The Reasonableness of Constitutional Jurisprudence in the Areas of Cultural and Social Rights: Traces of Political Theories

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Introduction

Recent case-law of European and member states highest courts has often been focussed on problems deriving from the encounter/conflict of cultures. The massive immigration from underdeveloped countries toward more affluent European countries generates problems of cultural, socio-economic and political kind. On the background I would locate a growing general fear of radical Islamic groups and terrorist attacks [1]. The institutional response to attacks that want to destabilize the foundations of liberal democratic societies has been so far mainly on the level of criminal legislation. I believe that a correct understanding of and the possible solution to the harsh threat to the values and principles of liberal democracy requires an analysis of the two main terms of the challenge: the Islamic culture and what we generally refer to as “Western values”. Of course these two fields cannot be enquired at large without employing at least the space of a book. Much more modestly in this paper I shall try to trace some principles deriving from the adjudication of higher courts and discuss the pictures that derives from their decisions with regard to plausible alternatives. I anticipate that, while I shall refer to “the principle of neutrality” as the mainstream liberal position, I hold that more than one strand of political ideas contributes to compose contemporary liberal culture: perfectionist and republican elements. My approach can be described as a mixed legal-political inquiry in which some usual boundaries of liberalism are taken as ‘porous’. After all the jurisprudential work I have referred to consists in a constant reshaping of basic liberal principles against the plurality of challenges they have to confront.

From the point of view of contents, my approach is bounded to those problems that derive from the encounter of cultures, such as the legitimacy of wearing a veil or other religious symbols (e.g. the Sikh kirpan) or the legitimacy of exposing religious symbols such as the crucifix in public places, for example school classrooms. However, the encounter of cultures also produces socio-economic consequences on the residents of a state, whether they are citizens or not. What the German Federal Constitutional Court calls a “dignified minimum existence” entails an active role of the state to provide minimal means toward the realisation of fundamental rights. This is true also for temporary residents, immigrants who establish in some EU member states and ask permission for their relatives to reach them. Balancing public finances and the large...
numbers of immigrants who demand asylum in EU states, a basic question is whether the right to a “dignified minimum existence” may cover all residents – even temporary ones – or should distinguish according to citizenship. This is a delicate juncture in which possible competitors are the principle of universal equality, advocated by a large part of liberal doctrine – following Rawls’s lead – a more restrictive Republican ideal of citizenship and, finally, a perfectionist proposal that founds fundamental human rights on some idea of ‘human development’.

My general assumption is that once liberal principles of justice are stressed by socio-economic, political or cultural tensions they can be partially reshaped through theoretical resources that already belong to the liberal tradition. Rather than being interpreted as a surrender of the principles of justice, these moves can be taken as a necessary opening of principles toward the “social tissue” that characterises a certain society. In other words, assuming that republican and perfectionist elements belong to the theoretical resources of the liberal tradition, I shall hold that their injection through judicial decisions may be sometimes welcome as a necessary corrective measure when states’ legislation (in the EU) does not respond adequately to the demands coming from the ‘social tissue’.

It is necessary to recall that often the reshaping of principles in the legal spheres takes place through reinterpretations of the principle of ‘reasonableness’. Its different and multiple dimensions would require an inquiry of their own [2] but in the present context I want to emphasise the idea of reasonableness as “social acceptability”. Reasonableness is often invoked in adjudicating on questions of fundamental rights or distributive justice: it is the necessary point of connection between moral/political principles and the “social tissue”, what a certain ethos may accept [3].

European Jurisprudence on Cultural Rights

It is now time for the presentation and discussion of some case-law. In each case I shall consider some of the legal and political implications raised by the circumstances of the case. In the ECJ case Bougnaoui v. Micropole S.A. (C-188/15), Ms Bougnaoui, a French design engineer, was dismissed by her employer, the Micropole S.A. because of her refusal not to wear a headscarf in meeting certain clients who had shown embarrassment in a previous visit. A French tribunal granted Bougnaoui compensation because she was fired without prior warning but ruled that her dismissal was founded on a “real and serious cause”.

