



## 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 Constitution of the Portuguese Republic presents one of the widest catalogues on social rights among the European Union' Member States - embracing the right to social security (article 63); the right to health protection (article 64); the right to housing (article 65); the right to environment (article 66); the right to family (article 67); the right to parenthood and motherhood (article 68); the right to childhood (article 69), youth (article 70); the right of disabled citizens (article 71) and the protection of the elderly (article 72). The social rights fulfilment, as positive rights, is left to Portuguese 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

Considering that all citizens are entitled to human dignity, the Portuguese legal system promotes (a) governmental support to people in need, through the attribution of the social insertion income<sup>1</sup>; (b) job search facilitating measures, such as "Employment-Insertion Contract"<sup>2</sup>, to promote employability and job quality; (c) health protection, through the approval of the new Statute of the National Health Service (SNS)<sup>3</sup>; (d) support to social housing, through the new legislative package on housing for families suffering loss of income<sup>4</sup>, (e) assistance to people with disabilities, by updating the supplement value of the social benefit for inclusion<sup>5</sup> and (f) support to the families, by granting the unemployment benefit<sup>6</sup> and reinforcing the family allowance<sup>7</sup>, etc.

<sup>1</sup> Cf. Law no. 13/2003, May 21, last amended by Law no.100/2019, September 6.

<sup>2</sup> Cf. Order no. 136/2022, April 4.

<sup>3</sup> Cf. Decree-Law no. 52/2022, August 4.

<sup>4</sup> Cf. Approved by the Council of Ministers on February 16, 2023.

<sup>5</sup> Cf. Order no. 31-B/2023, January 10.

<sup>6</sup> Cf. Decree-Law no. 56/2022, August 19.

<sup>7</sup> Cf. Decree-Law no. 220/2006, November 3, last amended by Decree-Law no. 119/2021, December 16.



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

Portugal participate, through the "Portuguese Charter of Human Rights in the Digital Era"<sup>8</sup>, in the global process of the Internet transformation into a tool to achieve equality, social justice, promotion of human rights, aiming social inclusion in the digital environment. In this context, in order to promote digital citizenship, the Government approved – similarly to what already did with the social fees for other essential services (such as electricity and gas) –, a diploma creating the social fee for services supply of broadband internet access to be applied to low-income consumers<sup>9</sup>.

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

Under the "Programme for Economic and Financial Assistance", Portugal adopted, in 2011, austere budgetary measures aimed to reduce the public deficit. The social rights effectiveness was conditioned to the financial availability of both the State and other public entities.

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)

<sup>8</sup> Cf. Law no. 27/2021, May 17, last amended by Law no. 15/2022, August 11.

<sup>9</sup> Cf. Decree-Law no. 66/2021, July 30.



Please explain

The Constitutional norms concerning social rights entail a stability guarantee of the legal positions created by the legislator. This guarantee covers a minimum content which corresponds to a minimum of socially dignified existence. In this context, the “possible funding reserve” cannot be invoked to obstruct the realisation of a minimum content of economic, social and cultural rights. In this regard, the following constitutional jurisprudence should be noted: decision no. 509/2002 (which assessed the law constitutionality of a direct violation of the minimum content of the “right to a dignified minimum existence”) and the decision no. 177/2002 (which attributed normative relevance to the minimum of dignified subsistence)<sup>10</sup>.

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:

Social rights are associated to certain public financial costs. In these terms, the power to decide on public spending lies within the legislator, the effect power of spending lies in the State/Financial Administration and the power to supervise public spending lies in the Court of Auditors. In turn, the necessary balance between austerity measures versus the Social State is ensured by the Constitutional Court that played, between 2011 and 2014, an active role in the production of the so-called “crisis jurisprudence” - cf. decision no. 396/2011 (on the viability of the initial salary cuts); decision no. 353/2012 (on the restriction effects of the unconstitutionality declaration regarding the suspension of the holiday and Christmas subsidies of the civil servants); decision no. 474/2013 (on the requalification of workers in public functions); and decision no. 572/2014 (on the special contribution of the retired).

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 successive pandemic, energy and financial crises have had repercussions in the Portuguese society. The Government adopted, in the context of the “social emergency state”, several initiatives aimed to protect workers, families and companies, such as: the extraordinary income support for workers in an unprotected economic situation caused by the COVID-19<sup>11</sup> disease; exceptional measures to support families to mitigate the inflation<sup>12</sup> effects and, within the companies support, the creation of credit lines and tax benefits.

