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How fundamental rights clash (sometimes) with internal market freedoms

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SUMMARY

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1. Motivation

1. Motivation.

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

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

1. Motivation.

- Fundamental rights protection in European Union has changed with the years.
  - At first, the Treaties constituting European Communities were silent on human rights protection, and European Court of Justice had to make it possible.
    - ✓ After the consecration of the autonomy, direct effect and primacy of European Law (*Van Gend &Loos*, 1963; *Flaminio Costa*, 1964).
  - 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.
    - ✓ In this sense, the relevance of market freedoms and the second place of fundamental rights, in particular social rights, has been criticized (Poiares Maduro,1999:449).

- 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 (Dauses,1985: 398-419; Lindfeldt, 2007: 68-78)

- Fundamental rights have become more relevant with the acquisition of legal force by the Charter of Fundamental Rights of the European Union (1 December 2009 with Lisbon Treaty)

- In fact, ECJ is exercising today a constitutional role in EU Law system, particularly balancing fundamental rights and market freedoms (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). However, 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.

- 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.

1. Motivation.

- 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 today is to examine the relation of fundamental rights and market freedoms, and particularly the balance between them in the ECJ case law; and conclude some remarks on the position of national courts.

2. Methodology

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➢***Multilevel constitutionalism perspective*** approach(Bilancia, De Marco, 2004; Gómez Sánchez, 2008, 2011) with attention to different legal systems with effect to right's legislation and interpretation.

- The different levels or legal systems are becoming progressively more interconnected, and therefore we need to explain the relation and identify the correct criteria to integrate them from the perspective of fundamental rights protection (Gómez Sánchez, 2011), particularly in the EU complex system.

2. Methodology.

✓There are at least three levels to take into account:

- International level (International instruments on human rights, and particularly European Convention Human Rights standard)

- EU Level (EU Fundamental Rights Charter standard / and Fundamental Rights as General Principles of EU Law in the ECJ case law)

- National Level ([Constitutional] fundamental rights standards, and in some conuntries maybe regional rights)

3. Relationship between fundamental rights and market freedoms

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- There are two types of relationship between fundamental rights and market freedoms: **a positive relationship** where fundamental rights serve to protect market freedoms; and **conflicting situations** where fundamental rights and market freedoms come in to direct conflict with each other, and for this reason the ECJ must balance them.
- In the first type of relationship, the most representative cases begin with *ERT* (1991) where the ECJ stipulatet that Member States must respect fundamental rights when implementing Community law. Moreover, this respect is also required when dealing with an exclusion of treaty obligations. Therefore, a measure restricting market freedom must not only be justified, it should also respect fundamental rights as general principles of Community law.

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- In the first type of relationship, the most representative cases begin with *ERT* (1991) where the ECJ stipulatet that Member States must respect fundamental rights when implementing Community law. Moreover, this respect is also required when dealing with an exclusion of treaty obligations. Therefore, a measure restricting market freedom must not only be justified, it should also respect fundamental rights as general principles of Community law.
- The idea behind the doctrine established in ERT is that both market freedoms as well as any restrictions on them must take account of fundamental rights. In this case, it was free movement of services with freedom of expression. The line case continued with *Karner* (2004) about free movement of goods in relation to freedom of expression; *Carpenter* (2002) about free movement of persons and workers regarding the right to family life.

3. Relationship between fundamental rights and market freedoms

- Anyway, a positive synergistic relationship is not a problem to social rights protection. It is in conflicting situation when problems came out.

In fact, the question is:

"*When a fundamental right meets a fundamental freedom- which one prevails? How fundamental really is 'fundamental'?"* (Krzeminska-Vamvaka, 2005: 2).

4. Balancing fundamental rights and market freedoms

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- In these conflicting situations, two categories can be distinguished in the ECJ case law:

  - ✓ 1) A first category where we could see that there have been conflicting situations between fundamental civil rights and human dignity in front of market freedoms (*Schmidberger*, 2003; *Omega,* 2004; Sayn-Wittgestein, 2010).