The French Supreme Court before examining the case asked the ECJ whether the requirement not to wear the Islamic headscarf while working could fall outside the scope of the prohibition on discrimination of the article 14 of the ECHR.

It is worth-mentioning that France more than other member states requires a strict and rigorous application of the principle of laïcité (or ‘neutrality’, to keep within our theoretical frame) – as it is more commonly referred to in the liberal debate – in the public sector. By contrast, in the private sector restrictions may be imposed on the wearing of religious apparel for reasons of health, hygiene or safety in order to protect the individual or justified if the proper functioning of the business so requires.

The ECJ made reference, inter alia, to the Strasbourg Court that held a ban on wearing Islamic headscarf while teaching to children of tender age in the state education sector. The ban was justified in principle and proportionate to the aim of protecting the rights and freedoms of others, public order and public safety [4]. However, in Eweida and Others v. the United Kingdom [5] the Court held that a corporate restriction on the wearing of a cross, described as “discreet”, constituted interference with the rights under article 9 of the ECHR (protecting freedom of thought and religion). Two particular circumstances were relevant in this case: the cross was “discreet” and could not detract from the employee’s professional appearance; the employer had previously authorised the wearing of other items of religious apparel such as turbans and hijabs by other employees. By contrast, in Dahlab the headscarf was not discreet and presented the risk of proselytising with regard to children of tender age. Here pluralism of values seems to be the basic principle that the court wants to protect both banning religious symbols too invasive of individual freedom and allowing discreet symbols such as the cross that belong with the individual’s freedom of expression, as in Eweida.

What is ‘reasonable’ from a legal point of view depends on a careful assessment aimed at balancing the principles at stake within the particular circumstances of the case. In another case a restriction on the wearing of a cross “both visible and accessible” imposed on a nurse working in a psychiatric hospital was upheld because not disproportionate. Psychiatric patients might have been disturbed by the sight of a “visible and accessible” cross: thus their protection was more important than the manifestation of one’s religious freedom.
Further, a reasonable decision by the court has to take into account the ‘social tissue’ of a member state of the EU, its manifested will of accepting certain displays of religious freedom. In considering the well-known *S.A.S. v. France* [6] we should recall how the so-called “margin of appreciation of the state” represents the legal clause by which European adjudication defers to the social acceptance of a national community: it is quite well-known that religious and cultural sensibilities vary according to the social tissue of Italy, France, the UK or Poland, just to name a few different societies. In *S.A.S.* the applicant reacted against the French ban “prohibiting the concealment of one’s face in public places” enacted by the law of 11 October 2010. The Muslim woman objected that the ban prevented her from exercising her freedom of religion, wearing a full-face veil, according to her own choice and without any constriction. In turn the French National Assembly had adopted a few months earlier (on 11 May 2010) a Resolution “on attachment to respect for Republic values at a time when they are being undermined by the development of radical practices.”

The Assembly appealed to the ideals of fraternity, the minimum requirements of civility necessary for social interaction and the principle of respect for the dignity of the person. This argument was used by the Government in front of the Court together with the argument of gender equality (the veil discriminates between Muslim men and women) and the argument of public safety (concealment of one’s identity allows identity’s fraud). In its judgment the Court accepted the argument from public safety in defence of the law as a legitimate limitation of religious freedom within articles 8 and 9 of the Convention [7]. By contrast, the Court did not accept the argument of gender equality because the practice of wearing the veil was defended by women such as the applicant. According to the Court, not even the argument of respect for human dignity could justify a blanket ban on wearing the full-face veil in public places.

The winning argument in favour of the ban is that of the requirement of civility necessary for social interaction, the conditions of “living together”, among which showing one’s face and identity to the others. Free interaction among people is essential for the expression of pluralism, tolerance and broadmindedness that make a democratic society work. When these values are at stake, the Court observes, compliance with the principles of the Convention should leave way to the balance of values struck in the democratic process by the domestic policy-maker.

