THE CONSTITUTIONAL STATUS OF SOCIAL RIGHTS IN SPAIN*

La posición constitucional de los derechos sociales en España

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Resumen

El Estado de Bienestar es una forma de gobierno que hace responsable a los poderes públicos de asegurar una protección social y un bienestar básico a sus ciudadanos. Se caracteriza por buscar la igualdad efectiva entre sus ciudadanos y por dotarles de cierta seguridad económica y de servicios sociales.

Los derechos sociales fueron reconocidos a raíz de los diferentes movimientos sociales que tuvieron lugar en los territorios industrializados durante la segunda mitad del siglo XX. Entre otros, comprende los siguientes derechos: el derecho a la educación, el derecho a la propiedad privada, los derechos laborales y la libertad de empresa. Además, aparecen regidos por una serie de principios: la protección social, económica y jurídica de la familia; la protección integral de los hijos; la protección de los trabajadores; el derecho a la sanidad…

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Además de llevar a cabo un estudio detallado de los derechos sociales, este trabajo tiene como objeto exponer las reformas que deberían operarse en la Constitución a este respecto.

Palabras clave

Estado de Bienestar; derechos sociales; igualdad efectiva; reforma; Constitución Española.

Abstract

The Welfare State can be defined as a form of government that involves a responsability of the public powers in order to ensure social protection and basic welfare for citizens. It is characterized for pursuing effective equality among citizens and providing them with economic security and social servicies.

The social rights are the result of the labor movement in the industrialized states during the second half of the nineteenth century. Among others, include these rights: the right to education, the right to private property, labor rights and freedom of enterprise. Furthermore, are guided by some principles: the principle of protection of the family, the principle of integral protection of children, the principle of protection of workers, the right to heatlh protection…

In addition to making a sustained study of these social rights, this paper aims to expose the reforms that should be operated in the *Constitución* in this regard.

Keywords

Welfare State; social rights; real equality; amendment; Spanish Constitution.

I. THE SOCIAL STATE

There are basic principles from the constitutionalist point of view that are necessary to reach the definition of the rule of law; namely, separation of powers, rule of law, popular sovereignty, and recognition and protection of rights. These principles were already recognized in the French and American constitutions of the end of the 18th century. Within the consubstantial rights to the defense of human dignity and the free development of the personality as the essence of our democratic system, the recognition and protection of social rights become particularly intense. Especially since the effective capacity of our political model to assure us all the possibility of having a decent life and of realizing our vital project resides in their development, guarantee and equanimity. With this aim, and from this axiological point of view, the rule of law is also constituted as a social State.

In the second half of the twentieth century, fundamentally in Western Europe, this model of the rule of law known as the welfare State is intensely developed.

As we have had the opportunity to develop in the books *Estado social y felicidad* (2006) and *La protección multinivel del Estado social* (2013), whose fundamental ideas are specified in this section, the Welfare State can be defined as a modality of organization of the Political power in the community that involves a responsibility of the public powers in order to ensure social protection and basic welfare for citizens. It is characterized by including social rights within the category of citizenship rights, pursuing effective equality among citizens and providing them with economic security and social services.

It involves the public provision of a number of social services, including transfers to cover citizens' basic human needs in a complex and changing society and the State's responsibility in maintaining a minimum standard of living for all citizens belonging to the political community (Monereo, 1996). Thus, Heller (1974) considers that "the meaning of the State can only be its social function, that is, the mission that it has to fulfill as a factor, as a unit of action in the connection of social activity."

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Using the classical definition of Briggs, we can define the welfare State as "the organized power deliberately used through politics and administration in an effort to manage market forces in at least three directions: First to guarantee individuals and families a minimum income regardless of the market value of their work or property; Second, to reduce the extent of insecurity to enable individuals and families to meet certain social contingencies (eg. illness, old age and unemployment) that otherwise lead to individual and family crises; And third, to ensure that all citizens without distinction of status or class are offered the best available standards of a certain agreed range of social services."

Therefore the social state is responsible for existential demand. This concept was coined by Forsthoff and supposes, as Garcia Pelayo (1982) points out, the State's responsibility "to carry out the measures that assure men the possibilities of existence that they cannot assure by themselves". This existential demand extends directly or indirectly to the generality of the citizens, materializing itself in a series of benefits and measures always with regard to the specific economic and social situation. This new field of action leads the State to abandon its passive attitude, characteristically liberal, with the aim of regulating and guiding the economic process. This is how the welfare State is born. The state action becomes intense, being part of a dynamic of protection to society. In addition, the State must fulfill a regulatory function and define the socio-economic objectives. Its action should not be understood as a set of isolated measures, but rather as a continuous intervention and regulation embedded in a program which not only aims for immediate results, but rather for long-term perspectives.

