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# Some recent EU developments and potentialities in social rights discourse

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SUMMARY: 1. Background. – 2. The institutional framework: strategies and objectives in the social field. – 3. The social rights discourse and the 'transformative' approach. – 4. Education and training: further insights for the 'transformative' approach.

## *1. Background*

In the context of the internationalization of the economy, the European social and welfare models are at the centre of the political debate. It is recurrently claimed that European welfare models, which encapsulate implicitly all the dispositions which protect the workers' status on the labour market as part of European common traditions of values, would imply rigidities and, ultimately, extra costs which may impair economic productivity, reduce competitiveness and account for the slow pace of economic growth.

The current debate is still focusing on the tension between the efforts to protect and implement labour rights and the forces of globalization<sup>(1)</sup>. Such a tension is mounting under the worsening of the economic context: the deep recession, following the banking crisis, presents us with a number of

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(1) Concerns for this tension started gaining new emphasis at the turn of the century. In a comparative and international perspective, see the book edited by BOB HEPPLER (2002) and, in particular, the contributions by LORD WEDDERBURN and S. SCIARRA. A controversial issue at stake was – and still is – the legal status of social rights: G. DE BÚRCA – B. DE WITTE (2005); P. ALSTON (2005) and, in particular, the contribution by S. DEAKIN. MORE IN GENERAL, this tension has also raised interest over the 'crisis of concepts' in labour law: in an *evolutionary* perspective, see the seminal work by S. DEAKIN - F. WILKINSON (2005), spec. p. 18. More recently, cf. B. HEPPLER (2009), critically questioning the relationship between the economic and financial crisis and (the very survival of) the system of labour law and social protection developed in Europe since 1945. With regard on the Italian doctrine, see S. SCARPONI (2001); F. GALGANO (2005); M. NAPOLI (2006) and, in particular, the contribution by A. PERULLI.

major problems which threaten the very survival of the systems of labour law and social protection that have developed in Europe since 1945.

It is obviously out of the scope of this paper to analyse such problems in depth. Nevertheless it is worth mentioning them as representing very good reasons for (re)considering the relationship between economic and social policy.

Due to the disputed inspiration and objectives, an important debate has taken place since the origin of the Community on whether to oppose a project of European integration brought into being as one to create a common market and aimed at the institutionalisation of economic rationality or rather accept that such a perspective was not to be considered unavoidable. From one side, the integration process has been considered as basically relying on the guaranteeing of economic liberties and on the control of economic power by competition law; on the other, the role of strong European traditions of labour movements, social doctrines of the Catholic heritage and social liberalism have been considered as balancing factors of the economic dimension in the European integration process<sup>(2)</sup>.

## *2. The institutional framework: strategies and objectives in the social field*

After the Lisbon amendments to the Treaty new social objectives have gained visibility. This is the case of a social market economy aiming at full employment and social progress, the combating of social exclusion and discrimination, solidarity between the generations, the promotion of economic, social and territorial cohesion and solidarity between the Member States.

Whether and to what extent the Lisbon Treaty will allow for further progress in consolidating the social dimension of European integration is still a very disputed question<sup>(3)</sup>.

Nevertheless, the dispute is open and there is room for further and new developments worth being explored.

In the Preface to the 2020 *Strategy for smart, sustainable and inclusive growth*, Mr. Barroso himself has somehow put emphasis on this by admitting that «*this is the moment where we recognise that 'business*

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(2) D. J. GERBER (1998); C. BARNARD (2012), part I, 33 *et seq.*

(3) D. GOTTARDI (2010).

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*as usual' would consign us to a gradual decline»<sup>(4)</sup>. To avoid such a decline, the 2020 Strategy draws on a mix of EU and national efforts which should be mutually reinforcing.*

Under the third out of three mutually reinforcing priorities set out thereof (the one titled «*Inclusive growth – a high-employment economy delivering economic, social and territorial cohesion*») and within the Flagship Initiative, «An Agenda for new skills and jobs», the Commission has committed itself to work «to strengthen the capacity of social partners and make full use of the problem-solving potential of social dialogue at all levels (EU, national/regional, sectoral, company), and to promote strengthened cooperation between labour market institutions (...)».

