Social rights in today's Europe: the role of domestic and European Courts

Conference organized by the Supreme Court of Cyprus
in cooperation with the Council of Europe

Nicosia, 24 February 2017

Session II

Social rights in the case-law of national jurisdictions: selected examples

Social rights litigation: constitutional issues

Ninon COLNERIC

Former judge of the Court of Justice of the European Union

Introduction

For today's conference, I selected two examples. Both of them do not only have a national but also a European dimension. The first example demonstrates harmonious relations between the national and the EU level. The second example illustrates frictions between the two levels. This choice was inspired by the subtitle of this conference "The role of domestic and European Courts". I shall talk about constitutional issues of national law and at the same time about the roles of domestic courts and the Court of Justice of the EU in the event that there is an overlap of the domestic and the EU legal order.

Example 1

My first example concerns the difficult relation between equal treatment of men and women on the one hand and the special protection of employed women on the other.

In 1956, the German Federal Constitutional Court dismissed as manifestly unfounded the constitutional complaint of a man who alleged that the limitation of the prohibition of night work on women disadvantages men compared to women and infringes the constitutional provisions on equal treatment of men and women.[1] The Federal Constitutional Court invoked biological peculiarities of women and their protection as a justification. In 1979, it confirmed this legal opinion in an *obiter dictum*.[2]

Some years later, the problem was again brought before the German Federal Constitutional Court. An employer who had been fined for employment of women at night filed a constitutional complaint. Moreover, two lower courts asked the Federal Constitutional Court whether the prohibition of night work for women was in line with the constitutional prohibition of discrimination.

While these cases were still pending, the European Court of Justice[3] (ECJ) gave a ruling on Article 5 of the Equal Treatment Directive of 1976[4]. This provision prescribed equal treatment for men and women with regard to working conditions. The ECJ held that it was sufficiently precise to impose on the Member States the obligation not to lay down by legislation the principle that night work by women is prohibited, even if that is subject to exceptions, where night work by men is not prohibited.[5] The ECJ rejected the alleged justifications for the prohibition as follows: Whatever the disadvantages of night work may be, it does not seem that, except in the case of pregnancy or maternity, the risks to which women are exposed when working at night are, in general, inherently different from those to which men are exposed.[6] If it is assumed that the risks of attacks are greater at night than during the day, appropriate measures can be adopted to deal with them without

[1] BVerfGE 5, 9ff.
[2] BVerfGE 52, 369.
[3] More precisely: the Court of Justice of the European Communities.
[4] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
[5] Case C-345/89 *Stoeckel*, EU:C:1991:324.
[6] Paragraph 15.

undermining the fundamental principle of equal treatment for men and women.[7] As regards the heavier domestic workload borne by women, the ECJ stated that the Equal Treatment Directive was not designed to settle questions concerned with the organization of the family or to alter the division of responsibility between parents.[8] The plaintiff of this case was Mr *Stoeckel*, who had been charged in criminal proceedings with employing women to work at night.

In 1992, under the impact of the *Stoeckel* ruling of the ECJ, the German Federal Constitutional Court considered the legislation limiting the prohibition of night work on women as incompatible with the constitutional prohibition of discrimination on grounds of sex.[9] The reasoning of that judgement contained a complete reorientation of the case-law of the Federal Constitutional Court on equal rights for men and women. In particular, the Court held that unequal treatment linked to sex is only compatible with the constitutional interdiction of discrimination on grounds of sex where it is mandatory in order to solve problems which, by their nature, can only occur either in men or in women.

