

“DOES THE RIGHT TO BASIC INCOME ALREADY EXIST? AN OVERVIEW OF THE EUROPEAN AND SPANISH LEGAL FRAMEWORK”

Carmen García Pérez²

Abstract:

Do we really need a change in our legal framework to implement a universal Basic Income? Maybe the change, in legal terms, is not as significant as it is commonly thought. Fortunately, we have a solid legal framework absolutely prepared to declare that every citizen, because of his or her very existence, has the right to a guaranteed income. Ethical, philosophical and economic justification are the most common arguments used to discuss in favour and against the feasibility of universal Basic Income. However, it is not that easy to find legal analysis and justification. Due to this circumstance, the objective of this paper is to reveal that the implementation of Basic Income could be possible without adding new precepts to the enormous quantity of rules that already exist. From the Universal Declaration of Human Rights to the unemployed benefits legislation in Spain, passing through the European principles, it is the duty of public authorities to ensure a dignified life for all citizens. As a reference point, this paper analyses the Hartz IV Decision of the German Federal Constitutional Court (2010) and the explanatory memorandum of the most relevant legislation that regulate social benefits in Spain. Although both refer to means-tested benefits, the argumentation behind can actually be used in any country, structured as a social and democratic state of law, to legally defend the right to universal Basic Income.

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² Carmen García Pérez (Murcia, 1987) is a Spanish lawyer and economist specialized in public sector. Author of the book “Social convenience and economic feasibility of Basic Income”, published in December 2017. She is a BIEN life member and also part of Red Renta Básica. You can read more at www.cgarciaperez.me

«Legislators, you have done nothing for freedom if your laws do not tend towards decreasing, through sweet and effective forms, the extreme inequality of fortunes» MAXIMILIEN ROBESPIERRE (1758 – 1794)

«I request, in defence of those so dispossessed, a right, and not charity»
THOMAS PAINE (1737 – 1809)

Does our legislation need a change for the implementation of Basic Income? Perhaps the change, legally speaking, is not as significant as one may think. Fortunately, we have a legal framework that is truly prepared to declare that all citizens have the right to perceive, by the mere fact of their existence, an income. In fact, the goal of this paper is to prove that is even possible to implement this measure without even adding new precepts to the vast number of rules that already exist. We have a legal framework that provides enough cover for this measure.

«Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international cooperation and in accordance with the organisation and resources of each State, to the economic, social and cultural rights indispensable to his dignity and the free development of his personality» [Own emphasis added]

The foregoing is Article 22 of the Universal Declaration of Human Rights which, as can be noted, does not understand a dignified and free life without the satisfaction of certain rights.

A dignified life has to do with access to a particular well-being that, inevitable, includes food, clothing, housing, culture... Thus, Article 25 of the Declaration lays down the right of all persons to an adequate standard of living which ensures this person and his family, an adequate standard of health and well-being and, in particular, their right to housing. In similar terms, the International Covenant on Economic, Social and Cultural Rights, acknowledges in its Article 11.1 the right everyone has to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to continuous improvement of living conditions. This being so, the article itself contains the obligation of the States to make this right effective by expressly establishing that The Member States shall take appropriate measures to ensure the effectiveness

of this right. Guaranteeing citizens receive a minimum income results in the dignity and freedom of people; in the real opportunity to do what we value; in self-esteem, as a primary asset and as a feeling of value itself.

If we look at the European level and turn to the Charter of Fundamental Rights of the European Union³ we find the values on which the Union is based and including, among them, human dignity, freedom, equality and solidarity. Literally, the preamble reads in the following terms:

«(...) Conscious of its spiritual and moral heritage, the Union is founded on the indivisible and universal values of human dignity, freedom, equality and solidarity, and is based on the principles of democracy and the rule of law. Establishing the citizenship of the Union and creating the freedom, security and justice, places the person at the centre of its actions. (...)»