From an even wider perspective, partnership is considered as a key element in the elaboration of national reform programmes as well as with regard to the implementation of the same. This idea of partnership to be pursued at all levels, so to bring «the priorities of the Union closer to citizens», is gaining growing importance in the EU strategies and developments and offers grounds for exploring the rising of a trend aimed at enhancing some (new) dimensions of social justice and fill the endemic democracy gap in the EU institutional framework.

In a more restricted though crucial perspective, partnership is strictly committed with the impact and scope of the inclusion of new social objectives within European Union strategies and priorities.

It is worth pointing out Art. 3 of the Treaty of the European Union (TEU) establishing that the Union «shall work for the sustainable development of Europe», which is intended to be also based on «a highly competitive social market economy, aiming at full employment and social progress». Besides, the Union shall combat social exclusion and discrimination and shall promote social and territorial cohesion.

It is also worth mentioning here the horizontal “social clause” contained in Art. 9 of the Treaty on the Functioning of the European Union (TFEU), according to which «in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health».

These are the fields which mostly fall within the competence of the Member States and where only flexible and non-binding instruments for coordinating national policies are to be used. As is well known, the Action Programmes from 1995 onwards have been characterised by their

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(4) COM(2010) 2020.

«heavy reliance on soft law measures which are persuasive rather than coercive in nature»<sup>(5)</sup>.

Most importantly here, soft law measures have formed the principle legislative vehicle under the new Employment Title.

As has been pointed out, the Amsterdam Treaty and the Lisbon strategy have brought about a «seismic shift in EU social policy as it moves from being focused solely on a rights based agenda, where the EU legislates for employment rights, towards employment policies with a new method of governance based on guidelines, benchmarking, targets, National Reform Programmes and recommendations»<sup>(6)</sup>.

This shift has to be taken into due account. This means taking (more) seriously the need for coordination among different levels of government, which also means focusing on the many actors involved and the need for clearer rules about responsibility in what concerns the implementation of strategies as well as in what concerns the forms of assessing the implementation and impact of the strategies themselves.

As the Commission itself clearly puts it, both in the 2020 Strategy and in other connected documents, responsibility for a big part of social policy lies at national level. Despite the Commission's commitment to co-operate, supporting Member States, it remains the importance of further considering national level responsibility in making effective the greater and more deliberate synergy between the classic Community method and new governance tools, notably the open method of coordination (OMC), which is an essential albeit very disputed instrument in order to achieve the common objectives laid down in the field of social inclusion and social protection.

A good perspective by which exploring the coordination challenges is offered by social dialogue intended in a very broad meaning, including bipartite and tripartite practices, both within and outside an institutional context. The reason why social dialogue would offer such an interesting perspective is deeply concerned with its aptitude to work as a coordination tool, i.e. to grant wide degrees of coordination among different levels (the EU one as well as the national and regional ones) and different forms (legislation and negotiation) of regulation.

As a fact, social dialogue has gained growing importance in EU framework.

As the Commission itself puts it (COM(2004) 557 final, p. 3), social dialogue «embodies the principle of social subsidiarity and complements

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(5) C. BARNARD (2012), 63.

(6) C. BARNARD (2012), 44; M. BARBERA (2006), spec. 309.

the national practices of social dialogue and industrial relations, while acknowledging the autonomy of social partners – i.e. the representatives of management and labour (employers’ organisations and trade unions) – and the diversity of industrial relations in Europe».

The purpose of the Commission, at the mid-term point of the Lisbon Strategy, was indeed «to promote awareness and understanding of the results of the European social dialogue, to improve their impact, and to promote further developments based on effective interaction between different levels of industrial relations» (p. 4).