In this sense, the clause of the Social State must be interpreted as a defining rule of the State's objectives. This obliges the legislator to act in terms of social configuration. The fundamental idea of the clause of the Social State states that the common good does not automatically come from the free concurrence of social forces and individuals, but that it requires that the State, with its authority, arbitrates a compensation of interests. In this sense, the social State has to pursue a differentiating justice in terms of social standards, objectives and needs. The most evident consequence of these new State dimensions is undoubtedly the interrelation between the State and society, where the State is constantly regulating society, in the pursuit of certain objectives. For example the need to provide economic and social security, the reduction of inequality of opportunities or even the guarantee of a vital minimum that eliminates or reduces poverty.

These objectives are intended to be achieved through normative mechanisms, such as the extension and equanimity of social rights, the inclusion in the legal-political texts that structure social coexistence clauses that advocate substantial equality or the regulation of mechanisms of involvement of the State in economic life.

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II. THE CONSTITUTIONAL PROTECTION OF SOCIAL RIGHTS

This group of rights is identified under the denomination of social rights or economic and social rights. They are characterized mainly by the historical moment of their recognition. These rights are the result of the labor movement in the industrialized states during the second half of the nineteenth century. That is why they are also called second-generation rights, as they arose from the civil and political rights postulated by the bourgeois revolutions of the late eighteenth and early nineteenth century in Europe and North America (which would be first generation rights).

The constitutionalisation of social rights occurred for the first time in the Mexican Constitution of Queretaro of 1917, in the German Constitution Weimar of 1919 and in the Spanish Republican Constitution of 1931, as well as in the Constitutions of the socialist states of the Soviet bloc. But since the Second World War, the recognition of these rights in the democratic Constitutions has become widespread.

International treaties also recognize, alongside the classic civil and political rights, social rights. Within the framework of the United Nations, the Universal Declaration of Human Rights of 1948 enshrines the right to social security, work, protection in the event of unemployment, equal pay and rest and leisure. There is also an expressly established treaty for the recognition of these rights: the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the United Nations on 16 December 1966.

At different regional levels, Treaties and Conventions on fundamental rights in general and social rights in particular are also approved, as we will develop later.

The Constitution of 1978 (CE), following a pattern of behavior of comparative law, contemplates a wide range of social rights that are closely related to the idea of the social State.

This type of rights has traditionally been considered of a utilitarian nature because they demand the State true active behaviors to make them a reality, thus distinguishing them from those of freedom that only require its abstention. This dichotomy now seems to have been overcome by most of the doctrine; so that liberty also demands a state service (we could not imagine, for example, an effective right to life or personal liberty without the existence of public security forces). And those of a seemingly utilitarian nature are also elements of the legal system that pursue social and collective goals that are constitutionally proclaimed as necessary for the dignity and free development of the person as the traditional rights of freedom.

The location of social rights in our Constitution is transcendental in view of the analysis of their effective protection.

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Thus, those rights that are regulated within the section of "fundamental rights and public freedoms" are guaranteed with the greatest protection both normative and procedural: we refer to the right to education, right to syndication and right to strike, as well as the principle of equality.

Secondly, taking into account their location, other rights, such as the right to work, with all the sub-rights that delimit its essential content: free choice of profession and trade, promotion through work, sufficient remuneration, non-discrimination by reason of sex; the right to collective bargaining; the right to take collective action or the social function of property, have an intermediate level of protection.

Finally, most social rights are included in the chapter 3 of Title I of our Constitution called "Principles governing Economic and Social Policy ". As the heading itself points out, we are not in the presence of genuine fundamental rights, although this does not mean, as we shall see below, they have no legal relevance.

Let's briefly outline the essential content of the social rights that enjoy direct protection in our Constitution, leaving to the next section the study of the so-called "Principles governing Economic and Social Policy".

1. Right to education. The right to education is an essential requirement to make effective the free development of our personality and a requirement of the principle of democratic legitimacy of the State, which is stated in article 1.2 of our Constitution. Participation in the formation of the popular will has to be carried out on an equal footing. For this to happen, it is essential that the citizen has not only sufficient information available so that his or her will formation is autonomous, but also the capacity and the criteria to assimilate it, to evaluate it and to decide on it.

