

18.-Social rights protection in times of crisis

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SOCIAL RIGHTS PROTECTION IN TIMES OF CRISIS

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Abstract: This work analyse fundamental rights protection, particularly social ones and social dimension in European Union and the consequences of actual economic crisis.

We study, from a multilevel constitutionalism perspective, the different levels of legal rights' realization; the connection points between them; the way in which the multilevel rights system can contribute to consolidate the standard of protection in times of economic and social crisis, and democracy demands that may limit the discretion of public authorities in the framework of a good governance in the crisis we live.

Key words: social rights, social dimension, economic crisis

Summary: 1.- MOTIVATION; 2.- SOCIAL RIGHTS AND THE SOCIAL DIMENSION IN EUROPEAN UNION. 3.- MULTILEVEL PERSPECTIVE IN RELATION TO SOCIAL RIGHTS AND SOCIAL DIMENSION. 4.- ECONOMIC MEASURES AND SOCIAL DIMENSION IN EUROPEAN UNION. 5.- CONCLUSIONS. 6.- REFERENCES.

1. MOTIVATION

European integration can be structured as a economic, social, political and legal process with special and plural characteristics and a nature and future in ongoing discussion.

It is important to point out the dual economic and social dimension of European integration manifested in Treaties and European Court of Justice Case Law.

Fundamental rights protection in European Union has changed with the years.¹ At first, the Treaties constituting European Communities were silent on human rights protection, and ECJ had to make it possible.² Unlike fundamental rights, market freedoms have always enjoyed an explicit relevance in the Treaties as instruments to serve the attainment of market and economic integration.³

We leave aside the “conceptualization” of market freedoms like fundamental rights, question discussed in the literature;⁴ but clear in the jurisprudence of the Court⁵, where ECJ referred to them in that sense: *Forcheri v. Belgium* (1983);⁶ *UNCTEF v. Heylens*, (1987);⁷ *Dounias v. Minister for Economic Affairs* (2000).⁸

In this sense, the relevance of market freedoms and the second place of fundamental rights, in particular social rights⁹, has been criticized (Poiares Maduro,1999:449).

Nevertheless, fundamental rights have become more relevant with the acquisition of legal force by the Charter of Fundamental Rights of the European Union.

Now, the social dimension and social rights are affected by the actual economic and social crisis. And it is important to see the problems of the realization of a good governance in Europe in relation to social rights and social dimension in times of crisis.

¹We don't want to enter into the literature discussion about the concept of "fundamental rights" and the distinction with the concept of "human rights". However, it is necessary to define the meaning we give to these terms in these lines. We take for good the distinction made by Díez Picazo, in the sense that the difference between human and fundamental rights would be based on the system that recognizes and protects them: internal, in the case of fundamental rights, international, for human rights. Of course, European Union Law is in the ambit of International law, however, given the peculiarities of European Union, it's commonly used the term “fundamental rights” (Díez Picazo, 2005: 389).

² About the crucial role of ECJ vid. Dausés (1985: 398-419); Lindfeldt (2007: 68-78).

³ To study the evolution of market freedoms in European Union Law, vid. Pérez de las Heras (2008).

⁴ About the literature, believing that the conceptualization exist vid. Krzeminska-Vamvaka (2005: 5-6), Lindfeldt (2007:196-208),

⁵ In this sense vid. Biondi (2004: 53-54)

⁶ *Forcheri v. Belgium* , C-152/82, para. 11, referred to free movement of workers.

⁷ *UNCTEF v. Heylens*, C-222/86, para. 14, referred to free movement of workers.

⁸ *Dounias v. Ipourgos Ikonomikon (Minister for Economic Affairs)*, C-228/98, para. 64, referred to free movement of goods.

⁹ We use the term “social rights” to refer labour rights as it is generally used in literature (Rodríguez-Piñero Royo, 2009; Fudge, 2007)

2. SOCIAL RIGHTS AND SOCIAL DIMENSION IN EUROPEAN UNION.

There is no doubt that most of social rights are fundamental rights in European Union Law. Of course, if we study the ECJ case law, we see it clearly, for example in the representatives *Viking* and *Laval* cases. And it's clear in the law literature after these cases (Fudge, 2007: 29-66; Sarrión Esteve, 2010, 2012).

Moreover, social rights are included in the Charter of fundamental Rights of the European Union, in Section IV of the Charter, named with the expression "Rights to Solidarity". Of course, not every rights to solidarity are social or labour rights, only work-related rights to solidarity. It's also possible to understand that "not all rights are granted equal status", and make a typology of legal positions in the Charter (Menéndez, 2003: 183-187).

In this sense, we can see the difference between fundamental rights, ordinary rights, and policy clauses of work-related rights to solidarity. (Menéndez, 2003, 183-186). The distinction is based on an attractive interpretation of article 51 of the Charter:

- 1) Fundamental rights are claims that could be used against the action of the ordinary legislator. Of course the ordinary legislator can regulate them, but must respect their essence: Fundamental rights: right to work (article 15), collective bargaining and action (article 28); working conditions respecting health and safety at work, and limited working hours and paid holidays (article 31.1 and 2).
- 2) Ordinary rights (clauses that refer to national legislation to determine the substantive contained of the right): worker's right to information and consultation within the undertaken (article 27); protection in the event of unjustified dismissal (article 30)
- 3) Policy clauses are norms that require public institutions to achieve a certain objective Policy clauses: protection of the family (article 33.1); consumer protection (article 38)

With Lisbon Treaty, the European Union Charter of Fundamental Rights enters into force. What impact will the Charter have on the balance between social rights, social dimension and the economic market and economic freedoms?