In the articles, it is not irrelevant that the first of the precepts is dedicated to human dignity. Literally, establishing that human dignity is inviolable. It must be respected and protected. For its part, Article 6 includes the right of all persons to freedom and security. And it is not until Article 34.3 when the right to security and social support are included:

«In order to fight social exclusion and poverty, the Union acknowledges and respects the right to social and housing aid to guarantee dignified existence for all those who do not have sufficient resources, in accordance with the rules laid down by the law of the Union and by national laws and practices». [Own emphasis added]

Contrary to what, more frequently than it should be, is thought, the international rules and treaties directly oblige the public authorities. This implies that there is no need to claim the declaration of certain rights within the local, regional or state scope of our country, because we already have a regulatory framework that is sufficient to demand these rights. In this sense, the content of Article

³ On 1 December 2009, the Charter became legally binding. However, according to Article 6, paragraph 1, of the Treaty on European Union “the Union recognises the rights, freedoms and principles set forth in the Charter of Fundamental Rights of the European Union [...], which shall have the same legal value as the Treaty”. Therefore, the Charter is part of the primary law of the Union and, as such, serves as a reference parameter to examine the validity of the secondary law and of national measures. Retrieved on http://www.europarl.europa.eu/atyourservice/es/displayFtu.html?ftuId=FTU_1.1.6.html (accessed on 01/08/2018).

29 of the Treaty Law⁴ is clear when stating that all public authorities, bodies and agencies of the State must comply with the obligations laid down in international treaties and ensure their adequate enforcement. For greater clarity and forcefulness, the same law provides that international treaties shall be of direct application (Article 30.1).

Taking into account the regulatory framework, we see that this not only allows public authorities to adopt measures aimed at ensuring the effective exercise of human rights, but that there are explicit guidelines provided by international organisations and by our laws for the purpose of adopting an active position that promotes and guarantees them. We cannot ignore that the international treaties give rise to effects in Spain and, in addition, prevail over any other domestic legal system in the event of conflict between the same.

Having established the foregoing, let us see what the Spanish Constitution (SC) offers us. The preamble of the Spanish Constitution is of interest as it clearly lays down the basis used for justifying the implementation of Basic Income. To this regard, it includes the will to ensure a socially fair coexistence, protect human rights and promote a decent quality of life. Literally, the preamble reads as follows:

«The Spanish Nation, desiring to establish justice, freedom and security and promote the well-being of all those comprising it, in use of its sovereignty, proclaims its will to:

Guarantee the democratic coexistence within the Constitution and the laws under a fair economic and social order.

Consolidate a rule of law that ensures legal certainty as an expression of the will of the people.

Protect all Spanish citizens and municipalities of Spain in the exercise of human rights, their cultures and traditions, languages and institutions.

Promote the progress of culture and of the economy to ensure a decent quality of life for everyone.

⁴ Law 25/2014, of 27 November, on Treaties and other International Agreements (available at https://boe.es/diario_boe/txt.php?id=BOE-A-2014-12326) BOE n. 288, of 28 November 2014.

Establish an advanced democratic society, and

Collaborate in the strengthening of peaceful relations and effective cooperation among all the peoples of the Earth. (...) [Own emphasis added]

Consistent with this, the articles of the Spanish Constitution begin with the declaration of Spain as a ***Social and democratic state of law, which advocates as higher values of its legal system freedom, justice, equality and political pluralism*** (own emphasis added, Article 1.1.). Likewise, within the guiding principles that should govern Spanish policies, we come across important references that we now broach. The first paragraph of Article 39 establishes the obligation of the public authorities to ensure the social, economic and legal protection of the family. Immediately after, Articles 40.1 and 41 state the following in relation to the income of citizens and the sufficient social benefits for meeting situations of need:

*“The public authorities shall promote **favourable conditions for social and economic progress and for a more equitable distribution of regional and personal income** (...)” [Article 40.1; own emphasis added]*

*“The public authorities shall maintain a public Social Security system for all citizens **guaranteeing adequate social assistance and benefits in situations of hardship, especially in the event of unemployment.**” [Article 41]*

It seems that the Spanish Constitution can perfectly frame the implementation of an income for all people because, after all, it is a redistribution of income in the term demanded by the same⁵.