   Our Constitution recognizes this right in article 27, along with academic freedom. And although the Constitutional Court in its judgment 86/85 has indicated that both are rights of freedom, the truth is that the right to education is not a right of freedom, which can or can not be exercised. It is a right that must be exercised inexcusably, so it can also be qualified as a duty. Hence, for the State this right must be classified as a service, since it is obliged to guarantee its exercise through the establishment of a public service of education.

   Article 27 of the Constitution is characterized, therefore, as heterogeneous. It contains fundamental rights, institutional guarantees, mandates to the legislator, duties and clauses of attribution of competence. The right of all to education is recognized in generic terms in the first paragraph of this precept. It is translatable by the right of integral formation within the framework of the regulated teachings established legally

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by the educational system and which tends, in any case, to the full development of the human personality, as well as respect for the democratic principles of coexistence and fundamental rights and freedoms.

2. Academic freedom. It is a projection of the ideological and speech freedoms that are recognized in articles 16 and 20.1a) of the Constitution.
   It implies the right to create educational institutions, respecting constitutional principles. This entails the following powers: to establish educational institutions within the legal framework, to establish an educational ideology for the institution and to manage the educational institution.
   It also involves the right of those who personally carry out the function of teaching, to develop it freely within the limits of the teaching position they occupy.
   It also includes the freedom to choose a school.
3. Right to unionize freely. The right to free unionize has a double dimension:

   A) Subjective dimension: it is an individual right that is concretized in the possibility of founding trade union organizations, in the right to join or not to join – negative freedom of association – to the unions already created and in the right to carry out a free trade union action, all these within the legal framework. This right is developed by the Organic Law 11/1985, of August 2, on Freedom of Association.
   B) Collective dimension: it is the right of the unions to carry out those activities that allow the defense and protection of the workers themselves. Our Constitutional Court has indicated that the trade unions are the subject of this right, not the workers' representative bodies in the companies.

   The law may limit or exempt the exercise of this right to members of the Armed Forces or Institutes or to those who make up the other bodies subject to military discipline and must regulate the peculiarities of its exercise for civil servants.
4. Right to strike. Article 28.2 of the Constitution recognizes the right to strike by workers to defend their interests. This can be understood as the constitutionally protected power of the workers to cease concerted and temporarily in their work, leaving in suspension the employment contract in order to pressure their employers or employers to achieve improvements in their working conditions. This fundamental right – states STC 27/1989, among others – may experience limitations or restrictions in its exercise deriving from the protection of other

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constitutional rights. For example the guarantee of the essential services of the Community, understood as services that guarantee or assure the exercise of fundamental rights and public freedoms.

5. Right to private property and inheritance. In Article 33, our Constitution recognizes the right to private property and inheritance. It will be the social function of these rights that delimits its content, according to the laws.

   In STC 37/87, a double categorization of property rights is made: as an individual right to enjoyment and use or lordship over things; And as an institution with a social function to fulfill.

   The reference to the social function as a structural element of the very definition of the right of private property or as a determining factor in the legal delimitation of its content reveals that the Constitution recognizes a right to private property that is configured and protected, As a bundle of individual faculties, but also, and at the same time, as a set of duties and obligations established, according to the laws, in attention to values or interests of the collectivity, that is, to the purpose or social utility that Each category of goods object of the domain is called to comply. Thus, individual utility and social function inevitably define the content of the property right.

   The third section of this article 33 introduces the figure of compulsory expropriation by stating that "no one may be deprived of their property and rights except for justified cause of public utility or social interest, through the corresponding compensation and in accordance with the provisions of law ".

6. Labor rights. Article 35 CE (Spanish Constitution) includes the right (and duty) that all Spaniards have to work, to free choice of profession or trade, to promotion through work and to sufficient remuneration to meet their needs and those of their family, without discrimination on grounds of sex. The law will regulate a workers' statute.

   The right to work, as stated in STC 22/81, in its individual dimension is the right of everyone, under conditions of equality and according to the capacity required, to get a job and to keep it. In its collective dimension, it is a mandate for the public authorities to carry out a policy geared towards full employment.

   For its part, Article 37 EC establishes that the law will guarantee the right to collective bargaining between the representatives of workers and employers, as well as the binding force of the agreements.

   It also recognizes the right of workers and employers to take collective action. The law regulating the exercise of this right, notwithstanding any limitations it may establish, shall include the necessary guarantees to ensure the functioning of the essential services of the community.

