CONSTITUTIONAL PRINCIPLES REGARDING THE SPANISH SOCIAL SECURITY SYSTEM: A CITIZEN'S RIGHT

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CONSTITUTIONAL PRINCIPLES REGARDING THE SPANISH SOCIAL SECURITY SYSTEM: A CITIZEN'S RIGHT[1]

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1. INTRODUCTION

Given the international scenario, I will merely present the general characteristics of the Spanish Social Security system, in particular, those identified as constitutional principles, insofar as they derive from the Constitution, and are imposed on all public authorities. I am of the opinion that our long and positive experience may be of interest to other countries in terms of comparison, especially, for those that have not yet created or consolidated a public system. I will try my best to be particularly clear and to the point. As you can imagine, I won't go into greater detail regarding the problems of this system, since I am afraid that the great distance between Europe and China, not only with regard to remoteness but especially to culture —such different alphabets and languages reflect very different cultures— may distort the meaning of my message.

I will deal with the right to social security as it has been defined by professors of Labour and Social Security Law, and not by the constitutionalists.

[1] This paper was presented at the Round Table of the International Association of Constitutional Law (IACL) which was titled «Positive social rights (social security) in comparative Constitutional Law»), Xi'an and Macao, China, October 2011. I am grateful to my colleges from the Labour Law Department at the Complutense University, Joaquín García Murcia and Yolanda Sánchez, for their help in selecting my sources of reference.

Although the Spanish Association of Constitutionalists (ACE) devoted its last national congress to studying social rights, it did not pay much attention to the aforementioned right. I believe it is highly interesting and necessary to examine this right to social security from the constitutional point of view, specially because of its *interdisciplinary* nature.

We will, therefore, consider the right to social security taking into account the international scene, the general principles of its constitutional status and its interdisciplinarity.

2. THE CONSTITUTIONAL GUARANTEE OF A PUBLIC SOCIAL SECURITY SYSTEM WITHIN THE CONTEXT OF A SOCIAL STATE

> *Article 41 of the Spanish Constitution* (hereinafter, the SC) states that: «The public authorities shall maintain a public Social Security system for all citizens guaranteeing adequate social assistance and benefits in situations of need, especially, in case of unemployment. Additional assistance and benefits shall be optional».

The Spanish regulation is framed within the well-known *tendency of the European law* to introduce social security into its legislation after the Second World War. The Spanish Constitution of 1978 preserves this European heritage, as well as those of other previous constitutions and laws, such as article 38 of the Italian Constitution, the preamble to the French Constitution, in its paragraph eleven, or article 63 of the Portuguese Constitution. Even so, other countries like the United Kingdom or Germany have no such references in their constitutional rules, despite having systems of social protection. This is a distinguishing feature of the European social States with regard to other regions. We can not overlook, however, the acknowledgement of the universal right of every person to social security, provided for in article 9 of the International Covenant on Economic, Social and Cultural Rights. In addition, it is not a coincidence, but a reflection of this European tendency, that today the Charter of Fundamental Rights of the European Union, which after the Lisbon Treaty has achieved the same legal status as a treaty, recognizes the right to social security benefits and social assistance. All people legally living in Europe enjoy the right to all these benefits, as well as the right to protection against poverty and social exclusion (article 34). Such a doctrine deserves a positive opinion.

It is also true that the Spanish Constitution was influenced by a *pre-constitutional model* of social security, which originated during our Second Republic,

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where pioneering article 46 under the Constitution of 1931 guaranteed every worker the necessary conditions for a decent life and provided social laws to regulate health insurance and other contingencies. Insurance that was recognized during the civil war by the Labour Charter of 1938 and designed by laws regulating Social Security and assistance benefits specially between 1963 and 1966 (Palomeque 304 and 311). The dictatorship of General Franco was significantly more open to recognizing some social rights —of course not the right to strike or the freedom of association although it did recognize public health and social security— than other civil and political rights denied to citizens by the dictatorship owning to its totalitarian origins. There has been, therefore, a continuous evolution of the Spanish legal order in this respect (Vida Soria 118). The Constitution did not create a model from scratch; in fact, it had been in previous existence for decades. It was merely transformed.

The guarantee provided for in article 41 SC should be interpreted within the set of constitutional regulations and in a context none other than that of a *social State*, a type of constitutional government completely different from that of other societies with hardly any State (stateless societies). The Constitution defines the Spanish State as a social State in its first provision (article 1.1) or more accurately as a social and democratic state subject to the Rule of Law (*Estado social y democrático de Derecho*). A formula that emanates from the Basic Law of Bonn (articles 23 and 28) and combines the democratic, social and Rule of Law principles; these three restrict and interact reciprocally in an interesting synthesis. The public social security system is the core of protection that a social State as a welfare State must guarantee its citizens, as well as their rights to health and education. From this perspective, all public authorities must be responsible for guaranteeing the citizens' well-being. Every social State has a way of understanding a community of citizens, which markedly differs from that of other States, because it is much more ambitious regarding its aspirations of cohesion, integration and unity. At the same time, it denies the total separation of the civil society and the political communities, as both are set like gemstones in the same jewel.

The Spanish Constitution, unlike other European constitutions, has a long and modern declaration of rights, including the so called *guiding principles of social and economic policy,* widely recognized within Section III of Title I (articles 39 to 52 SC). However, their efficacy and enforceability are not very detailed in comparison to traditional political and civil rights, which are easier to guarantee. And, to a large extent, the aforementioned principles require legal mediation. In fact, these guiding principles recognized in the Constitution, shape and inform the laws, judicial proceedings and the role of public authorities. How-

ever, they cannot be directly invoked by citizens before courts, unless it is permitted by law. Their effectiveness depends, to a great extent, on their regulation within legal provisions.

Many of the *needs* that are met by a system of public social protection are identified in the very Constitution, *Section III*, as social rights or guiding principles (articles 39, 40, 43, 49 and 50): the rights of the elderly —what the Constitution refers to as senior citizens—, family rights, rights of the child, rights of disabled persons, workers' rights, or the right to work...

