

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?

- x Constitution
- x Ordinary law
- Other

(tick more than one box if necessary)

Please explain

We find various articles in the Constitution for example, article 7: The State recognizes the right of all citizens to work and shall promote such conditions as will make this right effective; article 10: primary education shall be compulsory and in State schools free of charge. However, article 21 of the Maltese Constitution specifies that these provisions in this Chapter are not enforceable in any Court. Having said this, Ordinary Legislation, consisting in Acts of Parliament and Subsidiary Legislation has given effect to these principles.

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

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

(tick more than one box if necessary)

Please explain

By way of example, the Maltese healthcare system is based on the principle of free healthcare. Persons who are in the low-income group, as determined by a means test, are entitled to free medicines from a restricted list of essential medicines and to certain medical devices (subject to certain conditions and the payment of a refundable deposit); persons who suffer from chronic illnesses included in a specific schedule incorporated



in the Social Security Act are entitled to free medicines strictly related to the chronic illness in question. This benefit is independent of financial means.

As to the right to social security and social assistance, rights falling under this category are regulated mainly by the Pensions Ordinance (Chapter 93 of the Laws of Malta) and the Social Security Act (Chapter 318 of the Laws of Malta). Chapter 93 deals with the right to pensions, gratuities and various allowances in respect of persons in the public service, as well as pensions and gratuities payable to dependants of public officers in certain cases (for example the pensions payable to widows of officers killed in the discharge of their duty). The Social Security Act deals with the payment of social insurance benefits, pensions and allowances, social and medical assistance, non-contributory pensions and the payment of social insurance contributions by employees, employers, self-employed and the State. It provides for the payments of sickness benefits, sickness assistance, invalidity pensions, disability pension, injury benefits, unemployment benefits, widows' pensions and pensions in respect of retirement. Then there are special pensions and allowances such as maternity benefit and children's 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

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

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

Please explain



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

The Maltese system does not recognize any distinct category of 'social rights'. However, one finds ordinary legislation which regulates rights and has given effect to rights classified as being social rights.

Of course, with the incorporation of the ECHR in 1987 some rights such as the right to adequate compensation when property is expropriated or controlled in the public interest and the right to primary and secondary education, there has been an increased awareness of such rights

One must also mention that Malta's accession to the European Union from 1st May, 2004 has also changed and introduced new laws in this area.

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)

As already explained, social rights are mostly found in various legislative acts and of course there are rights which are associated with fundamental human rights. Hence one can say that the rights granted cannot be sacrificed as such.

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:



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:

Covid-supplement to workers in certain specialised areas such as tourism, shops, businesses to encourage retention of employees. Tax relief for businesses and self-employed. Deferred tax to business liquidity by easing pressure on their cashflow. Vouchers to be spent in retail, restaurants and bars were also distributed to help the economy.

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

No

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

When it comes to the healthcare system there are the hospitals owned by the State, whilst there are also Private hospitals. It is to be mentioned that at times, so that the service to the patient is more efficient the State makes arrangements with Private hospitals so that, against payment by the State, the patient is attended to in the private hospital.

With regards to the elderly there are State-owned homes, whilst there are private homes for the elderly, and there are others in which there is collaboration between the State and Private sector.



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

- Yes
- x 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

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.
- x Yes in some areas

Please explain

Subject to certain exceptions, State-provided primary, secondary and tertiary full-timed education in Malta is free for all citizens of Malta and (subject to certain exceptions) for all those resident in Malta.

With regards to healthcare, persons living in Malta and covered by Maltese social security legislation may receive public health care services in accordance with the entitlements determined by the Ministry for Health.



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

In Malta we do not have an Administrative Court but we have an Administrative Review Tribunal and various administrative tribunals.

Please see below.

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 Malta we have an Administrative Review Tribunal established by the Administrative Justice Act (Chapter 490 of the Laws of Malta). However, social rights are dealt with by the Civil Courts in their original jurisdiction. It is to be noted that in the case of certain decisions relating to social security (for example, if an individual is notified of a decision by the Department such as refusal to pay sick leave because there were not enough social contributions paid) the individual has a right to go before the Arbiter (Administrative Tribunal). The law also provides in certain cases for a right of appeal to the Court of Appeal (Inferior Jurisdiction) from this Tribunal's decision.

With regards to employment there is an Industrial Tribunal established by Law which competence is determined by law. An appeal, in certain instances, from a decision of the Industrial Tribunal lies with the Court of Appeal (Inferior Jurisdiction).

Another example is when an individual who benefits from social housing assistance



- 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?

- x Yes (with reference to Administrative Tribunals and in the Civil Courts the answer would obviously be answered positively too)
 No

Please explain

- 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
 Not really
 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.)

Reference is made to the answer to the 2nd question in this section.

- 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.
 x 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

It is to be noted that who feels aggrieved that he has been denied a social right to which he or she is entitled may sue the appropriate Government Department (or, if the right is alleged to have been denied by a particular person, that person) by filing an application before the First Hall of the Civil Court. An appeal from a decision of this court lies to the Court of Appeal. When the Court finds a violation it will order specific performance, and damages according to the case.

- 6) What kind of remedy can the administrative judge put in place for the protection of social rights?
- x Annulment of organizational acts or specific acts limiting social rights
 Damage compensation



- x 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

Vide above

- 7) In relation to the protection of social rights, are there any accelerated or simplified procedures or, in any case, special procedures?
- Yes
 - No
 - x Yes, but only in some sectors

First of all, there is an article in the Code of Organization and Civil Procedure, namely article 469A of Chapter 12 of the Laws of Malta. This is an action for judicial review. It is a judicial remedy that grants natural or legal persons the possibility to request the courts to delve into the validity of any administrative act or declare such act null, invalid or without effect.

Then, there is always the possibility of Constitutional cases. In fact when the violation of a social right is alleged to be also a violation of a fundamental human right (recognised by the constitution or by the substantive provisions of the European Convention on Human Rights or one of its protocols, or recognised by both), the applicant needs to file an application before the First Hall Civil Court and then has a right to appeal before the Constitutional Court. These cases

- 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
 - x Yes, but only in some sectors

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



In Civil cases there is always the availability of mediation. In Family law, before the filing of any separation case, it is mandatory to file a letter addressed to the Registrar of the Courts, to ask for the appointment of a mediator. This mediation must be concluded within two months. If the parties fail to reach an agreement, there will be an authorisation by the Court to proceed to file the case.

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

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).

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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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