<sup>10</sup> Accessible at <https://www.tribunalconstitucional.pt/tc/home.html>

<sup>11</sup> Cf. Article 156, Decree-Law no. 75-B/2020, December 31 (2021 State Budget).

<sup>12</sup> Cf. Decree-Law no. 57-C/2022, September 6.



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

In Portugal, the special support measures were not accompanied by special rules on the competencies split between the administrative judge and the other judges.

The delimitation of the jurisdictional power attributed to administrative courts is made according to a material criterion, linked to the nature of the issue to be settled. In these terms, it is up to the administrative courts to adjudicate actions that seek to settle disputes arising from the relationship between individuals and the Administration, when the latter carries out its administrative activity of public management, excluding private law relations in which it may intervene.

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

Within the scope of the European System of National and Regional Accounts, Law no. 64/2013, August 27<sup>13</sup>, approved the new publicise regime on grants and community benefits by public entities, in favour of individual or collective persons of the private, cooperative and social sectors, as well as public entities outside the perimeter of the public administration sector.

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 respect for the principle of territorial subsidiarity, the autonomous regions are responsible for promoting regional interests and the local authorities are responsible for pursuing the populations interests they represent, through the exercise of their own regulatory power<sup>14</sup>. Some subsidies granted by regulation, are: the "Regulation that approved the Municipal Social Emergency Fund"<sup>15</sup>; the "Regulation that approved the

<sup>13</sup> Last amended by Law no. 13/2014, March 14.

<sup>14</sup> Cf. Article 241, Constitution of the Portuguese Republic and article 33, no. 1, items v), and k) of the Legal Regime for the Municipalities, approved by Law no. 75/2013, September 12.

<sup>15</sup> Cf. Regulation no. 813/2022, August 19.



Awarding to Associations Subsidies<sup>16</sup>; the "Regulation on Social Assistance and Monitoring Service"<sup>17</sup> and the "Regulation on Family Social Support and Leisure Activities"<sup>18</sup>.

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 equivalence of foreign citizens to Portuguese citizens applies, unless otherwise stated, to all rights, namely to the right to health. In these terms, the Constitution states that all citizens (including foreigners) have the right to comprehensive health care.

In the ordinary law, this right is provided for in the Basic Law on Health<sup>19</sup>, as follows: "NHS beneficiaries are also citizens with permanent residency or staying or residing temporarily in Portugal, who are nationals of European Union Member States or equivalent, third country nationals or stateless persons, applicants to international protection and migrants with or without their situation legalized under the terms of the applicable legal regime" (cf. Base 21). In turn, the Ministerial Order no. 25360/2001, 12 December 2001, established the procedures regarding access to the National Health Service by foreign citizens.

Within social benefits, more specifically the Social Benefit for Inclusion, articles 4 and 9 of the Regime of the Social Benefit for Inclusion<sup>20</sup> clarifies that are covered the national citizens and foreigners, refugees and stateless persons that meets the conditions to receive it, considering that the recognition of this right depends on the holder having legal residence in Portugal.

## 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 the national legal order, the Administrative and Tax Courts competences is defined in the no. 3, article 4 of the Statute of the Administrative and Tax Courts (ETAF) which have jurisdiction to deal with disputes related to: (i) the protection of fundamental rights and other legally protected rights and interests, within the scope of administrative and tax legal relations, and (ii) the prevention, cessation and reparation of

<sup>16</sup> Cf. Regulation no. 363/2022, April 12.

<sup>17</sup> Cf. Regulation no. 30/2023, January 13.

<sup>18</sup> Cf. Regulation no. 131/2023, January 25.

<sup>19</sup> Cf. Law no. 95/2019, April 4.

<sup>20</sup> Cf. Decree-Law no. 126-A/2017, October 6, last amended by Decree-Law no. 11/2021, February 8.



violations to constitutionally protected values and assets, in matters of public health, housing, education, environment, territory planning, urbanism, quality of life, cultural heritage and State assets, when committed by public entities.

In turn, the Statute's article 44-A, regarding the specialized administrative courts competence, clarifies that the social administrative court is responsible for hearing all cases related to disputes arising from the employment contract in public functions and its training, or related to public or private types of social protection, including those related to the payment of labour credits by the Wage Guarantee Fund, and other matters that may be granted by law.

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 Portugal, the delimitation of jurisdictional power attributed to administrative courts is made according to a material criterion, linked to the nature of the issue to be settled, and the legislator differentiated the legal regime of public employment - approved by the General Law on Labour in Public Functions (LTFP) from the legal regime of private employment - approved by the Labour Code (CT). In this context, disputes related to maternity protection as well as disputes related to employment protection and vocational training, may fall under the jurisdiction of the judicial courts, depending on the nature of the employment relationship.