All the arguments drawn from the Strasbourg court are no more than preparatory ground for the ECJ’s decision that, insofar as it does not recognise any derogation to the religious freedom of articles 9 and 14 of the ECHR but on the grounds of health and safety at work, cannot help decide in favour of Ms Bougnaoui. In my view it is especially interesting the endorsement of the position expressed in *Coleman* [8] according to which individuals should be able to decide and conduct their lives choosing among valuable options. Here we have the presentation of an explicit perfectionist foundation of fundamental rights and freedom in an ideal of personal autonomy according to which access to employment and professional development is important for self-fulfilment and realisation of one’s potential. Discrimination may often deprive an individual of her valuable options. Given the importance of the latter for that condition of personal autonomy that grounds one’s self-realisation, antidiscrimination law can reasonably intervene.

The freedom to manifest one’s religion in the workplace is explicitly protected and strengthened by a prohibition on discrimination against individuals because of their appearance (e.g. wearing a headscarf or other apparel) or because of their nature (being black, homosexual or a woman). In my view the argument from freedom and that from equality are expressions of personal autonomy and work together toward an ideal of self-realisation. In turn, the opinion is explicit in supporting the employer who imposes and enforces rules against proselytising. The employer has paid for the employee’s work time and for the purposes of this business wants to create harmonious conditions for his workforce, thus his ban on proselytizing is legitimate.

At this point we should consider the consequences of the encounter of cultures at the level of individual freedom of religion. In *Bougnaoui* the latter is granted – as in *Eweida* – because there is no infringement of other fundamental rights. Judicial balancing of principles comes to the conclusion that the act of upholding religious freedom is reasonable (there is also a proportion between the means employed and the end pursued). By contrast, in *S.A.S.* we have a different conclusion because the argument against religious freedom is found more weighty and sounder. It is nothing less than upholding the “requirements of civility necessary for social interaction”. In other words the court holds that the respect of certain principles concerning human identity and interaction cannot be violated in a European society such as France. It is also worth
emphasising that the state’s ‘margin of appreciation’ plays an important role in this case: the particular culture of a certain society has to be respected.

In the light of these last considerations it may be helpful to recall another important and well-known case, the so-called “crucifix case”. In Lautsi v. Italy [9] it is not so much religious freedom to be at stake as the principle of neutrality – the French laïcité. I have discussed in detail this case elsewhere [10], so here I limit my presentation to a few considerations that are conducive to the purposes of this discussion. In short, the Court concludes that there is no evidence that the display of a religious symbol – such as the crucifix – on classroom walls may have an influence on pupils and, so, it cannot reasonably be asserted that it does have an effect on young persons whose convictions are being formed. A persuasive argument presented by the advocates of the crucifix is the “identity- or tradition-based argument” according to which the display of the crucifix in classroom marks Italy’s historical development and symbolises the principles and values which formed the foundations of democracy and Western civilisation. This argument helps the Court to conclude that the decision on the crucifix falls within the state’s “margin of appreciation”. Provided the state’s decision on the place to be accorded to religion does not lead to indoctrination – the crucifix on the wall is taken as a ‘passive symbol’ – a state has margins within which to promote some specific aspects of its own culture.

In my view it is important to emphasise that Lautsi, similarly to some degree to S.A.S., shows that it is reasonable for the state to promote its own tradition and culture when these embed the foundations of democracy and Western civilisation. I consider these opinions as traces of a “perfectionist and/or republican” conception that European courts tend to sketch from time to time in the context of cultural encounters. Before taking stock of these traces I want to add some further considerations coming from a decision of the Italian “Cassazione Penale” 2008 [11]. Threats and violence by a Muslim husband against his wife are justified by the husband’s lawyers on the grounds of a “historical” custom or practice that wants to reintroduce arrangements that have been overcome through a long-standing evolution in Western culture.

