

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.

Article 2 of the Slovenian Constitution stipulates that Slovenia is a state governed by the rule of law and social state. The principle of the social (welfare) state is the basis for all social rights in Slovenia. The Constitution guarantees several different social rights: right to social security (Article 50), the right to health care (Article 51), the rights of disabled persons (Article 52), the right to education and schooling (Article 57), the right to healthy living environment (Article 72), the rights of children (Article 56) and protection of the family, motherhood, fatherhood, children and young people (Article 53) etc. Other rights, concerning more specific services, are recognized by law (for example patients' rights, right to (financial) social assistance, subsidies and reduced payments, free legal aid). It has to be stressed that international agreements ratified by the parliament can be relied to as a legal basis for recognition of social rights, if their legal norms are adequate in this regard.

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.



Traditionally the Slovenian society is based on a high degree of solidarity and mutual support, which is reflected also in Slovenian legal system. Solidarity forms the basic principles for the establishment of several social security rights, including the health care system.

Slovenian health care system is financed through a mandatory insurance program called the Health Insurance Institute with contributions paid by both employers and employees relative to their income. Dependent family members are covered by the employed family members. However, not all costs are covered by the mandatory insurance scheme (except children's health care), so most Slovenians pay voluntary (nominal) insurance fees for additional coverage. All emergency services are provided for free.

The law also ensures all employed persons are compulsorily insured for the case of unemployment (self-employed persons can opt-in in this national insurance scheme) and the contribution is calculated as a percentage of the persons salary. If thus insured persons become unemployed against their own will or not as a result of their own fault (and fulfill other conditions), they are entitled to unemployment benefits. Employed insured persons and some other groups are also entitled to wage compensation for temporary absence from work due to illness or injury and to the cost of all essential treatment and medical rehabilitation in the case of occupational injury or occupational disease.

In relation to social security of unemployed or persons who are unable to support themselves or their families, meaning that they are unable to provide means (certain minimal income) for reasons which beyond their control, are entitled to different rights of social assistance.

Regarding family protection, law ensures different child benefits and other family allowances: parental allowance, childbirth allowance, large family allowance, child care allowance, partial payment for loss of earnings etc. The law also provides for different forms of parental protection: maternity, paternity and parental leave, right to benefit, right to part-time work, right to payment of social security contributions owing to parenthood, right to the payment of social security contributions as a result of parenthood in the instance of four or more children, rights to benefits during nursing etc.

Disabled persons are entitled to different rights from disability insurance, which is compulsory for all the employed persons and handled by a special state fund, for example disability pension, disability allowance, partial benefit, disability benefit for physical impairment.

Regarding social housing, the public Housing Fund of the Republic of Slovenia manages its own rental apartments for the need of non-profit and affordable rental throughout Slovenia, as well as apartments of operators in free use for the requirements of the non-profit rental. This is seen as a service, provided in the public interests and can therefore give rise to public law claims.

- 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.

In March 2014 and May 2015 members of parliament initiated a constitutional amendment procedure to make access to drinkable water a fundamental right for all citizens, but the initiative stalled. The members' initiative then received strong support from NGOs, (e. g. Civilian Initiative for Slovenia and Freedom). The civil initiative became a part of the formal procedure for constitutional amendment and available for public signature on 30 January 2016. It has collected more than the required 30 thousand signatures in under six weeks. The civil initiative was then backed by all parties in the governing coalition, as well as by some opposition parties. Based on the initiative's demands and the findings of the group of experts (who concluded that constitutional amendment was relevant and well founded) the parliamentary constitutional committee proposed a new constitutional provision guaranteeing the right to water and requiring the state to ensure the supply of drinking water to inhabitants and households through a non-profit public service. In the end of 2016 the Slovenian parliament adopted the amendment to the Constitution of the Republic of Slovenia, which declares water a public good and prevents its commercialization. This new Article (70A) of the Constitution stipulates that every citizen of Slovenia has the right to drinkable water, which is deemed as a public good managed exclusively by the state. Water resources shall primary and durably be used to supply citizens and households with potable water and, in this sense, are not a market commodity.

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.

