

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 Austrian Federal Constitutional Law (Bundesverfassungsgesetz - B-VG) contains some human rights provisions, but not a comprehensive catalog of fundamental rights. However, there are numerous laws with constitutional rank, first and foremost the ECHR, but also the Basic Law on the General Rights of Nationals (Staatsgrundgesetz - StGG), which contain social rights. In simple laws the implementation of these social rights is further specified. However, some social rights, such as the provisions on maternal leave or the right to social assistance, are only protected by simple laws.

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

- In January 2023, six out of nine Austrian provinces have issued provincial laws on social assistance (Sozialhilfegesetze) replacing regional laws on minimum income (Mindestsicherungsgesetze). Social assistance and minimum income benefits for indigent and needy people generally include cash benefits, bonuses for single parents and people with disabilities, as well as health insurance and coverage of housing costs in provinces with higher costs of housing. The granted benefits differ depending on the provincial law as the provinces cover their costs.



- In Austria, job placement is regulated in the Labour Market Promotion Act (Arbeitsmarktförderungsgesetz - AMFG) and is carried out by the Public Employment Service (Arbeitsmarktservice - AMS). Apart from the AMS, various companies and institutions may also provide job placement services.
- The Austrian health care system is financed by a mixture of income-related social insurance contributions, tax-financed public funds and private additional payments. This solidarity-based financing ensures equitable access to health care services - regardless of income, age, gender or origin.
- Many cities and municipalities provide affordable housing. However, the requirements to be pre-registered vary greatly.
- Different subsidies and grants are available for employees with disabilities or their employers and for entrepreneurs with disabilities. Concerning the care of people with disabilities, there are aids for supporting care-giving relatives, subsidies for 24-hour care and care leave available. Among other benefits for people with disabilities such as free motorway tax stickers, tax benefits, fee exemptions and the entitlement to increased family allowance, victims of crime, army casualties and victims of the two world wars, among others, receive benefits as social compensation.
- Family allowance is granted to parents regardless of their employment or income and increases with each child. Parents with three or more children can receive the multiple-child supplement. In addition, other deduction and allowances exist in regards to economic aid and facilities for families, such as the child deduction paid out in the form of a negative tax or the childcare allowance.

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

A fundamental right to access the Internet might derive from the “universal service” for telecommunications (as explained in para. 106 et seq. Telecommunications Act - Telekommunikationsgesetz - TKG) granting the right to a minimum range of telecommunication and postal services at affordable prices and of a certain quality. Every person is therefore entitled to internet access, regardless of where they live or do business.



In addition, pursuant to sec. 77 Electricity Industry and Organisation Act 2010 (Elektrizitätswirtschafts- und -organisationsgesetz 2010 - ElWOG 2010) and sec. 124 Gas Industry Act 2011 (Gaswirtschaftsgesetz 2011 - GWG 2011), electricity and gas suppliers are obliged to provide a basic supply of natural gas at their applicable general terms and conditions and at the general tariff.

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

Since the detailed implementation of social rights in Austria is not regulated in the Constitution but by simple law, the approved budget determines the framework for the payment of social benefits.

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

The term "essential nucleus" of social rights is not known in the Austrian legal system. However, the Austrian Constitutional Court protects the individual's fundamental rights in relation to actions taken by administrative authorities and administrative courts as well as the legislator and reviews legal provisions for their constitutionality and lawfulness. In doing so, it ensures the observance of social rights that are regulated



in provisions with constitutional rank, such as the ECHR (see also question 1). Since these rights are protected by their constitutional rank, they might be seen as the “essential nucleus” of Austrian social rights.

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:

If the infringement of social rights derives from legal provisions that are not in accordance with the Constitution, the Austrian Constitutional Court decides. If, on the other hand, the infringement of social rights derives from specific acts of measures by administrative authorities, the competent administrative court 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:

A hardship fund has been created in order to provide a safety net for hardship cases caused by the legal and economic consequences of COVID-19 and a COVID-19 short-time work scheme has been established. Allowances and bonus payments additionally paid to employees due to the COVID-19 crisis have been exempt from tax up to € 3,000. Numerous business aids have been introduced.

