

Challenges on Work and Society relationships: A brief over the application of the so called “Societal Constitutionalism”

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1. INTRODUCTION

While facing the many challenges coming up from a modernized context of work and society, and particularly from the changing interaction between working relations and society, it is of a major importance to investigate divergences in supports and contributions that may arise from public bodies compared to private bodies: these both can play an administrative role in coordinating the different (and mixed) relationships as involved. This paper moves from the reading of a book cured by Sandro Chignola, about the commons' juridic perspective, nation-state supremacy crises, ownership, and new constituent powers (*Il Diritto del Comune, Crisi della sovranità, proprietà e nuovi poteri costituenti*, Ed. Uninomade Ombre Corte, November 2012); the book collects several essays connected by the authors' shared aim to theoretically reflect over the so called “societal constitutionalism”, meant as a dynamic approach to legal theory that is coined by Gunter Teubner. This paper, thereafter, is aimed at considering such a theoretical perspective in its application to a couple of examples, the one regarding a case of dismissal, the other regarding the circulation of digital goods. Lastly, the paper focuses over the macroeconomic impact of such application.

2. ANALYSIS OF THE THEME IN MICROECONOMIC TERMS

It is acquired that the globalized scenario poses unprecedented issues that cannot be solved by looking for an answer simply within the legal system as apparently involved, and often private and public matters are mixed and pose complex issues of administration; in general, globalization rises a matter of interrelation amongst different legal systems.

At a level of legal theory, scholars are exploring revolutionary approaches for a new conception of the normative process, that would be capable to overcome the statutory paradigm as just based on a private/public ownership as well as on a possessive individual will that is all centered on the single person (physic human being); I am here referring to the studies by Gunter Teubner, from the Frankfurt School, and by Antonio Negri from the Italian experience of the workerist movement¹, who both

consider the social/civil progress as something to be captured from the interrelation of different normative systems, wherein not only the legal/statutory one assumes a relative meaning as a parameter, rather, its constituent categories too can turn to be the object of a critical approach, in a perspective that is called new “societal constitutionalism”.

The societal constitutionalism would have the ambition of posing overtures toward a dynamic substantial justice, other from the rigidities of traditional state-centered formal-gerarchical systems; it stresses the need to rebalance the distances between private and public sectors by also using hybrid categories, which can better contain traditional features and new needs according to a given space and time. This post-systematic approach is searching for efficient solutions by not limiting the normative context to legal institutions, (national or globalized), rather it looks for giving a normative value to also the spontaneous processes that rise across the civil society. Essentially, this means to normatively remark the value of actions/lack of actions, by collocating them in a broader communicative context being explanative or meaningful to the search of solutions, not excluding the claiming before judicial authorities: whenever a potential conflict amongst legal system emerges, the main question to be highlighted is where the dynamic of actions/lack of actions as concerned might actually lead, else from into an unfruitful or consuming-only fight.

From a legal theory point of view, this means to accept that any relevant fact that matters in the dispute, both for the purpose of its qualification into a given definitional category or for the purpose of its being recipient of a given normative effect, be it from an *ex ante* perspective or an *ex post* one, should be better considered in its dynamic dimension, wherein the norm is not just an

Comune, Crisi della sovranità, proprietà e nuovi poteri costituenti, Ed. Uninomade Ombre Corte, Novembre 2012. See at page 144 for a brief synthesis by P.Femia on Teubner's minima concepts on “structural corruption”, “pathological systematic dependence”, “dominion” and finally “societal constitutionism” as a system not having a constitution, but being constitutional continuously. A basic work for Antonio Negri's thought is his 1992 book *Il potere costituente*, Saggio sulle alternative di Governo; a more recent contribution by Gunter Teubner is the 2008 book titled *Selbstsubversive Gerechtigkeit: Kontingenz-order Transzendenzformel des Recht?* in *Zeitschrift für Rechtssoz.*, XXIX 1, 2008, 9.

¹ Part of these authors' argumentations are directly translated and reported in S.Chignola, (a cura di) *Il Diritto del*

abstraction, it rather becomes part of a normative process where in the subject, in his or her action, is participating to the definition of the normative category itself².

I would like to reflect over such a perspective but moving from a couple of practical examples that help imagining the connection of the philosophical idea to the real world of working relations and their social interrelations.