According to established constitutional case law the state's incapacity to cover certain social benefits can, in the prevalent and legitimate public interest, be a justified reason for their limitation. The principle of the social state guarantees that the state will not arbitrarily worsen person's legal position, that is without a reason, based on the pressing and legitimate public interest. In the event of a conflict between this principle and other constitutional values it must be decided, which of the constitutionally protected interests should



be given priority in the given case of conflict. In doing so, the aspect of legal certainty must also be taken into account, meaning that the impact on persons' legitimate expectations were disproportionately affected: whether the disputed changes were relatively foreseeable, whether the persons affected by the change could take that into account in advance, what is the weight of the change and the significance of the existing one legal position for the beneficiaries on the one hand and the public interest justifying the other regulation on the other hand.

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 Slovenian Constitutional Court emphasized, that there exists a constitutionally protected core of the right to social security (Article 50 of the Constitution). To illustrate: in one its decisions the Court explained that the scope of special protection of war veterans and victims of the war, (as regulated in the third paragraph of Article 50 of the Constitution) is determined by an act of parliament and that a reduction of this legally guaranteed "special protection", which would otherwise be admissible according to the milder, more general limitations based on the principle of the rule of law (protection of legitimate expectations), may be constitutionally inadmissible and a matter for the Constitutional Court's review, because it has already interfered with the very core of the constitutionally guaranteed right to special protection of this group of people. The Constitutional Court pointed out that the legislator has by reducing the scope of aforementioned social right already exceeded it's own scope of (free) appreciation and interfered with the constitutionally protected core (or essence) of the constitutionally protected social right. However, since in this case the legal provisions in question were constitutionally inadmissible also due to the more general criteria of the rule of law, the determination of their potential interference with the essence of the constitutional right from the third paragraph of Article 50 of the Constitution was not necessary.



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:

Since the establishment and scope of social rights has to be regulated by an act of parliament, the constitutional control of legal provisions limiting or affecting social rights, including the balancing of the opposing interests and requirements falls to the Constitutional Court, when called upon to assess the constitutionality of the provisions in question. If, on the other hand, the limitations are imposed by secondary legislation (based on the legislative authorization) and/or individual acts or measures of state authorities, the competent court (social court or administrative court, depending on type of act), will decide on the individual case.

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

- Yes.
- No

If yes, please indicate the main measures introduced:

Due to Covid-19 pandemic many citizens received one-time solidarity allowance (pensioners, students, vulnerable groups, unemployed...), increased amount of allowance for large families, increased amount of child benefit, income support for the self-employed, companies received salary reimbursements for employees waiting for work and partial subsidies.

Following the emergence of the energy crisis the following benefits have been introduced: determined maximum resale price of electric energy, natural gas and oil, aid for business sector, energy solidarity allowance for socially most vulnerable groups of citizens due to impact of high energy prices, one-time allowance for child allowance recipients.

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 special derogation from the ordinary division of competencies between administrative judge and the other judges in Slovenia because of the special support measures that has been introduced in order to cope with the short and medium-term emergencies of recent years.

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.

In Slovenia, the provision of social rights and benefits, including other related activities, is carried out by a public system of different bodies and networks. This is also linked to different public institutions that are designated service providers. Different social institutions (health care, care for the elderly, etc.) are established by the state and municipalities. Many of these services can also be carried out by private providers on the basis of an administrative authorization in a form of a license or a public law contract (“concession”). Several of these services are also provided by private subjects outside of the public system, either as a provision of paid-for services or as charitable activities.

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

- Yes
- Not

Article 140 of the Slovenian Constitution stipulates, that the competencies of a municipality comprise local affairs which affect only the residents of the municipality. By law, the state may transfer to municipalities the performance of specific duties within the state competence, if it also provides the financial resources to enable them. State authorities supervise the proper and competent performance of work relating to matters vested in local community authorities by the state.

The constitutional system of local self-governance in the Republic of Slovenia is therefore based on a strict separation of the municipality and the state - municipalities regulate only local affairs and have to fund them from municipal budget. Thus, the municipalities in Slovenia are in practice very limited in regulating special social rights for their own inhabitants based on the municipal own funding. The social rights in Slovenia are therefore regulated centrally, but the municipalities are quite often designated to implement them in the framework determined and funded by the state.



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.

Municipal bodies can regulate (and limit) only those social benefits that are specifically determined by their own regulation and not those that are regulated by the state.

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.

Foreigners who are non-EU citizens are entitled to certain social assistance benefits if they have permanent residence permit in Slovenia and they do not have sufficient means, assets or savings and if they are actively seeking solutions for their social problems. They can also receive social assistance benefits for limited period of time, depending on circumstances.

