

## SOCIAL LAW – PUBLIC LAW IN A EUROPEAN CONTEXT?

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**Abstract:** *The paper addresses the issue of whether social law can be perceived as a separate and specific field of law and whether it can be defined as a purely public branch of law. Recent specific cases of the application of contractual principles in legal relations falling under social law and the impact thereof on the practice are discussed. Selected decisions from the ECJ are used to demonstrate a shift in the perception of Member States' autonomy to set their own social policy.*

**Keywords:** *social law, social rights, social policy, EU law, CJEU case law*

### INTRODUCTION

If we are to discuss social law and answer the question of whether it can really be classified as a branch of public law, even in the European context, it is certainly appropriate to first briefly consider whether the concept of social law is indeed tenable in the Czech context, and if so, what we understand by this term at present. If we perceive social law as a branch of law, it is appropriate to characterize it either as a branch of public law or of private law; at the same time, ruminations on this topic are necessarily related to other fields, particularly social policy. After verifying the hypotheses that social law exists and that it is essentially a branch of public law, we will briefly mention the European context, which should further confirm the above hypotheses.

### 1. SOCIAL LAW

#### 1.1 Social law as an expression of compulsory solidarity or even wider

The term social law is commonly used in both domestic and foreign literature, but it is not always clear what it actually encompasses and how broad it is. This is most likely due to the fact that social law has certain specificities compared to other fields of law. Social law rules embody what we call a welfare state, and they reflect social-political thinking (and, if possible, the vision) of political representation at the present moment. Social law also implements social rights enshrined in human rights documents. These rights include the right to work and to fair remuneration therefor, the right to have basic needs met, as well as the right to education, the right to family and its protection, the right to health and, today, also the right to housing, or the right to a healthy environment.<sup>1</sup> At the same time,

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<sup>1</sup> In judgments of the Constitutional Court it is the rights contained in the Charter of Fundamental Rights and Freedoms that are perceived as social rights. Some of them are directly referred to as social rights by the Constitutional Court itself, for example the right to health (judgment of 27.1.2015, Ref. No. Pl.ÚS 19/14), the right to housing (judgment of 2.10.2007, Ref. No. I.ÚS 1897/07), or the right to material security in old age (judgment of 1.12.2009, Ref. No. Pl.ÚS 4/07).

social law, which is connected with the welfare state, is more connected with policies (not only social) than other branches of law, and has recently become a political issue, particularly for those parties that tend to populism.

The opinions of various authors on what social law encompasses differ and there is no consensus in the professional literature on how to precisely define the field. Some authors understand social law as an area of law related to the employment and to the application of social rights, others see it as the part of law that is distinct from private law and regulates financial aid provided by a state.

However, there are no doubts in the professional literature:

- that social law encompasses social, or more precisely protective, aspects of labour law and employment-related relations<sup>2</sup>; and
- that it is a branch of public law standing outside the law of contract.<sup>3</sup>

At the same time, it is currently important to emphasize, particularly in the Czech context, that social law is pervaded by the principle of equal treatment and non-discrimination as a prerequisite for the correct setting and functioning of legal relations of social law.

## 2. SOCIAL LAW – PUBLIC LAW

If social law is a branch of public law, then applies that it is usually public administration bodies which make decisions regarding social law issues (employment, social insurance, state social support, or social aid), or that they at least get involved in these relations (see the competencies of labour inspectorates).

Social law, as an expression of the welfare state, is also a “public thing” in the sense that it reflects social development in society, and, at the same time, its rules should respond to current and future social issues which should be anticipated by these rules. In this sense, social law is “doubly public” – because of the prevailing public law nature of its rules, and because of public interest in the successful development of social law and its conception, which is a reflection of a well-considered social policy.

At this point, it may be worthwhile to mention some of the basic challenges that contemporary social law (not only in the Czech Republic) is facing.

One of the major contemporary challenges for contemporary social law is **migration**. If we accept the fact that European societies will have to accept migrants in the future, should they want to preserve the humanist and human rights tradition on which they are based, the question regarding the future of social systems and therefore the future of social law and its rules suggests itself.

