

SERVICES TO CITIZENS AND SOCIAL RIGHTS

INTRODUCTION

This seminar aims to examine in depth the approach of the Supreme Courts of several European states to so-called 'social rights'. By this expression, we identify that category of rights whose implementation requires the legislator to take action, introducing and regulating benefits in favour of the citizens who are entitled to them; at the same time, those citizens are identified as having an enforceable claim against the State or more generally against the public authorities with regard to those benefits. These are therefore "claims to benefits", which for this reason differ from the more traditional (and consolidated in Western systems) rights "of freedom".

Precisely because of this peculiarity, it cannot be taken for granted that the rights in question are always recognised and protected as fundamental rights. Moreover, they traditionally pertain to sectors (the protection of health, work, education, the right to housing, etc.) that do not fall within the direct competence of the European Union, and in which there is therefore no need for harmonisation between the laws of the various countries, in which therefore it is possible that the recognition and protection of these rights takes place in very different forms.

Another peculiarity of social rights is that their realisation entails a burden on public finances. This is why in recent years, due to both the structural economic crises and those linked to contingent situations (such as, for example, the Covid-19 pandemic), the jurisprudence of the various States has often had to address the issue of the relationship between regulatory interventions that have become necessary to contain public spending and the need to ensure the effectiveness of these rights. In particular, especially in the countries hardest hit by the crises, the question has arisen as to whether it is possible to identify a limit to the possible incision of social rights for reasons of financial balance, and thus a 'minimum essential core' of services pertaining to these rights that must in any case be guaranteed to citizens.

In developing the topics of the seminar, it was therefore considered necessary to verify not only the breadth and type of protection techniques that the Courts of the various States (and primarily the administrative ones) have at their disposal to ensure the effectiveness of social rights, but also the way in which these are recognised and guaranteed by the various legal systems and jurisprudence. If it were possible to conclude that the 'essential core' of social benefits to be ensured in each case is transversally homogeneous despite the multiformity of normative and jurisprudential options in the various countries, social rights could be placed with greater certainty among the fundamental rights that contribute to defining a modern notion of European citizenship even beyond what is strictly imposed by Union law.

To pursue the aforementioned objective, it was also decided to assign particular importance to the analysis of case law, reserving to it a special part of the questionnaire with a view to carrying out the last part of the seminar in the form of a workshop, and therefore through a richer and freer comparison between colleagues of the various Supreme Courts on the specific cases in which administrative judges were confronted with social rights and their protection.



PART I

SOCIAL RIGHTS: THE GUARANTEES OFFERED BY NATIONAL LAW AND THEIR IMPLEMENTATION IN TIME OF 'CRISIS'

1) In your country, which regulatory sources discipline the main social rights?

- Constitution
- Ordinary law
- Other

(tick more than one box if necessary)

Please explain

The Albanian Constitution guarantees the main social rights, Thus, in the fourth Chapter 'Economic, Social and Cultural Rights and Freedoms' of the Second Part 'The fundamental rights and freedoms' of the Constitution, there are foreseen as follows:

- the right to work (Article 49/1 of the Constitution); Specific provisions related the right to unite freely in labor organizations for the defense of their work interests and the right of an employee to strike in connection with labor relations (Articles 50, 51 of the Constitution).
- The right to social security - Specific provisions related the social protection of the work (Article 49(2) of the Constitution). In article 52 of the Constitution is provided the right to social security in old age and when everyone is unable to work and also the right to assistance for everyone who remains without work;
- Protection of the family, mothers and children (Articles 53, 54 of the Constitution);
- The right to physical and mental health and health insurance (Article 55 of the Constitution).
- The right to education (Article 57 of the Constitution).
- Cultural rights (Article 58 of the Constitution) meaning 'the freedom of artistic creation as well as profit from their results are guaranteed for all and also the copyright is protected by law.