In addition, the Constitution *regulates the economy* (Title VII, articles 128 to 136) which does not exclude State initiative and intervention, or public planning of economic activities. In Spain there is no such constitutional enshrinement of a principle of subsidiarity with regard to private initiative, as, for example, exists in the Constitution of Chile. The Constitution defines a social market economy as an economy not only based on the recognition of considerable freedom to conduct a business (article 38 SC), which is a true individual right, but also on the protection of the demands on the economy and general interest (Vid. García Vitoria).

The *flexibility of the constitutional recognition* of the Social Security system allows diverse legal interpretation depending on the different policies of the Government of every parliamentary majority. Actually, the laws have established *a combined system* based on, to a great extent, on an *occupational and contributory model*. This consists of the contributions made by a group of workers and professionals included in the Social Security system, where the amount of benefits varies according to individual earnings. This model is complemented by a gradual tendency to broaden its scope in order to include all citizens (Sánchez-Urán b, 2009, 437-439). For this reason, the Spanish system is said to combine elements of the Anglo-Saxon or Universalist model, which stems from the Lord Beveridge Report in the United Kingdom with the continental model put forward in Germany by Bismarck and based on social insurance (Sánchez-Urán b, 2009, 438).

The democratic Constitution of 1978 did not completely change the inherited Social Security model, but it did regulate it with realism, and also with social sensibility and progressivism, opening the door to the *universal access* to benefits, a manifestation of the constitutional principles of real equality and solidarity by recognising a system for all citizens. Over three decades of political democracy and economic prosperity, our legislative evolution consolidated this model, not only as regulations, but in real life as well. There is no political party with parliamentary representation in favour of suppressing the public nature of the system, which is a State achievement strengthened by the support

of the electorate and public opinion, no matter how much its rationalization or the need to make spending adjustments or to combine public and private financing is debated. In this sense, when it was noted that a decrease in contributions and an increase in spending had cast doubts upon the the stability of the system the so-called *«Pacto de Toledo»* of 1994 was highly important because it provided some recommendations regarding the future regulation of the contributive retirement pension system. It was ratified by Parliament, and it led to the establishment of a temporary Parliamentary Committee to follow-up and assesses the implementation of these agreements. In any case, this difficult situation was later cushioned thanks to the incorporation of large groups of immigrants into our Social Security system. It seems clear that there is a need to achieve considerable commitment and agreement among all political and trade union forces in this matter.

3. CONSTITUTIONAL PRINCIPLES THAT SHAPE THE MODEL: CONSTITUTIONAL FLEXIBILITY, PUBLICITY, SUFFICIENCY, NECESSITY, UNIVERSALITY AND COMPLEMENTARITY

3.1 **Constitutional flexibility**. The non-existence of a closed or finished constitutional model of Social Security is widely accepted by experts (Sánchez-Urán (a) 1995 and (b) 2009, 440. Vida Soria 112. Monereo 1435 and 1441, etc.). But it is believed there are a set of *serious limits* placed on the performance of public authorities and, above all, of the legislative body. The Spanish Constitution does not work as a *programmatic Constitution*, but as a modern *Constitution with boundaries* —terms used in a debate by Gomes Canotilho— and focuses on defining a set of limits to the actions of the people's representatives. This political decision, in spite of criticism, has proved to be excellent over the course of time, since social security is, by definition, a *dynamic system* (Alonso Olea, Sánchez-Urán b, 2009, 440) and is subject to a regulatory evolution which responds to changes imposed by the fluctuating economic situations, as well as to experience in running the institution and fulfilling needs.

The *flexibility* of these constitutional *restrictions* certainly gives way to different developments and interpretations and has been reinforced by the Constitutional Court which, with common sense and *self-restraint,* clarified those restrictions in various conflicts. The situation has led to the assertion that those limits imposed upon legislators do exist, but they are «malleable», that is, they can be molded without breaking (Sánchez-Urán b, 2009, 442). It has also been said that those limits hardly have an effect on anything (Vida Soria 113. Monereo 1437).

Is that a mistake? I don't think so, and I tend to agree with this type of flexible recognition, in contrast to the positions of many experts on social security (for example, Vida Soria 105 is very critical), who would like to find a much denser and more detailed constitutional regulation. However, that is not the role of good constitutions, which should be confined to obtaining basic formulas of commitment among diverse political forces and not closing unfinished debates that take place in all open-minded societies. In these cases, it is better that constitutional regulations remain open in order to allow the political community to always enter into dialogue and reconsider the modernization of its fundamentals in a rational manner. Those complex debates about the State fiscal crisis, or the considerable economic expenditures of Social Security that, to a certain extent, fall on companies as well as on the workers themselves. Also discussions about the impact of inflation on capital subject to the contribution of workers and professionals, or about whether certain types of benefits do or do not promote workplace absenteeism, or about the ageing population. These controversies existed in 1978 and they exist today in Spain and all over Europe. The Constitution would not have been able to do wonders to solve these problems.

However, I would like to highlight that the so-called *Social Security crisis* (Vida Soria 111) is about to go the way of the old parliamentary crisis: they both end up surviving... It is true, moreover, that we cannot trivialize the need to study how to rationalize and transform the system, and we must make serious financial adjustments to allow it to survive in the future in times of globalization and strong international market competitiveness. But social rights lead precisely to reasonable limits on markets logic, by virtue of other no less important constitutional values and assets.

It is true that we are dealing with a right which is particularly easy to model with regulations stemming from *constitutional principles* (clasic Zagrebelsky) that, by their *soft nature* are both dense and vague and need to be diluted and developed by legislators. We do not have a set of constitutional rules with concrete and detailed regulations regarding this matter. But we constitutionalists, unlike other kinds of legal experts, are very used to working with these types of *ambiguous principles* and open regulations, and this situation does not present any major problems. Let's see how these principles work (vid. Palomeque 310 and ss.).

3.2 **Publicity**. Article 41 SC states the constitutional obligation to maintain a *public system* of Social Security. «Public system» is an expression that has been used in Spain by laws since the 1960s, and it seems that the constituent power very knowingly used it in reference to a certain kind of model (Palomeque 311). This suggests the existence of a state-run institution with historically consoli-

dated and easily recognizable profiles. But there are many possible regulatory changes; as, in fact, the Constitutional Court has confirmed on numerous occasions (for example STC 37/1994, 17 March). Social Security is, moreover, a «public function», a typical responsibility of the State, which goes beyond private insurance techniques for social risks (Palomeque 310).

