Applicability and effectiveness of the Charter of Fundamental Rights of the European Union.

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The purposes of the Charter: general remarks

The project for the development of a Charter of Fundamental Rights of the European Union is an old claim from trade union associations and European pro-labor law doctrine since the 80s. The need for codification of a Bill of Rights of the EU comes from the need to confer certainty, visibility and rationality to the system of fundamental rights protection offered by way of "judicial substitute" since the '70s by the Court of Justice, that offered protection against the European law (and the connected national one) to a set of prerogatives (including the social ones), deriving from the "constitutional common traditions" and the ECHR. It soon emerged a matter of entitlement and "legal certainty" of this role of the Luxembourg Court in the protection of fundamental rights as a whole, considered that together with the progressive enlargement of the European community and then the Union, the "constitutional common traditions" were less and less clear and unambiguous and that, in the ECHR, does not include the socio-economic rights, nor the so-called "new rights" of citizenship.

The discretionality to define the content and the same list of rights appeared, in substance, excessive and overlapped "politically" the Court, making it a legislator more than a judge, even if of a higher ranking. It has also been stressed well ahead how it was questionable even the "method" by which the judges in Luxembourg formerly protected the economic and social demands of EU citizens, who were protected not so much in and for themselves, as fundamental rights, of the same rank of the other rights recognized by the Union (such as the right to freedom of movement or competition), but only in view of the achievement of the primary objectives of European integration (construction of a common market in full competition), that had (and still partially have) a predominantly functionalist and economic character. While in the domestic Constitutions the right to holiday leave or to rest, for example, is directly protected as a fundamental right that can possibly be balanced with other rights, in the case law of the Court of Luxembourg these rights were protected only in order to avoid market distortions or danger of social dumping between member countries, so therefore imperfect and inconsistent with the directions of contemporary constitutionalism. Finally, in the lack of a clear list of protected rights, the citizen was forced to rebuild them in a complex jurisprudence with casuistic character, that is not always appropriate to provide information of a general nature.

For these reasons, as shown by the official records, the fundamental objectives of codification were to give certainty and visibility in the protection of fundamental rights and, above all, be attributed to socio-economic rights (and the "new rights") the same status of the typical ones of the liberal-democratic tradition that were already listed in the ECHR.

The first two objectives have been achieved without doubt, for the Court of Justice currently operates on the basis of a Bill of Rights; in more than 200 judgments from 1.12.2009 there were spelled out the content of those rights. The socio-economic rights enjoy nowadays the same status of the traditional rights, considered that the Preamble of the Charter affirms the principle of "indivisibility" of all rights in the Charter. However, it is still too early to say that, through the Charter, the social protection of European rank find the same degree of protection of other rights associated more closely with the integration process to a series of questions of a technical and legal order, that we will try to summarize also in the light of the case law of the Court of Justice.

The scope of the Charter
The Bill of Rights is a tool of protection of fundamental rights which applies to European Union law, but that does not suppress other security tools both internal (national constitutions) and international. As such, it has no universal nature but must respect the spheres of competence laid down in the Treaties, as stated in the Charter and Art. 6 of the Treaty of the European Union. This specification limits its operation, because it is not enough that a right is recognized by the Charter as "critical", but it is necessary that the Union has jurisdiction to discipline it and that the same competence, in concrete, has been actually carried out. If these two conditions are fulfilled, the law in question, in general, has the same legal value as the rules of the Treaties and therefore binds the Court of Justice to interpret directives and regulations, so that they meet the essential content of the fundamental right concerned and possibly cancel the European standards that fail to do so, and also, if requested by the national courts, to refer questions to determine which are the national standards, which violate the provisions of the Charter. Furthermore, it binds the national courts to operate in a similar manner with the national laws that constitute the application of the "Union law" through a so-called "consistent interpretation" (meaning that you choose the standard that is respectful of the supranational right) or, where appropriate, disregarding the internal standard: in case of doubt, the national court is required to refer to the Court of Justice for a preliminary ruling. In a recent judgment (Court of Justice, September 11, 2014, A c. B and other C-112/13) the Court of Justice pointed out, that with reference to the Charter (art. 47) where the question concerns the "European law", the ordinary judge must remain free to invest the Court of Justice and, if necessary, to disapply domestic rules, even if domestic law provides that it can also turn to the Constitutional Court.