The Italian opinion and previous European decisions can be read together as traces of a general legal-political trend in the states of the European Union. This would be a trend toward what I have just mentioned as traces of perfectionist and/or republican elements that hold true a few basic principles of liberal democracy. The decisions composing this trend do not rely on a conscious and well-defined political conception endorsed by lawyers and politicians but are, in my view, examples of an attitude of defence of those values and principles that we as Western societies cherish as the legacy of the Enlightenment and, much earlier, of ancient Greece. Human dignity, personal autonomy, freedom, equality among persons, justice, self-respect and self-realisation, just to name those most well-known and widely shared, represent the common Western – and particularly European – values which we want to hold firm against challenges coming from other cultures. While in the past isolated cases of conflict between Western values and values from other cultures did not raise much worry and political and legal philosophers could advocate an uncompromising principle of neutrality; in our days – in Europe more than everywhere else – the big pressure determined by large number of immigrants coming every day to Europe – and frequent conflictuality – raises worries in the population, shifts in the political balance and some new directions in judicial decisions. Overall this is what I would call a ‘trend’ away from the principle of neutrality that, after Rawls and his many followers, has been dominant in the legal-political landscape of the last decades. In turn, the new situation seems, in my view, to call on a stronger and more cohesive ethical-political picture which protects and promotes a set of values such as the ones mentioned earlier that can be considered as a ‘liberal core’ on which we cannot make compromises without missing what makes liberalism meaningful.

These considerations lead us toward some perfectionist and/or republican elements that I now have to introduce. I want to make clear that the picture I shall try to sketch is a liberal theoretical position that competes with ‘liberal neutralism’ on theoretical grounds as much as on grounds of application, as the ‘traces’ I have already mentioned show. Those traces emerging from judicial decisions can be interpreted and make sense within a coherent liberal picture that expresses both a cultural and a socio-economic position aimed at human development.
Perfectionist and Republican Traces?

It is now time to sketch what I mean by a ‘perfectionist’ conception and a ‘republican’ conception as liberal resources alternative to ‘neutralism’. This also makes sense as an interpretation of those judicial traces which we have already met and of those socio-political trends in the population of EU member states that have determined a quick growth of rightist parties. By way of anticipation, I assume that the perfectionist elements respond to the ethical-political demand of a set of principles and values that account for what we cherish and that describe to a large degree our cultural identity. In turn, the republican elements respond to a demand of well-integrated citizenship in which citizens share some degree of a common good and believe in political participation as an important aspect of their good life.

First, what is liberal perfectionism? I have recently introduced a perfectionist alternative in discussing the ECHR ‘crucifix case’ [12] against other liberal neutralist interpretations. As far as we are concerned here, I limit myself to a few considerations that centre on political perfectionism (leaving personal perfectionism aside). In my view political perfectionism can be legitimately called a liberal theory if it grants the protection of principles such as individual freedom, equality of respect, pluralism of values and toleration. This is the heart of liberalism that is not violated if the state views some conception of the good base or degrading or contrary to core liberal principles and, so, rejects it.

