Editorial

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1 Introduction

The Eurozone systemic economic crisis from 2009 and after has radically altered the south European jurisprudence concerning social rights protection. As it shown in selected cases from Portugal, Greece and Italy, a shift from asserting and realising social rights to defending their minimum protection has taken place. This shift in social rights protection in the south European jurisprudence will be illustrated and analysed from three separate yet interconnected points of view:

a its legal justification and the tools that are evoked regarding social rights protection (e.g., principle of equality)

b its agenda setting and balancing between national interest and European politics

c the invisible barriers that have to be respected concerning separation of powers and the role of the judicial during an economic, political and human rights crisis.

In the end, it will be underlined that the current economic crisis is more and more forcing the south European jurisprudence to re-capture social rights from a more moral than economic, human rights point of view.

2 The various functions of social rights

Social rights protection in Europe initiates with a great dynamic after the WW II as a result of the European society's determination not only to safeguard human dignity but also to enhance *social integration* and *social pluralism*. In this framework, social rights can be understood in a multi-old manner:

a as the reflections of a given economic system based on the intervention of the state

b as goods and values that a society should protect and gradually fulfil and realise in a form of state or public policy goals

c as the moral basis for the subjects to articulate their claims for social protection against the state

d as arguments regulating the *fair play* between the conflicting social demands

e as claims of political decision making legitimation and of substantive democracy

f social rights have presented the framework for the ongoing social compromises in the field of redistribution of public goods and of substantive equality.

3 Social rights in southern Europe

In South Europe, namely the Mediterranean, social rights protection can be separated from the European social rights paradigm as a whole, though the influence of the German *Rechtsstaat* is immense. Thus, social rights are developed in conditions – in some cases – of extreme poverty, of corporatism, in mainly agricultural and not industrial state intervention economies and in general in the frame of authoritarian regimes, dictatorships. With variations, the social rights protection of south Europe is reflected in the national Constitutions which in some cases refer to an extremely powerful social citizenship. Thus, the Constitution of Portugal (1976) is forged around the understanding of the citizen as a *social subject*, setting the idea of labour and its protection in its epicenter, the Italian Constitution (1947) recognises Italy in its preamble as a Republic founded on labour, while the Greek Constitution (1975) is basing citizenship on the principle of dignity and equality.

4 The social rights acquis in southern Europe

On this relatively solid constitutional basis, the Portuguese as well as the Greek and Italian jurisprudence for almost three decades (from the late '70s -to the mid 2010) have gradually constructed the south European social acquis, the south European social state. This jurisprudence based on constructions, e.g., regarding the principle of substantive equality, the protection of the *core* minimum of social rights and of social autonomy has not achieve in rendering social rights with complete justiciability but it had provided them with the legal safe nets necessary for them in order to be gradually fulfilled and realised in the greatest possible extent. Nevertheless, the acquisitions of this jurisprudence nowadays are challenged by the Eurozone crisis reality, both in an ideological and a normative level. Thus, in the agenda of new-liberalism this

jurisprudence is ideologically criticised for forging and supporting an extremely expensive, ineffective and corrupted social state. At the same time the courts, namely the Constitutional and Supreme national courts are trying to cope with the tensions and conflicts that scarcity of economic sources transfers in the social sphere. In this conditions, the integrative power of social rights seems to be undermined more than never, since their subjects are currently in most of the cases not only struggling against the state in order to protect the social acquisitions of the past but also with each other. This transition is reflected in the jurisprudence of the south European Constitutional and Supreme Courts and signals a shift from a safe-guarding for the social rights to a mainly defensive case law.

5 The recent financial crisis jurisprudence in Portugal

The paradigm of Portugal, best illustrates this argument. In its recent jurisprudence the Tribunal Constitucional of Portugal has produced a gradually empowered jurisprudence regarding the austerity measures enforced after the country's introduction to the European Financial Stability Mechanism and the adoption of *Memoranda*, agreements with the International Monetary Fund and the European Union that define the county's general economic policy towards the direction of reducing the public debt.

In its *first* after Memorandum ruling, the Constitutional Court of Portugal (case 396/2011) considered as constitutional the first austerity measures taken regarding reduces in the public servants salaries and taxation, justifying them in the pressing framework of the Portuguese economic crisis, nevertheless underline that otherwise these measures where infringing the principle of equality.

This argument served as the foundation for the reasoning of the *second* after Memorandum ruling of the Court (case 353/2013). In this judgement, the Portuguese Constitutional Court declared as unconstitutional two provisions (Articles 21 and 25) of the 2012 budget law (N 64-V/2011), according which the legislator suspended for three whole years the payment of Christmas gifts and holiday benefits corresponding to the 13th and 14th salary for the employees and retirees of the public sector. The Constitutional Court founded this decision on Art. 13 of the Portuguese Constitution, which safeguards the principle of equality in the distribution of public burdens, arguing that the introduction of this measure is introducing a tax and unjustified discrimination against employees of the public sector versus the private sector employees. Nevertheless, showing its 'self-restraint' against the legislator and taking account of the urgency and severity of the Portuguese economic crisis, the Portuguese Constitutional Court reduced the impact that the declaration of unconstitutionality had for the national budget law, permitting the enforcement of the measures for the current year (2012) and suspending them for 2013 and 2014.