A first case is that of conflicting protections that can be recognized to accidents having the same objects or subjects, for examples a system giving protection to workers against unjust dismissal/termination from employment in case of economic dependence, conflicting with a system giving economic protection to family couples in case of separation; economic dependence deriving from work and economic dependence deriving from family relations can be both a matter of State intervention in case of an unwanted ending of the relationship, and this is theoretically posing no critical issues, until the real case circumstances highlight a substantial injustice coming up from the connections amongst family relationship and working relationship. Typically, the very reach-family employee that is dismissed together with the very poor-family one can be covered by the State via a same level allowance, which substantially does favor the reach one and discriminate the poor one³. It is generally hard, if not impossible, for a legal system to preventively regard the many profound social conflicts that stays at the base of working and familiar relationships, mixing together the processes of people's life; so far, ordinary judges can only adjust, not actually at the moment when the conflict rises, but far later, as soon as a new economic equilibrium has been actually found, which is what may keep many people's life just suspended for years, reasonably or not.

Another case expressing the dimension of the societal constitutionalism being relevant for working relations and society is the circulation of immaterial goods, that matters in working activities, especially those using digital platforms, which can have a value according to different normative systems, having both public and private implications, and possibly conflicting the one to each other. Immaterial goods have a character of being usable by several consumers contemporarily so their circulation poses an issue over distribution of an utility, covering several public and private aspects, reflecting on temporary and territorial effects.

In 2008 an Italian parliamentary Commission (Rodotà

Commission)⁴ proposed a sort of inverted process to rule over goods defined as common (also immaterial) "*utilities, just functional to the exercise of fundamental rights and for the free development of the person, also to the benefit of future generations*". The idea was then to move from a list of goods, including cultural products, that should be treated not according to a given regime, public rather than private, but belonging to both public entities and private persons, except for the commitment of those goods to be managed in agreement with both laws and good practices, and for them to be freely accessible by everybody just intentioned to grant their judicial protection.

At the activist level, the movement for "common goods" manifested worldwide, especially in 2011 (the Spanish so called M.15 indignados movement, the American "Occupy" group movement, the 2011 Arab revolution also happened in Egypt and Tunisia, and wanted to realize a "post-feudal project of reciprocity not already consumed within a bourgeoisies experience nor within an anti-bourgeoisie one"⁵); nevertheless, that idea is struggling still to find a solid juridical definitions in legal systems, contrarily to the originary intentions, mainly because legal systems are centered on a statutory static perspective, and they are oriented toward the middle class' juridical forms and needs⁶.

Both the cases just mentioned make evident the possibility of latent conflicts regarding the legitimacy of public authorities' intervention on private issues and more globally, the possibility of conflicts amongst different normative systems, and they show how the path to adapt traditional legal theory to a world that is changing, following big amount of datas just instantaneously transferable from one device to the other, even miles distant from each other, is where some steps forward can be done: there is given the possibility to explore models that permit to take out from the increased socio/economic complexity not only more social disparity, as connected to the lack of information and technological knowledge, but also some useful tools to obtain the reverse, that is less disparity and accessible equitable procedures.

While the first case focuses on issues rising from the

² Jacques Derrida and his many works on deconstruction as a method toward social progress is another reading to be done (https://it.wikipedia.org/wiki/Jacques_Derrida).

³ It has been argued that there is a "systematic tool of protection" in the Italian Constitution, according to both article 4 (giving everyone the right to work in a protected manner) and article 38 (giving protection to anyone who is involuntary unemployed), G.Balandi, *Mercato del lavoro (tutele nel)*, draft paper for Enciclopedia del Diritto.

⁴ U.Mattei in <http://www.euronomade.info/?p=162>.

⁵ M.Blecher, *Postoperaismo: trasformazione di capitale, lavoro, sovranità e autocostruzione della moltitudine*, in *Il diritto del comune*, op.cit., p.98 e ss.

