which is increasingly restricting access to national welfare systems, so that the ECJ is now indirectly endorsing the notion of «social tourism» which has been denounced by some Member States (see the 2014 ***Dano*** judgment)! Not surprisingly, Stefano Giubboni has recently stated that “*The most recent case-law shows, in fact, a spectacular retreat from this rhetoric in tune with*

the neo-nationalistic and social-chauvinistic moods prevailing in Europe" .

Yet, the most evident *vulnus* to the Charter's credibility (from a constitutional perspective) is that, apparently, there still aren't any judges at a supranational and national level who can rule on the fundamental rights compatibility of austerity measures and of measures adopted within the framework of supranational rescue plans or recommended by the EU within its economic governance framework (and they have even been praised recently by the Strasbourg Court working on the Greece and Portugal cases). Regarding the latter, the ECJ's legal reasoning in the *"Pringle"* case is an appalling precedent for the future because if there are any future bailouts within the ESM framework (European Stability Mechanism), according to the Court, such operations will not fall within the Charter's scope because they were established by an international treaty.

As for the latter measures (concerning Greece and Portugal), the declaration of incompetence adopted by the Judges also appears difficult to overcome, because a State would have to prove that it was forced to adopt a specific measure rather than another one to cut its deficit. Hence, it appears that due to their nature, procedures concerning financial stability linked to the Euro are, de facto, in an …unChartered space (as could also be the case for the measures that the ECB may require in exchange for so-called *outright monetary transactions*).

Needless to say this outcome is the result of a formalistic approach which, unsurprisingly, has been contested by academia (see the vigorous article by Andreas Fischer Lescano on this subject) . In turn, it has demoralized the national judges and courts (with the exception of the Portuguese and Italian Constitutional Courts), not to mention ordinary citizens, who have been clearly shown that the Charter is ineffective when issues concerning guarantees of minimum subsistence levels and access to welfare are at stake. Within the framework of a major study for the European University Institute, Claire Kilpatrick has shown the "conformist" effect these decisions have unleashed, which have turned budgetary constraints into "metanorms" which prevail over other public obligations, thus shattering

the hierarchy of constitutional values at the EU and national levels. Alain Supiot recently criticised this abdication of constitutional values in his latest book, "*La gouvernance par les nombres*".

These new trends threaten to jeopardize the legal certainty of supranational law because they show that technical aspects prevail over substantive matters. This paralyzes the virtuous cycle through which the Charter, according to a beautiful expression coined by Luigi Ferrajoli, should have fostered European citizens' "legal self-respect", encouraging them to play an active role, in association with the Courts, in the assertion of their concrete rights.

Stefano Rodotà (in *La Repubblica* on 9 January 2014) stressed that: "What is happening in the European Union is a de-constitutionalisation process. The Charter of Fundamental Rights, the EU Bill of Rights, which, as stated in art. 6 of the Lisbon Treaty, has the same legal value as the Treaties, has been detached from the European system". He later stated that "the perspective has changed, the European Union acts as if the Charter did not exist, it denies citizens the added value entrusted to the Charter precisely as the instrument to confer legitimacy to the EU through their involvement. European citizens are turned from actors in the European process into disheartened and powerless spectators of the sacrifices imposed by Brussels, rather than persons whose rights are guaranteed by EU institutions".

All of this without mentioning the substantive unlawfulness of the Troika's role, which is not covered by the Treaties, and nor is it regulated in any way by internal constitutional rules.

Thus, the EU Charter's traction in social matters is very weak if not evanescent in practice, and it does not add any value to the protection which the previously adopted Union's Social Chapter already provided (see the "***Mascolo"*** ruling on precarious workers in the Italian school system and the abundant jurisprudence on fixed-term contracts, which did not avail itself of the EU Bill of Rights). Nonetheless, the ECJ must be given credit for issuing some signals promoting the extension of the scope of EU law, as it did in the 2015 "*Fenoll"* judgement (C-316/13) by placing a

rather unusual working relationship between a handicapped person and an association for social support under the Charter's protection. In this case (as in the *Mascolo* ruling), the judges deemed that budgetary concerns may not lead to job insecurity for workers.