I do not consider it to be a real problem that the Constitution does not define *the meaning of Social Security* (Vida Soria 114) since it is normal in these types of constitutional regulations containing *institutional guarantees* that the sense of the protected institution must be determined by the interpreters and the judiciary, in accordance with history, tradition and legal logic. The existence of this institutional guarantee, like the essential content of rights, is a call for jurists' opinion when it comes time for a judicial review.

However, it is indeed a problem to resolve whether the constitution hinders *formulas of private contribution* with this principle, a point included in the political debate on the possibility of privatizing the management of Social Security. Schollars have continued controversy on this subject (Vida Soria 124 and opposed to Palomeque 313). It seems to me that in accordance with constitutional regulations, we can distinguish between the *public ownership* of Social Security, which makes the State responsible in all cases for the management of the system, and the ability of some private entities to collaborate in some areas and through different formulas in *exercising the performance of this function* and helping to carry out the service. Of course, if that is the way the legislators intend to organize the institution. I consider it is very questionable to conclude that the Constitution vetoes any form of intervention by individuals through mutual insurance companies or private corporations (Palomeque 313 with the support of De la Villa). The abovementioned STC 37/1994 seems to defend this understanding by recognizing the constitutionality of certain private management formulas introduced by legal reforms of Social Security (Monereo 1430). The monopoly of the State regarding management is not derived from the Constitution, only the public nature of the system is.

It is rather more complex to determine what part of the system should have public coverage —only the minimum?— and what part could be privatized through successive partial reforms; a path towards a less expansive and more austere model of Social Security in the future (Monereo 1498).

3.3 **Sufficiency**. As for the sufficiency of benefits to meet needs, one can not really expect the constitution to guarantee the maintenance of the levels acquired up to now; a formal restriction opposed to any policy changes in laws and regulations (Vida Soria 113 based on Borrajo). This would be like freezing benefit levels, or the old theory of acquired rights, or *the principle of irreversibility*

of social conquests, which was quite fashionable during the sixties in Europe and resurfaces from time to time in diverse formulas both here and in Latin America. This position is neither realistic nor can it be inevitably drawn from the constitutional model, and, of course, it is not the kind of interpretation that a constitutional court would likely be willing to assume, when judging a claim from a pragmatic and legal approach, rather than from a political and ideological one. Neither the Constitution nor constitutional case law enshrines in Spain the old theory of acquired rights, which was devised by Ferdinand Lasalle in the middle of the nineteenth century. Quite a separate issue is that certain quick or disproportionate legal changes, adopted by Parliament without observing the necessary precautions of provisional law, can infringe legal certainty and other constitutional principles. Or even infringe the right of every natural and legal person to peacefully enjoy their possessions, recognised in article 1 of the First Protocol to the European Convention on Human Rights. As, on some occasions, the European Court has done with regard to several marked and radical changes of the domestic public pension scheme. We are talking about a sufficiency principle of benefits, whose demands, I believe, can be satisfied if the measure is analysed by an independent authority, in accordance with the principle of proportionality. On other occasions, for example, the entire exclusion of a benefit, the correct legal approach could be to identify the unavoidable minimum that a public system of social security should maintain, so that the institution can be identified or immediately recognizable as such.

A very different matter from the judicial review of the restrictions on social security benefits and on the guarantee of professionals and workers' rights is that the social benefits of the system can be strongly *consolidated by Spanish public opinion* and that any political party intending to win elections would hardly be willing to include their suppression or drastic reduction in its *electoral programme* [2].

3.4 **Necessity**. The concept of situations of necessity as the bedrock of protective action is broader than the notion of social risk and contingency. It goes beyond them: it allows attending to any social need of a citizen, regardless of origin or cause (Palomeque 327). To put it briefly, it allows for broad protection within the system. The vital importance of unemployment in our societies made the constituent power specifically include this situation of necessity in article 41 SC. But there are many more: the loss of family support, retirement

[2] *Metroscopia*, barometer for citizens' confidence, *El País* newspaper, 7 August 2010. The result of the survey showed that citizens' confidence in Social Security was given a mark of 6.6 out of a possible 10, only exceeded by the mark given to scientists, the University, public health and the police.

from work, illness or invalidity... Furthermore, old age is specifically laid down in article 50 SC. The general theory of Social Security has accurately been defining the meaning of these circumstances of necessity. The Constitution incorporates these specific situations from the rest of the legal system propelled by laws, as well as treaties and international agreements.

On the other hand, the Constitutional Court has recognized with its authority what is obvious: the remedy to a situation of necessity is a key component in article 41 SC, but it should be acknowledged and determined in the general context of *economic circumstances* (SSTC 184/1993, 231/1993, 38/1995...).

3.5 **Universality**. It can be reasonably confirmed that article 41 SC has a universalist spirit which seems at last to provide a system of Social Security for all citizens and not only for those who have previously contributed over a legally determined period of time, at least as regards some of the benefits. But the degree in which both ingredients are combined and compatible, contributive and universal elements, is left to the formula chosen by the legislative body. During the happy nineties, in times of economic growth and development, *non-contributive benefits* began appearing, when it was enough to claim necessity and a lack of economic resources to be eligible to receive some benefits (Sánchez-Urán b, 2009, 446).

3.6 **Complementarity**. This principle should be understood as the possibility to create a private assistance service which complements the minimum standards of Social Security. In other words, the constitutional provision allows establishing a social protection with has both a voluntary and supplementary nature.

The freedom of complementary assistance can be understood, as well, as a reference to the *privatization* of the organization and of the mechanisms of coverage of personal needs that are established beyond these minimum public standards (Palomeque 329).

In consequence, the Spanish model of social security is based on *various levels* (Vida Soria 126. Monereo1451): First, the *professional or contributive* for those registered in the system and based on insurance schemes of social welfare. Second, the *voluntary and complementary* which is not, in fact, really social security any more but private social protection that can be obtained by those who work steadily and receive medium to high salaries. Third, *universal* protection for all citizens. Lastly, *social assistance* is provided by the Autonomous Communities in cases of public aid depending on real situations of need. So this is a social security system with multi-level protection.