Having established the foregoing and despite it not being a Spanish judicial ruling, it is worth drawing attention to the case of the **German Constitutional Court Judgement**, of 9 February

⁵ Article 30 in its entirety establishes the following: *1. International treaties will be of direct application, unless their text expresses that said application is subject to the approval of the pertinent laws or regulatory provisions.*

2. The Government shall submit to the Parliament the draft laws that are required for the implementation of an international treaty.

3. The Government, Autonomous Communities and the cities of Ceuta and Melilla shall adopt the necessary measures for the implementation of international treaties of which Spain is a party with regards to matters of their respective powers.

2010⁶. Pursuant to the fact that Germany is a social state where the public authorities have an obligation to protect the dignity of persons, the Court came to the conclusion that the unemployment benefit did not guarantee a dignified life and was in need of an increase. Let us take a close look at the facts and legal arguments that gave rise to this very important judgement⁷.

The origin of the dispute resides in three families residing in the federated states of Bavaria, Hesse and Rhineland in North Rhine-Westphalia. They claimed that the social benefit they received was insufficient to maintain their children. This is the Arbeitslosengeld II, regulated by the SGB II⁸ and better known as the Hartz IV programme⁹. This aid programme is intended to cover the needs of people in a situation of long-term unemployment. The amounts of money they receive varies depending on the concurrent circumstances within the family, such as the number of members, the existence of children, the age of the children and the properties, among others.

2005 saw the entry into force of the co-called Hartz IV legislation, which was made up by the modification of several rules in order to create a more uniform legal framework for unemployed people and their family environment. These benefits are, essentially: (i) the normal benefits paid to ensure the livelihood of the family; and (ii) benefits for accommodation and supplies.

When it entered into force, the SGB II set the standard benefit for singles at 345 euros and other members of the household would receive amounts that are calculated based on this first amount. So, the spouses would receive 90% of said amount, while children under the age of 15 years would receive 60% and children aged 15 years or over would receive 80%. The plan was for a single payment, and not one broken down by family members. In principle, these amounts were intended to provide the beneficiary with the chance to save.

The problem arose regarding the quantities that were taken as reference to reach those calculations. According to the judgement, the reference was taken from a survey of income and expense which the Federal Bureau of Statistics carries out every five years. The survey used was

⁶ Case no. 1BvL, 1/09, 125 BVERF.

⁷ The full text may be consulted on the website of the German Constitutional Court, recovered at http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2010/bvg10-005.html?sessionId=72DB9E302D7ECDF1A916CE500659F7AA.2_cid392 (accessed on 01/08/2018).

⁸ SGB II is the common name given to the Second Book of Social Laws (*Zweites Sozialgesetzbuch*). The SGB I deals with unemployment benefits, the SGB II is responsible for long-term unemployment benefits, and the SGB III deals with subsistence aid for those are unable to find any kind of job.

⁹ In reference to Peter Hartz, former minister who was responsible for carrying out several major reforms of the German labour system under the mandate of the German Chancellor Gerhard Schröder (1998 - 2005).

from 1998 and they projected the amounts to 1 January 2005, date of entry into force of the new package of legislative reforms. They also questioned the way to calculate the living costs of the families and, especially, the differentiation made regarding the children, by dividing them into age groups (a third age group was added). In the opinion of the plaintiffs, shared by the Court, this was not justified.

The specific subject matter of the proceeding was whether the amount of the standard benefit, to ensure the livelihood of adults and children (up to 14 years) was compatible with Article 1.1 in relation to Article 20.1 of the German Constitution. The answer was no, especially regarding children and teenagers.

The Court's reasoning was simple but very enlightening. Article 1.1 of the German Constitution is dedicated to the protection of human dignity and the linking of public authorities with fundamental rights. Literally, establishing that Human dignity is intangible. It must be respected and protected by all public authorities. This precept must be placed in relation to Article 20.1, which states that The Federal Republic of Germany is a democratic federal and social State. Well, under these two constitutional principles, the Court understands that the public authorities must ensure that all persons have the essential material conditions for their existence and their participation in social, cultural and political life.