  - ✓ 2) On the other hand, a second one characterized by conflicting situations between social rights and market freedoms, in particular freedom to provide services (*Viking*, 2008; *Laval*, 2008)

4.Balancing fundamental rights and market freedoms

- ***Schmidberger*. (C-112/00)**

A environmentalists demonstration closing the Brenner motorway (in Austria) to traffic for 30 hours.

- ✓ Liability of Austrian for an infringement of EU law under Article 34 TFEU (the free movement of goods)?

- ECJ: the free movement of goods was indeed restricted, but the restrictions were justifiable by the protection of fundamental rights, particularly the right to freedom of expression, assembly and manifestation.

4.Balancing fundamental rights and market freedoms

- ***Omega*** **(C-36/02)**

A German company operating the laser games in Germany, where players should try to 'shoot' with a laser gun in a *laserdrome*, thanks to the technology and equipment provided by a Brithis Company named Pulsar.

The Police ordered a prohibition of these games as a danger to public order because they were contrary to human dignity (basing the order in the simulation of homicides, violence trivialization, etc.)

- ✓ Contrary to the free movement of services?
- ECJ: the free movement of services was affected but this restriction is justified by the protection of human dignity which has a particular status as independent fundamental rights in Germany

- ***Sayn -Wittgestein* (C-218/09)**

An Austrian citizen (a woman) married with a German citizen and adquired the surname 'Fürstin von Sayn-Wittgestein'.

However, after the inscription of this name and title in Austria, it was established that it can no be registered under Austrian law (after an important Austrian Constitutional Court decision)

- ✓ Contrary to the free movement of persons and free movement of services?

- ECJ: the restriction is justified by the protection of equality principle as fundamental principle of the national identity of Austria as a republican State.

- ***Viking* (C-438/05)**

A Finnish ferry company, Viking Line, was responsible for carrying out a naval route between Tallinn (Estonia) and Helsinki (Finland) under a Finnished flagged ferry. At one point Viking Line sought to re-flag Rosella, so it would be able to benefit from lower working costs, because Rosella showed inability to compete against Estonian ships in the same route.

But it was prevented to take place by Finnish Seamen's Union (FSU) with the support of International transport Workers' federation (ITF), with a strike.

- ✓ Is it the strike contrary to the freedom of establishment?
- ECJ: the right to collective action is a fundamental right, but it was necessary to examine whether the restriction was or not was justified (leaving the decision to the national court)

4.Balancing fundamental rights and market freedoms

- ***Laval*** (C-341/05)

A Latvian company, posted Latvian workers to Sweden, to work on the construction of a school through Laval and Baltic Bygg AB (a subsidiary company). Laval had signed collective agreements with the Latvian trade unions, but not with the Swedish trade ones, because negotiations not come to fruition.

The Swedish electricians' trade union joined collective actions, and the work stopped. After that, Baltic Bygg was declared bankrupt.

- ✓ Are the collective actions contrary to the free movement of services?

4.Balancing fundamental rights and market freedoms

- ***Laval* (C- 341/05)**
  - ✓ Are the collective actions contrary to the free movement of services?

- ECJ: the right to collective action is a fundamental right, but it was a restriction not justified of the market freedom.

  - ❖ **The solution was not the Viking one**. ECJ did not leave the resolution of the balance to national court. Therefore, this is very important, because despite in *Viking Line* case, in *Laval* one, it seems impossible for the national court not to balance in favor of market freedom.

4.Balancing fundamental rights and market freedoms

- While in *Schmidberger* and *Omega* the Court considered that the restriction of a market freedom was justified in terms of protection of fundamental rights (the right to freedom of expression and assembly, and the right to human dignity, respectively); in a conflicting situation between social rights (labor rights) and the freedom to provide service, the solution adopted by ECJ was different.

So, how fundamental really are social rights? (Sarrión Esteve, 2010: 88)

✓

5. Conclusions

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- Fundamental rights and market freedoms can interact in a positive relationship and in a conflicting one.
- In conflicting situations, ECJ usually balance between these two “fundamental” elements of constitutional EU law.
- When there is a civil right in the conflict, ECJ usually is more comprehensive than when there is a social right.
- From the multilevel constitutionalism approach, we think that ECJ may leave the final decision to the national court with several indicators (like in *Viking case*).

THANK YOU FOR YOUR ATTENTION