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New perspectives of EU Member States Constitutional Courts as actors in the European Union integration process.

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Abstract

We live in the Europe Union (EU) in a context of relations between legal systems of different levels. Therefore we would like to study, from the multi-level constitutionalism theoretical approach, EU Member States Constitutional Courts position as actors in the EU integration process, especially after the entry into force of the Lisbon Treaty, that opened a new constitutional horizon in the EU integration process.

European Court of Justice (ECJ) defined relations between EU law and national law thanks to the primacy principle of EU law. Nevertheless, EU law's formal authority not depends exclusively on ECJ position. It is conditioned largely by characteristics of each national legal system and national supreme or constitutional courts case law.

In fact, in most of EU Member States, we can find certain constitutional reserves or constitutional limits to the primacy of EU law in the constitutional and supreme courts case law: fundamental rights and constitutional principles.

Our purpose is to examine the origin and development of constitutional limits case law doctrine, in order to understand better the relationship between the highest courts of EU Member States and European Court of Justice in the European multilevel legal system. And finally, we would like to study the actual position and new perspectives of EU Member States Constitutional Courts as actors in EU integration process.

1.- Motivation; 2.- Origin and development of constitutional limits doctrine; 3.- Conclusions. New perspectives of EU Member States Constitutional Courts as actors in EU integration process; 4.- References.

1. Motivation

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

In this sense, 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. And, of course, 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, but after the consagracion of the autonomy, direct effect and primacy of European Law (*Van Gend & Loos*, 1963; *Flaminio Costa*, 1964).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 (Poiarés 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.

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 *Van Gend en Loos*, C-26/62; and *Flaminio Costa*, C-6/64.

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)

Nevertheless we can say that the role of ECJ in the evolution of fundamental rights protection in the European Communities, and today in European Union is very relevant.¹⁰ In fact, we think that ECJ is exercising today a constitutional role in EU Law system (Sarrión Esteve, 2013).

However, fundamental rights protection is a question where different Courts can participate, rather, they must participate because it is their role, their function. So, we know that we are living in EU in a context of relations between legal systems of different levels (European Union Level, European Human Rights Level, National levels)

Therefore, it is necessary a multi-level constitutionalism theoretical approach, where European Court of Justice, EU Member States Constitutional or Supreme Courts, and European Human Rights Court have a relevant position as actors in the protection of fundamental rights in Europe.

The question is that, as we know, ECJ defined relations between EU law and national law thanks to the primacy principle of EU law (*Flaminio Costa*, 1964).¹¹ However, EU law's formal authority does not depend exclusively on ECJ position. It is conditioned largely by characteristics of each national legal system and national supreme or constitutional courts case law.

Now, the EU State Members Constitutional or Supreme Courts with constitutional role are relevant actors in the European integration process, and particularly in the protection of fundamental rights.

In fact, in most of EU Member States, we can find certain constitutional reserves or constitutional limits to the primacy of EU law in the constitutional and supreme courts case law: fundamental rights and constitutional principles.

Our purpose in this work is to examine the origin and development of constitutional limits case law doctrine, in order to understand better the relationship between the highest courts of EU Member States and European Court of Justice in the European multilevel legal system. And finally, we would like to study the actual position and new perspectives of EU Member States Constitutional Courts as actors in EU integration process.

¹⁰ About the crucial role of ECJ vid. Dausès (1985: 398-419; Lindfeldt (2007: 68-78); Sarrión Esteve (2013: 31-48)

¹¹ *Flaminio Costa*, C-6/64.

2. Origin and development of constitutional limits doctrine

The he assumption of the primacy principle of EU law is not accepted with uniformity in all Member States, and we can see formal limits in constitutional law, and material limits in the jurisprudence of Constitutional courts.

We think that the difference between formal and material limits is not very relevant. The key question, from our point of view is the interpretation of the Constitutional law by the competent Constitutional or Supreme court with constitutional competenc, and therefore if there are or not real constitutional limits to the primacy principle.

