

## 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 x Ordinary law
- x Other

(Swedish answers in black)

(tick more than one box if necessary)

Please explain

The Swedish constitution does provide for some very general social rights, as a right to education, but refers to legislation for the details of such rights. Therefore, we may say that the legal source for social rights are found in legislation and in regulations from the government.

The Italian Constitution guarantees the main social rights, such as the right to health (art. 32), the right to work (art. 4), the right to education (art. 34) and aid to families (art. 31). Other rights, concerning more specific services, are recognized by ordinary law.

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

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

(tick more than one box if necessary)

Please explain

In order of topics above: Needy people have a right to economic and other support in order to have "a decent quality of living", which can be provided in the form of cash, housing and other services. An individual assessment is done according to the need. Unemployed persons have the right to special benefits for a period of time (somewhat longer than a year) and will thereafter be subject to social welfare (as above). Special



services and programs for getting jobs are provided. Swedish health care is almost free of charge except for a more symbolic cost per visit. Persons with low or no income are excluded from that fee. The issue of birth rate is difficult to understand. In Sweden, special birth-clinics are provided for expecting mothers, with highly trained staff, with very low death-rates in connections to births as a result.

The Italian healthcare system is based on the principle of free healthcare for all, with special attention to the less well-off. Similarly, the law ensures that the unemployed receive aid and benefits to support themselves and, where possible, to get a job. Forms of aid (e.g. in the form of tax exemptions) are also provided for large and poor families, as well as incentives for capable and deserving persons in a state of poverty to access higher education. Finally, through the social housing system it is possible to secure housing for those who could not afford it.

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?

- x Yes, as a result of regulatory action
- Yes, thanks to the application of general principles and clauses
- x Yes, thanks to the interpretation of the case-law
- Yes, thanks to the negotiation carried out by trade unions and private associations.
- x There has been no recognition of new rights

(tick more than one box if necessary)

Please explain

Access to public information – in whatever form – has been a constitutional right for a very long time in Sweden, and no need for a special right to the web has been deemed necessary. A right to access to nature (“*Allemansrätten*”) is recognized in law and as a legal principle since long and includes the right to access land owned by other persons as long as it is not too close to living-quarters. No new social rights as such have been discussed, but the rights of transpersons to get gender treatment has been under some discussion, especially concerning persons under 18 years.

As regards the right to the web, with the 2017 amendments to the Digital Administration Code (Legislative Decree No. 82/2005), rules were introduced to guarantee the so-called Digital Citizenship Charter (Chapter I, Section II, Articles 3-9), comprising the rights that citizens and businesses have vis-à-vis the public administration, and in accordance with the provisions of the European Digital Agenda (ADE) and the Italian Digital Agenda (ADI), initiatives were planned to overcome the digital divide in Italy and to guarantee access to the Internet for all. Moreover, on the subject of the so-called 'common goods', the Court of Cassation since 2011 has identified this notion from the traditional notion of 'public goods', with reference to tangible goods (e.g. certain natural sites of particular value) and intangible goods (e.g. the web space) of which the



enjoyment of each individual must be ensured, insofar as they entail a utility that cannot be determined in patrimonial terms but is of 'existential' importance.

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

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

Please explain

In Sweden, the responsibility for realising many social rights in the areas of health care, education and social welfare are divided between the state and local self-governments. The latter can often – especially in under-populated parts of the country – have budgetary limits to what they can achieve, even if there is a system for economic support from the state.

The experience of the Italian legislation on the containment of public expenditure, following the introduction in the Constitution of the obligation to balanced budgets due to European commitments, shows that it has been preferred to intervene selectively to safeguard certain social rights considered more worthy of protection rather than operating with a system of indiscriminate cuts

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?

- x 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?

- x At the constitutional level  
 x By ordinary law  
 By regulatory rules  
 x By case-law  
 Other

(tick more than one box if necessary)

Please explain



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In Sweden, the legislation on social welfare can be said to contain a sort of “inner core” in the respect that local governments or state authorities cannot deny an entitled person support with economic arguments and that there is a basic responsibility for local government to secure the social welfare of any resident at a reasonable standard of living level.

Since the 1980s, the Constitutional Court has based on the second paragraph of Article 3 of the Constitution the need to ensure a minimum level of effectiveness of social rights. This obliges the State to undertake all necessary actions to achieve the effective implementation of the principle of equality. More recently, a provision has been inserted in the Constitution (Article 117, par.2) letter m,) which reserves to State law the competence of setting minimum levels of benefits relating to civil and social rights to be ensured throughout Italy. The case law also transposed this approach in assessing the legitimacy and adequacy of administrative measures affecting social rights.

7) How does the scarcity of available financial resources affect the effectiveness of social rights in your country?

- x Social rights must be guaranteed in any case, regardless of budgetary requirements.
- The budgetary requirements always prevail over social rights.
- x A balance between the opposing requirements is to be carried out.