7. Freedom of enterprise. Article 38 CE recognizes freedom of enterprise in the context of the market economy. The public authorities guarantee and protect their exercise and the defense of productivity, in accordance with the requirements of the overall economy and, where appropriate, of economic planning.

According to STC 83/84 freedom of enterprise does not recognize the right to undertake any enterprise, but only to initiate and sustain business activity. This activity is governed by rules of very different order.

III. PRINCIPLES GOVERNING ECONOMIC AND SOCIAL POLICY

As its own name indicates, they are the essential principles that must inform the performance of the public powers. They are not rights in the subjective sense and, therefore, do not directly give exercisable powers to people.

They are a wide range of social rights / principles that are intimately related to the idea of social State.

From the legal point of view they are authentic norms, although they have an eminently programmatic nature. They orientate public action, but no subjective rights directly come from them.

In relation to them, Article 53.3 of the Constitution states that "recognition, respect and protection of the principles recognized in Chapter Three will inform positive legislation, judicial practice and the actions of public authorities. They may only be asserted before the ordinary jurisdiction in accordance with the provisions of the laws that develop them.

Thus, these principles serve as guidelines for the production, interpretation and application of the law by the public authorities. Any activity contrary to them is prohibited. Even if the action of the legislator is required for them to be invoked before the ordinary courts, it is no less true that the term "shape" must be understood in a broad sense and not restrictive, so that all public authorities, judicial authorities too, will be bound by the constitutional regulation that is made of them.

Our Constitutional Court states that they are not rules without content but authentic constitutional provisions that force the public powers as constitutional minimums that they are.

The normative character of the Constitution and the particular nature of these principles / rights, has led the Constitutional Court – for example, through STC (Constitutional Court Sentence) 14/92, of February 10 – to say that their binding nature needs clarification:

1. The Court recognizes that such principles are not legal norms without content. They enunciate authentic binding proposals that, in any case,

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must inform the positive legislation and the judicial practice. They oblige the public powers – legislative, executive and, in particular, to the judiciary for its function of applying the law that develops them – to have them present in the interpretation of both the other constitutional norms and laws.

2. The Court states that these principles, in the terms that are protected in Article 53.3 CE, have limited effectiveness, being principles that must guide the actions of public powers but do not themselves generate judicially claimable rights. It will be necessary to wait until the legislator makes the corresponding regulation, although that does not remove, as minimum constitutional contents that they are, the possibility to invoke them directly before the courts without that regulation.

Let's cite, just as a reminder, these principles:

1. The principle of protection of the family. Article 39.1 CE establishes that the public authorities ensure the social, economic and legal protection of the family. Since the definition of family is not specified in the constitutional text, we refer to its social concept in each time and place. This article specifies with respect to the integral defense of children, thus contemplating a concretization of the clause of material equality established in Article 9.2 CE for the members of the family historically discriminated by Law.
2. The principle of integral protection of children. They are equal before the Law regardless of their filiation. In order to make this protection a reality, the Constitution imposes that the law must make possible the investigation of paternity and that parents provide assistance of any order to children born in or out of marriage, as long as they are minors and when it legally proceeds (Article 39.2 EC). In this regard, Spain has ratified the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1989.
3. The principle of protection of workers. Several articles of this part of the Constitution contain rules that tend to protect workers. Some of them must be seen as the definition of economic policy purposes, others as recognition of classic social rights of workers and, finally, some others as imperative mandates to the legislator.
   Public authorities shall promote favorable conditions for social and economic progress and for a more equitable distribution of regional and personal income. They will develop policies aimed at full employment. They will also promote policies to ensure professional training and retraining. They will ensure occupational safety and health, the

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necessary rest, periodic paid leave and the promotion of suitable centers. In addition, the State shall ensure the safeguarding of the economic and social rights of Spanish workers abroad.

