

DEFENDING SOCIAL RIGHTS IN ECONOMIC CRISIS: MORE ACTIVE CONSTITUTIONAL POLICY AND GREATER POSITIVE OBLIGATIONS OF THE STATE

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Abstract:

The economic crisis should not be accepted as the end of the Welfare State. It is a new opportunity for social and economic human rights. A few changes in systemic understanding of the concept of Welfare State should be made accordingly and constitutional policy should play important part. The doctrine of positive obligations of the State should be applied for more determined and effective realization of the constitutional principles of sociality, solidarity and social equality. Social roles of lawyers, especially legal scholars and judges, should be among the most important to achieve these goals.

Key words:

Economic Crisis; Welfare State; Constitutionalism; Doctrine of the Positive Obligations of the State; Social and Economic Human Rights.

1. A NEW OPPORTUNITY

Once again, we as members of the global society are facing the test of our democratic culture and social awareness. Our political self-understanding must clearly and convincingly show that we have not forgotten the political and philosophical ideas regarding democratic, social and just society (comp. McChesney 2000). The economic crisis should not be accepted as the end of the Welfare State.¹ Mysteriousness of the future of global political systems and its socio-democratic quality must be taken as a new opportunity to realize our democratic commitments and ambitions for the highest possible standards of the Welfare State (comp. Wallerstein 2003). In other words, we have to accept this challenge as a new opportunity to defend social and economic human rights and to create the European Welfare State worthy of its name (see Loic 2003). The fundamental principles of the modern constitutionalism, including the principle of socio-liberalism and genuine Welfare State, must finally be transformed from the theoretical concepts into the social reality with more determination and more effectiveness (comp. Armstrong 1998, Joerges 2003, Hardt and Negri 2005).²

¹ In this article I use the term Welfare State, as a general term predominantly used in constitutional or other scientific literature. Even though Constitution of the Republic of Slovenia uses the term Social State. See its Article No. 2. Available at: http://www.crnvo.cg.yu/Ustav_Slovenije.pdf. The term Welfare State must not be understood in its original or classical interpretation, but in balance with its contemporarily theoretical and doctrinal understanding which corresponds to the fundamental theoretical features of socio-liberal constitutionalism. I try to explain the latter in this article.

² One should not think of the idea to establish a genuine European Welfare State and its ambitions as an utopia. Nevertheless there were theories and social experiments in the history of Mankind which have ended as an utopia, especially those with a clear social character. See Dilas-Rocherieux 2004.

In order to act accordingly it would be of greater importance than anything else to increase and reinforce social and economic rights. In the sense of policy making and socio-political system we should expect and demand more from the State, which claims its sociality as a political quality and one of the most important criteria for its legitimacy. We should make a few changes in systemic understanding of the concept and fundamental constitutional principle of Welfare (or Social) State. We should use a more aggressive and daring legal policy as a tool to realize this goal. We should especially think about using constitutional law and constitutional law making as the institutionalized answer to political arbitrariness and unresponsiveness when social and economic rights are concerned. So it seems like the time has come to realize the idea of "governing with judges" with more courage and more determined advocacy of its legitimacy (see Stone Sweet 2000, Ewing 2009).

We should define a starting point of these suggestions and explain a few arguments supporting them in more detail.

2. AMBITIONS AND EXPECTATIONS OF SOCIO-LIBERAL STATE

2.1 THE MODEL

A reflection, even an appeal towards defending social and economic rights, requires a theoretical foundation. This theoretical foundation should provide necessary theoretical assumptions for convincingly justifying an appeal to a more active constitutional policy and a demand for greater positive obligations of the state. As an example of such theoretical foundation one could point out the model of modern European democracy, which is also a model of socio-liberal constitutional democracy. It is essential for this model that the modern concept of the Welfare State moves beyond classical ideas of political liberalism and the classical conception of the Welfare State (see Habermas 1998, Siedentop 2000).

In this model of social liberalism and constitutional democracy the fundamental human rights and liberties, as well as fundamental constitutional principles do not have only the so-called negative status. The State is not held responsible only in cases when its active practices directly interfere and violate said rights and principles. Its legitimate obligation, which is not only political, does not end by the State simply refraining itself from interfering with fundamental rights and principles, from "leaving them alone."

Fundamental human rights and liberties and the basic principles also have the so-called positive status. This status is essential for quality surplus of modern social liberalism and constitutionalism, in comparison with their classical beginnings. It establishes a political responsibility and legal obligation of the State to undertake active measures in order to ensure the best quality of the legal protection of fundamental rights and principles it reasonably can, and at the same time to facilitate their effective exercise in the social practice (comp. Mau and Veghte 2007, Gardbaum 2006).