Non-EU citizens are also entitled to unemployment benefits under a social insurance agreement between Slovenia and their home country, if there is such an agreement. If there is no such agreement foreigners can in some circumstances exercise this right under the same conditions as Slovenian citizens. Access to health care for foreigners in Slovenia depends on their residence status and if they have health insurance or not (as employed persons, etc.). Non-EU citizens who are not included in health insurance in Slovenia, have the right to emergency or necessary health-care services for which payment is provided in accordance with EU legal order, international agreements or from the state budget. Asylum seekers are provided with emergency medical/dental assistance and necessary treatment. Persons granted international protection get compulsory health insurance based on their international protection status and have the right to health care services in the same scope as any other person in Slovenia who is covered with compulsory health insurance. Regarding access to social welfare, people with granted international protection have equal rights as Slovenian 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.

Only matters expressly determined by law fall within jurisdiction of social courts (e.g. those relating to certain decisions within social security systems), all others are decided by the administrative court, meaning also all public law disputes concerning administrative measures affecting social rights. This means however that in practice the majority of cases regarding social rights fall within the jurisdiction of social courts. In Slovenia all these cases are in the last instance decided by the (one) Supreme Court, since all remedies against decisions of lower instance courts are decided by it.

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.)

The jurisdiction to decide on social rights is very much divided in Slovenia. There majority of cases in health, and social assistance are decided by specialized social courts, the protection of motherhood and job protection by the labour courts. But it has to be stressed that in all these areas there are disputes that are decided by administrative courts as well (e. g. in financing of measures to promote employment of certain groups, in health system regarding concessions, in rights to education, etc.). In cases of constitutionally protected social rights the jurisdiction to protect (and enforce) such a right would fall to administrative court if there is no other effective legal remedy in place to guarantee such a right (Art. 157 of the Constitution).



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

- Yes
 No

Please explain.

In Slovenia the administrative judge can rule on the lawfulness of these administrative acts not regarding their legal form (governmental decree, municipal regulation, decision etc.). Quite often these issues are regulated by an act of parliament, so that in those cases the jurisdiction on their constitutionality lies with the Constitutional Court. If the administrative judge finds such an act to be unconstitutional, he can stay the proceedings and refer the question of validity of it to the Constitutional Court.

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.)

As mentioned above the administrative judge is quite often also competent to decide on these matters, if the jurisdiction is not expressly given to the social court.

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.

The powers of the administrative judge are the same as in all administrative dispute cases and he can decide also on the merits of the case and grant the claim to the individual in full jurisdiction. This means that also limitations of these powers are the same – if the administration is given discretionary powers, the powers of the administrative judge to change the administrative decision are limited. It has to be noted, however, that in practice it is quite uncommon for social rights to be dependent on



the discretion of administration in individual cases. On the other hand it is quite a problem that a lot of aspects are determined by secondary laws (e.g. conditions, procedures), as explained below.

6) What kind of remedy can the administrative judge put in place for the protection of social rights?

- Annulment of organizational acts or specific acts limiting social rights
- Damage compensation
- Condemn to a specific performance through the recognition or attribution of the benefit/right required.
- Other

(tick more than one box if necessary)

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

In practice the annulment and/or change of disputed administrative act granting social rights to the individual are the most common remedies granted by the administrative judge. Damages can be given in compensation in administrative dispute, but more often the plaintiff would in this part of his claim be referred to the civil court.

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.

As mentioned before a large number of such cases are decided by social courts, that have a special procedure for these (social) disputes, determined by an act of parliaments. They are in principle not more accelerated or simplified than other administrative disputes.

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

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

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



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

- Excessive discretion of the competent public bodies
- Unwillingness to comply with judicial decisions
- Inadequacy of the instruments of protection made available by the legal system
- Scarcity of available economic resources
- Low awareness of social rights in the community
- Other

(tick more than one box if necessary)

Please explain.

The discretionary powers of the administration to decide on individual cases of social rights are relatively rare, but the possibility of different public bodies to regulate different aspects/conditions of social rights has a similar effect. It is quite often – and not without constitutional questions and concerns raised by it – that public bodies determine specific procedures and conditions for certain social rights to be granted (e.g. subsidies for employment). It is in these secondary regulations that the requirements can be disproportionate, unlawful or uncertain so that the administrative judge has to ignore them in a given case (*exceptio illegalis*). But as the administrative judge can not write a new rule in place of the unlawful one, the dispute can not lead to success of the plaintiff with his social rights granted by the court, but it has to be referred back to the public body that has to change/adapt the rules and issue a new decision.





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).
.....