In relation to the foregoing, it adds that human dignity is a fundamental right, unavailable for the legislator, which must be honoured and guaranteed. What is more, it must be updated and specified in a manner that adapts to the existing living conditions. For this reason, the public authorities are ordered to provide for the expense that is necessary to ensure the beneficiaries of these benefits a dignified life under the terms required by the Constitution and in accordance with reality.

It should be noted that, while no change was made to the Law, citizens could claim these amounts directly to the government, under Articles 1.1 and 20.1 of the Constitution. Thus, it was expressly established by the Court in its judgement.

In sum, through this judgement the German Constitutional Court forced the redefinition of the criteria for calculating the benefits in order to ensure a decent existence for the beneficiaries of the same. In the event of failing to implement this redefinition, this would give rise to a violation of Art. 1.1. and 20.1, intended to ensure a minimum level of livelihood in accordance with human

dignity. The Court did not specify beyond constitutional principles for reaching the conclusion that citizens are entitled to demand the State provide decent living conditions.

Spain is, alike Germany, a social state that also protects dignity, could a similar action not be proposed? For the purposes discussed herein, we are really in the same legal conditions.

In Spain, since its creation in August 2009¹⁰ until now, upon reaching its term we find that the **subsidy for long-term unemployment** –which incidentally meet a host of other circumstances– is always renewed. It is true that this benefit is fully referenced to employment and conditional. However, we bring it up because its **approval year after year means the recognition by the public authorities that it is unacceptable not to act in response to situations of need.**

The explanatory memorandum explains that the rule was born from the urgent need to provide coverage to those workers who had exhausted their unemployment benefit to prevent or mitigate their risk of social exclusion (...). That is, the end of the rule is no more than preventing the social exclusion that comes in hand with a lack of income. And it continues to explain:

«Within a limited temporary scope and through this Programme, the protection for unemployment is extended for workers who have exhausted their previous benefits and subsidies and are in a situation of need due to lacking other income. However, with being essential for providing a guarantee of minimum income to cope with these situations in which an ever increasing number of workers are finding themselves, this Programme aims to go beyond by applying adequate measures aimed at promoting the employability of affected communities, through their participation in an active itinerary for employment, with a view to them becoming involved and achieving objectives regarding social protection in addition to job placement» [Own emphasis added]

As we can see, despite being fully conditioned and linked to employment, this measure actually goes beyond the concept of unemployment benefit. Once exhausted, what is the difference between a long-term unemployed person or a person who, for other reasons, is not within the labour market either? It seems hard to detach from the idea that work does not necessarily have to underpin the income system of people.

¹⁰ The measure was approved by Royal Decree-Law 10/2009, of 13 August, which regulates the temporary programme for the protection for unemployment and placement.

In addition, the extension of this measure has been implemented by governments with ideologies different from the one which initially approved the measure. This being so, it seems that they share the idea of ensuring a minimum income for all citizens.

In the context of this legal provision and returning to the German case exposed, we cannot ignore the difference between demanding a judicial ruling or a legislative change. While we applaud that the Courts, in an interpretation consistent with the times, acknowledge specific legal situations, we are more accustomed, at least in continental Europe, to the legal configuration of subjective rights. The German case demonstrates the ability of the Courts to acknowledge rights “ignoring” the procedure of the ordinary legislator. Voltaire said that “perfection is the enemy of the good” and here we argue that legislating according to existing principles is a step forward, that the Courts, as a result of citizens’ demands, recognise the right to a decent standard of living, is another step forward... and so on until reaching an acknowledgement embodied in a written rule of the right to receive an income that guarantees that decent standard of living.

To end, we turn back to the Universal Declaration of Human Rights, since we need no more than to stick to its articles to understand that, in truth, it is all or nearly all written. Surely, we will only need to claim it:

Every person has the right to a social and international order be established in which the rights and freedoms set forth in this Declaration can be fully realised. (Article 28 UDHR)