4. IS THERE A RIGHT TO SOCIAL SECURITY: IN THE CONSTITUTION, BY LAW, IN INTERNATIONAL TREATIES?

4.1 What is the true *legal nature of this alleged right* to Social Security? At first glance, the regulatory structure of article 41 SC does not seem to recognize a citizen's right, nor is the word «right» even used although it appears in other similar regulations, for example, article 63 of the Portuguese Constitution or article 34 of the Charter of Human Rights of the European Union. However, we cannot talk nowadays about a *programmatic provision*, a type of constitutional regulation without legal force as was defended in Italy (*norme programattiche* as opposed to norme *precettive*) despite its influence in Spain in the past. All constitutional regulations have the same legal force. But their legal enforceability can vary. And this is what happens with the right to Social Security. Regulatory constitutions do not simply contain wishful thinking; instead they are a set of serious limitations that the constitution making power establishes for constituted powered.

Constitutional recognition embodies the nature of a *guiding principle* of economic and social problems and whose *effectiveness* is defined in article 53.3 SC: the principles herein inspire legislation, judicial practices and the conduct of public authorities but they can only be invoked or cited before ordinary courts, in accordance with the laws which shape them.

But at the same time, this is a clear *mandate to the legislator*. Public authorities are obliged to maintain a public scheme of Social Security, that is, to preserve a historically recognizable institution guaranteeing concrete social benefits: social protection for concrete cases of need. The existence of an obligatory and minimal public system can not be questioned by the legislative body. Within the constitutional obligation to keep this institution alive, the legislator enjoys considerable freedom to regulate it in various ways, according to the different policies selected by Governments. It is, therefore, also an *institutional guarantee* that the legislator should respect, in the way that German legal doctrine has used this technique since Carl Schmitt.

From this mandate to the legislator and institutional guarantee, moreover, emerges the *social right to benefits*, for citizens to receive public protection in concrete situations of need. It is about a *public function* (Palomeque 310. Monereo 1432), as was acknowledged by the Constitutional Court (STC 77/1995, 21 June). This *public service* is the responsibility of the State, which must guarantee the existence of a social security system (Monereo 1461). The nature of this public scheme by law is neither contractual nor private, but *legal and obligatory*, and this special nature breaks the correspondence between contribution and

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benefit, which is typical of private insurance. However, the beneficiary's contribution must be taken into account with regard to the origin of the right to benefit and its quantity (STC 38/1995, 18 March).

Lastly, article 41 SC is a *rule of purposes* (Monereo 1443) which obliges public authorities to secure the sufficiency of assistance and social benefits. The Constitution establishes a commitment on the part of public authorities to achieve and reinforce the standards fixed by several international treaties to which the Spanish Basic Law is receptive.

To *summarize*, article 41 SC establishes a guiding principle which shapes legislation. It is also a mandate to the legislator who is obliged to maintain a public Social Security system so that this institution becomes completely identifiable and recognizable, and the rest of public authorities are obliged to develop it. It means the acknowledgement of a right to benefit that the State must accord, and finally a constitutional rule establishing some objectives that must be promoted by laws. This is the set of ideas on which the constitutional model is rooted; a firm bedrock in which a right can be sustained.

4.2 Beneath the level of Constitutional recognition, the provisions of the *General Law on Social Security* must be taken into account (Royal Legislative Decree 1/1994, 20th June). The latter is a revised text which compiles and systemizes all regulations. Article 1 declares that this «right» of Spaniards laid down in article 41 SC shall be in line with the present law, so that the legal provisions of constitutional principle convert the latter into a truly subjective citizens' right. And article 3 states that rights granted by law to workers are not to be waived by means of any pact, either individual or collective; a typical characteristic of fundamental rights.

4.3 Once *international treaties* are ratified by Spain and are appropriately published, they become part of the legal order (article 96.1 SC) and are then binding. Moreover, article 10 SC decrees the complaisance —the «opening»— of the Constitution with respect to the International Law on Human Rights and obliges the State to construe the internal regulations in accordance with the Universal Declaration of Human Rights and other treaties and agreements ratified by Spain. This constitutional norm is influenced by the Portuguese Constitution, and at the same time both have influenced several Latin American Constitutions. The international regulations for social security are, therefore, a point of reference and have great importance in construing article 41 SC because they are much more detailed, which helps to close constitutional flexibility by specifying their principles (Vida Soria 117. Monereo 1426). So a constitutional interpretation *secundum conventionem* is required.

In 1952, the *International Labour Organization* (I.O.L.) adopted several important standards at the *C012 Convention on Minimum Standards of Social Security*. The definition of these standards was supposedly minimally elaborated but, in fact, was rather broad, nevertheless has been ratified by numerous countries, including Spain although not until 1988.

This Convention cites the following benefits which must be guaranteed to individuals receiving protection: medical care, illness, unemployment, unemployment injury, family, maternity, invalidity, survivors; and it regulates contingencies and benefits in detail and with a great degree of specification which cannot be presented here, but which must really be taken into account by national legislators.

As it is well known, article 9 of the *International Covenant on Economic, Social and Cultural Rights* of 1966 declares that the States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

The *European Social Charter* should also be considered. It is a Council of Europe treaty guaranteeing social and economic human rights. It was adopted in 1961 and revised in 1996. So it has garnered 50 years of experience. Article 12 recognizes the right to Social Security and commands every Member State «to establish or maintain a system of Social Security» at a satisfactory level, «at least at the level required for ratification by the European Code of Social Security» and to endeavour to progressively raise their social security system to a higher level. Therefore recognition of the European Social Charter leads to several commitments for the Member States, which guarantee the enforceability of the right (Monereo 1426).

Last but not least, the aforementioned European *Code of Social Security* was adopted in 1964 and revised in Rome on the 6th of November of 1990, another Council of Europe provision adding some additional contingencies and benefits, such as old age, work-related accident and occupational disease benefits.

Also there are relevant norms from the European Union, for instance, *Council Regulation 1408/1971*, 14 June of 1971, amended several times, and related with employed persons and their families moving within the Community. It designs the main lines of ideal coverage in the European Union and recognizes equality of treatment. Any person subject to the special provisions of this Regulation must be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State.

