

## 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 German Constitution (Art. 20) defines the Federal Republic of Germany as a Republic, a federal state, a democratic state, a rule-of-law state and a social state. So, being a social state is one of the five major principles of the Federal Republic of Germany. The social state principle contains a mandate, mostly for government and parliament. Yet, no precise claims of citizens can be derived from it. But there is manifold legislation as to social rights. The social budget is usually the largest within the federal budget.

One explanatory note in the beginning of the questionnaire. The German constitution also provides for a Federal Social Court as a supreme court in social law matters. The Federal Administrative Court only has a few relicts of competence in social matters, mostly additional aid for housing and facilities for children and juveniles. They do not form part of the Code of Social Law and have never been transferred into the competence of the social judiciary. This hopefully helps explain why some questions will remain unanswered or only partly answered.

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 German healthcare system is based on two pillars. The largest is that of public health insurances in which every employee is automatically a member, including his or her dependent family members (children and non-working spouse). The premiums are in relation to the income (with a maximum premium serving as a ceiling; this is presently reached with an annual income of 66,600 €). They are financed by employees and employers 50/50. Unemployed and college students are also part of this system. Anyone else can be a member of a public health insurance on the basis of a voluntary decision. In this case they have to cover 100 % of the premium. The second pillar is that of private health insurance. Membership in private health insurance is voluntary. The premiums are usually higher than those of public health insurance. Membership is open to those who do not have to be a member of public health insurance: Mostly self-employed, employees earning above the aforementioned ceiling and civil servants.

There are four more kinds of public social insurances employees are automatically a member of: Insurance in case of unemployment, retirement insurance, professional accident insurance and nursing insurance.

Next to the insurance system there are public subsidies for living expenses, housing and health for anyone in need. The law defines a so-called minimum of existence which is not only designed to help survive, but also to participate in social life. Anyone who does not have sufficient assets to reach this minimum of existence receives the gap - or everything - from the state.

In addition, there are subsidies or non-economical help in certain situations such as handicap, youth, maternity or young parenthood, housing etc.

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 not really the creation of new rights in the way asked for. Yet, every citizen has equal access to any benefit provided for by a public institution. So, if the law provides for a new benefit, citizens will have access to it if they meet the qualifications. To benefits or services on the private market (TV, internet...) this rule does not apply. Yet, a discriminatory exclusion of these benefits and services is prohibited by law. In addition, benefits considered necessary to form part of society (and this includes TV and internet, access to media in general) form part of the definition of the minimum of existence and thus may lead to a raise of government subsidies for those in need.

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

The administration is not allowed to withhold a benefit provided for by the law reasoning with budgetary restraints. It is the responsibility of parliament to provide government with sufficient means to fulfil its obligations as provided for by social statutory rights. If, in a given case - such as health costs during the pandemic - the budget provided is not sufficient, parliament will have to extend the budget - or - cut social spending.

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 minimum of existence as explained above is being derived from the protection of human dignity and the social state principle in the constitution. The legislator only has a small margin of appreciation in defining what is necessary to be able to live and participate in the German society. Also, the social state principle in combination with the fundamental law obligation of the state to protect life and health of its citizens would stand against a too extensive cutting down on public health protection. In this case there are large margins of discretion in favour of the government. In the end it would be up to the constitutional court to define the red line that cannot be crossed. To my knowledge no government has ever tested this line. The same would apply to the cutting down of retirement and unemployment protection. The ultimate threshold would always be the protection of human dignity which cannot be changed, not even by constitutional law.



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:

See above, it is foremost the responsibility of government and parliament to negotiate and determine the budget in correspondence with all spending, including social spending.

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:

The definition of short term unemployment, which allows employees to stay in a given job, yet on government money, was extended on a large scale, as was a sort of moratorium on bankruptcy. Business aids were also granted on a generous scale. The labor rules for leave were generously extended for those with children under 12 years of age whose nurseries or schools were closed or who had to stay home for quarantine reasons.

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

There was no alteration in the competence of the judges.

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

See answer to question 2.

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

There is an institution called the Common Federal Committee of the public health insurances. The legislator has indeed left a fair number of questions of detail for them to decide. This may also include matters of accepted treatments etc. At times its power is under criticism from a point of view of democratic legitimacy.

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 rules of the German social law in principle do not differentiate between Germans, EU citizens and other citizens. Social benefits are a little reduced for foreigners claiming refugee status during the application procedure. Also, within the margin of what the jurisprudence of the ECJ allows there have been attempts to face the misuse of the social system even by EU citizens.



## 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

See above, part I question 2: The social courts are competent for social matters.

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.)

See above, part I question 2.

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

See above, part I question 2.

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.)

See above, Part I question 2.

- 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 - in administrative as in social court procedure - the judge can award the successful applicant the advantage which has been unlawfully denied, unless it is under the discretion of the state (which in social cases is usually not so).

- 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

The administrative as well as the social judge can mostly annul a decision and award a benefit given by the law. Only if an additional damage has arisen which is not compensated by awarding the benefit could there be additional damage compensation decisions. Social law also knows a further claim not known to general administrative jurisprudence. The social compensation claim aims at compensating damages which may arise from deficient information, counselling etc.

- 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

- 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)

There is mediation in the administrative and in the social judiciary. It is offered by judges who are especially trained for mediation and who are not (!) competent to decide the case. Also, the mediation process and the mediator underlie a secrecy obligation, so in case the mediation fails, the litigation can go back to the competent judge without any alterations.

- 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

No empirical data on the side of the administrative judge, see above, Part I question 2.

### 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).



- .....
- 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).

- .....
- 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).

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Lack of competence, see above, question 2.....