In the Fifth Chapter 'Social objectives' of the Second Part of the Constitution (Article 59(1) are included also specific provisions on the rights contained in the articles 7, 11, 12, 13, 14, 15 of the Covenant concretely related to the right to just and favorable conditions of work; the right to an adequate standard of living; the right to physical and mental health; the right to education; cultural rights. such as the right to health (art. 32), the right to work (art. 4), the right to education (art. 34) and aid to families (art. 31). Other rights, concerning more specific services, are recognized by ordinary law.



2) What social benefits are provided by public administrations according to the provisions of your legal system?

- Subsidies and aid to indigent and needy people
- Facilities for the pursuit of employment
- Health benefits
- Social Housing
- Assistance to disabled and disadvantaged people
- Economic aid and facilities for families and birth rate

(tick more than one box if necessary)

Please explain

The Albanian healthcare system is based on the principle of free healthcare for all, with special attention to the less well-off. Similarly, the law ensures that the unemployed receive aid and benefits to support themselves and, where possible, to get a job. Forms of aid (e.g. in the form of tax exemptions) are also provided for large and poor families, who receive social as well as incentives for capable and deserving persons in a state of poverty to access higher education. Finally, through the social housing system it is possible to secure housing for those who could not afford it.

3) Have new social rights emerged in your country, other than those traditionally recognised by the Constitutions and laws in force (such as the right to access the Internet, water and other common goods)? And if so, how?

- Yes, as a result of regulatory action
- Yes, thanks to the application of general principles and clauses
- Yes, thanks to the interpretation of the case-law
- Yes, thanks to the negotiation carried out by trade unions and private associations.
- There has been no recognition of new rights

(tick more than one box if necessary)

Please explain

There is an initiative of the government to digitalize most of public services free of charge. It is an ongoing process but there is no recognition as "new social rights".

4) Can budgetary constraints and measures of containment of public expenditure limit the effectiveness of social rights?

- Yes.
- No.



Yes, but only in some areas.

Please explain

Due to some financial difficulties caused by force majeure (earthquakes and pandemic) there have been cuts in building new housing for poor families.

5) In your country does there exist, even in specific sectors, an '*intangible nucleus*' of social rights that cannot be sacrificed even to cope with a contingent financial situation?

Yes.

No

6) If the previous question has been answered in positively, how has the identification of the '*essential nucleus*' of social rights which cannot be sacrificed been carried out?

At the constitutional level

By ordinary law

By regulatory rules

By case-law

Other

(tick more than one box if necessary)

Please explain

Since the 2010, the Constitutional Court has declared the need to ensure a minimum level of effectiveness of human rights in general (Article 17), including the social rights. This obliges the State to undertake all necessary actions to achieve the effective implementation of the principle of equality. The Albanian Constitutional Court during three decade tried to interpret in a broad and creative way the individual rights guaranteed by the Constitution underlining a direct or indirect link between them and human dignity.¹ The Court has elaborated different implicit principles of the Constitution, which are considered as a paramount of a democratic state or society in order to respect the fundamental rights and freedoms. Such principles as legal certainty and legal expectations, clarity and accuracy of a legal norm, equality before and by law etc. are elaborated widely in its jurisprudence expanding in some cases the spirit of the Constitution. The Court has elaborated in its case law also another link between human dignity and an individual right, namely the right to work. Following the same approach of its early decisions, the Court has stated that the right to work, which means the right to choose and exercise a profession and the place of work, is guaranteed by

¹ A.Vorpsi, Human Dignity in Albania, in: Becchi, Matthis (Eds) *Human Dignity in Europe*, Springer 2019, pp.45-48



Article 49² of the Constitution and Article 6(1) of the International Covenant on Economic, Social and Cultural Rights. Restrictions on the right to work should be established by law and should respect the proportionality test. From this background, any action of state organs that have direct consequences in impeding any professional activity without respecting the criteria for limitations constitutes a violation of this right. The guarantee given by the Constitution respecting the right of an individual to choose freely a profession is related to his/her personal freedom to shape his/her private life, which further is protected by a superior constitutional value, namely human dignity. The exercise of a profession may be limited by reasonable rules in the interest of the public interest. The legislator may set restrictions only if there is a need to protect fundamental interests of the community.³

7) How does the scarcity of available financial resources affect the effectiveness of social rights in your country?