To speak about the constitutional jurisprudence limits, the doctrine usually use the terms counter-limits (*controlimiti*) or constitutional reserves (among others). We like to use the simple term of ‘constitutional limits’ in relation to the european integration process, or in relation to primacy principlly.

The origin of the constitutional limits doctrine is well known. We can found the origin of the constitutional limits doctrine in the jurisprudence of Italian Constitutional Court (*Acciaierie San Michele*, and *Frontini* cases)¹² and in the doctrine of the German Constitutional Court (*Solange I* case).¹³

We can think that this doctrine of constitutional limits or constitutional reserves related to the primacy principle are logical and responds to a skeptical view of the rof of ECJ in the protection of fundamental rights, or better say, in the European Comunities’ protection of fundametal rights systemt (if we can use this expresion to name the fundamental rights protection function in European Comunitas, and now in EU).

However, if there was a skeptical view of the question of fundamental rights protection in European Comunities, and after in European Union system, it should disappear with European Human Rights Court Bosphorus case (2005).¹⁴

¹² *Acciaierie San Michele c. CECA* (Corte Costituzionale Italiana, N° 98/1965), and *Frontini* (Corte Costituzionale Italiana, N° 177/1983). Doctrine confirmed after in *Granital* (Corte Costituzionale, N° 170/1984), *Fragd* (Corte Costituzionale, N° 232/1989), and Corte Costituzionale, N° 454 de 2006.

¹³ *SOLANGE I*, 37 BVerfGE 271, 29 May 1974. Doctrine confirmed by the German Constitutional Court in the sentences *Vielleicht*, BVerfGE, 4, 168. 25 July 1979; *SOLANGE II*, BVerfGE, 73, 22 October 1986; *Maastricht Urteil*, BVerfGE 89, 155, 12 October 1993; Arrest warrant case, BVerfG, 2BvR 2236/04, 18 July 2005; and Lisbon Treaty case, BVerfG, 2 BvE 2/08, 30 June 2009.

¹⁴ European Human Righths Court, 30 June 2005, *Bosphorus*.

But, the reality is that as we know the constitutional limits doctrine has developed a lot, and not only in the jurisprudence of Italian Constitutional Court and German one, we can also see a development of this jurisprudence doctrine in other EU. Despite this, the jurisprudence of the constitutional limits has been very successful, probably because it is a way of easing the principle of primacy without a radical break from it. So much so that it has been generalized, winning new voices, and increase our relevance. Of course that each Member State is a special case with its own circumstances, and as we speak about constitutional interpretations, they can evolve and change (with or without a constitutional reform). In this sense, we are sure that the situation is not static.

Anyway, the group of states in which we have identified the development of the doctrine of constitutional limits following the example of Italy and Germany, would be: in Belgium¹⁵, Ireland¹⁶, Spain¹⁷, Denmark¹⁸, UK¹⁹, France,²⁰ Poland²¹, Cyprus²², and the Czech Republic²³.

Of course it should be noted that although we have tried to conduct a comprehensive study of constitutional law in the 27 Member States, and we have identified the jurisprudence of constitutional limits previously mentioned in these cases, it is possible that we left a particular recent case that we do not have identified correctly in time.

In addition, in the cases of Ireland and Cyprus, there are two constitutional amendments that can curb constitutional limits doctrine in favor of the primacy of EU law.

Another relevant question is the role of EU Member States Constitutional and Supreme Courts as ordinary judges in relation to the prejudicial question, because several of them had

¹⁵ Cour d'Arbitrage, 23 March 1990, n° 26/90, 3.B; and 3 February 1994, *Ecoles Européennes*, n° 12/94.

¹⁶ *S.P.U.C. c. Grogan*, 1998, IR 343.

¹⁷ STC 64/1991, 22 March, STC 252/1988, 20 December, among other sentences; and particularly DTC 1/1992 in relation to Maastricht Treaty; and DTC 1/2004, in relation to European Constitution.