ECB President Mario Draghi has also said, repeatedly and with increasing insistence, that cohesion and solidarity cannot be achieved just through monetary means (which, moreover, are adopted by the ECB without a clear mandate from the Treaties). Thus, we may say that through its rulings the ECJ is implicitly asking for more effective support from politicians and the legislature in order to extend guarantees within the framework of an overall strengthening of the supranational institutions.

We should never forget that in recent years the ECJ has been acting in a very difficult situation, marked by increasing disagreements between EU Member States and growing protests against its directive role, which can also be noted in the positions adopted by the German Constitutional Court.

Another very serious problem is the lack of knowledge of the Charter in Member States, because, as a source of primary EU law, it obviously requires uniform application throughout the Member States' territories. A comparative analysis (by the website www. Europeanrights.eu) shows that, while the national judges in Spain, Portugal, Italy, Belgium and some other countries make references to the EU Charter quite regularly, in other Member States this text seems to be unknown, as is the case in France. Moreover, it is highly unlikely for a national provision to be abandoned as a result of the Charter (even beyond the sensitive field of social rights).

Some Constitutional Courts (like the Italian one) have been developing a wise reasoning on the integration of the sources of law to show how a European *ius commune* may be established, whereas other Courts have ruled out paying it the same attention. Overall, an in-depth and shared understanding among judges is still lacking, even if some slow, convergent steps towards a shared vision of the Charter are beginning. Such a common approach is extremely important because, unlike the ECHR

which must be implemented according to the each country's legal framework, the EU Charter should always be present when assessing national choices. The planned EU Justice Portal may make this exercise easier, but it is appalling that in 2014 only 46 preliminary rulings submitted by the national judges to the ECJ made reference to the Charter in reference to the matter at hand.

Summing up, a first overview of the EU Charter's impact leads us to bittersweet judgement; we cannot deny that the Charter is proving a valid instrument in some domains of EU law, such as rights on Internet, or even regarding migration policies or cooperation in criminal law (the latest competence to fall within the ordinary EU regime). In the latter domain, the Charter may have some very positive effects in relation to the various Directives (some of which are still being negotiated) dealing with procedural rights, and the measures which aim to strengthen the European Area of Freedom, Security and Justice (where stock-taking of the past and current experience of the Council of Europe and of the Strasbourg Court's case law would be relevant).

As stated above, the Charter's traction in social matters is modest while not non-existent, and it seems unable to guarantee the control needed to assess the compatibility of recovery measures with fundamental rights. Unfortunately, socio-economic rights have not been strengthened by the Charter but they have been subordinated to the goals for defending the Euro.

The legal technical hurdles raised (even by the ECJ) when protection by the Charter is invoked risk undermining the legal certainty which the Charter was meant to pursue. National case-law is very limited and follows national guidelines which are hard to bring together into a truly supranational vision or common design.

Moreover, art. 51 of the Charter is being used to justify an overly restrictive interpretation of its scope (see the EP Resolution of 08/09/2015). Although the ambitious multi-level process of guarantees which the Charter's text promotes is not yet compromised, it is clear that the judiciary does not suffice to develop it. It is unjustifiable (even if it is

understandable) that the Fundamental Rights Agency in Vienna has not been granted inspective competences in the Member States to safeguard respect for the Charter (as it had done in "*Ponticelli*" on the Nomad Camps case in Italy soon after it was established). Moreover, some emergencies such as immigration do not lend themselves to being governed merely through the use of legal instruments. Further, it is not clear yet whether violations of the Charter may, *per se*, result in infringement proceedings and give rise to a duty for States to refund any damages caused (I am not aware of any precedents in which this has been the case).

3. The above description of the Charter's situation means that a strong, clear political and institutional effort is needed to promote a positive evolution which cannot be triggered by the judiciary on its own any longer, in its role as a forerunner of the integration process (from a federal perspective). It is up to the European Parliament, as the only institution legitimized by a universal mandate, to elevate the role of the Charter in the interest of European citizens (the initial project in 2000 was for "a *demos* and a Charter"), more than the Commission whose political role has been strengthened (positively) over the last two years.