Such interaction with different levels of industrial relations as well as the ‘complementary function’ it could play with regard to EU policies do represent a key element to understand the *social impact* of most recent (institutional) developments of the European integration process as well as of (more or less innovative) social dialogue practices, both within and outside the institutional framework<sup>(7)</sup>.

This key element would require closer examination, far beyond the scope of this paper. However, there are some few points that can be stressed here in order to shed further light on the intimate connections between social dialogue practices and the open method of coordination, on one side, and the acknowledgement of social rights in the EU institutional and legal framework.

To this end, some further explanatory remarks are to be made not only to stress the meaning of the concepts here employed, but also to introduce education and training as a good example of the need to *rethink* the nature of fundamental rights and move forward traditional paradigms and the many limitations they present.

### 3. *The social rights discourse and the ‘transformative’ approach*

The need for new paradigms to face existing criticisms surrounding any social rights discourse is very well explained in the context of the transformative approach suggested by Sandra Fredman.

This approach is intended to question the potential of the EU to operate as a «powerful engine buttressing social rights against the *race to the bottom* created by competitive forces», provided that «the *sui generis* nature of the EU destabilises some of the basic assumptions behind social rights (...)».

Social rights are reconceptualised, not as burdens on business, but

(7) M. PERUZZI (2011).

as essential contributors to efficiency». To be clearer, «(t)he traditional conceptions of rights as individual, negative, judicially enforceable, and fault based are challenged by mainstreaming, positive duties, and other proactive initiatives»<sup>(8)</sup>.

On these basis, a proactive model of rights would seemingly offer important advantages over individualised mechanisms with all their intrinsic weaknesses. Drawing from Fredman's reconstruction, (fundamental) rights vest in individual subjects and are exercisable against other individuals or the state; the correlative duty is generally a restraint on the state; it is only when an individual can show that there has been an interference with the right that the remedial structure of the law comes into play. In other words, remedies are retrospective, individual, and based on proof of breach or fault and courts are seen as the primary means of enforcing rights, which entails that it is generally left to the individual to take the necessary steps to enforce his rights<sup>(9)</sup>.

There are so many self-evident reasons why to recognise that traditional notions of fundamental rights have significant limitations. The very evolution of Labour law over time in a large part of Continental Europe shows the crucial importance of a quite different perspective, basically centred on the value of social interaction and aimed at granting effectiveness and efficaciousness of rights in a collective and institutional way. In other words, the state is apparently supposed to be a force for enhancing freedom through the provision of social goods, while collective autonomy is the only way to grant power *on the labour side*<sup>(10)</sup>.

As is well known, under the current economic crisis the provision of social goods is undergoing deep restrictions, also because the Member States are constrained by the budgetary limits set by the EU's Stability Growth Pact (SGP)<sup>(11)</sup>, with worrying consequences on the welfare state and public services.

Growing difficulties are also present on the side of collective autonomy. Apart from any other considerations concerning the increasing weakness of union organisation and action in the national contexts, the

(8) S. FREDMAN (2006).

(9) Still quoting S. FREDMAN.

(10) O. KAHN-FREUND, 6.

(11) The SGP is defined by the Treaty on the Functioning of the European Union (TFEU) and implemented through secondary legislation. In March 2012, with the exception of the Czech republic and the United Kingdom, all EU countries signed the Intergovernmental Treaty on Stability Coordination and Governance, which contains the Fiscal Compact. This Treaty is basically aimed at ensuring that the national processes are able to fulfill European obligations and that national policy is in line with the requirements of the SGP.

many ambiguities and difficulties present in the EU scenario are suggesting that social dialogue will not play any significant role in removing inequalities in the bargaining power: without a safety net of non-negotiable fundamental rights, particularly freedom of association and rights to bargaining and strikes, there is no means of preventing compromise over principles.