Among them are the social rights and the constitutional principle of the welfare state with a special importance. This practical aspect of State's responsibility substantiates its broad, systemic and strict liability for the quality of legal protection of the economic and social rights. It also establishes the responsibility of the State for the existence of the system which provides opportunities for the actual and effective realization of social and economic rights. Therefore it establishes the liability of the State for the effectiveness of such a system as a whole. This aspect of the constitutional obligations of the State has the crucial importance for

the quality of legal protection and systemic possibilities for the realization of social and economic rights.

In other words, the State has a legally binding and legally actionable duty to do everything in its power and what can reasonably be expected of it that ensures the highest possible degree of legal protection of these rights and principles, and ensures the efficiency of their realization in social practice. This constitutional, not only political obligation of the State³ can be fulfilled with the implementation of proper political programs, with constitutionally correct, quality legislation and with a quality "legal policy" in general. Finally, this obligation of the State can be fulfilled with the establishment of a whole social system of rules, authorities and institutions, which must be constitutionally correct, legally and politically proper, transparent and efficient.

2.2 TO STRENGTHEN THE EXERCISE OF THE POSITIVE OBLIGATIONS OF THE STATE

The doctrine of legitimate obligations of the State, which require of it active measures for protection and realization of fundamental rights and liberties, is in constitutional law known as "doctrine of positive obligations of the State" (see Macdonald, Matscher and Petzold 1993, Mowbray 2004). For example, the Constitution of the Republic of Slovenia (indirectly) states it in Article 5.⁴

However, daily politics is far too often out of tune with this doctrine. Even the Slovene courts show little interest in acknowledging it, while the lawyers, both practitioners and professors of law, pay this doctrine very little attention in their professional and research endeavours. As a consequence, students of law and other social studies know very little about this doctrine or were not even aware of it during their studies. Attempts at asserting it in courts are rare, and even when this does happen, they are predominantly unsuccessful in regular courts. As far as Slovenia is concerned, this doctrine shares the fate of the Constitution and constitutional law, which play virtually no role in the rulings of regular courts.

For example, it took Slovene courts a few decades longer than the Strasbourg court to assert an elementary legal position stating that it is not up to an individual to prove that he/she has been beaten during detention at a police station, but rather in such cases the burden of proof is on the police to show that his/her injuries were not caused by their actions. Another examples are the rulings that committees dealing with appeals against police work cannot consist of police officers,⁵ or that the State is objectively and compensatory liable if its legal system is responsible for large case backlogs,⁶ or that the State violates the Constitution if it does not

³ For the political evaluation of some of the obligations of the State, or for some legitimate expectations towards the State concerning social and economic rights, known as "the third way", see Giddens 1998.

⁴ Article 5 of the Constitution of the Republic of Slovenia starts as follows: "In its own territory, the state shall protect human rights and fundamental freedoms." Available at: http://www.crnvo.cg.yu/Ustav_Slovenije.pdf

⁵ See the decision of the Constitutional Court of the Republic of Slovenia, No. Up-555/03-41 and No. Up-827/04-26. Available at: www.us-rs.si.

⁶ See Decision of the European Court for Human Rights (ECHR) against Slovenia in cases *Rehbock v. Slovenia* (2000) (police brutality), *Lukenda v. Slovenia* (2006) (violation of the right to trial in reasonable time or without

adopt a legislation which is a prerequisite for exercising certain constitutional rights. All of the above is a part of the aforementioned doctrine and there are many similar cases out there.

It is precisely with social rights where the responsibility of the State is even slightly more emphasized and particular. On one hand these rights namely have the biggest, most direct impact on citizens themselves, while on the other hand the constitutional provisions of these rights are often not only abstract, but also have programmatic characteristics. The Constitution, which in Article 2 already defines the State as "social",⁷ thus for example in Article 50 talks about the right to "social security",⁸ in Article 66 about "creating opportunities for work and about workplace protection",⁹ and in Article 72 about "the State providing for health and healthy living environment protection".¹⁰ However, all these constitutional guarantees require concretization of their contents. The positive obligation of the State in this regard means that the State needs a well-crafted political program which defines how the State will systemically ensure legal protection of the highest possible quality and the exercise of these rights and principles in practice. It must adopt a legally correct and effective legislation, which regulate a particular social or economic field. It is responsible for the quality and especially for the effectiveness of the entire system of protection, control and exercise of these rights and principles.

