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THE EUROPEAN COURT OF JUSTICE RECOGNITION OF CROSS-BORDER WELFARE RIGHTS THROUGH THE RESHAPING OF MEMBER STATES' WELFARE POLICIES – A COMMENT ON LENA BOUCON

O RECONHECIMENTO DE DIREITOS SOCIAIS TRANSNACIONAIS PELO TRIBUNAL DE JUSTIÇA ATRAVÉS DA REFORMULAÇÃO DAS POLÍTICAS DE BEM-ESTAR DOS ESTADOS-MEMBROS – UM COMENTÁRIO A LENA BOUCON

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Sumário: 1. Presentation; 2. Brief overview of the paper; 3. Critical comments; a) Terminology and methodology problems; b) Incomplete analysis; c) Unanswered questions; i) Do the Member States really have the “final say”?; ii) Does the ECJ “protect the sustainability” of the Member States social policies?; iii) Are these really “cross-border” social rights?; iv) Does the obligation to extend social rights to non-national EU citizens put an excessive strain on already overburdened Member States’ systems?; 4. Conclusion

Abstract: This paper is the written version of the comment presented during the Lisbon International Conference on Social Rights, regarding the paper “The European Court of Justice Recognition of Cross-border Welfare Rights through the Reshaping of Member States’ Welfare Policies”, submitted by Lena Boucon. The present paper begins by highlighting its main aspects, and its important contribution for the study of the ECJ’s case-law in the field of non-national EU citizens’ access to national social policies. However, some critical comments can be made in terms of terminology and methodology. The paper can also be criticized for presenting an incomplete analysis and leaving significant questions unanswered.

Keywords: cross border social rights; National social policies; ECJ case-law; free movement of workers; non-discrimination.

Resumo: O presente artigo representa a versão escrita do comentário apresentado durante a Lisbon International Conference on Social Rights quanto ao texto “The European Court of Justice Recognition of Cross-border Welfare Rights through the Reshaping of Member States’ Welfare Policies” apresentado por Lena Boucon. O presente artigo começa por apresentar brevemente esse texto e a sua

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importante contribuição para o estudo da jurisprudência do TJUE sobre o acesso de cidadãos da UE não nacionais a prestações sociais de Estados-Membros. No entanto, algumas críticas podem ser feitas quanto à terminologia e à metodologia utilizadas. O texto também pode ser criticado por apresentar uma análise incompleta dos dados e por deixar algumas importantes questões por responder.

Palavras-chave: direitos sociais transfronteiriços; políticas sociais nacionais; jurisprudência do TJUE; livre circulação de trabalhadores; não discriminação.

1. Presentation

This paper is based on the comment presented on the 20th May 2014, during the Lisbon International Conference on Social Rights in celebration of the 70th anniversary of the ‘Second Bill of Rights’, regarding the paper “The European Court of Justice Recognition of Cross-border Welfare Rights through the Reshaping of Member States’ Welfare Policies”, submitted by Lena Boucon. The comment was meant to be a critical discussion of no more than fifteen minutes, where the main aspects of the submitted paper were highlighted and some questions were raised, so as to stimulate a further debate. This paper is the written version of the comment.

2. Brief Overview Of The Paper

The paper “The European Court of Justice Recognition of Cross-border Welfare Rights through the Reshaping of Member States’ Welfare Policies” is divided into three main points. To begin with, it attempts to draw a brief picture of the specific context characterizing the European Union (EU), in order to identify the issues raised by the recognition of “cross-border welfare rights”. It then focuses on the approach developed by the European Court of Justice (ECJ) when recognizing “welfare rights”, and intends to show that it amounts to reshaping Member States’ welfare policies through a “mutual adjustment resolution”. Finally, it culminates with an assessment of the peculiar nature of what Lena Boucon calls the European Union “welfare rights”.

In the first point, on “the specific context characterizing the European Union”, the Author refers to the “Welfare rights’ features”: the significant financial investments from the States providing them, on the one hand, and the “quasi-inexistence of European Union jurisdiction over welfare”, on the other hand. Lena Boucon notes the merely complementary EU action in the fields of education and health care policies – the TFEU expressly excludes harmonization in these areas – and the silence of the Treaties on the issue of “compensation of civil war victims”. The EU jurisdiction is view as incidental and normally related to the free movement of workers.

Welfare is, thus, under the general jurisdiction of the Member States which means

that the political powers over welfare would naturally be boundary-based – in the sense that they should respect a principle of closure, where the territorial and personal scopes are strictly circumscribed, in order to ensure internal coherence. In fact, Lena Boucon defends that the existence of inclusion and exclusion rules (usually through residence or nationality requirements) is crucial for the preservation of the internal coherence and sustainability of welfare policies for two main reasons. On the one hand, because of their financial sustainability and capacity planning. It is practically impossible to offer unlimited access to national welfare policies without imposing excessive financial burdens. On the other hand, welfare policies are perceived as institutionalized forms of solidarity, primarily based on redistribution mechanisms within closed communities. The redrawing of welfare boundaries could have the effect of altering the bonds that exist between a State and its community and could allow the entry into redistributive schemes of “free riders”.