This being the scenario, the transformative approach would suggest to take into consideration both the clear dangers and «the exciting new set of parameters»<sup>(12)</sup> offered by the European Employment Strategy and the Open method of coordination. In this perspective, the challenge to take up is rethinking fundamental rights: instead of implying a reversion to the individualist model, «rights should have a prescriptive role, providing the normative guidelines within which policy must operate»<sup>(13)</sup>. This obviously implies switching the focus from what increasingly proves to be ineffective, without denying its roots and value but rather stressing on some potentialities lying (still) hidden in the current institutional and social context.

Good reasons why to engage in this direction do already exist and are particularly evident when considering the mainstreaming approaches.

Mainstreaming approaches «are intended to be *anticipatory* (rather than essentially retrospective, or relatively late insertions into the policy-making process), to be *participatory* (rather than limited to small groups of knowledgeable), and to be *integrated* into the policy-making of those primarily involved (rather than add-ons perceived to be exogenous by policy makers)»<sup>(14)</sup>

More in particular, a significant combination of fundamental rights and soft law is found in the field of gender equality, where the individual rights established in a number of directives have been supplemented by gender mainstreaming, so unveiling some of the key features of a new human-rights paradigm.

Mainstreaming focuses on «proactive, institutional change, with responsibilities born by those best able to bring about change»<sup>(15)</sup>. This basically stresses the need to identify *who* is accountable for the implementation of the framework strategy. This obviously calls into question the role of the Commission, which is also required to encourage participation by all stakeholders. The social partners should play indeed a central role, especially when negotiating framework agreements in social dialogue.

(12) S. FREDMAN (2006), 52.

(13) *Ibidem*, at 53.

(14) C. MCCRUDDEN (2007), 77.

(15) S. FREDMAN (2006), 53.

As argued by some scholars with regard to gender mainstreaming, despite its apparent bureaucratic and rigid nature, «the EU provides multiple points of access to the policy process, and multiple allies among the European policymaking élite»<sup>(16)</sup>.

Of course, the assessment of such new paradigm is complex and brings about many questions, especially with regard to the effectiveness of institutional changes as well as to the nature of the objectives pursued in the context of the multi-layered structure of EU governance.

Things have not changed much with the coming into force of the Lisbon Treaty, when the Charter has become directly enforceable by the EU and national courts. Art. 6(1) of the TEU provides that «the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights». There is no direct incorporation of the Charter in the Lisbon Treaty, but the Charter is given the same legal status.

However, the point to be stressed here is mostly concerned with the many ambiguities and tensions within this new vision for Europe: tensions between EU and Member State competence, between economic and social aims, and between traditional and transformative notions of human rights.

Notwithstanding this, criticism of the Charter from the perspective of the traditional rights paradigm takes on a different perspective if the Charter is viewed in the context of new forms of governance such as mainstreaming and the OMC.

Particularly important is «the participative nature of these processes, aiming to incorporate a wide range of actors in a deliberative process, enhancing (...) their ability to deal with complex, indeterminate and often sensitive policy areas»<sup>(17)</sup>.

In this perspective, the Charter can perform a crucial role within policy making by providing «a substantive underpinning to otherwise free-floating decision-making»<sup>(18)</sup>.

Mainstreaming might therefore be intended as a way to require a consideration of the impact on social rights of all policy making and implementation: «without the bedrock of fundamental rights, processes such as social dialogue and the EES would quickly prioritise economic over social concerns, reflecting the greater bargaining power of economic interests»<sup>(19)</sup>.

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(16) S. FREDMAN (2006), 54, quoting Pollack and Hafner-Burton.

(17) FREDMAN (2006), 59; DE BURCA (2003), 892.

(18) S. FREDMAN (2006), 59.

(19) *Ibidem*.

#### 4. *Education and training: further insights for the transformative approach*

As argued before, there is an intriguing connection between social dialogue practices, the EES, the OMC or mainstreaming approaches, from one side, and the social rights discourse, on the other.

This connection is particularly intriguing with regard to education and training issues as an important though largely neglected part of employment policy<sup>(20)</sup>, which offers interesting insights for further use of the transformative approach itself.