In the latter case, explain who is competent to perform the balancing:

In the presence of legal provisions limiting social rights or in any case affecting them, the balancing of the opposing 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 derive from specific acts or measures, the competent court (ordinary or administrative, depending on the sector involved or the 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)?

- x Yes.
- x No

If yes, please indicate the main measures introduced:

In Sweden, the support in regard of recent crisis have not taken the form of social benefits, but rather support to companies to maintain employees etc.

Business aid, tax exemptions, special fund for workers at companies in crisis.



- 9) If the previous question is answered positively, please specify whether the measures introduced have also provided for derogations from the ordinary division of competencies among the administrative judge and the other judges

The special support measures introduced in Italy to deal with the emergencies of recent years have not been accompanied by special rules that have altered the ordinary division of jurisdiction between ordinary and administrative courts in the areas concerned.

- 10) Which subjects can be involved in the provision of social benefits?

- Public subjects  
 Private subjects included in the public system  
 Private subjects on a voluntary basis  
 Other

(tick more than one box if necessary)

Please explain

The social sector in Sweden have many private entities providing schooling, health care, elder care etc. according to a system of authorisation and control by state authorities. However, as social rights are individual rights, such actors are not per se subjects to social benefits, but individuals can choose to channel their support to a private actor instead of using a public institution.

The Italian healthcare service is not only focused on the activities directly carried out by public structures, but also on those carried out by private entities, which on the basis of an accreditation and authorisation mechanism, as well as special service contracts, are allowed to perform public health functions. After the introduction in 2001 into the Italian Constitution of the principle of so-called *horizontal subsidiarity* (Article 118), it is increasingly recognised the role of associations and private bodies to ensure benefits relating to social rights, without prejudice to the centrality of public intervention in this field.

- 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

As mentioned above (4) region and local government have special tasks concerning several social rights, including health care, education and social welfare. Many of these activities are in practice done by local authorities. This is all regulated in legislation, and not in the constitution. Many administrative functions are done by local governments. Local government has a constitutionally recognized right to self-government that is important when exercising such administrative functions.

Except for a few matters reserved to the State (immigration, social security), most of the matters relating to social rights are attributed by the Constitution to the shared legislation of the State and Regions. Therefore, they have broad regulatory powers, in accordance with the general principles laid down by State law. On the other hand, administrative functions — including those relating to the recognition of specific benefits — are assigned to Municipalities, Provinces or Regions, depending on the extent of the needs to be met and in accordance with the principle of *vertical subsidiarity* (Article 119 of the Constitution).

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

Acute health care and basic education is provided irrespectively of citizenship, other social rights and benefits may be subject to certain limits or qualifications. Local government have a basic responsibility for any resident in the municipality that also does not exclude persons without legal rights to stay in Sweden. However, such benefits are provided at a reduced level without regard to long-term living-costs. All this is regulated in ordinary legislation.

The Italian national healthcare service guarantees everyone, including irregular non-EU citizens, the right to first-aid care. Regularly resident non-EU citizens have full access to healthcare, on a par with Italian citizens and, in general, to all social rights such as education, social assistance and social services (e.g. maternity allowance, family allowance, birth allowance, etc.). They also may benefit from a social pension if they have been resident for more than 10 years. The Constitutional Court, when recently addressing the issues of the possible extension to non-EU citizens of certain social benefits (citizenship income, birth allowance), has affirmed the existence of a principle of equal treatment, stemming not only from national law but also from EU and international rules (e.g. Article 14 ECHR and Article 34 CFEU), which can be legitimately rejected only under specific conditions justifying a derogation.





## 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

Social rights are decided by state or local authorities and all such decisions are possible to appeal to a regional administrative court.

Apart from certain matters reserved to civil courts (e.g. those relating to social security), the administrative court usually has jurisdiction on all cases of disputes concerning administrative measures affecting social rights. Indeed, the former position of the Cassation, initially elaborated with regard to the right to health and according to which the jurisdiction on matters concerning fundamental rights shall fall under the competence of the ordinary judge since those rights were not compressible by the public authority, has now been abandoned.

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 Sweden, we do not have a legal category such as “protection of motherhood”. Issues of parental care are dealt with either as issues of health care or as compulsory care of children that are mistreated, both within the administrative court system.

In matters of social security, jurisdiction in Italy lies with the ordinary judge and, specifically, the labour judge. In pension matters, disputes relating to the quantification and payment of pensions lie with the Court of Auditors, without prejudice to the jurisdiction of the civil or administrative courts (depending on the sector of employment) for those relating to the determination of the basis of remuneration on which the pension should be calculated.





- 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

All judges in Sweden have the competence to oversee if legislation, ordinances or lower types of regulations are in accordance with constitutional provisions on the adoption and content of legal norms. Such an issue can, however, only be tried in a concrete case with a legal question about the rights of an individual, there is no right to an abstract revision on by a court.

