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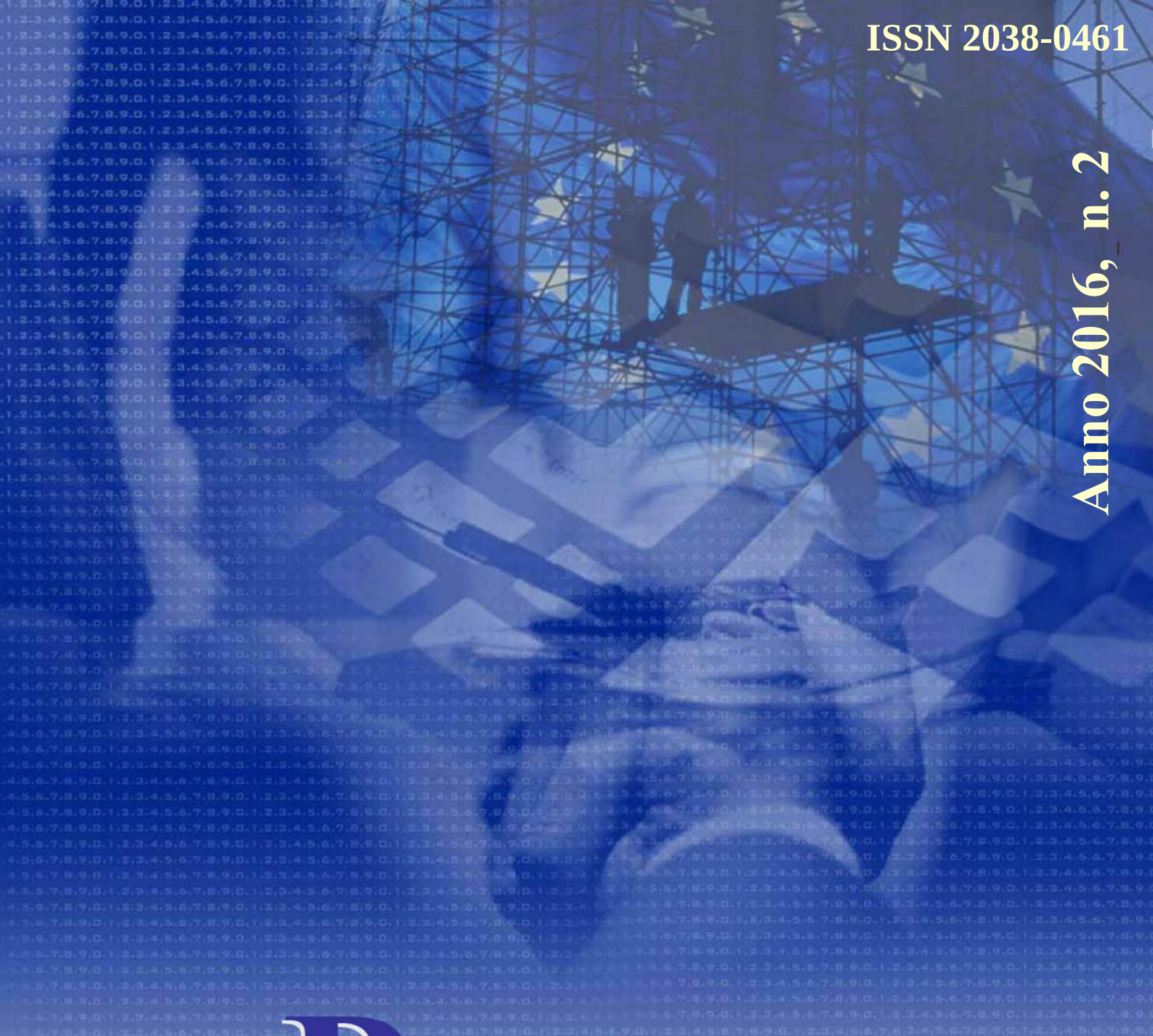

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EU Citizenship and Protection of Social Rights in the Court of Justice case-law

Cinzia Peraro

Abstract

This paper aims at analysing the fundamental freedom of movement of workers and the protection of social rights in the light of the recent EU Court of Justice case-law. The arising question is whether fundamental social rights may assume the same hierarchical level as general principles when a balancing test is exercised within the assessment of compatibility of national measures with EU law.