It is not a coincidence that the best doctrine, rather hesitantly received in the latest Commission Communication on the strengthening of the principle of the rule of law, is increasingly vocal about the binding character of the TEU's art. 2. It does not seem to suffer the limits resulting from art. 51 of the Charter, and its prescriptive effects beyond art. 7 (16) should not be underestimated.

Since the EU Charter's proclamation, it was hypothesized that any violations of art. 2 TEU should be judged using the same procedures as for violations of the Charter (in spite of the limitations envisaged by the Treaties for the Court of Justice in these cases). It is necessary to insist along this path, also in response to the emergence of newly formed liberticidal governments in some Member States, seeking to impose a wider interpretation of art. 51 by combining these two normative instruments. Simply, overcoming the limits set by art. 51 may not be realistic, but it may perhaps be applicable for a more integrated

area such as the Eurozone (or Schengen?), within the framework of its constitutional development.

Another urgent issue to foreground at the political and institutional level is to bring social rights within the scope of protection under the Charter. The “social pillar” (which should basically be reflected in a single system of safeguards against unemployment, the introduction of a minimum wage and a minimum European income, as well as a framework agreement covering self-employed and dependent workers, etc.) promised by the Commission President Juncker apparently heads in this direction, although it already appears to be struggling in its initial phase, as also happened in the early stages of the European Investment Plan.

If it is duly developed and implemented, the social chapter of the Charter may have a trickle-down effect with regards to its applicability in other domains (as is happening in the field of cooperation in criminal law).

The Charter may also become the best instrument to assess whether the objectives of the 20-20 strategy have been achieved, with the prospect of the Charter being used as a reference enabling the adoption of sanctions (like partial or total exclusion from EU funds for social purposes) in cases involving failures by Member States (for instance in reducing poverty and social exclusion). Again, it would be wise to “communitarise” the default rescue procedures covered by the Fiscal Compact and by the ESM, as is expressly envisaged by the relevant international treaties.

Improving (from a Charter-compliant perspective) other austerity measures such as the EU’s economic governance is a more delicate matter. More transparent monitoring and assessment of the economic impact of some EU governance acts may compel EU bodies to resolve their ambiguous aspects, paving the way for them to clearly establish what is required in order for such choices to be, by and large, subject to judicial oversight.

The EU should also promptly ratify the European Social Charter which, on the one hand, does not require that the Treaties be reformed and, on the other, it does not raise any problems in relations with the Strasbourg

Court as was the case for EU accession to the ECHR (see Opinion 2/13 of the Court of Justice).

Speaking of a Charter for EU citizens, it would be a common-sense solution to resume work on the old proposal for citizens to have direct access to the Court of Justice when a violation of fundamental rights is at stake. This measure would strengthen the Luxembourg judges' role as the highest guarantors of fundamental rights in the EU. It would also be necessary to improve monitoring to assess the impact on fundamental rights of proposed legislation through a stricter prior evaluation, while the approval of norms by national parliaments is pending (they may work alongside the EP and Commission within a collaborative perspective). This may prevent these rights being severely limited by measures which are not of a legislative nature (such as Commission or Council implementing acts – see the Case C-355/10 on search and rescue in international waters). Monitoring respect for these rights in subsequent stages may require the creation of a committee of independent experts to be granted investigative powers under control by the European Parliament, in association with the Vienna Agency for Fundamental Rights which has not been very proactive to date.

As already occurred for the evaluation of the common principles of *flexicurity* (approved in December 2007), some virtuous countries may spontaneously agree to be closely monitored regarding their compliance with the Charter's fundamental rights, giving rise to an "enhanced cooperation", even if it is just *de facto*, which may prove a safeguard for their citizens.

It may also be necessary:

- to review the effectiveness of the binding nature (as has already been stated by several advocates general) of the social, environmental and anti-discrimination clauses (TFEU arts. 9-10-11);
- in the external security field, until EU accession to the ECHR is attained, it would be wise to resort to neutral authorities external to the European system such as the Venice Commission or the

Copenhagen Commission, to assess whether EU external action complies with the Charter.