As a matter of fact, the European standard is rather more comprehensive than the one mentioned at the C102 Convention of the International Labour Organization (Monereo 1426). These complex international regulations envisage

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some quite precise content of the Social Security institution, which is recognized by the Constitution and protected by law.

4.4 All in all, beyond the constitutional recognition of minimums, the legal regulations that shape the system and relevant international treaties assert a true right to Social Security equipped with precise content and laid down in a very consolidated widespread European legal culture.

5. SUBJECTS AND BENEFICIARIES: WORKERS OR CITIZENS?

Article 41 of the Constitution grants this right to Social Security to «all citizens» and not only to «workers», who were the origin of the model, and so extends the guarantee of the right to receive benefits to other active individuals, considering the population as a whole and not only wage-earners (Palomeque 325). The generalization of the system was something that, in fact, the previous ordinary legislation had already achieved, which the Constitution received and vested in. But the importance of what the Constitution states cannot be underestimated or go unnoticed, because one of the classical arguments against considering economic and social rights as true rights lies in their so-called distinct character of being associated with a certain class of individuals, in contrast to the typical universality of the fundamental rights granted to all human beings (Hierro 174).

Obviously, this is a right of all citizens determined by the observance of *concrete requirements* defined by law (Monereo 1426).

The public scheme of social security has to be organized at *two levels*: a *minimum*, basic, standardized scheme for all citizens financed by the tax authority through taxes and a second level, the *professional* and differentiated one, financed by charges, granting alternate income. It seems that this conclusion was already an aspiration of the Constituent Assembly (Palomeque 312 with the support of Ciriaco de Vicente, socialist Member of Parliament, whose criteria was followed by Parliamentary Groups).

It is clear that Constitutional foresight does not prevent the existence of *formulas of differential protection* and with different legal systems with respect to various situations: employed persons, self-employed persons, and the rest of citizens (Vida Soria 115). The Constitution neither imposes nor prevents uniform coverage, that is, an identical degree of protection (Vid. Palomeque 311).

On the subject, article 7 of the General Law of Social Security considers within the scope of the mentioned law, for the purposes of contributive benefits, Spaniards and foreigners legally residing in Spain and those working as:

employed persons, self-employed persons, members of cooperative associations, students and civil servants. Likewise, article 9 of the Law, which organizes the structure of the Social Security and distinguishes between a general system for workers in general and special systems for concrete groups: fishermen, domestic servants, students, etc.

6. THE CONCEPT OF SOCIAL SECURITY. THE INTERRELATED AREAS: SOCIAL ASSISTANCE, THE RIGHT TO HEALTH, SOCIAL SERVICES

What is to be understood by Social Security in article 41 is a bit more complicated than it appears, despite the fact that it must be linked with the purpose of protecting the needs of individuals. So it is not easy to distinguish between social security and social assistance. The Constitution, however, makes the distinction when it comes to dividing powers between the State and Autonomous Communities. *Social assistance* refers to a type of protection different from the professional and contributive one, which modernizes the old public aid scheme, but *social insurance* is another diverse thing altogether. Nevertheless, in some way, the concept of social security in a broad sense should encompass both and that is the Constitutional Court's interpretation of the matter (Vida Soria 122). It is clearly mentioned in article 50 SC, which guarantees the elderly or senior citizens adequate and periodically updated pensions and a social service system which addresses their problems.

Far more relevant is deciding whether or not *health care* should be included in Social Security. The Constitution recognizes health protection as a right in article 43 and confers on public authorities the obligation to safeguard it with preventive measures and benefits, and the authority to organize this public service on the State and Autonomous Communities (article 149.1.16 SC). According to laws, the *Social Security System* and the *National Health System* are closely related as components of the social protection accorded by the State, but they function in a separate and non-overlapping manner: they share a common field of social reality, but they are far from being organized in the same way (Palomeque 306). The second is independently regulated by the *General Health Law*, 14/1986 of April 25th and by Law 16/2003, 28 May, of *Cohesion and Quality of the National Health System*. The health system is decentralized and Autonomous Communiites have jurisdiction to plan and organize health care and hygiene (article 148.1.21 SC); the service works thanks to mechanisms of horizontal cooperation among them and vertical cooperation with the State.

There is a marked principle of universal assistance, as it covers 100% of the population, regardless of their economic situation or their registration with Social Security.

Autonomous Communities are also responsible for the social welfare services part of the Social Security System, that is, activities and functions typical of the former National Institute for Social Services (IMSERSO). There are many possible meanings for the term «social services» (García Murcia b, 2003, 363 and ss). However, as an element of protective action within Social Security, social services complement the basic benefits of the system. They include tasks such as assisting the elderly and re-educating and rehabilitating the handicapped.

7. A SOCIAL RIGHT TO BENEFIT BROADLY BACKED BY LAWS. THE ECONOMIC RESTRICTION OF WHAT IS FINANCIALLY POSSIBLE

Let us look at some specific characteristics of this right to public Social Security. Firstly, it is a characteristic *right to assistance* disposed to guaranteeing that all citizens' basic needs are minimally covered by certain benefits. These needs can be theoretically satisfied through the market, but a social State is constitutionally and internationally obliged to protect its citizens by observing the constitutional values of real and effective equality and solidarity. This citizen's right obliges the State to organize a public service in compliance with concrete public functions of social protection. The structure of these *rights to benefits* is very different from that of the traditional *rights to defence*, since it is not enough for the State to abstain to preserve the right, so public authorities are unquestionably obliged to act diligently with positive actions in order to facilitate concrete social benefits and secure their survival. Public authorities can be directly in charge of organizing this system of protection, or through private management formulas of public services; and even, as in the case of Spain, by imposing legal obligations upon private enterprises whose employers are obliged to help meet social security expenditure, together with their employee's contributions (Escobar 59).