If the State fails to do so, it violates the Constitution in a similar manner as if it directly violated any other constitutional right of an individual. The State is objectively responsible for the establishment and quality of the system of the Social State and protection of economic rights, as well as for its proper and efficient operation. Its constitutional legal responsibility therefore does not affect only the direct relations between individuals and the State. It is too often forgotten that the State must take responsibility for the adoption of relevant legislation and for the establishment of a system of institutions that enable the protection of constitutional rights, liberties and principles in relations between individuals (the so-called *drittwirkung* doctrine) (Macdonald, Mather and Petzold 1993, 163 et al). In other words, a

undue delay), *Matko v. Slovenia* (2007) (ineffective investigation of the allegations for being ill-treated by the police) and *Šilih v. Slovenia* (2009) (inefficiency of the judicial system in establishing responsibility for medical negligence).

⁷ Article 2 of the Constitution of the Republic of Slovenia: "Slovenia is a state governed by the rule of law and a social state."

⁸ Article 50 of the Constitution of the Republic of Slovenia: "*(Right to Social Security)* Citizens have the right to social security under conditions provided by law. The state shall regulate compulsory health, pension, disability and other social insurance, and shall ensure its proper functioning. Special protection in accordance with the law shall be guaranteed to war veterans and victims of war."

⁹ Article 66 of the Constitution of the Republic of Slovenia: "*(Security of Employment)* The state shall create opportunities for employment and work, and shall ensure the protection of both by law."

¹⁰ Article 72 the Constitution of the Republic of Slovenia: "*(Healthy Living Environment)* Everyone has the right in accordance with the law to a healthy living environment. The state shall promote a healthy living environment. To this end, the conditions and manner in which economic and other activities are pursued shall be established by law. The law shall establish under which conditions and to what extent a person who has damaged the living environment is obliged to provide compensation. The protection of animals from cruelty shall be regulated by law."

system of institutionalized protection of human rights and liberties must be above all practical and effective.

3. RESPONSIBILITY FOR THE PEOPLE ON SOCIAL MARGIN

This doctrine must be directly linked to other current and highly important social issues. In particular those that concern the scope of social and economic rights. The State must have, for example, an appropriate program for the protection of mental health. Even more so if there is a well known and traditional problem of a high rate of suicides per capita. The State must produce the high-quality legislation in this area and establish an effective system of prevention and assistance. The same applies to the general system of health care. The State is objectively responsible for long waiting periods in medical institutions. It is also responsible for the lack of effective procedures for determining the liability of medical staff for mistakes at work and to protect the rights of victims. The same applies to the legal system and regulation of issues concerning the disabled, Roma, same-sex partners, single parents, children, athletes, young and educated people who are unemployed, etc.

This doctrine should also be used as an effective tool for solving problems of people on the social margins of society, or people with the lowest personal income. In the case of workers in the factories, who receive low or even the lowest personal income, barely enough to survive from day to day, the State which claims to be a real welfare State is responsible for setting up the legal system, which effectively protects those workers in the maximum possible, while still reasonable degree. The State must ensure the effective supervision of the protection of the rights and interests of workers and the fast, simple and low cost procedures for the exercise of their rights and to address their complaints. State must be convincingly and provably successful in preventing mobbing at workplace. It must ensure the effective protection of the most vulnerable groups of workers, easily actionable and quickly payable social benefits and pensions etc. Lastly, it is also responsible for cases where the managers and directors are paid a high severance pay, while the most deprived social workers are deprived of their minimum personal income and other statutory additions, or even get fired.

In such cases and circumstances the State is legally responsible in a similar manner as in the case, for example, where it does not carry out criminal prosecution of perpetrators, or when the system does not guarantee the victims and their relatives efficient and rapid procedure for compensation, or if it does not prevent the censorship of freedom of expression in the media, or if does not ensure an effective system of conditional releases (parole) of prisoners, or if it does not respond to its responsibility and undertake a proper action to guarantee safety at the most dangerous stretches of roads etc. The list is long.

If and when the State shall take appropriate programs and enact a proper legislation in this regard or when it is trying to establish a sound institutionalized system in any area of social life, then the State did not place its good will, the citizens were not awarded or given gifts from the State. Such action of the State was not the example of over standards in its policy and the legislation. The State has only realized its necessary, positive and constitutional obligation.