EU Citizenship and Protection of Social Rights in the Court of Justice case-law

Cinzia Peraro*

SUMMARY: 1. Introduction. – 2. Free movement of workers. – 3. Protection of social rights in the Court of Justice case-law. – 4. Final considerations.

1. Introduction.

This paper aims at analysing the fundamental freedom of movement of workers and the protection of social rights in the light of the recent EU Court of Justice case-law. The arising question is whether fundamental social rights may assume the same hierarchical level as general principles when a balancing test is exercised within the assessment of compatibility of national measures with EU law.

The definition of EU citizenship and the codification of rights granted to EU citizens are covered by the Treaties, namely by Article 9 TEU, Article 18 ff. TFEU and Chapter V of the EU Charter of Fundamental Rights. EU citizens can freely move across the Union in order to work or look for a job or establish their place of work in one Member State different from the one of origin, where they can enjoy the rights granted by the EU. Indeed, EU citizenship creates rights upon EU citizens and therefore could be defined as a "comunidade de direitos"[1].

Nowadays, the free movement of citizens became a core issue within the debates on present threats and challenges that the EU is facing, amongst which the EU immigration policy that is not only linked to the free movement of persons, but also to the underlying process of integration. In general, a more positive approach should be welcomed when addressing current issues.

2. Free movement of workers.

Originally, the four fundamental freedoms were established with the aim of increasing and developing the European internal market and workers were granted rights abroad. The Union offered workers the possibility to move across Member States in order to provide their services or capabilities or establish their place of work. Then, the personal dimension was considered, and individual rights

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[1] Alessandra Silveira, "Cidadania Europeia e Direitos Fundamentais", in *Direito da União Europeia. Elementos de direito e políticas da União*, Alessandra Silveira, Mariana Canotilho, Pedro Madeira Froufe (eds.), Coimbra, 2016, 17-72, spec. 24, 26.

were recognised, such as the right to family reunification. Thus, the free movement of workers should not be seen in macroeconomic terms, that is to say linked to the development of the internal market, but rather as a personal freedom to choose the country in which citizens want to work.[2]

With specific regard to workers,[3] according to Article 45 TFEU, no restrictions or different treatment regarding employment, remuneration or other work conditions may be imposed on the basis of the nationality of those citizens who want to work abroad. The free movement can be qualified as an individual right which, on the one hand, contributes to the development of the single market and, on the other hand, has a social dimension that implies the integration of EU citizens in the host Member State.[4]

Legislative actions were adopted by the European institutions with the specific purpose to protect workers' rights across Europe. Firstly, the Directive 96/71/EC[5] concerning the posting of workers in the framework of the provision of services established a core set of terms and conditions of employment which are required to be complied with by the service provider in the Member State to which the posting takes place to ensure the minimum protection of the posted workers concerned. As referred to in its first recital, the abolition of obstacles to the free movement of persons and services constitutes one of the objectives of the Community pursuant to Article 3 (c) of the Treaty. Indeed, the ultimate goal of the Directive was to enhance the economic dimension of the European market by protecting persons enjoying their right to freely move.

In 2012, a legislative proposal for a regulation on the exercise of the right to take collective action[6] was suggested, but then rejected by national parliaments considering its legal basis not valid. The proposed regulation addressed the need to respect the exercise of the right to collective action as a mean to effectively protect workers' interests and rights.

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[2] Päivi Johanna Neuvonen, "Equal Citizenship and Its Limits in EU law: We the burden?", Oxford, 2016, 44.

[3] The beneficiaries of the freedom to move are not described in the EU law, but a clarification has been provided by the CJEU, according to which migrant worker can be "any person who undertakes genuine and effective work for which he/she is paid under the direction of someone else": see Raúl Trujillo Herrera, "Free Movement of Workers in Times of Crisis. Some Observations", in *Citizenship and Solidarity in the European Union. From the Charter of Fundamental Rights to the Crisis, the State of the Art*, Alessandra Silveira, Mariana Canotilho, Pedro Madeira Froufe (eds.), 2013, 117-124, 119.

[4] Herrera, "Free Movement of Workers in Times of Crisis", 118.

[5] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 018, 21.01.1997, pp. 1–6.

[6] Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to privide services, COM(2012)130 final, Brussels, 21 March 2012, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0130:FIN.