Last but not least, in a common European area of justice, it would be wise to re-convene the *Assises Generaux de Justice* (as in November 2013) on a regular basis, under the European Parliament's oversight, to exchange best practices and collect views from the different levels of the EU's "multi-level" legal system on the emerging trends in case law.

In order to prevent the banalization of the EU Charter, we must set off from its current difficulties at a judicial level and consider elevating its profile at the political-institutional level in order to strengthen its role as a Bill of Rights (a *shield* for EU citizens), as an act providing a *compass* for political institutions (analogous to national constitutions) and as a criterion used to monitor EU public policies.

In short, there is still a lot of work ahead to constitute the idea of a supranational *demos* which identifies with the effectiveness of the Charter's guarantees and is inspired by the values it expresses in concrete terms, but the battle is not yet compromised.

NOTES

Report to the Conference "The Shield of Europe: The European Charter of fundamental rights" , European Parliament Brussels 13.01.2016

On 13th December the European Union announced it had initiated a procedure (adopted on March 2014) against Poland to enforce the rule of law, to avert threats of "systemic character" to the rule of law. This is an act of soft law initiated by the Commission, *praeter legem*, which is why it is not mentioned in the Treaties. This act is a measure that can be invoked before resorting to the measures provided for in art. 7 TEU. They are threats that do not concern the scope of European law; in this case the Commission may use art. 258 TFEU. In its document, the Commission

confirms that infraction procedures cannot concern violations which do not relate to European Union law.

It is a document for the “Protection of Fundamental Rights in Europe: it is the time for action” drawn up by six famous legal experts, including Alessandro Pizzorusso , chaired by Spiritos Simit, a text that preceded the Council of Koln Decision to codify the subject entrusted to the first Convention.

A. Knook, “The Court, the *Charter* and the vertical division of powers in the European Union”, in *Common Market Law Review*, 2005

Quite surprisingly, after examining the UNSC Resolution, the Court declared « ..that none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.» (p.163)

See « Digital Rights v.Ireland » (2014) annulling the data retention Directive, « Google v Spain » (2014) which confirmed the right to be forgotten when personal data are no longer relevant and the « Schrems » case in 2015.

See, for instance, the EU-US TFTP agreement on the exchange of bank account data or the Draft «Umbrella Agreement» on data protection, also when public security aspects are at stake.

M. SAJIAN, Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union, in Distinguished Lectures no. 2/2014

The Explanations contest the applicability of the Charter whenever states are “acting within the framework of EU law”, hence, without a direct and binding relationship with such legislation, without the internal act being necessarily an act of execution of a supranational obligation, but which nonetheless falls within its “grey area”

Quite surprisingly, the Court states: «It is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that

article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation.» (par.46)

S. Giubboni, *Free movements of persons in Europe. Solidarity Revisited*, in Perspectives of federalism, no. 7, 2015

A. F. Lescano, *Competencies of the Troika. Legal limits of the institutions of the European Union*, – by I. Schoemann ed other-, *Economic and financial crisis and collective labour law in Europe*, Oxford, 2014

C. Kilpatrick, *Constitutions, social rights and sovereign debt states in Europe: a challenge new area of constitutional inquire*, WP, IUE n.34/2015

A. Supiot, *La Gouvernance par les nombres*, Paris, Fayard, 2015

It should be recalled in particular that sentence no. 178/2015 of the Italian Constitutional Court declared that not indexing pensions and the blocking of collective bargaining in the public sector (request from Brussels to contain the Italian deficit) were unconstitutional; the Italian Court, while it applied art. 39 of the Constitution, provides invaluable references to art. 28 of the Charter of Rights, ILO sources and the European Social Charter, within a perspective of multilevel guarantees

16 A. von Bogdandy, M. Ioannidis, *Il deficit sistemico nell'Unione europea*, in Riv. Trim. dir. Pubbl., 2014, pp. 594 ss.