4. The right to health protection. It is the responsibility of the public authorities to organize and protect public health through preventive measures and the necessary services and services. They will also promote health education, physical education and sport.
   The public authorities will maintain a public social security system for all citizens that guarantees sufficient social assistance and benefits in situations of need, especially in the event of unemployment. It was Law 14/1986, of April 25, of Healthcare, which has developed this matter. It regulates all those activities whose goal is to achieve an effective protection of health.
5. The right of access to culture. Public authorities shall promote and protect access to culture, science and scientific and technical research for the benefit of general interest. The concept of culture embodied in this precept is not restricted to the right to education – recognized as fundamental in Article 27 –, serving, however, as a complement to it.
6. The right to the environment. The right to enjoy a suitable environment for personal development is a novel precept in the panorama of comparative constitutional law. It reflects the ecological concern that emerged in the last decades in large segments of public opinion and it has also been reflected in numerous international documents.
7. The principle of conservation and promotion of heritage. The public authorities shall guarantee the preservation and promote the enrichment of the historical, cultural and artistic heritage of the peoples of Spain and of the goods that comprise it. Criminal law shall punish any offenses against this heritage.
8. The right to decent housing. With the recognition of the right to enjoy decent and adequate housing, the public authorities are obliged to promote the necessary conditions and establish the pertinent rules to give effect to this right.
   There are innumerable laws related to the subject that try to realize this constitutional mandate addressed to all public powers and which is one of the most pressing problems, today, of Spanish society. This subject will also be developed later.
9. The principle of promoting the participation of youth. Article 48 of the Constitution provides that public authorities shall promote the conditions for the free and effective participation of youth in political, social, economic and cultural development.
   Here we have a new mandate to the legislator to materialize the participation of a social group such as youth in the life of the country. This

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principle has an intimate connection with the promotional clause established by Article 9.2 of our constitutional text.

10. The principle of protection of the disabled. Article 49 of the Constitution establishes that the public authorities will carry out a policy of anticipation, treatment, rehabilitation and integration of the physically, sensory and mentally disabled. This work of effective integral protection of the disabled has to be developed by the State, Autonomous Communities, Local Corporations, unions, public entities and organizations and associations and private individuals within the scope of their respective competences and according to their possibilities.
11. The principle of protection of senior citizens. The public authorities will ensure, through appropriate and regularly updated pensions, the economic sufficiency of senior citizens. They will also promote their welfare through a system of social services that will address their specific health, housing, culture and leisure problems. The projection of the protection of an increasingly large group in advanced societies must include all aspects of life, promoting the decent life of people who have contributed to social welfare.
12. The principle of consumers and users defense. Public authorities shall ensure the protection of consumers and users and promote their information and education. They will encourage their organizations and listen to them on issues that may affect them. Users are considered to be natural or legal people who acquire, use or enjoy as final recipients, movable or immovable property, products, services, activities or functions, whatever the public or private nature, individual or collective, from those who produce, facilitate, supply or issue them.

Once this reminder is made, it is therefore necessary to make a great effort to contribute ideas that help to evolve and shield, as far as possible, the model of social State. And, undoubtedly, the constitutional reform is presented as an ideal opportunity to shield the social State, through a new paradigm, that consolidates and extends its service area through a greater guarantee of social rights.

IV. WHAT MUST BE REFORMED IN THE CONSTITUTION TO SHIELD SOCIAL RIGHTS?

1. *Social cohesion as a fundamental objective of the social state*

The defense of the social State has been the main cause of the constitutional reform of September 2012, since, as stated in the Explanatory Memorandum of that reform, budgetary stability acquires a structural value and

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conditional of the action capacity of the social State. A value that justifies its constitutional consecration, with the effect of limiting and orienting, with the highest normative range, the performance of public powers since the economic and social sustainability of the State within the framework of the European Union is shown as an inescapable premise for the maintenance of the social State and, in particular, for social and territorial cohesion within the European framework. But in spite of the above, this defense of the social model should have been accompanied, at the time of the constitutional reform, by a paradigm shift that led to the understanding of social cohesion as the "guiding thread", the fundamental objective of the social State. Defining social cohesion is not an easy task. Perhaps, as Pérez Yruela (2012) points out, the political institution that has done the most for the definition of social cohesion has been the Council of Europe.

In 2000 it adopted the first Strategy Paper for Social Cohesion. Point 8 of the document refers to social cohesion as an ideal that societies must continually pursue. An objective that is difficult to define precisely because of the difficulty of fully achieving it, but in spite of this we must do everything we can to do so. Section 9 refers to social cohesion as that which holds societies together through the balance between centripetal and centrifugal forces operating within them. "Conflict," he literally says, "is a necessary and permanent feature of social life. The issue is not to create a permanent balance of forces but to build a dynamic equilibrium. The challenge is to create societies that can handle conflict and change in a constructive and creative way." He goes on to point out that what matters is to identify the factors that can divide society and he cites, among others, the excessive differences between rich and poor, the lack of employment, poverty or the lack of social protection.

