

Social Rights

Historical Context

- Reaction to social changes in 19th and early 20th century.
- Related to the evolution of “welfare state” (first traces in late 19th century in Germany, early 20th century in the UK)

Political and Philosophical Context

- Relation to human dignity
- At the same time politically controversial (mostly the extent of social rights and level of their protection, not their very existence)

Social Rights as Fundamental Rights

- Social rights as constitutional rights (some southern European states, CEE, South Africa etc., generally newer constitutions)
- Sometimes protected as part of classical rights

The Problem of „Positive Rights“

- Criticized by economic liberals
- According to some not suitable for constitutional protection (political question, enforceability)
- What can be described as a positive right? (social rights, fair trial, shift from negative rights to positive rights in the case-law)

International Protection

- ICESCR
- ESC
- Social aspects of classical fundamental rights (e. g. ECtHR cases like *Moldovan II*, *Larioshina* or *Lopez Ostra*)

Constitutional protection

	B	DK	D	GR	E	F	IRL	I	L	NL	A	P	FIN	S	UK
Right to work	■	■		■	■	■	□	■	■	■		■	■	■	
-fair/safe working conditions	■				■			■				■			
-fair wages	■				■			■				■			
-paid leave								■				■			
Right to education and training	■			■	■	■	■					■	■	■	
-free elementary education	■	■		■	■		■	■	■			■	■		
-free secondary school education				■								■			
-free university education												■			
-vocational training					■							■	■		
Right to housing	■			■	■			□		■		■	■	■	
Right to health	■			■	■	■	□	■	■	■		■	■		
-free for the indigent								■				■			
Right to social security	■	■	□	■	■	■		■	■	■		■	■	■	
-public welfare					■	■		■				■	■		
-special protection for mothers			■		■	■	■	■				■	■		
-special protection for families/parents			■	■	■		■	■				■	■		
-special protection for the disabled				■	■			■				■			
-special protection for children/young people.				■	■	■		■				■			
-special protection for the elderly				■	■	■						■	■		
Right to culture	■				■					■		■			
Right to a healthy environment	■		■		■			□		■		■		■	

Examples of Social Rights

Protection - Working conditions

- Czech Charter (art. 28): *„Employees have the right to fair remuneration for their work and to satisfactory work conditions. Detailed provisions shall be set by law.“*
- Old Hungarian Constitution (art. 70/B/3): *„Everyone who works has the right to emolument that corresponds to the amount and quality of the work performed.“*

Examples of Social Rights

Protection – Working conditions

ESC: „With a view to ensuring the effective exercise of the right to a fair remuneration, **the Parties undertake:**

- **to recognise** the right of workers to a remuneration such as will give them and their families a decent standard of living;
- to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;
- to recognise the right of men and women workers to equal pay for work of equal value;
- to recognise the right of all workers to a reasonable period of notice for termination of employment;
- **to permit deductions from wages only under conditions and to the extent prescribed by national laws** or regulations or fixed by collective agreements or arbitration awards.

The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions.“

Examples of Social Rights Protection – Health System

- Czech Charter: *„Everyone has the right to protection of his/her health. Citizens shall have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law.“*
- **ESC:** *„With a view to ensuring the effective exercise of the right to protection of health, the **Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures** designed inter alia: to remove as far as possible the causes of ill-health; to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.“*

Social security

With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake:

- 1 to establish or maintain a system of social security;
- 2 to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention (No. 102) Concerning Minimum Standards of Social Security;
- 3 to endeavour to raise progressively the system of social security to a higher level;
- 4 to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure: a equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights...

Free Education

- *CC: „Citizens have the right to free elementary and secondary school education, and, depending on particular citizens’ ability and the capability of society, also to higher education.“*
- What does it mean to be “free”

Enforceability

- Much lower than in case of „real“ fundamental rights – limited judicial review.
- International enforceability is almost non-existent (no courts, no complaint procedure with the exception of optional protocol to the ESC)
- Common standards are unlikely to be introduced; migration of ideas (like proportionality or *in dubio pro mitius* in case of first-generation rights) is very limited.

Social Rights and Proportionality

- Use of proportionality is limited, even though it is generally one of the most important HR concepts (Kai Moller labels it part of “global model of rights”).
- Various approach of national courts, but proportionality is used only exceptionally (Latvia) and even then it is highly problematic.

- Cf. Latvian CC judgement 2009-08-01

The persons summoned by the Constitutional Court have also indicated to alternative solutions to the Contested Norm. M. Hansen maintains that it would be possible cancel examination of pensions only in the case if this would ensure even greater budget deficit or budget expenses would be even more reduced, or budget incomes would be increased at the expense of increased tax rate. He rejects the above mentioned alternatives since they are less favourable if compared with the Contested Norm (see: case materials, Vol. 2, pp. 60 – 61). However, the School of Economics indicates that the legislator would have succeeded to reach the same effect as the one guaranteed by the Contested Norm if pensions were taxed...

Alternatives to proportionality

Czech version of “rational basis + essentiality” test.

- 1) defining the significance and essence of the social right, that is a certain essential content.
- 2) evaluating whether the statute does not affect essential content. If not, then
- 3) evaluating whether the statutory framework pursues a legitimate aim
- 4) weighing the question of whether the statutory means used to achieve it is reasonable, even if not necessarily the best, most suitable, most effective, or wisest.