In other words, the step forward on the cultural level, accomplished by the Charter with the attribution of the status of fundamental rights to all the prerogatives of social order recognized in the progressive Constitutions is immense, but the practical consequences of this "breakthrough" are yet to be established in, as the Charter depends for its practical application by the extension of the European powers in social matters and the approval of a European legislation. Today, this process is going very slowly. Having said that, the scope of the Charter depends on the interpretation of Art. 51 of the Charter (typically it's the internal regulations that are called into question in the light of the provisions of the Charter), which states that "The provisions of this Charter are addressed to the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law", in particular the term "application". It is always peaceful that the Charter is a parameter of constitutional legitimacy of European standards, which can also lead to the annulment of directives (as in its judgment of 1 March 2011 - Association Belge des Consommateurs (C-236/09) for violation of the prohibition of discrimination between sexes or in the epic decision on data retention of 8 April 2014 for the violation of the right to privacy) or their interpretation in conformity with the Charter (as in its judgment of 22 November 2011 Scarlet Extended SA (C-70/2010) in subject of copyright). But when the law can be considered "applied" to the supranational level and thus can be considered in the light of the rights of the Charter? Two hypotheses have been faced: the first interprets "application" as a direct and necessitated implementation of the European law as the classical assumption of a law transposing a directive. The second hypothesis (defended since 2010 by the European Commission) adopts instead a more generic and broad concept of "implementation" and considers it sufficient that the case examined fall for any of its aspects in the "shadow" of EU law, also indirectly (in the language of the Commission, that there is a link between the case and the supranational right). You can certainly say that with the judgment Fransson (C-617/2010) Large section of 10/26/2013) it is the second option that has become prevalent. The Court has stated literally "from settled case law of the Court, it shows substantially that the fundamental rights guaranteed in the legal order of the Union shall apply in all situations ruled by EU law, but not outside of them. In this regard, the Court has already pointed out that it, with regard to the Charter, can not assess national legislation, which are outside the scope of EU law. However, once such legislation is within the scope of that right, the Court, requested a preliminary ruling, must provide all the criteria of interpretation needed for the assessment by the national court, the compatibility of
that legislation with the fundamental rights, whose observance the Court ensures ...... This definition of the scope of fundamental rights is confirmed by the explanations regarding Art. 51 of the Charter which, in accordance with Art. 6, par. 1, third subpar. TEU and Art. 52, par. 7, of the Charter, must be taken into account for the interpretation of the latter... According to this explanation, "the obligation to respect fundamental rights defined within the Union applies to the Member States only when they are acting within the scope of Union law". Therefore, given that the fundamental rights guaranteed by the Charter must be respected, when national rules fall within the scope of Union law, it can not exist cases covered by Union law without such fundamental rights are applied. The applicability of EU law implies that the fundamental rights are guaranteed by the Charter. When, on the other hand, a legal situation does not fall within the scope of Union law, the Court has no jurisdiction in this regard and the provisions of the Charter invoked can not justify, by themselves, that power..." Now apart explicit statements, what matters most is that in the case examined, the internal rules on VAT did not show any direct or indirect connection with the European Union and which the Court considered there was not a sufficient existing EU competence in the field. Of course there are also more restrictive decisions according to which "to determine whether a measure falls within the national implementation of EU law in accordance with Art. 51, par. 1 of the Charter, it is necessary to determine, inter alia, whether the national legislation in question has the goal of implementing a provision of EU law, whatever its character and if it pursues objectives other than those covered by EU law, even if it is able to indirectly affect the latter, as well as whether there is a ruling of Union law specifically governing the matter, or that may affect the same" (as in the case of the Siragusa 6/3/2014 (C-206/2013) or in judgement “Sindicato dos bancarios do Norte of 07.03.2013 (C-128/2012, in which it was considered it had not been proved that the disputed Portuguese austerity measures had a connection with the European standards), but it seems to be prevailing the Fransson direction and it is, therefore, called on all decisions on the applicability of the Charter. A recent decision of 10.07.2014 (C-198/2013), Hernandéz has then stated that if the domestic legislation is considered a more favorable treatment than that of the State under the supranational provisions, then the rights of the Charter would not apply, because this is beyond the scope of European law.