In order to summarise sketchily the main points that make up liberal perfectionism I mean to emphasise (1) that in very general terms a perfectionist conception offers a “critical potential grounded in an ideal of human improvement”. By this definition I try to encompass the gist of what many perfectionist authors have proposed from Aristotle and Plato to Raz and Kramer in our days [13]. (2) A liberal perfectionism respects the liberal tenets just mentioned and does not run the risk of falling into illiberal versions of perfectionism such as Nietzsche’s or Randall Hastings’ [14]. Basically, the point is that an objective conception of the good – that characterises all brands of perfectionism – cannot be imposed on individuals despite their choices and preferences, as fascist or communist regimes used to do. This founds the liberal fear of objective ideals of the good but this fear can be easily overcome once we consider that on liberal perfectionism the tenet of individual freedom does not allow any imposition of the good on someone to count toward his good life without his consent. (3) Perfectionism rather than being a dangerous thesis for liberalism expresses a deep ethical concern for the ‘goodness of human life’. A perfectionist theory follows the deep-seated idea that some guidance of conduct can be needed both at the individual and at the political level. Surely ‘guidance of conduct’ may raise suspects of illiberal imposition on individual choice but respect of the liberal tenets mentioned earlier may grant a balance between the promotion of human goodness and individual freedom of choice. According to some recent perfectionist authors as Matthew Kramer, a thesis of “aspirational perfectionism” concentrates on “enhancing the lives of individuals indirectly and their society directly” [15] and is less controversial from a liberal point of view than the competing thesis of “edificatory perfectionism”, according to which “governments are morally permitted and morally obligated to introduce arrangements that will encourage people to develop and exert their capacities or to edify themselves” [16]. Kramer develops and supports the former as the less controversial thesis that does not lend itself to so much criticism from liberal quarters but I would observe that if the basic tenets of liberalism are respected also versions of edificatory perfectionism can find legitimate space in the liberal arena. (4) Finally, we come to the principle of neutrality as one of the main competitors in the field of liberal political theory. It represents the most legitimate heir to ‘liberal toleration’, the basic ground from which liberalism historically developed. But we should ask what neutrality consists of in order to grasp its theoretical role and eventual limits. Being a thorny issue, we cannot tackle its multiple aspects here [17] but only recall that neutrality is commonly interpreted as a constraint on political action that limits the kind of justification that can be provided for laws, policies, etc. By way of a minimum definition we might say that “a state is neutral if it helps or hinders the competing parties to an equal degree.”

Now, if we go back to the judicial cases already introduced, a sweeping application of neutrality would either run against all religious apparel and other religious symbols or legitimate all of them. However, the courts – sometimes following national governments’ positions – have decided differently, gesturing toward a liberal-democratic conception of the good which, according to aspirational perfectionism, improves the stature of society directly and the lives of individuals indirectly. If I am right about these traces of a perfectionist conception in judicial opinions, should we dismiss entirely the
principle of neutrality from the liberal camp? My view is that our understanding of the principle of neutrality should be balanced with a more careful interpretation of the expression “a conception of the good”. I assume, following Sher, that there is a larger potential for consent on a general conception of the good than what liberals are commonly led to think [18]. Such a consent should not be limited to instrumental goods -e.g. Rawls's primary goods- or goods such as health, prosperity and security but may cover also, for example, those liberal-democratic values that represent what our societies stand for. In times of socio-political crisis, if those values come under “cultural” attack I assume that judicial responses will hold tight the core values and principles of liberalism. In supporting this position the courts will also be perceptive of the general feelings of the population. Some rightist tendencies in the electorate of many European countries seem to confirm the growing appeal of a perfectionist view. Although often unwarily the ideal of liberal democracy and the kind of human values it embeds are gaining a growing consent in Western societies as something “we should stand for”.

I believe the considerations just put forward give an help in starting to design a coherent theoretical framework for those judicial ‘traces’ we have considered earlier. However, so far I have given an account that covers only the perfectionist elements of my proposal. After previous clarifications on perfectionism we should now consider the ‘republican’ side of the proposal that helps to make good sense of what is going on in some European judicial decisions, completing the perfectionist sketch I have provided. Rawls describes “classical republicanism” as the view according to which citizens of a democratic society can preserve their basic rights and liberties, if they also have to a sufficient degree the political virtues [19]. By political virtues Rawls refers to the virtues of fair social cooperation such as the virtues of civility and tolerance, reasonableness and a sense of fairness. These virtues do not lead to a perfectionist state but characterize the good citizen of a democratic state. Rawls tries to confront his view of “political liberalism” with what he calls “the perfectionist state of a comprehensive doctrine”. But here I believe he is mixing up two ideas that elsewhere he treated separately. In A Theory of Justice[20]“perfectionism” is described as a theory directed to maximise the achievement of human excellence, while he discusses “comprehensive doctrines” through many chapters of Political Liberalism as including claims of religious nature, meta-ethical theories, metaphysical claims, etc [21].