Though there are many differences between education and training issues and the respective fields of competence<sup>(21)</sup>, there is no doubt that education and training contribute to the personal and professional development of individuals and benefit society as a whole<sup>(22)</sup>. It is not by chance that they are argued to be an essential element of today's knowledge society and economy.

To be more precise, it is (at least) since the 1993 White Paper on Growth, competitiveness and employment<sup>(23)</sup> that education and training has been definitely acknowledged as having a fundamental task in promoting the development of individual and the values of citizenship» but also - and above all - a key role in «stimulating growth and restoring competitiveness and a socially acceptable level of employment»<sup>(24)</sup>. As a fact, since its origin, this topic has shown its intrinsic ambiguity or better say ambivalence<sup>(25)</sup>, in as far as the development of the individual is given a functional character: in the very end, it is supposed to serve market needs, though disguised under different means and targets, as the formula 'adaptability' (commonly referred to the labour force)<sup>(26)</sup>

(20) M. FREEDLAND (1996), 297.

(21) The Maastricht Treaty amended the existing vocational training provision (now Article 166 TEU) and introduced a provision granting competence to the EU in respect of education (now Article 165 TEU). The member states were against any common policy in this area, so that the Community shall only facilitate cooperation between the member states and, if necessary, supplement their action, while precluding harmonization.

(22) P. CRAIG, M. FREEDLAND, C. JACQUESON, N. COUNTOURIS (2007), 232.

(23) COM(93) 700.

(24) White Paper, Chapter 7, p. 117.

(25) For a critical analysis, see A. SUPLOT, 2009, 166.

(26) In the opinion of the UE Commission «a skilled and adaptable labour force is the key to future employment and productivity growth» (Commission's Report *Employment in Europe 2003*, [http://europa.eu.int/comm/dgs/employment\\_social/key\\_en.htm](http://europa.eu.int/comm/dgs/employment_social/key_en.htm)). As appears from all relevant documents and literature concerning UE strategies of last decade, adapt-

clearly reveals. As a fact, a rough overview of European policy attempts to address the many challenges being faced in the current scenario would confirm the growing role of education and training as well as its underlying and pretentious connection with the diffusion and implementation of active labour market policies, that is to say the wide variety of measures constituting part of the even wider notion of labour market policies<sup>(27)</sup>.

Such measures have gained importance along with the shift of attention from demand-led to supply-led policies, which are basically aimed at enhancing the employability and adaptability of the unemployed<sup>(28)</sup> and, more in general, of most vulnerable groups.

This trend is being driven by several factors and different ideological labels are used to strengthen the strategies aimed at improving employability, also by way of adaptability policies and practices.

Despite the widespread neoliberal critique of market regulation behind the use of terms like employability and adaptability as well as of the appealing concept of flexibility (that is strictly connected with the just mentioned ones), there are grounds for believing that an alternative approach is possible, if not necessary. To tell the truth, such an alternative approach has already been suggested based on the concept of *capability*, that is to say the term used by Amartya Sen to introduce a new dimension into economic theory and, for the present purposes, into current orientation of normative law and economics analysis<sup>(29)</sup>. Thanks to this approach it would be possible to throw new light on the relationship between the economy and the legal system<sup>(30)</sup>, arguing that market has not to be seen as an end in itself, but as an institution for enhancing the substantive economic freedom of individuals.

ability is (still) acknowledged as a means to increase an individual's employability, so to tackle the employment crisis and – especially by this way – respond to the main challenges of current economies and societies.

(27) According to M. FREEDLAND *et al.* (2007), the term 'labour market policies' potentially encompasses a large and varied array of measures aimed at regulating the labour market while rendering its functioning efficient and stable.

(28) *Ibidem.*

(29) As it is well-known, normative law and economics is commonly intended to express the crucial importance of the concept of efficiency applied to legal rules and, in this sense, it appears as a very disputed approach when applied to any social rights discourse. For a critical analysis on this and a first wide-reaching attempt to use the 'capability approach' to understand the relationship between the legal system and the market order, see S. DEAKIN, A. SUPPIOT (2009), *passim*.