In 2004, the Council of Europe revised its strategy of social cohesion, justifying the need to promote it with the risks that threatened it, and defining it as "the capacity of a society to ensure the well-being of all its members, minimizing differences and avoiding polarization. A cohesive society is a community of free individuals who support each other and pursue these common goals by democratic means. "

In July 2010, the Council adopted a New Strategy and Plan for Social Cohesion, which slightly modified the definition of 2004. The definition was written as follows: "the ability of a society to ensure the well-being of all its members – minimizing differences and avoiding marginalization –, to manage differences and divisions and to ensure the means to achieve the well-being of all its members. Social cohesion is a political concept that is essential to link the three core values of the Council of Europe: human rights, democracy and the rule of law".

The Council of Europe's position shows how the notion of social cohesion in the history of ideas in Europe has been shaped. Equally important is

the link between social cohesion, democracy and the welfare State: there is no genuine democracy – or quality democracy – without social cohesion. There is no social cohesion without a system of citizen protection against misfortunes and without universal access to the basic services of education, health and care to dependence.

The European Union has gradually developed a concept of social cohesion. It has been translated into certain Community policies and initiatives, up to a point that today a fundamental part of its political action is its strategy aimed at social cohesion. On the other hand, the European Union has started from the fact that social and cohesion policies of its member countries are a fundamental part of the social cohesion in each one of them and, by extension, of the European Union. Therefore, it has also carried out specific actions in this area, developing its own policies and establishing mechanisms for cooperation and supervision of the policies of the Member States. All this has been built through a long and complex process that began in the Treaty Establishing the European Economic Community of 1957, whose last milestone has been the Lisbon Treaties.

The Maastricht Treaty was the most important step towards strengthening the social dimension of the European Union. It incorporated a new section on the objectives of the European Union and it established a definition of the European Union's mission that reinforced the social aspects. To this end, it was expected that the European Union would develop a specific policy in the social sphere and another geared to strengthen economic and social cohesion. In order to reinforce both aspects, protocols on social policy and economic and social cohesion were added. The first one incorporated part of the contents of the Community Charter of Fundamental Social Rights of Workers, adopted in 1989. In order to strengthen social cohesion policy, a new structural fund was created, the Cohesion Fund. This reflects the idea of strengthening cohesion within the European Union through the creation of infrastructures that promote territorial integration.

Between the Treaty of Maastricht and the Treaty of Lisbon there were some modifications that added more content to the social and cohesion policy. A very important one was done in the Treaty of Amsterdam, where the Community policy of employment is created. Another one was introduced in the Treaty of Nice, which strengthens the Commission's capacity to support and complement Member States' capacity in various areas such as immigration and social exclusion, among others. For this purpose, the Social Protection Committee was created. From this, the Union's concern for the problem of social exclusion is intensified and even a specific strategy is developed.

A different but convergent contribution to this process was the adoption of the Charter of Fundamental Rights, proclaimed in Nice in December 2000, which now has the same binding legal character as the treaties.

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The Lisbon Summit of March 2000 is one of the important milestones in this process. It sets out the strategy to deal with the globalization of the economy, the growth of information and communication technologies and the risks and threats that stemmed from it. The text of the Lisbon Declaration sets out the ambitious objective underlying that strategy whereby the European economy should "... become the most competitive knowledge-based economy ... and grow in a sustainable way with more and better jobs and greater social cohesion ... People are the main asset and they should become the center of Union policies. "

In the Lisbon Treaties, the accumulated stock is collected in such a long and changing process. Social cohesion is formulated in the terms set out below.

The Treaty on European Union deals with general issues. It begins with a preamble where it recognizes inspiration from the cultural, religious and humanistic heritage of Europe. It confirms the adhesion to the European Social Charter and the Community Charter of Fundamental Rights of Workers. Article 2 states that: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of people belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". Among the aims set out in Article 3 are: "The Union shall combat social exclusion and discrimination and shall promote social justice and protection, equality between women and men, solidarity between generations and the protection of Rights of the child and it shall promote economic, social and territorial cohesion and solidarity between Member States ". For its part, the Treaty on the Functioning of the European Union deals with internal policies and institutional issues. Thus, Article 4 of the TFEU lays down shared competences between the Union and the Member States, which include employment, social policy, social and territorial economic cohesion, and agriculture and fisheries.

In particular, economic, social and territorial cohesion policy is governed by Title XVIII of the TFEU. The aim of this policy is: "In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion. In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favored regions. Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions. ".