In the areas in which lies its jurisdiction, the administrative judge in Italy may, as a rule, assess the lawfulness of both acts of organisation of social services and acts and procedures for the recognition of benefits relating to social rights. These are indeed administrative acts, which can be challenged through the ordinary action for annulment provided for in the code of administrative trial.

- 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.)

In the field of social security, as already mentioned in Italy, the labour court has jurisdiction to hear any disputes relating to the recognition of benefits, including those relating to procedural aspects.

- 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 Sweden, administrative court generally have the power to assess not only the lawfulness of the appealed decisions, but also the appropriateness of the assessments done by the authority when using



its discretionary powers. The court is, so to say, put in the same place as the authority, which decision is challenged.

As a general rule, the administrative judge may order the public administration to award the successful applicant the advantage which he has been unlawfully denied, provided that the administration does not yet have discretionary power in that regard. This may happen, for example, in the field of health protection, when the ruling finds that the local health authority have denied to the applicant, including through unlawful administrative acts, services which he was entitled to receive as they were falling within the essential levels guaranteed by the State rules.

- 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
  - x  Damage compensation
  - x  Condemn to a specific performance through the recognition or attribution of the benefit/right required.
  - x  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

Administrative courts in Sweden have no jurisdiction on issues of damages, that is for general (civil) courts to decide. In many cases, the court will remand a case to the responsible authority to make a new, correct decision, but in some cases the court will put its own decision in place of the authority's. As mentioned, the court can in those cases use the same room for discretion as the authority had in its original decision, which may result in a number of different outcomes (sometimes of course limited by procedural rules on what circumstances that can be taken into account by the court).

In the Italian administrative process, in addition to the annulment of unlawful administrative measures, the Court can always order the administration to pay compensation for the damage, preferably though a specific performance (and therefore, if there is no residual discretionary power, through the direct recognition of the benefit unfairly denied) and, in a subsidiary way, for equivalent. The provisions of the Legislative Decree No 198/2009 can also be applied in the field of social rights. The Decree introduced, with the aim of pursuing a greater efficiency for the Public administration, a form of *class action* to remedy, for instance, violations of time limits, failures to adopt mandatory administrative acts, failures to ensure adequate levels of performance. If the action is upheld, the Court shall order the Public administration or concessionaire to remedy the infringement within a reasonable period (Article 4).

- 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

In the field of social rights and security, it applies the special labour procedure, which is simplified and accelerated compared to the ordinary civil procedures. In areas falling within the jurisdiction of the administrative judge, there are not foreseen simplified or accelerated procedures.

- 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)

In Italy, alternative forms of dispute resolution are foreseen only in a few areas of social rights. This is, for instance, the case of family protection and assistance (e.g. assisted negotiation introduced by Legislative Decree No 132/2014). Compulsory mediation has been introduced in Italy, for the moment, only in relation to civil litigation. Almost none of the subjects for which it is foreseen can be related to social rights (perhaps, only indirectly, that of disputes regarding medical and professional liability). More recently, in the context of the emergency measures linked to the COVID-19 pandemic, there has been introduced a compulsory form of mediation for cases of contractual defaults to which the measures taken to contain the contagion have contributed (Article 3 of Legislative Decree No 6/2020), with the aim of supporting companies insolvent as a result of those measures.

- 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



In Sweden there is some experience of local administration being unwilling or unable to execute court decisions on social rights. This is due both to the strong tradition of local self-government, which resents involvement of state courts, as well as lack of resources. In some cases, the recourse to civil courts for damages is also a limiting factor for individuals in realising their social rights.

In addition to the traditional resistance of the Italian public administrations in executing the decisions of the administrative judge, the litigation on social rights must constantly be measured with the limitedness of available resources and the existence of measures to contain expenditure, so as to call the administrative judge (or the constitutional one, as the case may be) to a non-simple balancing work. Moreover, with the exception of the public health sector, State law is still largely lagging behind in setting the essential minimum levels required by Article 117 par. 2, letter m, of the Constitution.

### 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).

As explained above (part I question 6) the "essential core" is limited. An example would be when local government decided not to grant an illegal immigrant social welfare because he did not facilitate the authorities inquiry on his identity and citizenship. This was held to be unlawful and the man was to be granted basic support (HFD 2014 ref. 37).

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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).

There is probably such cases, but not from the Supreme Administrative Court. As explained elsewhere, most of Swedish social legislation does not per se make citizenship a requirement for taken part of social benefits, but instead residence is of importance.

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- 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).

This is a question that is difficult to understand. If it aims for cases in which the court directly grants an applicant the right under investigation by the court, this is very common (as explained above). HFD 2020 ref. 62 is an example in which the immigration authority denied a foreigner a certain social benefit because he had got a permanent permit of residence. In all three court-instances the decision was found to be unlawful and the courts granted the individual the benefit in question.

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