In my view Rawls’s misunderstanding of the wide range of views that can be included within perfectionism leads him also to miss from view some of the potentialities of this theory in respect of liberalism and also of its junction with republicanism. With respect to the first point, my vague and thin definition of “a perfectionist theory as a critical potential grounded in an ideal of human improvement” leaves room not only for the “maximisation of human excellence” – as Rawls holds – but also for views aimed at improving the socio-political environment of liberal democracy in which individual excellences flourish. I believe this is a picture that partially emerges from the court decisions already discussed. With respect to the second point, the republican element, I believe another part of the picture emerges from judicial opinions. S.A.S. stresses “the requirements of civility necessary for social interaction”; Coleman grounds self-realisation in an autonomous choice among valuable options, while Lautsi leaves to the states a “margin of appreciation” in defining what harmonises best with the religious sensibility of their populations (the ‘social tissue’). Finally, Cassazione penale 2008 explicitly states that certain rights and values are by now inviolable in the Italian (and European) society. In my view these decisions gesture (through quite timidly for the moment) toward a republican conception of citizenship in which, on the one hand, some idea of the common good and patriotism comes to strengthen Rawls’s republican view, limited to the “political virtues” and, on the other, those virtues are taken more intensely as the civic virtues of the republican tradition. From Machiavelli on in modern times the civic virtues are those of citizens who have a concern for the well-functioning of political institutions, who are concerned for the flourishing of their fellows at least as much as for their own and who believe to have “public duties” to contribute to those goals while also promoting their own interests. Some of the hints coming from judicial cases – and probably many more in the future – lead straightforwardly to a European – and sometimes national – picture in which citizens are not just residents with the same rights but persons who share something as the liberal-democratic conditions of individual and collective flourishing and are willing to cooperate in order to preserve them.

European Jurisprudence on Social Rights

The discussion so far was meant to show how we can find traces of a perfectionist and republican elements in certain opinions of EU higher courts. For the moment
they are just ‘traces’ that do not show an established trend. In my view it is worth emphasising how they show that a ‘reasonable’ decision cannot be imposed on a state on the mere ground of abstract principles but has to be shaped according to a compromise with the ‘social tissue’ of that state. On this reading what is reasonable depends on a contextualized understanding of the situation and of many of its nuances. This contextualization seems to make some room for perfectionist and republican elements that strengthen existing social tissue in EU states.

However, this inquiry will be very limited without considering also whether we can find perfectionist and republican traces in judicial decisions that concern what we may call the ‘domain of social justice’, the distribution of economic means that are conducive to people’s well-being. Beyond the EU response with regard to the “cultural challenge”, as it is well-known, the real posture of a state on political issues is determined by its economic policies: for example, whether it makes room for subsidies and to what extent. I shall not dwell here on subsidies for the arts or other intrinsic good that, by and large, all EU states allow but I shall consider a more specific category of subsidies that cover minimum means of subsistence for people and that are usually connected to citizenship. I shall assume that either judicial opinions give a central position to EU citizenship, up to the point that also relatives of citizens can apply for benefits on the presupposition of a “right to a dignified life”, extensively interpreted, or judicial opinions tend to favour a general ‘human rights conception’ that seems to be grounded on a ‘capability approach’, aimed at human development.

Proceeding to some extent in parallel with my previous account of some judicial responses to the ‘cultural challenge’ I want now to account for some judicial decisions concerning problems of social justice. In my view the issue is that of the extension and intensification of the EU citizenship: on the grounds of certain conditions member states are obliged to grant to citizens of other member states subsidies of different kinds but ultimately aimed to realise a right to a dignified life. Insofar as this right concerns all citizens of the EU, whatever their temporary residence in one of the member states, we can conclude that EU judges want to implement a condition of citizenship that overcomes national boundaries and grants to each citizen minimum subsidies for a dignified existence. This threshold is still far away from what I have sketched as a conception of ‘republican citizenship’, although it is plausible to hold that under a growing pressure from the outside – migrants, terrorism – courts will be inclined to give more space to republican principles within their decisions.