- Social rights must be guaranteed in any case, regardless of budgetary requirements.
- The budgetary requirements always prevail over social rights.
- A balance between the opposing requirements is to be carried out.

In the latter case, explain who is competent to perform the balancing:

In the presence of legal provisions limiting social rights or in any case affecting them, the balancing of the opposing requirements falls to the Constitutional Court, when called upon to assess the constitutionality of the provisions in question. If, on the other hand, the limitations derive from specific acts or measures, the competent court (ordinary or administrative, depending on the sector involved or the type of act) will decide on the individual case.

8) Have special social benefits been introduced in your country in order to cope with the short and medium-term emergencies of recent years (pandemic, energy crisis, banking and financial crisis)?

- Yes.
- No

If yes, please indicate the main measures introduced:

Business aid, tax exemptions, special fund for workers at companies in crisis, special fund for pensioners and other categories in need.

9) If the previous question is answered positively, please specify whether the measures introduced have also provided for derogations from the ordinary division of competencies among the administrative judge and the other judges

² Article 49 of the Constitution 'Everyone has the right to earn the means of living by lawful work chosen or accepted by himself. He is free to choose his profession, place of work, as well as his own system of professional qualification.'

³ Decision no. 9/2010 of the Constitutional Court.



The special support measures introduced to deal with the emergencies of recent years have not been accompanied by special rules that have altered the ordinary division of jurisdiction between ordinary and administrative courts in the areas concerned.

10) Which subjects can be involved in the provision of social benefits?

- Public subjects
- Private subjects included in the public system
- Private subjects on a voluntary basis
- Other

(tick more than one box if necessary)

Please explain

The Albanian healthcare service is not only focused on the activities directly carried out by public structures, but also on those carried out by private entities, which on the basis of an accreditation and authorisation mechanism, as well as special service contracts, are allowed to perform public health functions. Same could be said also for education institutions. The role of associations and private bodies to ensure benefits relating to social rights, without prejudice to the centrality of public intervention in this field, has been increased, but there are related to state regulation which include also compensation in various forms.

11) Do non-state territorial levels of government have administrative and regulatory powers in this area?

- Yes
- Not

12) If the previous question is answered positively, do non-state territorial levels of government have the power to admit, exclude or condition access to social benefits?

- Yes
- No
- Yes, but only in some areas.

Please explain

In Albania (a unitary state with autonomous local governments) most of the matters relating to social rights are attributed by the Constitution to the State, which could further delegate them to local governments. Therefore, it have broad regulatory powers, in accordance with the general principles laid down by State law. On the other hand, administrative functions — including those relating to the recognition of specific



benefits — are assigned to Municipalities, depending on the extent of the needs to be met and in accordance with the principle of *vertical subsidiarity* (Article 112 of the Constitution).

13) Is it possible in your legal system for non-EU citizens to benefit from social rights related benefits? And if so, under which conditions?

- Yes
- No.
- Yes in some areas

Please explain

The Albanian national healthcare service guarantees everyone, including irregular non-EU citizens, the right to first-aid care. Regularly resident non-EU citizens have full access to healthcare, on a par with Albanian citizens and, in general, to all social rights such as education, social assistance and social services (e.g. maternity allowance, family allowance, birth allowance, etc.). They also may benefit from a social pension if they have been resident for more than 10 years. The Albanian Constitution foresees that Albanian citizens, foreigners and stateless persons enjoy human rights, except for cases when the Constitution conditions the enjoyment of human rights with citizenship (Article 16).