Thusly, Lena Boucon identifies three significant issues raised by the constraints put by EU law on national welfare powers. Firstly, the tension between the free movement of workers principle and the need for boundaries for the sustainability of welfare systems. Secondly, the fact that there is a growing interference of the EU on a field which remains essentially in Member States’ hands, through the recognition of “cross-border welfare rights” by the ECJ or the implementation of a European Union social policy. Lastly, the opening national welfare policies to non-residents implies granting rights to people who neither participate in the national democratic process nor contribute through taxes.

The focus of the paper is on how, in practice, the ECJ settles jurisdictional disputes involving national welfare policies and the free movement principle. The Author’s main point is that this settlement can be best described as a “mutual adjustment resolution.” Through this expression the Author aims to reflect what she considers as the two fundamental components of the ECJ approach: *i*) the softening, by the Court, of its traditional case-law in several respects; and *ii*) the imposing of constraints and “peculiar obligations” on the Member States (what Lena Boucon designates as “adjustment requirements”).

The Author analyses the first point, *i.e.* the flexible character of the Court’s approach with respect to the acceptable grounds of justification, studying cases in three different fields: education (including students’ financial support), cross-border health care and the compensation of civil war victims. As for the second point, *i.e.* the obligations placed upon Member States to recognize and enforce cross-border welfare rights, Lena Boucon identifies four sets of obligations: *i*) “obligations to open subject to the preservation of the sustainability of welfare systems” (examples are given in the fields of access to higher education system and to national social security, and cross-border health care), *ii*) “obligations to open subject to the degree of integration into society” (examples are given in the fields of nonresident students’ financial assistance and compensation of war victims), *iii*) “obligations to take into account personal circumstances” (example is given in the field of cross-border health care), and *iv*) procedural requirements (examples are given in the fields of cross-border health care and higher education,

specifically the financial assistance of nonresident students).

The paper, then, explores the nature of “cross-border welfare rights”, studying their scope and their substance. In terms of their scope, Lena Boucon defends that it is broader than the scope of the EU’s jurisdiction. Quoting the Opinion of Advocate General Kokott in *Tas Hagen*,² the Author considers that no distinction needs to be drawn between ECJ rulings involving the freedoms and EU citizens’ rights and, thusly, that the scope of application of EU law and the scope of EU powers ought to be distinguished. When analyzing the substance of “cross-border welfare rights”, Lena Boucon considers that, although the Court has never denied the crucial role played by national solidarity with respect to Member States’ welfare policies, it has also required Member States to extend, to a certain degree, their benefits to nationals of other Member States.

According to this point of view, the ECJ is confronted with an “endless difficulty”: if, on one hand, it wishes to further European integration through the recognition of “cross-border welfare rights”, it must, at the same time, acknowledge that the EU model of solidarity is presently inexorably mediated by the Member States – and their autonomy must be safeguarded. The expansion of “cross-border welfare rights” by the ECJ has been met by several concerns. One range of concerns is related with the challenges this expansion poses to the sustainability of national welfare policies – as well as to their planning capacities – and the fact that it may lead to a ‘race to the bottom.’ Another range of concerns is linked to principles of social justice. “Cross-border welfare rights” are viewed as favoring primarily financially privileged EU citizens, for those can afford moving to other Member States, which would mean that one Member State’s poor taxpayers would end up paying for the “welfare rights” of wealthier incomers.

Lena Boucon rejects these criticisms, citing empirical data which, in her opinion, shows that, in reality, very few patients go abroad to receive cross-border treatments, and two legal arguments: *i*) the justification accepted by the ECJ include the necessity to safeguard the sustainability of national health care systems; and *ii*) if it is true that the Member States must “adjust” their welfare systems, they retain the “final say.” She then gives examples in the fields of health care, access to higher education, financial assistance to nonresident students and compensation of civil war victims.

The paper concludes that three defining features characterize the substance of “cross-border welfare rights”. The first feature lies in the fact that the ECJ consistently takes into account the potentially adverse implications of its case law for national welfare systems. According to Lena Boucon, the ECJ uses both the acceptance of justifications reflecting national (financial) interests and the assessment of proportionality “to protect the sustainability of national welfare systems”. The second feature is the reliance on Member States to assess whether an individual should have access to welfare benefits – with the exclusion of

2. V. the Opinion of Advocate General Kokott in Case C-192/05, *Tas-Hagen*, 26.10.2006, ECR I-10451.

cases relating to access to higher education. And the third feature is the “tacit recognition” by the ECJ “that welfare state is – and will remain – a largely domestic matter.”³ As a result of these features, the paper suggests that there is a discrepancy between the far-reaching scope of “cross-border welfare rights” and their actual substance.