This judgement of the German Federal Constitutional Court is also interesting for procedural reasons. You will remember that, in addition to the constitutional complaint of an employer, the German Federal Constitutional Court had to dispose of two requests by lower courts. They were based on Article 100 of the German Basic Law, which deals with the *incidenter* control of constitutionality and prescribes a preliminary ruling procedure for this purpose: If a court concludes that a law on whose validity its decision depends violates the German Basic Law, the proceedings shall be stayed, and a decision shall be obtained from the Federal Constitutional Court. In the light of the *Stoeckel* ruling of the ECJ, the German Federal Constitutional Court considered that the questions referred to it by the lower courts had become inadmissible. The *ratio decidendi* was that a law is not relevant to the decision within the meaning of Article 100 Basic Law if it is established that it is inapplicable because of opposing Community law. Thus, the German Federal Constitutional Court derived procedural consequences from the primacy of Community law.

Example 2

My second example concerns social security.

When the former Czech and Slovak Federative Republic was dissolved on 31 December 1992, it was necessary to find a criterion according to which the future pension claims of persons employed by former federal employers would be assessed. The two successor states concluded an agreement according to which the seat of the former employer was decisive. As a result of differences between the Czech and the Slovak pension schemes and the overall economic development in the two states, Czech nationals whose federal employers were located in the Slovak part of the federation were paid markedly lower retirement pensions than Czech nationals whose federal employers were seated in the Czech part of the federation. The Czech Constitutional Court considered that the constitutional right of

[7] Paragraph 16.
[8] Paragraph 17.
[9] BVerfG, judgment of 18 January 1992, 1 BvR 1025/82, 1 BvL 16/83 and 10/91, BVerfGE 85, 191.

"adequate material welfare in old age" was infringed. It accepted claims of affected Czech nationals for a supplementary allowance that would increase their old-age pensions to the level at which it would have been, should the federal period of insurance have been included pursuant to Czech legislation on social welfare. In addition to Czech nationality, the Czech Constitutional Court required residency in the territory of the Czech Republic as a condition for this allowance.

The Czech Supreme Administrative Court thought that this doctrine was contrary to EU law and asked the ECJ for a preliminary ruling. The plaintiff of this case was Ms. *Landtová* who satisfied all the preconditions for adjusting the amount of the old age benefit.

The ECJ held that the judgement of the Czech Constitutional Court involved a direct discrimination based on nationality and indirect discrimination based on nationality, as a result of the residence test, against those who have made use of their freedom of movement.[10] It concluded that such a national rule is contrary to Articles 3(1) and Article 10 Regulation No 1408/71. However, it added that it does not necessary follow, under European Union law, that an individual who satisfies the two requirements should be deprived of such a payment.[11]

Soon afterwards, in the case of a Czech complainant whose claim for a supplementary allowance had been dismissed, the Czech Constitutional Court considered that the ECJ failed to distinguish the legal relationships arising from the dissolution of a state with a uniform social security system from the legal relationships arising for social security from the free movement of persons in the European Communities, or the European Union. It held that Regulation No. 1408/71 could not be applied to entitlements of citizens of the Czech Republic arising from social security until 31 December 1992, and concluded that the ECJ judgment in *Landtová* was *ultra vires*.[12] The Czech Constitutional Court also considered that the ECJ had abandoned the principle *audiatur et altera pars* because the ECJ Registry had returned a statement which the Czech Constitutional Court wanted to submit in the proceedings before the ECJ in Case *Landtová* after the Czech Government had stated that the case-law of the Czech Constitutional Court violated EU law.

Jiři Zemánek remarked that the Czech Constitutional Court simply had not mastered the culture of European judicial dialogue yet.[13] I think he is right.

A better thought-out approach to the *ultra vires* problem was adopted by the German Federal Constitutional Court in *Honeywell*[14]. It dealt with the much criticized *Mangold* ruling of the ECJ[15] according to which the principle of non-discrimination on grounds of age must

[10] Case C-399/09 *Landtová*, EU:C:2011:415, paragraph 49.
[11] Paragraph 54.
[12] Judgment of 31 January 2012, Pl. ÚS 5/12: Slovak Pensions XVII, English translation available at http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=37&cHash=911a315c9c22ea1989d19a3a848724e2 .
[13] Undermining judicial authority: Landtová. See part VIII. Conclusion.
[14] Order of 6 July 2010 – 2 BvR 2661/06, English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html;jsessionid=D41762C73BE452B6F8E8BDDA7A65BDA8.2_cid392 .
[15] Case C-144/04 *Mangold*, EU:C:2005:709.