PART II

JUDICIAL PROTECTION OF SOCIAL RIGHTS

1) In your country, which court has jurisdiction on disputes concerning social rights?

- Administrative Judge
- Civil Judge
- Other

Please explain

Apart from certain matters reserved to civil courts (e.g. those relating to social security), the administrative court usually has jurisdiction on all cases of disputes concerning administrative measures affecting social rights.

2) Do disputes concerning social rights in the following areas fall within the jurisdiction of the administrative court of your country?

- Social security
- Education
- Health
- Social assistance
- Protection of motherhood
- Job protection and vocational training

If the answer is in the negative for some of the above areas, please indicate which court has jurisdiction to hear disputes relating to these rights (civil court, labour court, etc.)

In all matters mentioned above jurisdiction lies with the ordinary civil judge or administrative judge if f.e the employer is a public entity. In pension matters, disputes relating to the quantification and payment of pensions lie with the Administrative Court, without prejudice to the jurisdiction of the civil or administrative courts (depending on the sector of employment) for those relating to the determination of the basis of remuneration on which the pension should be calculated.

3) Does the administrative judge in your country have jurisdiction on the lawfulness of the administrative acts through which the public administrations or other public entities organise and regulate the provision of social services?

- Yes
- No

Please explain



In the areas in which lies its jurisdiction, the administrative judge may, as a rule, assess the lawfulness of both acts of organisation of social services and acts and procedures for the recognition of benefits relating to social rights. These are indeed administrative acts, which can be challenged through the ordinary action for annulment provided for in the code of administrative trial.

- 4) In particular, does the administrative court deal with administrative and/or procedures for the awarding or recognition of subsidies, aids, benefits and other services relating to social rights?
- Yes
 - No
 - Yes, but only in some areas

If no, please indicate which court is competent to hear the above-mentioned disputes (civil court, labour court, etc.)

In the field of social security, the administrative court has jurisdiction to hear any disputes relating to the recognition of benefits, including those relating to procedural aspects.

- 5) Does the administrative judge assess only the regularity of the procedures or can it also verify whether the individual is entitled to receive the benefit unjustly denied?
- It is only responsible for the regularity of administrative procedures.
 - It has the power to ascertain the entitlement of the individual to obtain a social benefit.

Please explain, possibly providing specific information on the different areas of social rights and on the techniques of protection used

As a general rule, the administrative judge may order the public administration to award the successful applicant the advantage which he has been unlawfully denied, provided that the administration does not yet have discretionary power in that regard. This may happen, for example, in the field of health protection, when the ruling finds that the local health authority have denied to the applicant, including through unlawful administrative acts, services which he was entitled to receive as they were falling within the essential levels guaranteed by the State rules.

- 6) What kind of remedy can the administrative judge put in place for the protection of social rights?
- Annulment of organizational acts or specific acts limiting social rights
 - Damage compensation
 - Condemn to a specific performance through the recognition or attribution of the benefit/right required.
 - Other



(tick more than one box if necessary)

Please explain, if necessary by providing specific information on the different areas of social rights and the protection techniques specifically used

In the Albanian administrative process, in addition to the annulment of unlawful administrative measures, the Court can always order the administration to pay compensation for the damage, preferably through a specific performance (and therefore, if there is no residual discretionary power, through the direct recognition of the benefit unfairly denied) and, in a subsidiary way, for equivalent. If the administrative organ violates the time limits, or fails to adopt mandatory administrative acts, failures to ensure adequate levels of performance, the court shall order the Public administration or concessionaire to remedy the infringement within a reasonable period.

7) In relation to the protection of social rights, are there any accelerated or simplified procedures or, in any case, special procedures?

- Yes
- No
- Yes, but only in some sectors

Please explain

In the field of social rights and security, it applies the social security law, which is simplified and accelerated compared to the ordinary civil procedures. In areas falling within the jurisdiction of the administrative judge, there are not foreseen simplified or accelerated procedures.