(30) This is, at least, the ambition underlying the work by S. DEAKIN and A. SUPPIOT (references in the previous footnote), basically aimed assessing (and contrasting) the deregulatory critique of social legislation (spec. 14 ff.)

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Taking *capabilities* seriously (also) in the context of legal discussion would indeed show that “there is a growing use of legal techniques which reflect a capability-enhancing approach to dealing with issues of asymmetries and externalities in contractual relations”<sup>(31)</sup>.

When applied to labour market regulations and policies, the capability approach would seemingly offer template for further analysis and suggestions. This proves particularly true with regard to the concepts of employability and adaptability, especially if confronted with latest UE developments in the field of education and training. In this perspective, education and training represent a good test case for reconsidering the preconditions for a different market order, a sustainable one, provided that sustainability is referred to a person-centred concept, relying on his/her substantive freedom.

To put it into more concrete terms, using capability-related concepts<sup>(32)</sup> in the field of labour law would allow to reconsider some basic ideas or regulatory interventions that are (becoming) mostly ineffective and maybe try to contrast – if not to reverse – the trend towards flexibility in the most exclusive sense of increasing variability of legal norms governing employment and wage security.

The Italian case is becoming mostly paradoxical with regard to this trend which is basically shown by the decline of principles that once formed the core of the Italian approach to the operation of labour legislation, namely the principle of ‘inderogability’ or mandatory effect of labour law rules. At the same time, very little attention is being paid on the transformative attitude of alternative techniques and for reconceptualising the relation between the legal system and the market. A good test case of this would be offered by the professional capacity of the worker understood as his/her ability to participate in a labour market increasingly characterised by flexibility, multi-tasking and career shifts. It is a common opinion that this idea “has been coalescing around a number of developments in the laws governing the employer’s duty to provide training and the state’s involvement in employment policy”<sup>(33)</sup>.

Many ambiguities are still surrounding these issues. As already argued, it is widespread the tendency to consider the market as an end in itself, with the subsequent assumption that the individual is required

(31) S. DEAKIN (2009), 22.

(32) In general, see S. DEAKIN and A. SUPLOT, 2009; for insights with regard to the Italian experience, see A. VIMERCATI, 2009. For a recent study inspired by a similar methodological approach, see S. BORELLI, P. VIELLE (eds), 2012.

(33) S. DEAKIN, 2009, 23.

to be ‘adaptable’ to changing market conditions. Despite this, there are many reasons why to insist in the effort to reverse the perspective. This would indeed mean taking *capabilities* seriously and requiring that employment practices be adapted to the circumstances of the individual<sup>(34)</sup>.

For the present purposes, it is sufficient to briefly recall some recent UE developments that are seemingly offering new grounds for insisting in this perspective against the risk of accepting a pure market-oriented interpretation of concepts like employability and adaptability.

Focusing either on employer’s duties to assist in retraining or human capital formation might be helpful in *transforming* the market in an institution for enhancing the substantive economic freedom of individuals.

In front of the harshness of the current economic crisis, its close link with high unemployment for both young people and adults as well as other long-term trends (i.e. technical progress, globalisation, ageing population, greener economy) are raising the question of whether the skills and qualifications provided by the European educational system will be able to satisfy changing labour market needs<sup>(35)</sup>.

Also because of this, it seems worthwhile to consider the potentialities of education and training as a proactive strategy, in the perspective that has been explained before, which basically requires taking into account the overall context of the EU integration process, which also imply not to consider labour market institutions in isolation<sup>(36)</sup>.

### 5. *Scope and perspective of mainstreaming approaches*

Taking into account the overall context of the EU integration process is basically intended, here, to focus on the intrinsic “transformative” potential of education and training «to “mainstream” fairness issues into

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(34) For a more in-depth explanation of these arguments, see S. DEAKIN and A. SUPIOT, 2009. In a similar perspective, see S. BORELLI, P. VIELLE (2012), *passim*.