Due to the high cost of living caused by the energy crisis, family benefits have been increased and special benefits, such as the “special family allowance”, “climate bonus” and “anti-inflation bonus”, have been granted. Other measures include the introduction of an energy costs credit as well as electricity costs subsidies, the abolition of cold progression or the valorisation of social benefits.

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

The special social benefits introduced in Austria to cope with the emergencies of recent years have not provided for derogations from 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

Since Austria is a federalist state and has a system of compulsory insurance, relevant actors involved in the provision of health care services in Austria are the federal government (*Bund*), the provinces (*Länder*) and the municipalities (*Gemeinden*), but also the social insurance institutions and the interest representation bodies (e.g. chambers) as part of the self-administration sector. The social insurance institutions provide services within their own field of activity, for example, the provision of contract services in the extra-mural sector or of rehabilitation services, medicines and medical aids. Public funds play an important role in the administration of funding which is carried out by the Federal Health Agency and the Provincial Health Funds.

Furthermore, social benefits may also be provided by other legal entities under public or private law, for instance the Austrian National Union of Students or the Vienna Social Fund. Professional chambers, such as the provincial medical chambers, have instituted welfare funds. Other actors involved in the social service sector include non-profit and charitable organisations, private health care providers or ombudspersons.

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

The division of competences is laid down in Art. 10 to 15 B-VG. The competence to admit, exclude or condition access to social benefits depends on the type of benefit involved. Some matters, such as family and child care allowance, social security, including unemployment insurance and emergency assistance or care allowance, fall within the exclusive competence of the federal government. The implementation of social insurance is carried out by the social security institutions as self-administration bodies within their own field of activity.



Other matters like social assistance as well as hospitals and nursing homes are attributed by the B-VG to the shared legislation of the federal government and the provinces, but responsibility for enforcement falls to the provinces. There are also matters, for example housing subsidies, which fall within the sole competence of the provinces. Supplementary family allowances or subsidies are provided for by the provinces. Municipalities also play a role when it comes to administrative functions, for example in the area of public services of general interest, such as (nursery) schools, hospitals and nursing homes. As self-administration bodies, they may act within their own field of activity provided that the matters concerned lie in the sole or predominant interest of the local community and are suitable to be taken care of by the community within its local boundaries (Art. 118 para. 2 B-VG).

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

Health care in Austria is based on a social insurance model (health, accident, pension and unemployment insurance) founded on compulsory insurance based on employment, not residence or nationality. Every insured person, whether EU citizen or third country national, has a legal right to services which are financed through a solidarity-based system. Health insurance may also cover dependent family members of the insured person who reside in Austria. Entitlement to insurance benefits generally starts with the take-up of work, regardless of the existence of a work permit. Persons who do not fall under the compulsory insurance scheme may insure themselves voluntarily. Persons without health insurance may need to pay for the cost of health services themselves, except for first-aid care. However, there are inpatient and outpatient clinics which provide free care for those without health insurance. Other social benefits, such as family or (child) care allowance, may require lawful residence in Austria or a minimum duration of lawful residence, as is the case with certain housing benefits. The entitlement to certain social benefits for third-country nationals, such as social assistance, may also be linked to the existence of agreements under international law. Asylum seekers are entitled to specific social services within the framework of the basic care program and have full access to health care. On the other hand, persons who have been granted refugee status generally benefit from all social services, such as social assistance, family or (child) care allowance, housing benefits etc.



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

The Constitutional Court is competent to rule on the question whether a fundamental or constitutionally guaranteed right has been infringed. The Supreme Administrative Court - on the other hand - has final jurisdiction in matters of statutory administrative law. Therefore, the Supreme Administrative Court is not competent to rule on the social right granted on the national constitutional level but has jurisdiction in matters connected to the social rights, such as the implementation of social rights in simple law. However, certain matters are reserved to civil courts (e.g. social security benefits to private employees).

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.)

As mentioned before, the Supreme Administrative Court does not have exclusive jurisdiction in the mentioned areas. Per example, the Supreme Administrative Court has jurisdiction over complaints against the dismissal of civil servants as a result of disciplinary proceedings under the Civil Service Act (Beamten-Dienstrechtsgesetz 1979 - BDG 1979), as well as in other specific cases where the law provides for the termination of provisional employment of civil servants. However, complaints against the dismissal of private employees fall within the jurisdiction of the labour courts.