4. EXPECTATIONS TOWARDS LEGAL PROFESSION AND THE JUDICIARY

The protection of social rights and responsible social policy are not the cause of the resulting state of the social system. Quite opposite, the failure in this area, low level of democracy and

the over inequalities in society are the main causes for the disturbing present and black predictions for the future. What our society needs is a significant increase of the social responsibility on the side of governing day-to-day politics and the biggest capital owners. Constitution, the people and human rights should be taken more seriously. Individuals as persons and their dignity should be ensured priority over profits (comp. Wallerstein 2004, Chomsky 2005). Political requirements in the direction of sociality (welfare), democracy and equality should be strengthened. Such positive changes in the global system will not be struck by the sacrifice, or the freezing of the welfare state. They may occur only with a substantial strengthening of the system of Welfare State.

We can legitimately expect and demand more concern for the social and economic rights and more concern for the positive obligations from the State. In this regard social role of legal scholars, all lawyers and especially judges could be among the most important roles to achieve these goals. Lawyers should be the first to increase the consciousness about the importance of the doctrine of positive obligations of the State. This doctrine should be applied by all courts and judges with the intent to guarantee more determined and effective realization of the constitutional principles of sociality, solidarity and social equality on one side and for those fundamental human rights and freedoms that are most closely connected to sociality and economy on the other. We should strive for the universalization of this doctrine and be determined in its practical realization.

Constitutional policy should also be used as a mean to achieve these goals. Constitutional judges should hesitate less when using this doctrine to decide cases involving social and economic fundamental and constitutional rights. In this context slightly increased judicial activism would not seem illegitimate.

European Court for Human Rights (ECHR) should also be actively involved in the process of application of constitutional policy and judicial law-making with a purpose to establish a genuine European welfare state, worthy of that name. Self-understanding of the social role of this Court on global scale should be modified in the direction of accepting and using the social and economic rights as an integral part of its decision-making. Social and economic rights must become a permanent subject of the judicial law-making of this Court and its creation of minimum common standards for European society, which will be truly social (welfare state) in its character. Separation of political and social rights is therefore not in place. There is a need for unity in the understanding of all human rights and freedoms which may be deemed to be fundamental. They have to be uniformly enforced on the transnational level. What is needed is therefore a new, unique constitutional and social policy. Therefore, the Strasbourg Court has to change its principled position and take the corpus of social and economic rights, as well as the European Social Charter, as an undoubted matter of its judicial law-making (see Harris, Darcy 2001). If the ECHR does not change its principled opinion on this regard (see *Botta v. Italy* 1998) there will be no effective legal protection of social and economic rights for the citizens of the member States of the Council of Europe at the supranational level. This would not seem an appropriate path to combat global economic crisis.

5. CONCLUSION

We live in a social system that has not yet realized the ideas regarding democratic, social and just society. It has also not fulfilled the political promises, nor the capitalist predictions assuring common good, solidarity and promotion of social equality. On the other side, identity

of our future political and economic system is mysterious. Most probably we can not escape recession and possibly not even economic depression. Nevertheless, we should cling to our desire not to let the future global events lead us to a total social chaos, intractable social disorder or even to the state of war. We should act accordingly. We should assure that this worrying global state of affairs will not result in an even more unequal, economically self-serving, usurious and inadequately democratic system as we have today. On the contrary, our ambition should be the realization of a genuine Welfare State. This ambition, of course, is not a new political idea. It is what the present social system should already have had realized if all of its proclamations had become reality, especially the social emphasis of the modern liberalism. This task demands inspiration and determination.

We are facing the gaudily alternatives regarding the future of human society. We will have to choose, to take over a unique responsibility and to act without hesitation. It is possible that we have found ourselves even at the most important fault line in the history of Mankind. We will have to elaborate convincing and feasible vision for the future of the Welfare State. Of course, if we still consider a Social State to be something we do not want to give away and, quite contrary, as the priority of our future social activity in global dimension.

We should increase our consciousness about the importance of the doctrine of positive obligations of the State. We should strengthen the theoretical understanding of it and make it useful and effective in social practice. This doctrine should especially be applied for more determined and effective realization of the constitutional principles of sociality, solidarity and social equality on one side and for the fundamental human rights and freedoms closely connected to sociality and economy on the other.

We must demand more from the State, not less. We must assure that the individual as a person, his dignity and his fundamental human rights will have absolute advantage before the interests of political power and profit. Social role of lawyers and especially judges could be among the most important roles to achieve these goals. The doctrine of positive obligations of the State, its determined, effective and courageous application in day-to-day social practice and its universalization can lead us to a unified constitutional policy which does not only seem possible but also necessary for combating economic crisis. We should do this with a clear intent to create the genuine European Welfare or Social State worthy of its name.

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