¹⁸ Denmark Supreme Court, Maastrich Case, 6 April 1998, caso n I-361/1997

¹⁹ *Thoburn v. Sunderland City Council* (Queen's Bench Division, Divisional Court, 18 de febrero de 2002); *Mc. Whirter & Gouriet v. Secretary of State of Foreign and Commonwealth Affairs* (Court of Appeal (Civil Division), 5 de marzo de 2003)

²⁰ French Constitutional Council, N° 2004-496, 10 June 2004, *Loi pour la confiance dans l'économie numérique*; confirmed in N° 2004-497, 1 July 2004; N° 2004-498, 29 July 2004; N° 2004-499, 29 July 2004; N° 2004-505, 19 November 2004, *Traté établissant une Constitution pour l'Europe*; N° 2006-540, 27 July 2006, loi relative au droit d'auteur et aux droits voisins dans la société de l'information; N° 2006-543, 30 November 2006, *Loi relative au secteur de l'énergie*; N° 2008-564 DC, 19 June 2008.

²¹ Polish Constitutional Court (*Trybunał Konstytucyjny*) 11 V 2005 judgement K 18/04; 24 IX 2010 judgement K 32/09.

²² Cyprus Supreme Court, 7 November 2005, Civil Appeal N° 294/2005

²³ 2006/03/08-Pl. ÚS 50/04, Sugar Quota Regulation III; 2008/11/26- Pl. ÚS 19/08, Treaty of Lisbon; 2009/11/03- Pl. ÚS 29/09, Treaty of Lisbon II

presented a prejudicial question to ECJ (for instance the Italian Constitutional Court²⁴, the Irish Supreme Court²⁵, or the Spanish Constitutional Court²⁶), and the prejudicial question is a relevant instrument of dialogue between the Courts. However, how can they deal with the response of ECJ if it were incompatible with national constitutional limits?

3. Conclusions. New perspectives of EU Member States Constitutional Courts as actors in EU integration process

From my point of view, the question must be solved with a multilevel constitutionalism perspective. As we said before, fundamental rights protection is a question where different Constitutional Courts can participate, rather, they must participate because it is their role, their function. So, we know that we are living in EU in a context of relations between legal systems of different levels (European Union Level, European Human Rights Level, National levels)

Therefore, it is necessary a multi-level constitutionalism theoretical approach, where European Court of Justice, EU Member States Constitutional or Supreme Courts, and European Human Rights Court have a relevant position as actors in the protection of fundamental rights in Europe.

With Lisbon Treaty, the European Union Charter of Fundamental Rights entered into force. The Charter reinforces limits on the power of the EU, as shown articles 6.1 EUT, and 51.2 of the Charter (Gómez Sánchez, 2008: 507).

Moreover, the Charter “further the development of a more articulated system of fundamental rights, encouraging a *rebalancing* of different goals of European integration” (Menéndez, 2003: 192).

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

²⁴ Corte Costituzionale N° 102/2008; and N° 103/2008.

²⁵ IESC 7 (30 th January, 2009, Appel N.° 136/08)

²⁶ ATC 9 June de 2011.

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, 2010: 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 EU Law. The reason of this provision is to exclude any kind of conflict between fundamental rights protection standards. However, it is no enough to do it. Because with this article we can think that there are three stands: European Human Rights Convention standar, European Union Standar, and National Standar, concluding that the last (the national one) contains exclusively fundamental rights resulting of common constitutional traditions.

This interpretation is nos correct. Certainly, article 53 with the title of ‘Level of protection’ establishes that: “Nothing in this Charter shall be interpreted as restricting or adversely affectin human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to with the Union or all the Membeer States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”.

In this sense, we cann go far away, and 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 relation to other standars, including International Law, International agreements (with the EU or all the Member States are party, including European Convention one), and finally, the standar of “Member States’ constitutions”.

And the National Standar indicated in the article 53 is not the standar of fundaemtlnal rights resulting of common constitutional traditions, it is clear that it refers to any national constitutional standard.

In this sense, we think, 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). But, any national constitutional tradition with a higher standard of protection of fundamental rights.

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

We think that constitutional limits doctrine has a way under European Union Law, from the perspective of a multilevel constitutionalism interpretation of the Charter. The question that we can ask is what will be the reply of Spanish Constitutional Court to Melloni ECJ sentence?

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