Regarding the protection of motherhood, the labour and social courts are in general competent to rule on claims under the Maternity Protection Act (Mutterschutzgesetz - MSchG) or the Paternity Leave Act (Väterkarenzgesetz- VKG). However, the Supreme Administrative Court decides, per example, on the advancement of civil servants in terms of salary during maternity and paternity leave.



Concerning health care, per example, the Supreme Administrative Court is competent to rule on matters relating to health insurance of certain public servants, pharmacy concessions and medical products law as well as relating to the approval process for health facilities and to the requests for medical aids and treatments under the Victims of Crime Act (Verbrechensopfergesetz - VOG). Insofar as social security benefits to private employees are concerned, benefits fall in part under the jurisdiction of the ordinary courts.

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

Per example, the first instance administrative courts rule on complaints against administrative decisions of the Main Association of the Social Security Providers (Hauptverband der Sozialversicherungsträger) which might entail the question if medical products are added or removed from the Medical Products Reimbursement Code (Erstattungskodex). The Supreme Administrative Court rules upon complaints against decisions of first instance administrative courts

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.)

n.a.

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



First instance administrative courts generally rule on the merits of the case. When examining the decision of an administrative authority which has failed to correctly apply the laws allowing an individual to obtain a social benefit, the first instance administrative judge may correct the decision which is, in turn, enforceable.

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

As mentioned above, first instance administrative courts, as a full legal and factual instance, decide on the merits of the case. They may therefore recognise a claim and award a benefit to which the person is entitled by law.

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

For example, § 21e Federal Care Allowance Act (Bundespflegegeldgesetz - BPGG) provides for an accelerated procedure with regard to care allowance if someone declares that he or she wants to take care leave. According to this, in principle, the authority shall complete this procedure within two weeks of receipt of the declaration.

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)

Per example, in Vienna a Tenancy Arbitration Board (Schlichtungsstelle) has been established, which must be called upon before going to court.

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

We have no perception on this issue.



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).

Although the term "essential core" of social rights is not known in the Austrian legal system, this constellation could occur if the Constitutional Court - as competent court to rule on the question whether a fundamental or constitutionally guaranteed right has been infringed - considered an act or measure affecting social rights to be unlawful because social rights that are regulated in provisions with constitutional rank (such as the ECHR) are infringed or because simple laws granting social rights are not conforming to the Constitution.

Per example, the Constitutional Court has annulled a provision in the Family Equalization Law (Familienlastenausgleichsgesetz - FLAG) that didn't grant family allowance if a child was already married despite the remaining financial burden of the parents as beneficiaries. The principle of equality according to Art. 7 B-VG was infringed (see judgement of 18 March 1980, G 35/79, only available in German: https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_10199682_79G00035_00/JFT_10199682_79G00035_00.pdf).

- 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).

As mentioned above, the principle of equality according to Art. 7 B-VG may be of importance when ruling on the question whether a social right was infringed. Although Art. 7 B-VG itself is not considered to be applicable to foreigners (with the exception of EU citizens within the scope of EU law), the Constitutional Court extended the general principle of equality to foreigners based on Art. I of the Federal Constitutional Act on elimination of racial discrimination (Bundesverfassungsgesetz vom 3. Juli 1973 zur Durchführung des Internationalen Übereinkommens über die Beseitigung aller Formen rassischer Diskriminierung - BVG Rassendiskriminierung). This provision forbids the unequal treatment between foreigners without objective reasons and the discrimination on the sole ground of nationality, but the Constitutional Court further recognised that unequal treatment of a foreigner is only permissible if not disproportionate and justified by a well-grounded reason (see judgement of 29 June 1995, B 2318/94, only available in German: https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_10049371_94B02318_00/JFT_10049371_94B02318_00.pdf).



- 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 the Austrian legal system, first instance administrative courts rule on the merits of the case when a complaint is filed against a decision by a public administration. For example, there are various cases where a first instance administrative court directly recognised an applicant social assistance benefits.