In its *third* ruling, issued at April (case 187/2013) the Portuguese Constitutional Court went even further, considering as unconstitutional four of the nine austerity measures introduced in the 2013 national budget law. Namely, the court considered as unconstitutional the measures regarding salary and pension cuts in the public sector as well as reductions on sick leaves and unemployment benefits deeming that they violated the principle of equality and the fair distribution of fiscal burdens. The extremely interesting in this case is the way that the court drew a line on cuts specifically aimed at

civil servants. More or less this ruling makes clear that measures specifically aiming at the public sector are considering discriminating and are going to be ruled out as unconstitutional by the court in the future also.

6 The recent financial crisis jurisprudence in Italy

On a much similar basis, in an austerity though not a Memorandum framework, the Italian Corte Costituzionale (Case 223/2012) considered as unconstitutional the reductions in judges' salaries enforced by Law 78/2010 (Misure urgenti in materia di stabilizzazione finanziariae di competitivitá economica). The Italian Constitutional Law adopted the argumentation of the Portuguese Constitutional Court, thus underlining that this measures were partial, targeted and thus infringing to the principle of equality and the fair distribution of public burdens. The measures referred to a 5% reduction in salaries that did not exceed the amount of 150.000 euro and 10% in salaries that exceeded this amount.

7 The recent financial crisis jurisprudence in Greece

The Greek jurisprudence, though the country is the most heavily wounded by austerity measures in the European south, only recently has attempted to restrain the 'Memoranda'. Thus, the Greek Council of the State (Greece lacks a Constitutional Court due to a diffused system of judicial review) in case 668/2012, accepted the measures prescribed in the first Memorandum taking into account the need to serve exceptional and urgent goals of public interest. More specifically, the court accepted that in this case the principles of proportionality, equality, the fair distribution of public burdens and the right to property where not infringed since the need to serve the country's external funding and the enhancement of its financial credibility were crucial. In a bolder framework, a few days ago on April 3rd 2013, the Greek Council of the state ruled against the complete de-regulation in the field of labour by considering as unconstitutional the abolishment of the trade unions right to resolve labour conflicts by appealing to arbitrary committees. The court considered this abolishment as infringing for the very core of collective autonomy as acknowledged in Art. 22 of the Greek Constitution. This judgement follows the recent condemnation of Greece by the European Social Charter Committee regarding the almost complete de-regulation of labour relations under the age of 25 (complaints 65 and 66/19.10.2012).

8 Remarks and conclusions

These selected paradigms from the jurisprudence of the European South provide us with the opportunity for some theoretical and comparative observations. One first remark is that the courts hesitate in many cases to declare as unconstitutional regulations that may in reality be infringing for the constitutions due to the pressing political environment both in the European Union, in the international and national level. This attitude can be understood either as self-restraining, a respect that the judicial shows to the legislative and executive bodies or as hierarchising the protection of the general in this case financial

interest as more valuable. A second remark is that the courts find it easier to consider austerity measures as unconstitutional when their moral dimension is more apparent from their economic character. Thus, for example, it was easier for the Greek Council of the State to restrain measures infringing for the collective autonomy than measures of specific economic impact to the national budget law. A third remark points out that Courts supported by strong of 'social' character constitutions, such as the constitution of Portugal, can more easily develop an argumentation regarding social rights protection than constitutions of a 'weaker' social rights protection as the Greek one. A fourth remark underlines that in some cases Courts tend to form regarding the austerity measures their own 'political' agenda. Thus, the Italian Corte Costituzionale answered to the austerity measures with a judgement that preserved its own authority against the government (the judgement was more of a political than financial character), the Portuguese Tribunal Constitucional has formed an agenda protective of the labour interests of those working in the public sector.

In the end, we should observe:

a that the aourts tend to loan from each other's argumentation, this is apparent in the Italian jurisprudence and the way it adopted the Portuguese's Constitutional Court jurisprudence regarding principle of equality

b that the judgements lack on general assessments of the financial crisis, as well of general observations regarding the justiciability of social rights, they do not appeal to the social state principle and its importance for democracy, they avoid referenced to the principle of dignity etc. in order to enhance their argumentation

c all the rulings (apart from the last one coming from the Portugal Constitutional Court) seem to decide on a case by case basis, in order not to overly bind the executive and the legislative bodies and with the consciousness that the financial crisis has an evolving nature that does not permit static conclusions.

Nevertheless, Portugal's paradigm shows that the judicial grows bolder as the financial crisis deepens and due to the augmenting accumulation of economic sacrifices – for some at least – parts of the population.

Looking at the bottle as half-fool, one can say that this jurisprudence shows that though the protection of social rights its retreating in the European south, the courts are trying to adopt defensive lines, protecting at least the moral if not the economic integrity of social rights protection. The path for the jurisprudence of crisis remains open and no one can at this point predict whether the courts can produce defensive mechanisms adequate to preserve the basic social guarantees as acknowledged by the national constitutions. What unfortunately at this point cannot be predicted is whether these judgements will be enforced or ignored in the end. Will the courts submit to the financial reality? The battle is uneven and the outcome right now is unknown.