I want to start with a judgment of the German Federal Constitutional Court (FCC), given its central importance and influence on European courts. In the BvL 10/10 of the 18 July 2012 the FCC has considered the “dignified minimum existence”, deciding that particular characteristics of specific groups cannot determine differentiation in terms of existential benefits unless there are special needs of a group that have to be consistently based. The FCC decision is based on article 1.1 of the German Basic Law that ensures a fundamental right to a dignified minimum existence. This includes not only the physical existence of a human being but also the possibility to maintain interpersonal relationships and a minimal degree of participation in social, cultural and political life. This right grounds the social welfare state in Germany and obliges the state to ensure that the necessary material means are available to those in need. The standard to define this minimum existence has to be defined with regard to the circumstances in Germany rather than in other countries and applies to residents as well, if minimum time requirements have been satisfied.

In Flora May Reyes v. Migrationsverket [22] the ECJ interpreted article 2(2) of Directive 2004/38/ EC that grants citizens of the Union and their family members the right to move and reside freely within the territory of the member state. The facts of the case can be quickly described: the mother of Ms Reyes married in 2011 a Norwegian citizen living in Sweden. They regularly sent money to Ms Reyes and to other members of the family. Ms Reyes applied for a residence permit in 2011 but the competent office objected that she had failed to prove economic dependence from her family members in Sweden. What was at stake in a Swedish court and later with the ECJ was the definition of “dependant”. The ECJ held in that case that the situation of dependance is characterized by the fact that material support for a family member is provided by a Union citizen or his spouses. It is enough to that purpose to have paid regularly for a significant period a sum of money necessary to support the descendant in his state of origin. According to the ECJ, the descendant cannot be required in addition to show to have searched unsuccessfully for work or to obtain subsistence from the authorities of her country of origin.

Thus, in Flora May Reyes the ECJ shows an extensive interpretation of EU citizenship that covers also dependents coming from abroad, once the relation
of dependency has been established before the move of the dependent to a EU member state. However, the intensiveness of the social assistance depending on the relation of EU citizenship has also to be measured against the financial situation of the host state from which residents of another member state demand assistance. In Jobcenter Berlin Neukölln v. Alimanovic Family[23] the ECJ decides on the Jobcentre’s withdrawal of benefits in the sense of basic means provided for under German law. The facts of the case consist of the request of “special non-contributory cash benefits” by the Alimanovic family of which two members – mother and the older daughter – had worked for about one year after emigration from Sweden while other two children remained in a situation of dependency. Basically the legal point at issue was that considerations – in German law and in the Directive 2004/38 of the EU – granting social assistance – toward a dignified life – and non-discrimination among citizens of different member states, run counter the objective set out in recital 10 of the preamble of the aforementioned Directive. This objective is aimed to prevent Union citizens who are nationals of other member state from becoming an unreasonable burden on the social assistance of the host member state.

Similarly to Reyes, in Jobcenter the ECJ upholds Union citizenship and the possibility of distributing benefits to grant subsistence – based on that “dignified minimum existence” that descends from the German Basic Law. The Court recognises that all citizens of the EU have a right to social assistance but this has to be proportioned to the economic burden imposed on the public finances of the guest state. Once more we find that what is reasonable depends on a balance between individual rights to subsistence – or a dignified minimum existence – and the public finances of a state. In times of economic crisis or under an uncommon pressure of immigration allowable benefits may be reduced and the contents of EU citizenship may become less tight and cohesive: it may keep the same extension but with a lesser intension, to use the initial distinction. However, one further element should be added to the sketch of a reasonable decision concerning EU citizenship. Under a growing pressure from the outside it is not unlikely that “reasonable decisions” of EU courts will tend to emphasize republican elements of cohesion, such as the ones already discussed with regard to the republican conception of citizenship: for example, the common good, patriotism, civic virtues, etc. This move would be made with the aim of encouraging a higher level of political participation and more cohesion around the founding values and principles of EU liberal democracy. Even before EU legislation reaches its determinations with regard to the evolving balance between freedoms, security, individual right and the common good of EU citizens, European courts such as the ECJ or the Strasbourg Court show a particularistic attention toward changing attitudes and sensibilities in the EU ‘social tissue’.