⁶ B.Milakovic, *Chi ha e chi non ha*, Il Mulino, p.95; by reflecting on the fact that very few theoretical studies exist on the evolution of income distribution amongst individuals, the author recalls that since the early contributions on economic theory what has been analysed is the "functional" distribution of incomes, that means distribution amongst social classes (profits for capitalists, wage for workers and land revenue for land owners) which is what culturally supported the idea that the interpersonal distribution can be included within the functional distribution. Such an inclusion began to appear not satisfactory at the rising of a big middle class of workers whose main income comes from work.

interaction between traditional legal system for family relations and employment, whenever matters of economic dependences creates a collision, which is a sort of very personal/private type of issue in legal theory, the second example is considering an issue of security in the circulation of goods that rises an immediate public interest. Nevertheless, in both cases the act of qualifying the issue, its constituent facts, its normative parameters, in traditional terms, as a statutory private matter rather than a public legal system matter, might prevent from obtaining a satisfactory ruling.

In many cases the issue might rise in term of discrimination that cannot immediately be highlighted, as for work and family related concerns, and in many others it can appear in the form of unjust appropriation, whenever the legal system has not ruled over goods that cannot immediately be kept closed into a normative parameter.

Statutory legal systems, with all their formal connections to the many international institutions that make up the global governance are thus called for reaction before such possible points of no return, whereat modern societies, by accepting new models of living and communicating, find themselves having more freedom and resulting trapped at the same time.

Clearly there is evidence that to merely transpose the relevant facts or subjects into their correspondent (systematic) legal categories, or by argumentation/recognition or by interpretation/adaptation, might be misleading according to the other systematical point of observation. The fact of being dismissed by a worker having a reach family could result to be positive as for a (time-for-)family point of perspective, at the same time resulting detrimental from an individual point of perspective, which is what leads to consider the social effects of that dismissal in a future defined space of time and places. Similarly, any appropriation of immaterial goods, as an invention or an art product, only can be appreciated as more or less legal/illegal accordingly to also the technical evolution that makes that product to be freely circulating in the considered time: level of techniques could make the product freely available until or after a certain day time, as well in or out from a certain territory (*lex digitalis versus lex mercatoria?*).

Procedural remedies, specifically, are called to face what is recognized to be, in continental civil law, as a shift from the paradigm of the “fattispecie” approach, to the paradigm of the remedial approach⁷, meaning that the process of application of the law is increasingly linked to a dynamic view point, setting legal certainties through more procedural legal steps, rather than to a static transposition of the relevant historical facts upon abstract legal categories. “Fattispecie” is a concept from the Italian legal traditional that provides for the abstract case,

to be ruled by the law, and it has not a proper translation in English legal system. In common law, which is essentially made by judges, including references to statutory provisions, the legal category is not generally referred to as an abstraction wherein the case shall be driven into, by means of interpretation, in order to assign the case its proper normative meaning.

A theory of new “subjective rights of resistance” has been elaborated⁸ just around the verb “to claim”, which is an hybrid legal concept referring to the need for an action (not necessarily done before a tribunal) in order to see recognized and protected any right that can be both public and private, via an institutional intervention.

Whenever it comes to a matter of conflicting economic dependences, economic dependences from labour and economic dependence from other sources (typically from family relationships), we can imagine two different circles: they can vary in size and issues’ proximity, they help us in measuring the impact and dimension of the conflict, as well as the range of governance that is in place to solve it (constitutional norms, administrative powers, applicable legal institutions, contractual dispositions, adjudicating bodies etc.).

Since one of the character of any legal system is its capability to theoretically cover any dispute, not leaving any case to anarchism, then problems on borders, like the possibility of conflicting different system, rise up because of antagonistic values, which impede the simple application of existing common practices and rules.

What then becomes essential is to delineate a common set of values, in term of both social and economic perspective, “elsewhere”, so flying from no-ending conflicting situations into the sphere of possibilities; such an abstraction can assume a concrete meaning once established a definite maximum length of time, till when theoretic possibilities become effective solutions. It will be within such a given deadline that actions and reactions, and comparison between different situations, would assume a new significance, specifically by bringing out from the unknown deepness of each one psychological dimension, toward a settlement that is accepted to be satisfactory.

In such a perspective it is essential to consider the action of claiming for the searched set of values in terms that are suitable for the purpose; if we go back to our two examples, this means to focus on reactions before the unjust dismissal as well as before the unjust appropriation/use of goods that are freely circulating. Before we adopt this dynamic – clinical approach, the number of possibility to escape from conflict as well as to remain stucked to it are such as numerous as numerous are the options the involved people have in managing their own job perspective and family life, as well as numerous can be the channels for the use of some common type of

⁷ O.Mazzotta, *Nel laboratorio del giuslavorista*, Labor, il diritto nel lavoro, n. 1/2017.