3. Critical Comments

Having briefly presented the paper it is now time to appreciate its merits and to address some critics to its approach.

The paper presents an interesting point of view and reflects a considerable knowledge of the ECJ’s case-law on EU citizens’ access to social rights recognized in Member States. There is, in fact, an equilibrium which is being built by this case-law, between, on the one hand, EU citizens’ rights, the freedom of movement of workers and the principle of non-discrimination, and, on the other hand, Member States jurisdiction over social policies. The paper represents an important contribution for the study of this balancing effort.

However, there are some troubling problems with the analysis made – some formal, others substantive – which will be developed *infra*.

a) Terminology and methodology problems

The paper focus on what it calls “welfare rights”. I have some problems with the use of this terminology. The term “welfare rights” can lead to confusion, because it is often used as a synonym for welfare benefits. However, in the paper it encompasses access to healthcare or education, for instance – both of which are not, strictly speaking, welfare benefits. The term more generally used to designate rights provided by the “Welfare State” is “social rights”. I think that it would have been better to use this terminology, especially when referring to rights to healthcare or education.

Besides this first, very formal, point, Lena Boucon does not define what she means with “welfare rights” or, more importantly, which are the social rights or social policy fields included. The paper gives examples of ECJ case-law on several areas, which range from access to healthcare to compensation of war victims, but it does not explain why these particular fields were selected and not others. It remains unclear, for instance, why other welfare benefits are not included – like those provided to individuals who are unemployed, those with illness or disability, the elderly, those with dependent children, and veterans –, which are, in fact, more commonly recognized as “welfare rights”. On a related note, it is also not clear why healthcare rights are treated as a single entity and the right to education is divided into right of access to education and right to financial

3. V. CATHERINE BARNARD, EU Citizenship and the Principle of Solidarity, in *Social Welfare and EU Law*, MICHAEL DOUGAN & ELEONORA SPAVENTA (Eds.), Hart Publishing, 2005, p. 180.

aid, for example. Perhaps because of this lack of a clear criterion, the analysis appears to mix very different cases – namely the National Health Service and social security, students’ financial support and compensation of war victims – as one indistinct reality.

As a result, the paper appears to extrapolate conclusions from the ECJ’s case-law relative to one or some of these areas to all the others without sufficient basis in the actual wording of the Court’s decisions. In some cases, the paper only delves in a particular field – for instance, access to healthcare – but the conclusions it takes would, apparently, be applicable to the other areas (or, in some cases, the paper does not specify leaving us guessing). The case-law is not exactly uniform between access to healthcare and access to (contributive or non-contributive) welfare benefits by non-national EU citizens, to only name two areas. The paper does not adequately reflect this diversity.

This is also a problem because it allows critics to accuse the paper of “cherry-picking” the evidence provided, only analyzing areas or cases that support a particular point of view, and/or of “leaps of faith” in the reasoning, by making claims without sufficient empirical evidence.

b) Incomplete analysis

Another problem of the paper is that it has some troubling omissions – in the sense that it is strange that some questions are not dealt with and no explanation is provided. Even if the main focus of the paper is the case-law of the ECJ, mention should have been made to some other legal aspects.

One would expect that, while discussing the scope and substance of fundamental (“social” or “welfare”) rights, the Author would explore the Charter of Fundamental Rights of the European Union. This is especially so, because the Charter expressly recognizes the right to education (in art. 14), social security and social assistance (in art. 34), or health care (in art. 35). It is strange to discuss the scope of application of these rights and if they bind the Member States without mention the Charter and the academic debate over its field of application (art. 51). The absence of any reference to the Charter leaves the paper to equate the Treaties’ freedoms and EU citizens’ rights in an incomplete legal framework – which would mean that its conclusions can be questioned, *prima facie*, because of this.

There are also a vast number of secondary EU legislative acts on social security⁴ or access to healthcare. In this last case, there is a relatively recent Directive on

4. For example, Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

Patients' Rights in Cross-border Healthcare⁵ which «*aims to establish rules for facilitating access to safe and high-quality cross-border healthcare in the Union and to ensure patient mobility in accordance with the principles established by the Court of Justice and to promote cooperation on healthcare between Member States, whilst fully respecting the responsibilities of the Member States for the definition of social security benefits relating to health and for the organisation and delivery of healthcare and medical care and social security benefits, in particular for sickness*»⁶. While discussing the case-law on cross-border healthcare it would be natural to mention its implementation by this Directive and the debate surrounding it. However, the paper does not do so.