Then, in 2014 the adoption of the Posting of Workers Enforcement Directive[7] intervened in order to ensure compliance with the Directive 96/71. It addressed the need to clearly identify the category of posted workers by establishing mechanisms of control undertakings. It also provided that posted workers could also look for effective protection before the courts pursuant to its Article 11, jointly with its recital 34. Indeed, "adequate and effective implementation and enforcement are key elements in protecting the rights of posted workers and in ensuring a level-playing field for the service providers".[8]

In cross-border social-labour contexts, EU actions appear to be appropriate in accordance with the principle of subsidiarity. However, not only the protection of posted workers and the safeguarding of minimum work conditions are involved.

As affirmed in the *Laval* quartet judgments[9], the exercise of social rights is subject to the balancing test with economic fundamental freedoms. Having regard to the Court of Justice case-law, the following considerations may be pointed out.

3. Protection of social rights in the Court of Justice case-law.

Social rights as fundamental rights are enshrined in the Charter, in particular in its Chapter IV titled "Solidarity". Their nature could be clearly affirmed thanks to its acknowledgment in international and European instruments[10] and the legally binding regime recognised to the Charter by the Lisbon Treaty. However, the Charter does not prevail upon the Treaties, thus the rights included are to be balanced with the Treaties provisions on general principles or objectives, such as the provisions on fundamental freedoms. This is the case of social rights and the economic freedoms. Indeed, some obstacles hamper the exercise of the fundamental freedoms and the enforcement of social rights.[11]

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[7] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159, 28.5.2014, pp. 11–31.

[8] Recital 16 of the Directive 2014/67.

[9] ECJ (Grand Chamber), Judgment of 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772; (Grand Chamber), Judgment of 18 December 2007, Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, ECLI:EU:C:2007:809; Judgment of 3 April 2008, Case C-346/06, *Dirk Rüffert* v *Land Niedersachsen*, ECLI:EU:C:2008:189; Judgment of 19 June 2008, Case C-319/06, *Commission of the European Communities* v *Grand Duchy of Luxemburg*, ECLI:EU:C:2008:350.

[10] Cinzia Peraro, "Right to collective action in cross-border employment contexts: a fundamental social right not yet covered by EU private international law", in *UNIO – EU Law Journal*, Vol. 2, No. 2, June 2016, 20 – 34.

[11] Herrera, "Free Movement of Workers", 123.

From a broad point of view, a question of compatibility of national measures with EU primary law arises when dealing with the protection of fundamental rights in social-labour contexts.

Fundamental rights should be reconciled with the requirements of the Treaty and in accordance with the principle of proportionality, as stated in 2003 *Schmidberger*[12] and 2004 *Omega*[13] judgments. The Court held that "the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty".[14] Therefore, Member States are obliged to respect fundamental rights when establishing restrictions to fundamental economic freedoms, which possibility is provided in the Treaty.

The finding ruled by the Court of Justice in *Viking* and *Laval* cases of 2007 concerned the balancing of the protection of social rights with the fundamental freedoms related to the internal market. If granting the exercise of social rights leads to the malfunctioning of the market, those rights are not to be exercised. In this context, the economic dimension of the EU prevailed on workers' rights. Nevertheless, for the first time the Court recognised the right to collective action as a fundamental social right.[15] In its reasoning, the Court actually held that the aim of the fundamental right to collective action clashes directly with a free movement provision.[16] Given that the right to strike aims at protecting workers' interests, it stated that it pursued public interests. Public interests are considered as an exception to fundamental freedoms, whose interpretation need to be strict.[17] Specifically, the Court observed that "the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty and that the protection of workers is one of the overriding reasons of public interest recognised by the Court".[18]

However, Member States should in any case comply with EU law when exercising competences resting on them.[19] Indeed, the Court also pointed out that "even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the

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[12] ECJ, Judgment of 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge* v *Republik Österreich*, ECLI:EU:C:2003:333.

[13] ECJ (First Chamber), Judgment of 14 October 2004, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn*, ECLI:EU:C:2004:614.

[14] Judgment *Schmidberger*, para. 74; Judgment *Omega*, para. 35.

[15] Judgment *Viking*, para. 44; Judgment *Laval*, para. 91.

[16] Vasiliki Kosta, "Fundamental Rights in EU Internal Market Legislation", Oxford and Protland, Oregon, 2015, 221.

[17] See also Judgment *Commission* v *Luxemburg*, para. 30: "the public policy exception is a derogation from the fundamental principle of freedom to provide services which must be interpreted strictly".

[18] Judgment *Viking*, para. 77; Judgment *Laval*, para. 103. See Leite, "Artigo 28", 355-359.