EU law already foresees the free movement and preservation of social rights of third-country nationals who are legally residing in one of the Member States. However, outstanding issues remain as to how national legal regulations should respond to the flow of migrants and their subsequent movement across the Union. The issues that still need to be dealt with include:

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<sup>2</sup> SHAW, J. (ed.). *Social Law and Policy in an Evolving European Union*. Oxford: Hart Publishing, 2000.

<sup>3</sup> HERVEY, T. *European Social Law and Policy*. London: Longman, 1998.

How should we integrate into the labour market third-country nationals whose religion is manifested outwardly, for example, by covering parts of their body – as is the case with different types of scarves worn by Muslim women? How, at the same time, should equal treatment be ensured while maintaining the secular nature of European societies, as well as, for example, health and safety at work in certain operations?

To what extent should the right to residence, employment, and free movement in the Union be preserved for third-country nationals who derive their rights from family members in the event of termination of a family relationship? And what should be the procedure in the case of offspring arising from such relationships?

How should pension systems be set up and linked to systems of social aid if third-country nationals have not worked long enough in the Union to be eligible for a state funded pension, and at the same time there is no bilateral agreement with their country of origin, or such agreement is not applicable with respect to a war situation in their country?

How should healthcare systems be set up and to what extent should they be opened to third-country nationals if, for example, a national system requires a certain period of insurance and, at the same time, there is an interest in the protection of public health? How should we factor into the systems of the provision of healthcare services the fact that in some cultures from which third-country nationals come it is inadmissible, for example, that the examination be carried out by a person of the opposite gender?

What form should inclusive education take in European countries where there will be a higher percentage of third-country nationals than previously?

How can we use the potential of third-country nationals in social services systems?

The above-mentioned issues, and certainly others, should be a part not only of socio-political discussions but also of purely political debates, if these discussions and debates are to be conducted responsibly and with respect for future generations. In addition, social systems need that these issues be handled relatively quickly and long-term solutions found, lest they fall into crisis and thus disrupt the stability and cohesion of European societies.

Another important challenge is **social exclusion**, which can intensify in the context of migration if integration efforts fail. In the Czech Republic, it is the Romani people who are particularly endangered, and often also affected, by social exclusion. Quite a high percentage of Romani people live in poverty, long-term unemployment, and often without basic education; the housing conditions of such excluded families (including children) are unsuitable for the long term.

In this context, several issues remain concerning the further development of social law:

How should we motivate employers to employ hard-to-employ workers? How should we design community work and employment by municipalities which should play a key role in social integration of their excluded citizens?

How should the social work of municipalities be strengthened and interlinked with the work of non-governmental organizations with the aim to integrate socially excluded families?

How should we conceive and set up a functional system of social housing that would prevent the further development and expansion of socially excluded localities? How should social housing be made more individualized, complemented by adequate social services and targeted at other groups of people endangered by social exclusion, such as homeless people?

How should inclusive education and the follow-up integration into the labour market be designed?

Another major issue of key concern to the Czech Republic and the conception of social law in our country is the **aging of the population**. At issue are:

Pension systems and their sustainability: Do we need more pillars? If so, what pillars will we have and what will be their proportion in terms of contributions? Which pillars will be mandatory and which voluntary?

Health care and its conception which takes into account the specific needs of senior citizens: interconnecting health and social services already in inpatient healthcare facilities so that physical and mental activation, as well as patient physiotherapy focused on self-sufficiency and independent management of basic life activities, takes place as early as during the provision of healthcare services.

### 2.1 Developing social services to be provided in the elderly's own social environment

The last challenge I would like to mention relates to a relatively radical **change of social roles** in society, not only in relation to women, but also in relation to the above-mentioned senior citizens or young people.

Social changes in society are connected with the following issues:

How should the harmonisation of work and private life be effectively promoted? How should we retreat from mere protectionism and focus on active and voluntary participation of employers in this process?

How should insurance systems take into account new forms of work – not only from the point of view of teleworking, job sharing, etc., but also from the point of view of voluntary or reciprocal activities of employees aimed at supporting care for children or senior citizens during working hours?