C) Unanswered Questions

In addition to these, more formal, comments, the paper leaves some substantive questions unanswered or, in another point-of-view, contains claims that lead to these questions. I list and develop these questions below.

i) Do the Member States really have the “final say”?

One of the central points of the paper is its claim that, despite the duty of the Member States to adjust their health care systems so as to comply with EU law, “they always have the ‘final say’”. The Author makes this claim firstly in relation to health care, but later extrapolates to other areas. I cannot agree – at least not with the evidence given by the paper.

The fact that the Member States have considerable discretion in implementing social policies does not necessarily mean that they retain the “final say”. In effect, their actions are judicially controlled by the ECJ, which will verify their compatibility with EU Law, through the referral procedure or the infringement procedure. The Court will analyze, for example, if there are acceptable grounds of justification for each restriction of the freedom to move or exception to the non-discrimination principle. In this sense, the “mutual adjustment resolution” – notion proposed by Lena Boucon – appears not to be as “mutual” as you might think. One can easily say that, in fact, it is the ECJ who retains the “final say”. In the end, it is the ECJ who decides to “soften” its traditional approach, how far does it do so, and which “peculiar obligations” or “adjustment requirements” it imposes on the Member States. In doing so, is the Court, in effect, promoting the harmonization of Member States' laws without Treaty conferral? The paper does not explore this problem.

To sum up: If the actions of the Member States can (and will) be scrutinized by the ECJ, without any clear limitation of its control powers, can one really say that they have the “final say”?

5. Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.

6. V. No 10 of the preamble of the Directive on Patients' Rights in Cross-border Healthcare.

ii) Does the ECJ “protect the sustainability” of the Member States social policies?

Another of the paper’s central claims is that “the acceptance of justifications reflecting national (financial) interests and the assessment of proportionality are used by the Court to protect the sustainability of national welfare systems”. I cannot agree with this.

The ECJ does not use these instruments to “protect” the sustainability of the Member States’ welfare systems. It is up to the Member States to claim it as a justification. The Court accepts it or not. In some cases the ECJ accepted the national solidarity as a reason to exclude non-national EU citizens from the scope of certain social rights. But, in other cases, these reasons are not accepted, with the Member States being forced to extend welfare benefits or access to healthcare to non-national EU citizens, disregarding those arguments. This, once again, proves that it is the ECJ and not the Member States which actually has the “final say” in this area.

iii) Are these really “cross-border” social rights?

The paper say that it studies “cross-border welfare rights” (social rights), and presents the examples discussed *supra*. However, the case-law which is referred in the paper does not focus on EU citizens’ rights *per se*, but on the application of the principles of non-discrimination and free movement of workers. In these cases, the Court recognizes access of non-national EU citizens to national social rights, as welfare benefits, access to the National Healthcare System or to public education. We are talking about national rights, are to be enforced by the Member States, according to their national systems. The EU dimension is one related with the personal scope of those rights (should the Member States include all EU citizens or not). In that sense, they are not, in fact, “cross-border” rights, but exceptions to nationality or residence requirements of national social policies.

This explains how the paper can discuss what it qualifies as “cross-border welfare rights” without mentioning the Charter of Fundamental Rights (which actually contains social rights): because the paper does not, in fact, study EU social rights but right of access to national social rights derived from EU law.

iv) Does the obligation to extend social rights to non-national EU citizens put an excessive strain on already overburdened Member States’ systems?

The paper takes a positive view of the evolution of the ECJ case-law, defending that the Court strikes a balance between the “cross-border welfare rights” of EU citizens and the sustainability of national social policies. It is what the paper calls the “mutual adjustment resolution” between the ECJ and the Member States. I have some doubts if one can see the ECJ in such favorable light and I do believe that recent developments in EU Law, as the Directive on Patients’ Rights in Cross-border Healthcare, which is absent from the paper, can have dire and unforeseen consequences to the financial sustainability of national social policies.

The paper rejects these fears by claiming, amongst other arguments, that actually only a very small number of EU citizens “go abroad to receive cross-border treatments”. It is a strange defense: the “cross-border welfare rights” do not pose a threat because only a minority of citizens can actually exercise them. Then what are these rights really for?

This final question is more provocative than substantive. I do not have a clear position on this problem. But I do think that it deserves a more thorough investigation.

4. Conclusion

As was already mentioned, the paper presents an interesting point of view and represents an important contribution for the study of the ECJ’s case-law in the field of non-national EU citizens’ access to national social policies. However, the paper has shortcomings: some terminology and methodology problems; can be accused of making an incomplete analysis; and leaves important questions unanswered.