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

Under the Constitution (Article 266) and the Code for Administrative Procedure (Article 3), the administrative activity is subject to the principle of legality, i.e., all Public Administration bodies must act in obedience to the law, and the law within the conferred limits, and in accordance with their purposes. Within the scope of guaranteeing economic, social and cultural rights, the principle of legality stands out, since the Administration is subject to the principle of the law precedence and must comply with the laws that establish rights to a certain minimum state benefits, as is the case of the unemployment benefit, the insertion social income, survivor's pensions, etc.).



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.).

Considering the previous answer, the question is impaired.

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

In its article 7, the Procedure Code for the Administrative Courts establishes that the judge, when faced with an injurious conduct of the Administration, cannot limit himself to a mere formal assessment of the litigation, but must pronounce on the merits of the claims concretely formulated – principle pro actione.

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 Constitution' article 268 guarantees to its "administered, effective judicial protection of their rights or protected interests, including, namely, the recognition of those rights or interests, the challenging of any administrative acts that harm them, regardless of their form, the practice determination of legally due administrative acts and the adoption of appropriate precautionary measures".

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

Under the Constitution, the law guarantees to the citizens, to defend their rights, freedoms and personal guarantees, judicial procedures characterized by celerity and priority, in order to obtain effective and timely protection against threats or violations of these rights. The rights associated to benefits, because they present a similar structure to the rights, freedoms and guarantees, may benefit from the priority and rapid judicial measures provided for in no. 5, article 20, of the Constitution, such as the "subpoena for the protection of rights, freedoms and guarantees" and the "provisional decree on welfare", under the terms of articles 131 and 109 of the Procedure Code for the Administrative Courts .

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)

The «Programme of the 23rd Constitutional Government» contemplates, for the administrative area, the use of alternative means of conflict resolution, among which mediation stands out. The "social mediation" more specifically the "family mediation", created by Order no. 18 778/2007, August 22 - in which an impartial third party (the mediator) promotes the approach between the parties to reach an agreement - is regulated by the Normative Order no. 13/2018, October 22.

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

There isn't any problem regarding social rights' effective protection.



### 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).

The decision by the Central Administrative Court of North of July 15, 2022, analysed the appeal filled by the General Retirement Fund (Caixa Geral de Aposentações) against the sentence handed down by the Administrative Tax Court of Oporto, which upheld the injunction that determined the restitution of the amounts received as retirement pension, as well as the act that proceeded to recalculate the pension, reducing it.

The ruling of the Central Administrative Court considered that "both the administrative act of offsetting debts of social security contributions against the full value of the applicant's pension, and the act of recalculation of his/her retirement pension reducing it from 457,05 euros to 381,00 euros, violate the essential content of the fundamental right to social security, and, as such, are null, under the provisions of articles 17 and 18, no. 1, and article 63, all of the Constitution of the Portuguese Republic, and in article 161, no. 1 and 2, item d) of the Code for the Administrative Procedure".

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).

The Central Administrative Court of South ruling of January 30, 2020, analysed the subpoena for the protection of rights, freedoms and guarantees against the Immigration and Borders Service (SEF), where it was petitioned to condemn the SEF to proceed with the issuance of a permit and residence, which the lack of it put into question the basic stronghold that is linked to the principle of human dignity.

The decision acknowledged that the applicant enjoyed a multi-level protection regarding fundamental rights - in particular, article 6 (right to liberty and security), article 7 (respect for private and family life), article 15 (professional freedom and right to work) and article 41 (right to good administration) of the Charter of Fundamental Rights of the European Union, article 6 (right to a fair trial) and article 14 (prohibition of discrimination) of the European Convention on Human Rights. This did not prevent that the requirements necessary to grant a residence permit wouldn't be verified - provided by article 88, no. 2, of the legal regime for the entry, stay, exit and expulsion of foreigners from national territory.

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).

The decision by the Central Administrative Court of North on March 10, 2022 – regarding an administrative action that requested that the General Retirement Fund (Caixa Geral de Aposentações) acknowledged the responsibility for the expenses payment with medication and treatment for the occupational illness of the plaintiff during the exercise of her public duties - considered that "given the provisions in no. 3, article 5, in





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conjunction with no. 1 and 4, article 34, both of Decree-Law no. 503/99, it is upon the General Retirement Fund and not upon the service of origin the responsibility for ensuring the reimbursement of health expenses incurred by a worker who is the victim of an occupational illness that has resulted in a situation of permanent partial incapacity".



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