The effectiveness of the Charter

It would be wrong to limit the importance of the Charter only to the courtroom in which the rights that it protects can be claimed with the "legal force" proper rules of the Treaties. The provisions of the European Bill of Rights have also an addressing function of the legislative action of the Union, so much so that the main directives typically offer on their premises a reference to the rights involved and the parameters for a constant monitoring of its fulfillment ( often conducted, however, also on rights not clearly included in the competences of the Union by the Fundamental Rights Agency (located in Vienna), of the European Parliament and the Commission in their annual Reports. Moreover, the Commission can certainly (although it has not happened yet) open an infringement procedure for the systematic violation of the rights of the Charter (the sphere of competence of the Union), if requested by the individual and collective subjects (or even from other states) that may require its intervention. Furthermore, in the case of systematic violation of the Union values (indicated by art. n. 2 TEU), the current literature agrees they should be referred to the European Bill of Rights, it is possible to activate the special procedure of art. 7 of the Union Treaty, which can extend the suspension of voting rights of the accused state (it was thought to activate this procedure against Hungary for violating the right of free press and freedom of expression). Finally, the provisions of the Charter are sometimes called, also outside the scope of competence of the Union, by national judges (including the constitutional courts, such as the Italian one) to show the level of constitutional convergence achieved in Europe on the basis of the issue according to which you anyway have to assume that the domestic regulatory actions respect the rights that states have voluntarily included in a Bill of Rights, that they are committed to respect (unfortunately up today there's a lack of comparative research to assess the extent of the phenomenon). Moreover, there are
many decisions of the Strasbourg Court which recalled the provisions of the EU Charter of Fundamental Rights (the most famous in the trade union sphere is the Demir and Baykara vs. Turkey on November 12, 2008 (No. 34503/2007). The lines of further expansion of case law of the Charter are at least three: a) non-discrimination, given the existence of long-range directives that end with the competence of the Union to outline a "quasi-general" in this field, a sort of "bridge-principle" that leads to the widespread applicability of the Charter (see decisions, Kükukdevici, January 19, 2010 in Case C-555/07, Hay against Crédit Agricole mutuel de Charente-Maritime et des Deux-Sèvres, (C-227 / 12) of 12 December 2013); b) the principle of a fair trial under Art. 47 of the Charter (e.g. in a Fuß judgment of 12 October 2010 in Case C-243/09 and in Gavieiro Gavieiro of December 22, 2010, in Cases C-444/09, C-456/09 the violation of the right to a fair trial has allowed the Court to intervene in matters in which it would not be competent in the abstract); c) judicial cooperation in the civil field, so if enforcement is sought in the European way for a domestic judgment, this can be assessed in terms of compliance with the essential core of the rights of the Charter, although the question is not of "European Law" (cfr. concerning the familiar Judgment JMcB Court of Justice, October 5, 2010 in Case C-400/10 PPU).

The last major unresolved issue is the ability to plead (horizontal) of the Charter in relations between individuals (as well as vertically upright against States and their public bodies). On this point, we should mention the recent decision of the Court of Justice (Grand Chamber) Association de médiation social January 15, 2014, according to which the provisions of the Charter (in this case Art. 27 on the right to information and consultation in the workplace), to be applied in disputes between private parties are clear, precise and unconditional and may, it seems to have been told by the Court, be integrated with the provisions of directives (peacefully applicable in the social field only vertically, that means against the states and their public entities) only if their content is inferred in some way from the formulation of the law in the same Charter; it is still possible to claim compensation for damage in case of horizontal applicability of the Charter and the associated Directive in cases where these are violated in any case. The same, much discussed, judgment of the Court reiterated that the prohibition of discrimination (Art. 21 EU Charter of Rights) operates directly on the relations between individuals (as stated by the decision Kükukdevici (Grand Chamber) of 19 January 2010 (Case C-555 / 07).

It should be pointed out, in conclusion, that in general, when the Charter rights are applicable, even the ECHR is still applicable (given that the first contains all of the rights of the second) and that, therefore, it should work art. 52, that provides that "where this Charter contains rights, which correspond to those guaranteed by the ECHR, the meaning and scope of those rights are the same as those laid down by the said Convention". Therefore, the Court of Justice, in establishing the content of the rights in the Courts, should consider the Strasbourg jurisprudence; while in the penal or civil field this link is usually done, in the social field it has to be registered a certain reluctance of the Court of Luxembourg to make the guidelines of the Strasbourg Court its own, in particular on the subject of retroactivity of civil law and also on that of the prohibition of discrimination (see judgments Carratù C-361/2012-December 12, 2012 and the Scattolon- C-108/4 2012-January 2012). The question, however, of the relationship between the two courts is open and will be completely redefined when there will be the anticipated EU accession to the Council of Europe.