(35) CEDEFOP, *From education to working life*, 2012, [http://www.cedefop.europa.eu/EN/Files/3063\\_en.pdf](http://www.cedefop.europa.eu/EN/Files/3063_en.pdf). The importance to deal with these problems is particularly clear if one thinks to the trends that have had a deep impact on job quality and its regulation in European countries: the flexibilisation of employment relations and the erosion of collective bargaining – from one side – and the transformation of the welfare state, on the other, which at its turn reflects a shift towards more market-oriented public policies: see J.M. BONVIN, N. CIANFERONI, F. WIDMER (2012), p. 259.

(36) As put by D. ASHAGBOR (2005, 49), «employment protection legislation may well be contained within a wider institutional framework which provides incentives to stabilize employment, and a supporting infrastructure that enables firms to benefit from efficiency advantages of internal labour markets and relational contacts».

public policy»<sup>(37)</sup>. As has been efficaciously put, this is «a particularly important issue if the problem is defined, as it increasingly is, as involving (...) the larger issue of unacceptable inequalities affecting women and particular disadvantaged groups». Drawing from this suggestion, issues concerning precarious workers or other “disadvantaged” people (i.e. older long-term unemployed, young people etc.) might be included within policy-making process.

To this end, the notions of employability and adaptability could prove useful if re-interpreted as “person-oriented” concepts.

At this regard, it is not useless to point out that the EU institutional framework – i.e. the legislative as well as the policy framework – is not only offering new grounds for theoretical debate, but also for experimenting with the proactive model, that is to say a model that, «instead of fixed and predetermined legal rights or obligations», «produces norms which are dynamic and renegotiable, capable of being implemented programmatically and subject to constant review»<sup>(38)</sup>.

This reversal of perspective – that is here suggested to be considered as a “transformative” one – might raise harsh criticism, which might also disguise some sort of endemic prejudice. However, arguments to bolster this idea can be found both in the EU legislative framework and in the employment policy EU agenda as integrated and updated by the other – though controversial – strategic plans that have become part of the EU economic governance<sup>(39)</sup>.

With regard to the legislative framework, it is worth noting the right to education and to have access to vocational and continuing training, as acknowledged by Art. 14 of the Charter of fundamental rights of the European Union.

With regard to the policy framework, attention has to be paid on the two interconnected policy-making processes both launched at the beginning of the new century by the European Councils at the summit that have taken place – respectively – in Lisbon and in Laeken<sup>(40)</sup>.

(37) C. McCrudden (2007), 77.

(38) This is the definition suggested by S. Fredman (2008), 190.

(39) Within the framework of the *Stability and Growth Pact* and under E the Europe 2020 strategy for *smart, sustainable and inclusive growth*. In this context, further light should be shed on other connected strategies, as it is the case of Europe 2020 – *An agenda for new skills and jobs* and the *Bruges communiqué* (2010) aimed at reviewing the Copenhagen Declaration (2002) launched the European strategy for enhanced cooperation in Vocational Education and Training (VET), commonly referred to as the *Copenhagen process*.

(40) Articles 165 and 166 of the Treaty on the functioning of the European Union foresee the Union to contribute to the development of quality education and to implement a voca-

As a fact, both frameworks are not only offering new grounds for theoretical debate, but also for experimenting with the proactive model.

Again, it is helpful recalling the important lesson drawn by gender legislative developments and policies in that it has contributed to show that simply imposing external norms on a body is unlikely to achieve real change<sup>(41)</sup>. This is why the proactive model is assumed as an attractive one (*supra*, par. 3). This will prove particularly true if the role played by EU structural funds will (also) be taken (more) seriously, in the sense that they might ensure that proactive strategies are firmly centred on fundamental rights rather than political discretion<sup>(42)</sup>. Continuing to follow the example of gender mainstreaming, regulations governing the Structural Funds might be likewise “revamped”<sup>(43)</sup> to include greater recognition of the importance of these issues.