It is clear that this is a typical *social right*, in contrast to the old liberal belief which denies the fundamental nature of the rights to benefit, downplaying their scope and guarantee. The doctrine of rights typical of a social State confirms the aforementioned nature and makes an effort to focus on specific problems regarding the effectiveness of social rights: further legal configuration or legal shaping, positive action by public authorities, and the economic restriction on what it is

financially possible. For a number of substantive reasons, it is difficult to deny the fundamental nature of these social rights in accordance with the most modern doctrine (Alexy, Bastida, Abramovich-Courtis, etc). I will only mention a few arguments. First of all, because of their direct and inseparable connection with human dignity and the free development of every person. Secondly, because they are set down in constitutional and international law and such legal value is present and can not be denied by the legislator. Thirdly, as they are vertically projected in their effectiveness in relation to public authorities, but also horizontally in relation to private individuals, such as employers and entrepreneurs. Fourthly, because after the Second World War many constitutions recognized the fundamental clause of real and effective equality (article 3.2 of the Italian Constitution, article 9.2 SC) by forcing the elimination of obstacles to the enforceability of this equality in social reality and enabling public powers to promote social rights. In addition, the Charter of Fundamental Rights of the European Union recognizes different types of equality and positive actions and several rights which respond to the value of solidarity.

It is above all a *right to legal configuration* or legal development. The Constitutional Court has highlighted this main characteristic and has underlined that the legislator is free to vary protective action in accordance with economic and social circumstances, which determines the feasibility of the system (STC 65/1987). The expression «right to legal configuration» is not unequivocal, and I have been very critical of it, with regard to other rights, as it is frequently used by courts with different meanings (García Roca). But, on the one hand, it must be understood that its use does not allow a de-constitutionalization of the guarantee. The legislator can freely regulate the right and make use of its content, provided that the neither the basic content of the institution nor various constitutional principles are violated, for example, the principle of proportionality included in the Charter of Fundamental Rights of the European Union (article 52). On the other hand, the legislator in general terms and according to the Constitutional Court certainly has a wide discretionary margin to choose the means and tools, define the scope of benefits and the moment of inception. (Monereo 1437).

In this sense, it can be said that the main target of the right we are dealing with is the legislator, for whom there are positive obligations to act, derived from the Constitution, similar to what occurs with the the doctrine of constitutional duties. In the words of Alexy, we are faced with a *right to a positive action of the State.* We cannot deduce from this point that this social right is not a *definitive right*, because it depends on further legal clarifications, from this perspective the constitutional clause would not be enough and the false guaranty

would be nothing more than a fake right. It makes no sense at all. Almost all human rights call for a later adaptation or legal or institutional development or a implementation. This is not a specific characteristic of social rights (vid. Hierro 181). The argument cannot be exaggerated.

Only in the case of the right to education and, even more so, in the case of the right to health as in the right to Social Security, are economic or financial restrictions for the effectiveness of social rights to benefit well-perceived. What has been called the *limitation of what is financially possible*. Alexy and, previously, other authors have insisted that social rights presuppose a great economic effort that contrasts with the State's lack of sufficient resources in many situations. The amount and quality of the benefits received by citizens are subject to the logic of budgetary balance. Not a single public authority can give what it does not have. The situation is more clearly perceived in these times of serious economic crisis, where expenditure and national debt must be reasonably limited so as not to impede growth and employment. But no less costly is the organization of the duty and right to defence, or the right to State security, or the right to the due process by law, or the right to vote. Fundamental rights do not have to be «*cheap rights*» (Hierro 189).

8. MULTI-LEVEL PROTECTION MECHANISMS: THE RIGHT TO REACT

There is no right without remedy *(ubi ius ibi remedium):* there must always be an accessible forum in which a complainant can receive a judicial response to any petition. And the citizens' right to Social Security has strong judicial protection before *judges and ordinary courts* in Spain. Therefore, this right is also a *right to react*, which allows the possibility of contesting decisions taken by institutions within the system (Monereo 1437), and this fact corroborates its essence as a *subjective right*. In fact, there is a specific jurisdictional order, dealing with Labour Law and Social Security, the so-called social order, where specialized judges and courts resolve complaints orally and relatively quickly, in contrast to the long drawn out proceedings of civil and administrative courts. Depending on the cases, court decisions can be appealed two or three times. So the right, at least according to its legal regulation form, is sufficiently guaranteed in practice. But indeed judicial protection is only accepted when the situation of necessity is included within the legal provisions.

However, the worker or citizen registered with Social Security cannot lodge an individual *appeal for constitutional protection (recurso de amparo)* before the

Constitutional Court, in accordance with the limitations defined in article 53.2 SC, which excludes guiding principles from this direct access. The solution is appropriate because thousands of minor issues brought before the Constitutional Court could bring it to a standstill. Even though there are such subjective limitations to the protection of the right to Social Security, its content can be perfectly protected in an institutional or objective manner through other constitutional actions and proceedings. For example, the *judicial review of laws* to guarantee their constitutionality, at the behest of some public subjects, among them parliamentary minorities, who can directly contest any law before the Constitutional Court (article 162 SC). And Judges and Courts could also bring up a *question concerning the unconstitutionality of laws* under certain circumstances (article 163 SC). Actually, the constitutionality of most Social Security legal reforms was checked through these channels by the supreme interpreter of the Constitution.

Finally, article *1 First of the Additional Protocol to the European Convention on Human Rights* recognizes that every natural or legal person is entitled to the peaceful enjoyment of his possessions. This right enabled the European Court of Human Rights to review the citizens' right to receive social security benefits when the pension system was faced with radical changes by national legislators.

In relation to the above, I will mention the **Case of Kjartan Ásmudsson v. Iceland**, judgement of 12 October 2004, about property rights and some private contributions to social welfare funds, where the system of the Convention for the Protection of Human Rights and Fundamental Freedom was contravened. This was a complete exclusion and not a reasonable reduction, which meant an excessive individual sacrifice and a disproportionate measure according to the European Court's decision. On the other hand, the **Case of Aizpurua Ortiz and others v. Spain**, 2 February 2010, decided that the modification of the supplementary pension to fifty retired workers under the terms of a collective agreement did not violate property rights, because it was not a disproportionate measure and did not violate the fair balance between general interests and private interests linked to the fundamental rights of individuals.

This is a *par richochet*, indirect and limited, protection of a social right, that in some cases the Strasbourg Court offers, although it apparently seems that social rights are not protected by the European Convention on Human Rights.