be regarded as a general principle of Community law. The German Federal Constitutional Court proceeded from the following premises: If each Member State claimed to be able to decide through their own courts on the validity of legal acts of the Union, the primacy of application could be circumvented in practice, and the uniform application of Union law would be placed at risk. If, however, on the other hand the Member States were to completely forgo *ultra vires* review, disposal of the treaty basis would be transferred to the union bodies alone, even if their understanding of the law led in the practical outcome to an amendment of a Treaty or to an expansion of competences. The Federal Constitutional Court held that the tensions, which are basically unavoidable according to this construction, are to be harmonised cooperatively in accordance with the European integration idea and relaxed through mutual consideration. Prior to the acceptance of an *ultra vires* act on the part of the European bodies and institutions, the ECJ is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU. Moreover, *ultra vires* review by the Federal Constitutional Court can only be considered if it is manifest that acts of the European bodies and institutions have taken place outside the transferred competences. The Federal Constitutional Court underlined the necessity to respect the Union's own methods of justice to which the ECJ considers itself to be bound and which do justice to the "uniqueness" of the Treaties and goals that are inherent to them. It even admitted that the ECJ has a right to tolerance of error.

By the way, *Jiři Zemánek*, the expert who criticised the Czech Constitutional Court for not yet mastering the culture of European judicial dialogue, has meanwhile himself become a judge of that Court.[16]

Concluding remarks

A matter of concern for constitutional courts of the EU Member States may be the *Viking* and *Laval* case-law of the ECJ[17], which deals with the right to take collective action. It puts the economic freedoms of the internal market first insofar as it uses them as the point of departure when taking a stance on permitted restrictions. This approach affects in particular the right to strike guaranteed by the constitutions of most European countries. The *Viking* and *Laval* rulings have already raised criticism from the ILO Committee of Experts on the Application of Conventions and Recommendations[18] and from the European Committee of Social Rights[19].

[16] http://www.usoud.cz/en/current-justices-and-court-officials/jiri-zemanek/ accessed 7 February 2017.
[17] Case C-438/05 – *Viking*, EU:C:2007:772; Case C-341/05 – *Laval*, EU:C:2007:809.
[18] Committee of Experts on the Application of Conventions and Recommendations (CEACR), *General Report and observations concerning particular countries*, International Labour Conference, 99th Session, Report III (Part 1A), 2010, 209. The CEACR states that its task is not to judge the correctness of the ECJ's holdings in *Viking* and *Laval* but rather to examine whether the impact of these decisions at national level are such as to deny worker's freedom of association rights under Convention No. 87. It observes that when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised. It considers that the doctrine articulated

However, after *Viking* and *Laval*, the legal framework was changed. The Treaty of Lisbon contains tools that could be used in order to diminish frictions between the guarantee of social rights in national constitutions and the economic freedoms protected by the TFEU. According to Article 3(3) TEU, the Union shall work for a social market economy. In line with this, Article 9 TFEU lays down a 'cross-cutting' social protection clause. In this new legal context, the weight of the economic freedoms of the internal market relative to that of fundamental social rights could be reconsidered.[20] It is to be hoped that the ECJ will grasp this chance.

in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.

[19] European Committee on Social Rights, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, decision (admissibility and merits) of 3 July 2013. Para. 122. The Committee emphasizes that "the facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater a priori value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers".

[20] See also Jonas Malmberg, *The impact of the ECJ judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action*, p. 12 and 16 http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24274/20110718ATT24274EN.pdf accessed 8 February 2017, accessed 8 February 2017; Advocate-General Pedro Cruz Villón in Opinion C-515/08 – *Santos Palhota*, EU:C:2010:245, para. 51.