The rights laid down by the Spanish Constitution that involve a provision by the State: are they reversible or not? The right to public health, the Royal Decree-Law 12/2012 and the Judgment of the Constitutional Court 139/2016

The Spanish Constitution, more specifically Chapter 3 of Part I on the Principles governing Economic and Social Policy of our constitutional system, includes "rights" such as the right to health and the right to adequate housing. Paragraph 3 of Article 53 establishes that these "rights" need to be further developed by law and may only be claimed in court according to law.

The ordinary legislator becomes determinant to regulate the content of these rights, which is directly related to the services the public bodies will compulsorily need to provide. However, one question needs to be posed: does the legislator have enough leeway to regulate this content and services?

On the one hand, the characterization of these guiding principles as "optimization requirements" aims to give them a positive and incremental content. According to this theory, the legislator has the duty to broaden as much as possible the number and scope of public obligations in favor of the citizenship.

On the other hand, in the context of an economic crisis the need has arisen to set restrictions on already recognized services with the essential aim to guarantee the sustainability of the economic and financial system and thus offer those services whose provision can actually be assumed.

The Judgment of the Constitutional Court of 21 July 2016[1], based on the Royal Decree-Law 16/2012, of 20 April, reopens the debate on the reversibility of such rights. The interesting dissenting opinion of Judge Valdés Dal-Ré, backed by Judge Asúa Batarrita, is worth mentioning here.

The Royal Decree-Law 16/2012, significantly called "on urgent measures to guarantee the sustainability of the National Health System", was adopted during the severe economic crisis and while the Government was under high pressure exerted by the EU institutions to reduce public deficit. The Royal Decree-Law introduced with this aim a series of cutbacks in healthcare. To summarize, the universal health coverage defended until then was abandoned in favor of the previous model based on insurances, consequently leaving specific populations out of the public system and limiting the access of registered foreigners without residence permit to most part of the public healthcare.

[1]Already analyzed in this blog by Professor David Moya with respect to cutbacks in healthcare for immigrants

Institut de Dret Públic

Adolf Florensa, 8, 1r pis Tel. (+34) 93 403 45 35
08028 Barcelona Fax. (+34) 93 403 45 36
www.idpbarcelona.net idp@ub.edu

As stated in previous judgments, the Constitutional Court insists on the reversible nature of previously guaranteed services, thus conferring great freedom on the legislator. The Court affirms that the systematic position of Article 43 within the Constitution, "gives the ordinary legislator freedom to regulate in accordance with Article 53.3 with relation to Article 43.2". The Court also states that the Royal Decree-Law "represents a turnabout in the existing policy based on a progressive expansion of free or subsidized healthcare". However, as mentioned in the Judgment, this turnabout relates to a previous law, not to a right defined in the Constitution and consequently unmodifiable. The legislator evaluates the reversible nature according to the different circumstances of the moment (in this line, Judgments 41/2013 and 49/2015).

It is important to highlight the aforementioned dissenting opinion because it proposes a more balanced approach to the analysis of the reversibility of the content of constitutional rights. The approach offered is more coherent with the expected function of the Constitutional Court: to protect the position of the citizenship in front of the public authorities, as a guarantor not only of civil liberties but also of the content of rights entailing a provision by these authorities.

The reform is, according to the dissenting opinion, clearly regressive, disproportionate and insufficiently reasoned. While it accepts reversibility, it calls for the need to fulfill three requirements as a general rule: restrictions should be established by law, necessary in a democratic society, as well as proportionate to the aim pursued. In the present case, restrictions are not proportionate as they do not justify the financial sustainability of the public healthcare system. In addition, they mean leaving particularly vulnerable populations out of the healthcare system.

We believe that this triple test should become a general criterion for the constitutionality of the new legislation imposing cutbacks in already recognized services that are, in addition, the basis for social cohesion.