Finally, it is worth-considering an opinion by the Italian Constitutional Court (ICC) that speaks against my search for traces of a republican conception through EU’s and member states’ courts. Notwithstanding the outstanding ‘frontier-position’ of Italy with regard to migrations, the ICC takes a position that extends certain benefits not only beyond Italian citizens but also beyond EU citizens [24]. In other words this decision contradicts the republican prong of my conception, although its appeal to ‘fundamental human rights’ seems to show an uncompromising perfectionist view.

The facts of the case can be quickly summarized. The Italian state charges Campania Region with the unconstitutionality and illegitimacy of a regional law (Legge Regione Campania 8 febbraio 2010 n.6) – that presumably invades the state’s competence of legislating – that does not limit social protection and access to housing, work, education and health assistance to regular migrants but extends those benefits to all foreigners who reside on the territory of Campania, including those who do not have a residency permit. By this measure, the Italian state holds, Campania Region exceeds its competence because this does not cover the rights of asylum and immigration from outside the EU nor public order and security that art. 117 of the Italian Constitution leaves to the competence of the state.

The Italian state expresses a restrictive position in this case with regard to irregular migrants. This position has been confirmed in later years up to date by the general attitude of the Italian population and, to a greater degree, by the attitude of the populations of other member states. By contrast, the ICC takes a view of opening toward migrants, though aimed only at the protection of their fundamental rights, without impinging on the migrants’ legal qualification (as citizens, residents or else). Drawing on state’s laws – decreto legislativo n.286 del 1998 - and on its own previous decisions - sentenze n.187 del 2010 and n. 306 del 2008 - the ICC establishes that the Italian legislator can emanate not unreasonable laws to regulate the residence of extra-EU citizens in Italy and can limit certain benefits to these people only to situations of serious
urgency, but it cannot discriminate these foreigners in their enjoyment of fundamental human rights.

In conclusion, in my view the appeal to fundamental rights to certain basic goods such as the ones named before shows to some extent a perfectionist position directed to grant the minimum grounds for the development of human nature. Housing, work, education and health assistance are among those goods that found the development of those “basic capabilities” - to use Martha Nussbaum’s term - that are central to human development [25]. Insofar as human development of basic capabilities can be taken as a minimal form of perfectionism we can consider the ICC’s and similar decisions, directed at affirming human rights that grant basic goods as ‘perfectionist-oriented’ decisions. It is worth-emphasizing that the Court draws no distinction between citizens and non-citizens, according to a widely shared definition of human rights.

References
1. Differently from other kinds of terrorism based on political reasons that Western countries have already run into in their recent past (United Kingdom, Germany, Italy, Spain), present terrorism is not addressed to political targets but is aimed at striking as many civilians as possible.


3. Cf. (2013) Reasonableness as social acceptability seems to resemble, to some degree, Rawls’s reflective equilibrium: moral and political principles and values may derive from some conception of justice, but then they have to be balanced with our considered opinions to become socially viable. Similarly, some values should make their way to social acceptability starting from what is already accepted in one’s society Cf. on this last point Atienza M. (2013) Curso de Argumentacion Juridica, Trotta, Madrid, 564.


6. ECHR Grand Chamber, n. 43835/n.1, 1 July 2014.

7. Although in 2010 the Court found that a blanket ban was not necessary for reasons of public safety in a democratic society, it is quite plausible to think that their response might be different in the present situation.

8. ECJ C-303/06, EU:C: 61.