In the end, all the key elements of mainstreaming are to be used in order to achieve the prescribed aims and, ultimately, to realize institutional change.

Against the risk that this method of governance may become “purely political”, with no normative dimension, it is suggested to put particular attention «to establishing mechanisms of accountability, and appropriate incentives and sanctions to ensure that the norms are in fact carried out»<sup>(44)</sup>.

According to the (many) authors that have explored this method of governance, a crucial means of accountability is *peer review*, which

tional training policy by encouraging co-operation between Member States. On this legal basis, several initiatives have been adopted. For the present purposes, see the *Strategic framework for European cooperation in education and training* (“ET 2020”) and the *Council conclusions* of 26 November 2012 on *education and training in Europe 2020 – the contribution of education and training to economic recovery, growth and jobs* (2012/C 393/02). More in particular, see the *Council conclusions on the social dimension of education and training* (2010/C 135/02); with special regard to lifelong learning strategies, see COM/2012/485 *final* and SWD(2012) 253 *final* del 5.9.2012. For a recent analysis, see A. Vimercati (2012).

(41) To tell the truth, such a lesson can be drawn from the very history of labour law, if one thinks to the role played by the social forces and, more in particular, by collective sources of regulation. At the same time – and leaving aside the role played by the courts – it cannot be undervalued the contribution of auxiliary legislation as experimented – in particular – in the Italian context and in the British one.

(42) Suggestion in this perspective are offered by S. FREDMAN (2008), 190. Though the author focuses above all on equality (and gender) issues, she points out that proactive models “also range well beyond the employment focus of traditional anti-discrimination law, to include pensions, tax, education, transport, health, corporate policies, benefits, conflict, violence and criminal justice”.

(43) C. MCCRUDDEN (2007), 78.

(44) S. FREDMAN (2008), 160.

«imposes on implementing “agents” the obligation to justify the exercise of discretion they have been granted by framework-making “principals” in the light of pooled comparable experience. In peer review, the actors at all levels learn from and correct each other»<sup>(45)</sup>.

Responsibility for change is therefore supposed to be realized progressively and is premised on the continuous participation of all actors through the *policy chain*.

As a conclusive remark, there are reasons to believe that mainstreaming might disclose unexpected results if only the focus will seriously shift to its internal dynamics and their anticipatory and participatory key elements as well as to the necessary integration of the different dimensions involved, which are finally aimed at achieving institutional (and cultural) change.

Responsibility for change is therefore supposed to be realized progressively and is premised on the continuous participation of all actors: the institutional ones as well as the stakeholders. In this perspective, social dialogue as revised by the Laeken Declaration could offer new opportunities for progressing towards this direction if only all the actors involved will interpret their role in a more appropriate way, which basically means succeeding in promoting individual and collective *capabilities* based on a fair and efficient use of rights to monetary and institutional resources for individuals.

As has been argued, the right to education – that has been called a multiplier right because of its attitude to facilitate other rights – proves to be a very good opportunity for all the parties involved to experiment with such an institutional challenge. Education might be indeed «the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain to participate fully in their communities»<sup>(46)</sup>.

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### *Abstract*

*The paper aims at (re)considering the potentialities of social rights in the context of the European Union integration process as challenged by globalization trends and by the unfavourable economic context. Following a short description of the most significant developments in the field of social policy, the paper focuses on the growing importance of objectives and strategies as opposed to the traditional structure and function of fundamental rights in European welfare models. It is argued that traditional concepts and categories in this field have to comply with the many difficulties of the current scenario, including the multi-layered structure of EU governance. To this end, the so called transformative approach is used as a conceptual framework to be further explored and better exploited in order to give social rights new potentialities. In this perspective, special attention is paid on mainstreaming approaches and it is argued that recent developments in the field of education and training offer good opportunities for testifying such potentialities, as ultimately suggested by a sort of intrinsic aptitude towards the three key elements of mainstreaming: the anticipatory and participatory ones as well as the necessary integration of the different dimensions (and actors) involved.*