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9. TONED-DOWN FEDERALISM AND DISTRIBUTION OF POWERS AMONG TERRITORIAL GOVERNMENTS: A CENTRALIZED MODEL

Spain is a *compound State* strongly decentralized into Autonomous Communities. Our model has very specific characteristics and is not the result of a theoretical design but of a pragmatic approach, somewhere between a regional State and a *Unitary Federal State*. Spain is a toned-down or weakened federal Sate that makes use of not only regional but also federal legal devices and practices. Nevertheless, the level of political power and economic resources in the hands of Autonomous Communities is quite prominent, in fact, as prominent as that of many federal States. But this is not the case when it comes to our Social Security model, which is, in practice, very centralized. The reality of what has happened is a far cry from the theoretical constitutional design.

The first rule of *distribution of powers* is defined in *article 149.1.7 SC*: «The State shall have jurisdiction over the following matters: the basic legislation and the financial system of Social Security, without prejudice to implementation of its services by the Autonomous Communities».

In accordance with the above regulation, *Social Security* falls within the jurisdiction of the State, which has *basic legislative power*, without prejudice to the *legislative powers incumbent upon the Autonomous Communities* so that they can develop by law those basic elements and to assume executive actions and faculties. This is a shared jurisdiction between the State and the Autonomous Communities, with significant leadership by the State.

Moreover, according to the Constitution, it is up to the State to *regulate the financial system and economic administration* of Social Security. National authorities have an exclusive power over the regulation of the so-called *single fund* of Social Security; to guarantee the unity of the system and the validity of the principle of solidarity among all Spaniards, regardless of their place of residence (Palomeque 321). In accordance with this constitutional foresight, the State owns all funds, goods and income pertaining to Social Security. If the economic benefits accorded by Social Security were not essentially equal, the equality of living conditions throughout the country would probably disintegrate. Therefore, Autonomous Communities cannot use their regulatory powers on economic issues; however, they could work together with the State in their «*management*»*or administration*. At least this is a possible constitutional interpretation. Actually, it is understood that the state jurisdiction over economic provisions enables it to financially administer the system and make every economic decision (in extenso García Murcia 362).

It is necessary to insist that when the State is able to pass *basic legislation* in certain matters, in theory, it cannot regulate everything, but only a minimal set of principles and regulations that should be the same throughout the State, and which Autonomous Communities must *develop by law and put into practice.* The Constitutional Court has explained that the State's basic provisions must not be detailed nor should they entirely regulate a matter. But, in practice, those basic regulations are constantly increasing and above all for Social Security. In fact, the domains that Autonomous Communities can regulate are very restricted, since everything concerning the protective action of the system, the status of benefits, is deemed basic, as well as everything concerning funding such as contributions and incomes. «The main axis of the system» belongs to the regulatory authority of the State and autonomous intervention is by Constitution possible, but highly unlikely, since there is nearly nothing left for them to regulate (García Murcia B., 2003, 362). There are very few other matters where the reality of things matches worse with the constitutional design. The authority over Social Security is in theory shared between the State and the Autonomous Communities, but State intervention is widespread, or we could even say complete.

The Autonomous Communities have the authority *to administer Social Security services* provided that these powers are included in their statutes of autonomy. In theory, these management or executive powers should allow them to carry out many activities related to administration, but to date, they have done little apart from taking over some collateral aspects such as social services (García Murcia B., 2003, 362). In this respect, the autonomous power is also more formal than real.

The second constitutional regulation on distribution of powers is in article 148.1.20 and states: «The Autonomous Communities may assume authority over the following matter: social assistance». Therefore, on the issue of «social assistance», included, as we already know, in the broad concept of Social Security, Autonomous Communites have the authority to plan their own regulations regarding public aid, as they are not subject to basic or minimal regulations passed by the State.

10. THE VALUE OF THE CONSTITUTIONAL GUARANTEE IN TIMES OF ECONOMIC DOWNTURN

In the previous pages, we have justified that fundamental rights do not have to be cheap and social rights least of all; yes, they can be austere, but their contribution to the cohesion, integration and unity of a community is essential and

they present unquestionable advantages. This is the logic of the social State as a modern form of the constitutional State, in contrast to the political decisions of other political societies in relation to their regulation. It is evident in the right to education or the right to health, but also in the citizens' right to protective action by Social Security in serious situations of need (disability, pregnancy and motherhood, invalidity, retirement, death and survival, family benefits...) recognized by the Spanish legal order and the Charter of Human Rights of the European Union.

Social Security is already a consolidated right, but it is also a particularly dynamic right at the time. Its content and scope are in permanent transformation, mainly driven by two factors: the new and changing needs and financial availability. The latter grew steadily for a while and gave the impression that the funds were inexhaustible. But in recent years debates have been focusing on how to ensure the financial sustainability of the institution, all of which involves the introduction of some limitations, or higher requirements of access to benefits.

The future challenge should be to rationalize with realism, austerity and efficacy the organization of this public service, the accorded benefits and their cost and the appropriate combination of private and public funding to establish financial equilibrium. The constitutional guarantee which requires constituent powers to maintain a public system of Social Security, inspires especially when the specter of economic downturn threatens to completely eliminate many public services developed over decades. And we citizens have already noticed the frivolous spending and the improvisations of too many governments and the pernicious effects of the alleged foolproof economic schemes on deregulation in managing economic policy in a framework of globalization. A system of social security as well as any market is always the fruit of Law.

SELECTED BIBLIOGRAPHY

ABRAMOVICH, V. y COURTIS, C., *Los derechos sociales como derechos exigibles*, Trotta, Madrid, 2002.

ALEXY, R., BASTIDA. F., HIERRO, L. y otros, *Derechos sociales y ponderación*, Fundación Coloquio Jurídico Europeo, Madrid, 2007.

ALONSO OLEA, M. y TORTUERO, J. L., *Instituciones de Seguridad Social*, Civitas, Madrid, 2002.

ESCOBAR, G., *Introducción a la teoría jurídica de los derechos humanos*, CICODE, Programa regional de apoyo a las Defensorías del Pueblo en Iberoamérica, Alcalá de Henares, 2005.

GARCÍA MURCIA, J. (a), «El derecho a la Seguridad Social en la jurisprudencia constitucional», en *VII Jornadas Universitarias Andaluzas de Derecho del Trabajo y Relaciones Laborales*, Consejo Andaluz de Relaciones Laborales, Sevilla, 1991.