⁸ P.Femia, *Il giorno prima. Comune, insorgenza dei diritti, sovversione infrastemica*, in “Il diritto del Comune” op.cit., p.133.

goods. Instead, the clinical approach⁹, which is in line with the “societal constitutional-ism”, as far as it moves from a diagnosis of a given social issue, is going to provoke a new experimental view upon the unsatisfactory/critical situation, wherein individuals and goods are transposed toward a settlement that is told to be preferable and mutually compatible.

Assumed that the case might present the opportunity to go beyond the line private/statutory, and to rather consider the “public” as a concept to be redefined, and possibly shaped according to circumstances too, the operation of experimenting new socio and economic perspectives would lead to a preliminary investigation over the legal nexus that is said to be present between any body having an administrative role in the relationship and the physical person who actually plays in the name of it, as part of the governance that is known to be in place. Such an investigation is part of the diagnosis of the problem/dispute: it clarify the legitimacy of actions having effects on any involved working relationship. It is a preliminary step coming naturally before any discussion on the legal limits of the administrative power that is going to be exercised. In other words, any discussion on how an existing interest should be better done or composed, requires to preliminary investigate the legal nexuses that are present between the pursued interest and the involved people.

Moreover, while we distinguish the impact of any administrative body, public or private, playing a role upon working and social relationships, also we must consider that any public bodies (educational institutes, public security bodies, social security entities etc.) use to exercise a function which itself is supposed to be transparent to anyone, while private bodies – and thereafter their administrators – are generally not obliged to make their function, nor their powers or their aims to be seen by others (enterprises with limited civil responsibilities do have this duty), nor the scope of the mandate they received from any controlling entities which they might be dependent upon (except for the exercise of public functions, like that of lawyers). This is what makes difficult and tricky to usefully observe, on a legislative-statutory base, the interaction between working relations and the social context wherein they are performed and formalized, that is a context including family relations, informal associations and business connections, more broadly, including the infinite opportunities that the globalist economy is offering.

3. ANALYSIS OF THE THEME IN ITS MACROECONOMIC IMPLICATIONS

To look for solution to complex situations, wherein conflict of values is at stake, typically lead into the sphere

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www.bollettinoadapt.it/old/files/document/7297REL_BW_21_05_10.pdf ; the experiment of legal clinics is born in the U.s.a. but recently it has taken floor in Italy too.

of politics, which is what might increase the difficulty of any ordinary court or adjudicator to settle the dispute in such a way to be acceptable as a precedent.

Generally, it is of major importance to consider how the same range of facts might assume a normative meaning once observed from a macro economic perspective; although the aim of this paper is to focus on a micro economic analysis that emerges at the rising of conflicts between different normative systems, the political implications of any also individual choice is relevant in its macro economic correspondents, if only we accept a dynamic perspective looking for future adjustments toward work and society equilibrium, and it can influence the single real case in return.

To this purpose is explicative a reflection over the legal evolution of work and society in the Sixties, which is when the political movements provoked deep changes in society. In the Sixties, labor legal system advanced relevantly in securing workers’ protections while family traditional assets and their securing models were claimed to be more flexible. Those political movements brought into much more liberalized social customs, and not in western society only, with important civil reforms impacting on traditional family relations, first of all that introducing divorce, but they did not reach a parallel liberalization as for the underneath economic institutions (that were claimed to change as well¹⁰); this can be argued particularly by the experience of the so called “workerist movement”¹¹.

The workerist movement has been recently defined as “*a misleading historical perspective that saw the revolutionary motor-power of the epoch in the workers, rather than in the material dynamics that signed the shift from the capitalism to the communism*”¹². The Sixties’ workerist movement wanted to take a distance from the classical Marxist theory: this latter was promising a revolution but considering workers as the essential (human) part of the capitalist machine, leading to the new society by means of a (consuming) fight, while the workerist movement, instead, denied the definition of workers as productive actors. The worker-ism rather saw a working class just meant as a political one, thus turning the fight from within the economic system to a fight that stays before and outside of the economic system, in contrast to the classical Marxist view that imagines a fight amongst productive forces (work, capital, land) to overrule the capitalism itself.

For the workerists, the conflict, the resistance to the

¹⁰ The observation comes from also a pedagogist like L.Giannini, author of “*La sfida educativa*” Erasmo ed., 2013.