8) Are there in your country any provisions for ADR (Alternative Dispute Resolution) in the field of social rights (also through the intervention of an institutional third figure such as a the "Social Rights Guarantor")? In particular, is mediation possible?

- Yes
- No
- Yes, but only in some sectors

Indicate the sectors concerned and models of ADRs (Alternative Dispute Resolution)

9) In the light of your experience, what are the main problems that the administrative judge encounters in giving effective protection to social rights?

- Excessive discretion of the competent public bodies
- Unwillingness to comply with judicial decisions



- Inadequacy of the instruments of protection made available by the legal system
- Scarcity of available economic resources
- Low awareness of social rights in the community
- Other

(tick more than one box if necessary)

Please explain

In addition to the traditional resistance of the Albanian public administrations in executing the decisions of the administrative judge, the litigation on social rights must constantly be measured with the limitedness of available resources and the existence of measures to contain expenditure, so as to call the administrative judge (or the constitutional one, as the case may be) to a non-simple balancing work. Moreover, with the exception of the public health sector, State law is still largely lagging behind in setting the essential minimum levels required by the Constitution.

PART III

PRACTICAL CASES

- 1) Illustrate a practical case, which has occurred in your legal system, in which the administrative judge has considered an act or measure affecting social rights to be unlawful because it involves an infringement of the 'essential core' of those rights which cannot be restricted for any reasons (maximum 10 lines).

In **decision no. 113, dated 22.07.2021**, the Administrative Chamber of the Supreme Court (ACSC) has clarified that the individual's personal rights have been fundamentally violated (Article 43 of the Constitution/the right of appeal to the court), and consequently also the economic and social rights to obtain economical aid from the state with a disability pension (Article 55 of the Constitution). Since it was not possible to appeal the decision of the Medical Commission for Determining Ability to Work (MCDAW) regarding the assignment of the disability pension, then this right was also indirectly violated.

Likewise, in **decision no. 2, dated 10.01.2017** the ACSC has tackled the payments made to students benefiting from state scholarships, thus closely related to the social right to education (Article 57 of the Constitution). In this decision, the ACSC emphasized and recognized the right to the payment of the scholarship, despite the fact that the case was unjustly dismissed by the appeal court.

- 2) Illustrate a practical case, which occurred in your legal system, in which a benefit or service related to social rights, recognised by law in favour of the citizens of your country, has been considered by the court extensible also to foreigners (both EU and extra EU citizens), or in which the court has



considered the condition of “territorial anchorage” required for foreigners unreasonable or not proportionate (max 10 lines).

Through **decision no. 00-2021-142 (9), dated 01.02.2021**, the ACSC has examined the administrative acts of deportation of two foreign citizens. Although the case has not been resolved on the merits, but has been remanded to the Appeal Court, it is noticeable that the ACSC has recognized the same guarantees of personal, economic and social rights for foreigners. This is because one of their children was also born in Albania and also benefited of the Albanian citizenship. On the other hand, it is also referred to the practice of the ECtHR regarding some social rights such as the special protection of children, and therefore also of parents, without forgetting the special social, cultural and family bond, where some of them are included in Article 54 of the Constitution.

- 3) Illustrate a practical case, which occurred in your legal system, in which the administrative court considered that it could directly recognise the applicant (in terms of assessment or conviction) the aid, the benefit or the service unlawfully refused by the public administration (maximum 10 lines).

In decision **no. 00-2022-991 (179), dated 12.05.2022**, the ACSC upheld the appeal court decisions where the right to be treated with transitional salary payments is guaranteed to the subject, with regards to contributions paid through the social security scheme (the social right on which the trial was conducted is related to Articles 52 and 49, point 2 of the Constitution). The payment was rejected by the directorate and public authorities. The same principle was applied in decision **no. 741, dated 02.11.2020** of the ACSC, where the plaintiff was denied the payment of temporary disability at work, due to an accident.