— (b), «Seguridad Social e INSERSO» y «Servicios sociales», en *El Estatuto de Autonomía del Principado de Asturias. Estudio sistemático*, Alberto Arce (ed.), Junta General del Principado de Asturias, 2003, pp. 360-380.

— (Ed.) (c), *La dimensión social de la Unión Europea a partir del Tratado de Lisboa,* Gobierno del Principado de AsturiasUniversidad de Oviedo, 2011.

GARCÍA ROCA, J., *Cargos públicos representativos*, Aranzadi, Pamplona, 1999, Capítulo IV, «Un supuesto derecho de configuración legal o mejor con los requisitos que señalen las leyes».

GARCÍA VITORIA, I., *La libertad de empresa. ¿un terrible derecho?*, Centro de Estudios Políticos y Constitucionales, Madrid, 2008, prólogo de Javier García Roca.

GOMES CANOLTILHO, J. J., *Constituição Dirigente e Vinculação do Legislador Contributo para a Compreensão das Normas Constitucionais Programáticas*, Coimbra Editora, 2001.

GONZÁLEZ ÓRTEGA, S., «Los principios caracterizadores del sistema de Seguridad Social en la jurisprudencia del Tribunal Constitucional», en *VII Jornadas Universitarias Andaluzas de Derecho del Trabajo y Relaciones Laborales*, Consejo Andaluz de Relaciones Laborales, Sevilla, 1991, pp. 326-357.

MONEREO, J. L., «El derecho a la Seguridad Social», en *Comentario a la Constitución socioeconómica de España,* Monereo Pérez/Molina Navarrete/Moreno Vida (Ed.), Comares, Granada, 2002, pp. 1425-1524. It includes a long list of bibliography references.

MUÑOZ MACHADO, S., *Derecho Público de las Comunidades Autónomas*, IUSTEL, Madrid, 2007, tomo I, 2.º ed., pp.776-790.

PALOMEQUE, M. C., «Los derechos de la Seguridad Social y a la salud en la Constitución», en VVAA, *Derecho del Trabajo y de la Seguridad Social en la Constitución*, Centro de Estudios Constitucionales, Madrid, 1980, pp.301-336.

PRESNO, M. A. y WOLFGANG STARELT, I. (Ed.), *Los derecho sociales como instrumentos de emancipación*, AranzadiThomsonReuters, Cizur Menor, 2010.

SÁNCHEZ-URÁN, Y. (a), *Seguridad Social y Constitución*, Civitas, Madrid, 1995, prólogo de Manuel Alonso Olea. It includes a long list of bibliography references and judicial decisions.

— (b), «Modelo legal de Seguridad Social y Constitución», en *Legislación Histórica de Previsión Social. En el centenario del Instituto Nacional de Previsión Social. Textos y comentarios*, García Murcia/Castro Argüelles/Rodríguez Cardo (ed.), Thomson ReutersAranzadi, 2009, pp. 435-448.

VIDA SORIA, J., «Artículo 41. Seguridad Social» en Comentarios a la Constitución española de 1978, Oscar Alzaga (Ed.), Cortes Generales Editoriales de Derecho Reunidas, Madrid, 1983, pp. 103-131.
ZAGREBELSKY, G., *Il diritto mite*, Einaudi, 1992.

Título:

PRINCIPIOS CONSTITUCIONALES DEL SISTEMA ESPAÑOL DE SEGURIDAD SOCIAL: UN DERECHO DE LOS CIUDADANOS

Resumen:

Un sistema público de seguridad social cobra especial protección en el contexto de un Estado social, como ocurre en España y en Europa, que viene ahora reforzado como derecho por la Carta de Derechos Fundamentales de la Unión Europea y no sólo por el Pacto Internacional de Derechos Económicos y Sociales. El reconocimiento constitucional español de este sistema (artículo 41 CE) se basa en los principios constitucionales de flexibilidad, suficiencia, necesidad, universalidad y complementariedad. El resto queda en manos de la ley, pero no por ello deja de ser un verdadero derecho de los ciudadanos de acuerdo con la Ley General de la Seguridad Social y con diversos tratados internacionales, como la Carta Social Europea, y relevantes normas de la Unión Europea. Es también un mandato al legislador de regular y mantener un servicio público con distintos niveles y prestaciones. Es verdad que este derecho de configuración legal admite limitaciones y modificaciones derivadas del no menos constitucional principio de sostenibilidad financiera. Pero, por otro lado, existen diversas acciones multiniveles para reaccionar frente a las restricciones legales que violen el principio de proporcionalidad ante las jurisdicciones laboral y constitucional y ante el Tribunal Europeo de Derechos Humanos de acuerdo con el derecho de toda persona al respeto de sus bienes. Un sistema de seguridad social es siempre el fruto del derecho y por ello las restricciones legales deben resultar proporcionadas.

Abstract:

A public system of social security is specially protected in a Social State, as happens in Spain and most of the European countries. This public system is nowadays reinforced by the Charter of Fundamental Rights of the European Union and not only by the International Covenant on Economic, Social and Cultural Rights. The Spanish constitutional recognition of this system (article 41 SC) is based on several principles: flexibility, publicity, sufficiency, necessity, universality

and complementarity. All the other contents of the right can be shaped by the law, but it is in any case a true citizen's right according to the General Law on Social Security and several international treaties such as the European Social Charter and certain relevant norms of the European Union. It is as well a clear mandate to the legislator, so public authorities are obliged to preserve a public scheme of Social Security with different benefits and levels. Indeed it is above all a right to legal configuration or legal development and several limits and dynamic restrictions can be imposed by laws according to the constitutional principle of financial sustainability. But, on the other hand, if the principle of proportionality has been violated, there are several remedies to react against those legal restrictions before the social courts, the Constitutional Court and the European Court of Human Rights which must guarantee the right to the peaceful enjoyment of possessions. A system of social security is always the fruit of the Law and therefore legal constrictions must be proportional.

Palabras claves:

Derecho a la seguridad social – principios constitucionales – Estado social – restricciones presupuestarias – derecho a reaccionar – garantías multiniveles.

Key words:

Right to social security – constitutional principles – Social State – budgetary restrictions – right to react – multilevel guarantees.