¹¹ M. Tronti, *Operai e capitale*, Einaudi,1966, found many arguments in Foucault’s and Butler’s studies, attesting that also the psychological dymention, as well as the physical one, are part of the social discourse leading to politicts and conflicts.

¹² <http://www.chicago86.org/archivio-storico/miscellanea-arch-sto/84-miscellanea/270-loperaismo-italiano-e-il-suo-sessantotto-lungo-ventanni.html?showall=1>.

economic system and to its technological power, comes first. Thereafter, probably because of a mindset that “could not depart from a definition of the subject as necessarily single subject”¹³ the movement found the political parties’ system to be the tool for playing the needed “transcendent” action, reaching a synthesis into the given complexity; but that solution was to the detriment of the working class autonomy as claimed in the movement premises.

There is a trace of similarity between that (failing) experience at connecting working relations to politics and the modern context, wherein working and social relations are still facing challenges toward recognition of liberties (not from internal extremists, but from severe threats just linked to the global, digital society): today, again, politics are called to ride the social call for change by thinking back to what an acceptable “social standard” should be.

This is involving both the sphere of conflicts based on different economic dependences and conflicts based on (possibly) shared values on the internet. The digital age is apparently giving the conditions to enjoy social and economic autonomy at such a level that was hard to predict few decades ago, and it is through the legitimacy of such technical opportunity that many individual choices, as well as collective once, are taken, regardless of the social and economic effect that they might cause on the relevant sphere of others. Many important factors having an impact on our working relations, as well as on our social relations, fundamental rights included, are nowadays staying on digital platforms and digital clouds, the transfer of (digitally available) datas has become a matter of economic speculation, as well of social dynamics, thus posing issues on delicate borders of social security and public order too, as well as corner stones like that on freedom of expression¹⁴.

Political movements are nowadays concerned with how we should deal with the increased liberty that technology is offering to individuals, where the more and more often the economic choices are a reflection of a technically determined domain, where after politics and public institutions struggle to delineate their own space of intervention.

Whereas in the Sixties the claim for a greater liberty at the civil (and micro) level of relationships did not reflect a greater liberty at the economic level, in its micro and macro implications, in the era of internet it seems to be possible to achieve a greater liberty at the economic level too, based on networking and increased information and digital formation, the price of which are nevertheless very hidden and far from clearly distributed. While in the Sixties the gap staying between the “real world” and politics laid upon the abstractions of political parties and

social intermediates like trade unions (having a large playground together with institutional players), today global citizens are called to be directly more conscious of their own voice, notwithstanding their freedom to associate and/or to delegate others speaking in their own interest. The greater (economic) autonomy the global age is (technically) offering is defended by activist movements and by liberal politicians belonging to both left and right parties, while it is regarded with some suspect by the traditional political guards, that is rather focused still on reflections of networking on temporal and territorial shortcomings. It is thus not a coincidence that, as a reaction against the promises of the connected and globalized world, the actual political debate is dragged, especially on part of the more traditionalist parties, to focus on delimitation of territorial borders.

As a matter of method, filling the gap between concrete needs and social aims is what make any policy to be reliable. Like in the Sixties the excessive dose of abstraction was responsible for incoherence between the workers’ claim for autonomy, and their plain delegation to political parties playing against the economic system (being, on the reverse, materially integrated), so in the new millennium an excessive dose of abstraction in considering opportunities and risks delivered through the internet and new technologies might lead to a claim for more freedom that is not consistent with material and concrete needs indeed: “*abstractions are necessary in mathematics, nonetheless they should not be followed for themselves, nor they should conduct to a point of no return from earth*”¹⁵.

¹³ M. Bletcher, *Post operaismo* op.cit., 107.

¹⁴ See, more specifically on this topic, B.Grandi, *Freedom of expression between general categories and enforcement*, in International Journal of Business and Management Invention, 2016.

¹⁵ Citation of A.Markov Jr from P.Zellini, *La matematica degli dei, gli algoritmi degli uomini*, Adelphi, 2016, p. 172; the author argues that “*verum et factum convertuntur*”, meaning that the truth of something depends on its being accomplished with action (so the solution of a matematic problem depends on the possibility of an automatic execution to efficiently calculate it, given a physical space and time, which is the only possibile strategy when facing big problems, p. 213).