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In view of the above it can be said that three aspects underlie the concept of social cohesion of the European Union. The first refers to the importance given to employment and to everything related to its promotion and to the protection of workers. As repeated in many documents of the European Union, employment is the best policy of integration and prevention of exclusion. The second concerns the fight against poverty and social exclusion, in the context of the right to sufficient benefits to lead a decent life. The third concerns the reduction of social, economic and territorial inequalities. The novelty lies in the emphasis on the territorial dimension of cohesion, as well as the economic dimension. This is clearly reflected in the criteria for the allocation of funds to balance territorial development and the importance given to infrastructure in territorial cohesion, as stated above. The European Union adopts a clear position with regard to territorial development, assuming that the reduction of inequalities passes through the balance between the regions from the infrastructures and equipment point of view that create the conditions for the improvement of living conditions and economic development. In contrast to the schools of economic thought that rely on market forces to develop territories, the European Union assumes the need to establish compensatory mechanisms to reduce and prevent disparities that can become a threat to social cohesion.

In sum, "the cohesion model that shapes the set of declarations and provisions just described, reflects and updates more heavily the acquis communautaire from the European concern for the social issue that we saw in the previous section. It is not an improvised model and it is not organized on principles accepted by all. Nor is it an absolutely guaranteed stability model. It is the result of a long process of conflicts, negotiations, transfers and transactions that reflects the progressive institutional maturation of that historically unique experience that is the construction of the European Union. It has made possible, above all else, that what we call the European Social Model keeps emerging "(Pérez Yruela, 2012).

Social cohesion is therefore the objective that the Constitution must express explicitly as fundamental when the social state is constitutionalised, since it involves, as we have advanced, the capacity of a society to ensure the well-being of all its members – minimizing the differences and preventing marginalization –, to manage differences and divisions and to ensure the means to achieve the well-being of all its members. Social cohesion is the element that links the essential values of our model of social and democratic State of Law: the recognition and guarantee of rights, democracy and the rule of law.

2. *The financial armor of the social state*

Our Constitution designs an original model of Social State of Autonomies. The specific coordinates that outline the Spanish social State of

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Autonomies are deduced first of the Constitution itself. Particularly from the comparison between the general system of social rights or of benefit included in the First Title, and the system of distribution of competences foreseen in Title VIII, articles 148 and 149, where it is detected that the bulk of the matters of autonomous competence correspond to some of the central areas of the social State, such as education, health, social assistance, environment or culture. In addition, the transfer process of powers to the Autonomous Communities has consolidated this tendency, where in any case, the central State assumes competences of legislation or basic regulation, and the Communities assume legislative powers and especially management powers in the respective material areas. It can be said, then, that the social benefits of the Autonomous Communities have ended up being the main instance of development of the social State in Spain.

The Autonomous Communities have thus become, in the Spanish State, the level of government that assumes the leading role and responsibility for the implementation of social rights. This is why the provision of basic public services is the responsibility of the Autonomous Communities, through the design and implementation of the different public policies of social content. In order to implement and enforce them it has been articulated an administrative, functional and personnel structure, dependent on the autonomous institutions of self-government (Sánchez Pino, 2014). Therefore, the satisfaction of the rights of social benefit will, in any case, require a positive action by the autonomous public powers. Only this way will it be possible to meet the obligation of guarantying to the citizenship the catalog of benefits derived from the social State.

The Autonomous Communities, especially those who undertook the reform of their Statutes, have consolidated this dimension of government level. They are now responsible for the social policies in their territory and with respect to their citizens. However, the commitment assumed by the public authorities in relation to the proper functioning of the basic public services, designed to make the welfare State in their territories a reality, requires the corresponding financing of the expenses that these public services generate, so both the implementation and maintenance of social benefits are adequate. Consequently, the Communities must establish and dispose of the necessary financial resources to cover the financial cost of such fundamental public services. And they must therefore ensure, through appropriate constitutional changes, the financial sufficiency which guarantees, in any circumstance, the viability of the fundamental social services derived from the rights to benefits that make the social State a reality.

In the same sense, the document *Por una reforma federal del Estado de las Autonomías* (2012) states that "constitutional reform must address inescapably the role of the principle of horizontal fiscal equity in the overall

financing system, so that the Constitution prefigures how the mechanisms of financial leveling will operate in practice. Art 158.1 CE shows a clear insufficiency on this subject, what advises its absolute reformulation. New regulation of this precept that should be undertaken taking into account one of the main deficiencies that has usually been imputed to the various LOFCA (Organic Law on Funding the Autonomous Communities) systems, and which is maintained or even intensified in the current funding model, namely: opacity or lack of transparency of the instruments through which the fiscal leveling is articulated ".