3. MULTILEVEL PERSPECTIVE IN RELATION TO SOCIAL RIGHTS AND SOCIAL DIMENSION

As we know, the Charter reinforces limits on the power of the EU, as sow articles 6.1 EUT, and 51.2 of the Charter (Gómez Sánchez, 2008: 507), and it was an important tool for legitimate European Union, and did not provide for any new rights (Goldmish, 2001: 1201-1216)

Moreover, the Charter “further the development of a more articulated system of fundamental rights, encouraging a *rebalancing* of different goals of European integration”, so social rights could be used as an argument for claiming exceptions to the four freedoms (Menéndez, 2003: 192); and the Charter might contribute to a conflicting situation in which fundamental rights and market freedoms are ranked at the same level (Lindfeldt, 2007: 216)

Certainly, article 6.1,3 of EUT provides that rights, freedoms, and principles in the Charter must be interpreted in accordance with Title VII of the Charter.

In relation of scope and interpretation of rights and principles, article 52 of the Charter, stipulates that when the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), “the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection” (article 52.3 Charter); and when the Charter recognizes rights resulting of common constitutional traditions of Member States, these rights must be interpreted in harmony with them (article 52.4 Charter) (Mangas Martin, 2008: 826-850)

In these two paragraphs the art. 52 is establishing the link between the rights enshrined in the Charter with the ECHR and common constitutional traditions in Member States, which are the sources of fundamental rights recognized by the Court of Justice as general principles of Community Law. The reason of this provision is to exclude any kind of conflict between fundamental rights protection standards. So we can understand that art. 53 provides a limitation on the scope of applicability of the Charter, to prevent a lesser level fundamental rights protection. In this sense, it is equivalent to ask for the highest fundamental rights protection standard of as a "principle of non-regression".

This would mean that the Charter only produces legal effects to Member States if they do not guarantee a higher level of protection, in which case the Charter should be applied (Ridola, 2002: 92), or “should make utterly clear that the Community rights should be interpreted, in line with national constitutional traditions, in such a way as to offer a high standard of protection” (Giubboni, 2003: 15)

In this sense we think that the Charter should be interpreted as a instrument to apply the highest standard of protection of fundamental rights between ECHD standard, national standard and Charter standard (Contrary to what ECJ seems to interprets in the recent case *Melloni*, C-399/11).

And EU institutions and EU Member States should respect fundamental rights highest standard, and of course, EU institutions social fundamental rights and the social dimensions of EU integration in this special economic crisis.

4. ECONOMIC MEASURES AND SOCIAL DIMENSION IN EUROPEAN UNION.

EU economic governance, despite the difficult times of actual economic crisis in which we are engaged, should try to guarantee social rights, particularly fundamental ones and the European social dimension.

Economic crisis has prompted relevant actions by EU and EU member states. In this sense is relevant to point out the named “six-pack” and the Treaty on Stability, Coordination and Governance.

The Six-Pack that entered into force on 13 December 2013, strengthens the Stability and Growth Pact, and reinforces preventive and corrective arm of the Pact. The Pack ensures stricter application of the fiscal rules; operationalizes the debt criterion (with a debt ratio above 60% of GDP); and provides financial sanctions for euro-area Member States, with qualified majority voting for most sanctions.

Nevertheless, some measures to correct the excessive indebtedness of Member States can greatly affect autonomy and social rights as is pointed out by the European Economic and Social Committee on its opinion on the “Social impact of the new economic governance legislation (own initiative opinion) 2012/C 143/05.

In this sense, as European Economic and Social Committee point out that:

-“The new structure for European economic governance (EEG) must, however, safeguard the democratic rights of the Member States and their freely elected parliaments, as well as the autonomy of the social partners and their freedom to conduct collective bargaining”

- “Some of the austerity measures already implemented or planned will have a negative impact, for example on people and businesses, by cutting back on social services or labour market measures for vulnerable groups and on key social infrastructure such as childcare or education. This will have negative repercussions for access to and quality of services, thereby seriously impairing quality of life for vulnerable groups.”

EESC raises the need for sustainable investments in training, infrastructures, and investment products, and promote social economy, social enterprise and social services. And recommends a social investment pact with a convention to establish a strategy based on social progress, and the participation of social partners.

5. CONCLUSIONS

While employment, specially youth employment has been one of the main problems of European social reality, and social protection and exclusion and the welfare system has been one of the key problems in understanding the development of EU integration; in the actual system the crisis is taking a new turn in relation to european coordination after most cutouts in social life areas as well as social rights concerned (for example, cutouts in health, education, etc., and the intern devaluation of salaries and pensions).

Now, EU institutions and Member States are conscious about the difficult of the actual reality to fight against the economic crisis exclusively with economic cutouts. Moreover, EU institutions and Member States must be conscious about the social dimension of european integration as one essential element of the DNA of European Union integration project. In this sense, the respect for social fundamental rights and the social dimension is clear and essential.

As European Economic and Social Committee pointed out we need the participation of social agents in order to obtain a social investment pact with a convention to establish a strategy based on social progress.

The economic dimension is important, but it is no more important than social one, we need social and economic dimensions as the two essential parts of EU integration progress. Without both dimensions the EU would not be itself.

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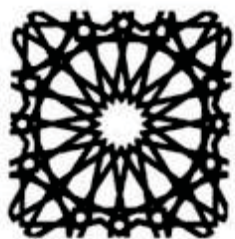
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COMARES

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