[19] Kosta, "Fundamental Rights", 220.

conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law".[20]

In the social context (not related to the right to collective action) other judgments were delivered by the Court where it addressed the question of compatibility of national measures with EU general principles.

In *Spezzino* case[21], and similarly in *CASTA* judgment[22] (both concerning the compatibility of the Italian legislation authorising regional health authorities to entrust medical transport activities to registered voluntary associations), the Court admitted that Member States can exercise their power in the area of health care, meanwhile they may not introduce or maintain unjustified restrictions on the exercise of fundamental freedoms. When testing the compliance of a prohibition, the fact that the health and life of humans rank foremost among the assets or interests protected by the Treaty must be considered and Member States may decide on the degree of protection which they wish to afford to public health and on the way in which that degree of protection is to be achieved.[23] Therefore, national measures could be legitimate only if they pursue EU general principles and they do not constitute an abuse of rights.[24]

It is of interest looking at certain decisions in the area of economic governance. The Court faced the question of its competence on the assessment of national measures adopted within the stability mechanism (MES), which are functionally close to the economic and monetary union policy, but substantially they are not included in the EU law scope and cannot be subject to the Court

[20] Judgment *Viking*, para. 40.

[21] ECJ, Judgment of 11 December 2014, Case C-113/13, *Azienda sanitaria locale n. 5 «Spezzino» and Others* v *San Lorenzo Soc. coop. sociale and Croce Verde Cogema cooperativa sociale Onlus*, ECLI:EU:C:2014:2440.

[22] ECJ, Judgment of 28 January 2016, Case C-50/14, *Consorzio Artigiano Servizio Taxi e Autonoleggio (CASTA) and Others* v *Azienda sanitaria locale di Ciriè, Chivasso e Ivrea (ASL TO4) and Regione Piemonte*, ECLI:EU:C:2016:56.

[23] Judgment *Spezzino*, para. 56.

[24] Judgment *Spezzino*, para. 62; Judgment *CASTA*, para. 65: "Having regard to the general principle of EU law on the prohibition of abuse of rights, the application of that legislation cannot be extended to cover the wrongful practices of voluntary associations or their members. Thus, the activities of voluntary associations may be carried out by the workforce only within the limits necessary for their proper functioning. As regards the reimbursement of costs, it must be ensured that profit making, even indirect, cannot be pursued under the cover of a voluntary activity and that volunteers may be reimbursed only for expenditure actually incurred for the activity performed, within the limits laid down in advance by the associations themselves". See also Peraro, "Right to collective action", 33; Davide Diverio, "Il ruolo degli Stati nella definizione del modello sociale europeo", in *Studi sull'integrazione europea*, X (2015), 515-545.

jurisdiction.[25] In other terms, such adopted measures are not subject to the control of compatibility with fundamental rights protected by the Charter in accordance with its Article 51.[26]

It could be argued that, however, it seems illogical that when Member States are acting under the economic and monetary union they are obliged to respect fundamental rights, while when applying the MES they are not. Both of the policies are aimed at safeguarding the economic dimension of the Union and even if the MES is an international agreement all Member States should exercise their power in accordance with their constitutional traditions, that in the end are strictly connected to general principles and fundamental rights set forth in the EU primary law. The Court seemed to have implicitly avoided to deal with the compatibility of economic measures under the MES and fundamental rights.[27]

4. Final considerations.

In the light of the foregoing, it could be asserted that even if rights are provided in EU law, still some questions arise related to their protection and enforcement. The case of posted workers is symbolic in this sense: although minimum standards are imposed upon Member States by EU Directives, some difficulties in effectively defend their interests are registered. The question of compatibility with EU law, EU general principles and fundamental rights is the overwhelming issue in relation to the protection of social rights. The hope is that the Court will try to declare its jurisdiction upon national measures that pursue EU objectives even if adopted within non-EU exclusive powers.

[25] Peraro, "Right to collective action", 27; see also ECJ, Order of 7 March 2013, Case C-128/12, *Sindicato dos Bancários do Norte and Others* v *BPN - Banco Português de Negócios SA*, ECLI:EU:C:2013:149.

[26] Francesco Munari, "Da Pringle a Gauweiler: I tormentati anni dell'unione monetaria e i loro effetti sull'ordinamento giuridico europeo", in *Il Diritto dell'Unione europea*, Fascicolo 4, 2015, 723 – 755, 741.

[27] Munari, "Da Pringle a Gauweiler", 742-743.