Among the suggested criteria to avoid this opacity, we highlight the one related to establishing the constitutional guarantee that the Autonomous Communities reach "reasonably comparable levels of public services", without constitutionally specifying the exact scope of their coverage, which would be materialized in the legislation.

3. *Inclusion in the constitution of the non-regression clause of social rights*

This reform proposal has already been provided by Amnesty International, Greenpeace and Oxfam (2015). It is incorporated into this work taking into account the magnitude of its content.

We must begin by asserting that the unjustified regression of social rights is against international law and the constitutional principle of legal certainty. However, there is not any clause in our constitutional order that expressly includes the principle of non-regression.

The International Covenant on Economic, Social and Cultural Rights imposes an obligation on States to progressively advance in terms of social rights: "Each State Party to the present Covenant undertakes to take steps ... to achieving progressively the full realization of the rights recognized in the present Covenant…"(Art 2.1).

The Committee on Economic, Social and Cultural Rights has stated in its General Comment 3 that "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources." and that there is "an obligation to move as expeditiously and effectively as possible towards that goal". For this Committee, the State must justify the full use of the maximum available resources before taking any retrogressive measures and analyze the impact on human rights prior to adopting it, as well as respecting the minimum essential content of rights, and the proportionality, temporality and non-discriminatory nature of the measure. Likewise, the State must guarantee the participation in the design of the measures of the people affected and the organizations that represent them.

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For its part, the Human Rights Council stresses that "economic and financial global crises do not diminish the responsibility of state authorities for the realization of human rights" (Resolution S-10/1, 2009). Furthermore, "the exercise of human rights, including the right to health, can not be subordinated to the implementation of structural adjustment policies" (Resolution 11/5, 2009).

In the Council of Europe, the European Committee of Social Rights has derived the principle of non-regression from Article 12 of the European Social Charter. The European Commissioner for Human Rights (2012), denouncing the impact of austerity measures on human rights, especially on social rights, reminded the importance of the principle of non-regression as a necessary guarantee of these rights.

As for comparative law, some Constitutional or Supreme Courts have deduced this principle from their Constitutions. This is the case of Germany, Argentina, Canada, France, Portugal or Italy.

In relation to our constitutional order, Spain can be considered to be legally bound to the principles of progressivity and non-regression, as they have been established in international law, supported by Articles 10.2 and 96.1 CE. Even in Articles 9.2 and 9.3, we could find arguments in favor of this thesis, especially if it is related to the model of social State that our Constitution establishes in its first article.

At the very least, according to that report, the principle of progressivity would imply an obligation of constantly adapting the benefits included on each right to the new needs. In any case, the Constitutional Court has not endorsed the existence of a principle of progressivity of rights in our legal system. In its most recent jurisprudence, the Constitutional Court admits regression without looking for a constitutional justification for them (see SSTC 184/1993, 197/2003, 44/2004, 213/2005 or 128/2009).

In this context, it can be seen how, since the beginning of the economic crisis, regressive measures at the legislative level have multiplied in our country, negatively affecting social rights.

Different United Nations agencies have reported these regressions. These included the Committee on Economic, Social and Cultural Rights, which recommended Spain to ensure that all measures of austerity implemented maintain the level of protection of economic, social and cultural rights and that they are in all cases temporary, proportional and non-detrimental to these rights. In addition, all austerity measures adopted must identify the essential minimum content of all rights and protect this essential content in any events. The effectiveness of state efforts for the protection of economic, social and cultural rights must also be increased. Similar reasons appear in the Reports on Spain of 2013, from both the ECSR and the European Commissioner for Human Rights.

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For all these reasons, since constitutional jurisprudence has seemed to fail to take account of the international law requirements of the principle of non-regression of social rights, it is therefore necessary to expressly recognize it in the Constitution. In particular by adding a new paragraph to article 53, which mentions the elements of the internationally consolidated control model of regressive measures, that we just quoted.

4. *Other proposal of constitutional reform*

To finish this paper, we can add some different aspects of protection of social rights in Spanish Constitution that could be reformed:

1. Constitutionalize a universal and permanent quality education as a fundamental right.
2. Establish the right to health as a fundamental right.
3. Constitutionally recognize the social function of the right to enjoy decent housing.
4. Constitutionally recognize personal autonomy as a fundamental objective of public social policies.
5. Constitutionalize the fundamental right to basic income.
6. Establish the right to a sustainable environment as a fundamental right.

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