I think that it clearly follows from the few issues mentioned above that “old” social security law with its traditional institutions may not be able to respond to new phenomena and challenges faced by European societies. Even in the Czech legislation we can find considerable evidence supporting the fact that existing social law regulations barely reflect newer requirements (retirement age, inability to implement paternity leave, response of social security insurance to new forms of work and job mobility); in some cases they even play into the hands of unfair practices (using the housing allowance and the housing supplement provided in case of destitution to pay for social housing, S-card project, possibly also the introduction and subsequent abolition of the second pillar (i.e., pension savings scheme)).

The question, however, is whether this inflexibility is caused by the fact that we are in the public law sphere and that the state still plays an important role in the area of social law. I do not think this is the main reason. After all, social law is also proof that the involvement of private entities and the implementation of a contractual principle in some areas is not a universal solution (e.g., a contractual principle in the case of social services).

## 3. CONTEMPORARY SOCIAL CONTEXT OF SOCIAL LAW

Nothing remains but to ask another question: Is it useful to ask whether social law is a public or private branch of law? In terms of identity and autonomy of persons it probably

is, as it also is in terms of the guarantee of social rights. This is particularly true in the European context in which our social law is set.

The EU is based on the principle of subsidiarity; from the point of view of social law this means that social policy, and therefore the conception of social law, is entirely within the competencies of the Member States. But is this still true? The Czech Republic has sought to protect its autonomy on several occasions, for example by its argumentation in matters of employee insurance, or in the Časta case. However, it was the Landtová case<sup>4</sup> in which the Czech Republic opposed the ECJ's decision most markedly.

With respect to the focus of this paper, it must be emphasized that the ECJ perceives social law as an integral part of EU law. In several judgments, which, surprisingly, addressed labour disputes, the ECJ identified some rights enshrined in EU secondary legislation as a reflection of the fundamental principles of Union's social law which are of particular importance and are therefore granted to every worker, such as the right to paid annual leave.<sup>5</sup> At the same time, the ECJ emphasises, in connection with the entitlement to paid annual leave, which it considers to be a particularly important principle of the Union's social law, that this principle is to be achieved only within the limits expressly stipulated in secondary law, namely in Directive 2003/88.<sup>6</sup> In addition, in case C-171/15 the ECJ points out that the entitlement to paid annual leave is not only of special importance as a principle of social law of the Union but is also expressly referred to in Article 31 (2) of the Charter of Fundamental Rights of the European Union, to which Article 6 (1) TEU confers the same legal force as to the Treaties.<sup>7</sup> In another decision, the ECJ refers to the individual requirements which Directive 2003/88 sets out with respect to the maximum working hours and minimum rest periods as particularly important rules of the Union's social law from which every worker should benefit as they are a minimum requirement necessary to ensure the protection and safety of his/her health.<sup>8</sup>

It is interesting that the ECJ does not use the term EU social law and its principles in connection with any other piece of legislation. It is clear, however, that in its case law the ECJ relies on this specific area of EU law, it works with this term, and by interpreting secondary EU legislation, it contributes to the correct application not only of particular legal documents but also of the principles of EU social law. It can be assumed that it will be possible to include all instruments of secondary legislation implementing the Solidarity Chapter of the Charter of Fundamental Rights of the EU, as well as most of the rights set out in the Equality Chapter of the same document under the term of EU social law.

Through its interpretation noted above, the ECJ has recently rather been focusing on efforts to influence developments in the field of social law. Some judgments show efforts to motivate states to give supremacy to EU law over their own legal systems, even to the extent that, in some cases, the possibility to develop their own social system is not made

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<sup>4</sup> C-399/09 Landtová.

<sup>5</sup> C-341/15 Maschek, Art. 25, or the cited judgments of 20 January 2009, Schultz-Hoff and others, C-350/06 and C-520/06, EU:C:2009:18, Art. 54, and of 3 May 2012, Neidel, C-337/10, EU:C:2012:263, Art. 28.

<sup>6</sup> Judgment of 10 September 2009, Vicente Pereda, C-277/08, EU:C:2009:542, Art. 18.

<sup>7</sup> C-171/15, Art. 20, or C-118/13, Art. 27.

<sup>8</sup> C-266/14.

superior to the duty to fulfil obligations arising from EU law, which is increasingly affecting the nature of welfare state across Europe. A similar tendency can be observed in the EU law-making in the field of social law, for example, the Commission's effort to introduce quotas for gender-balanced representation in the management of large companies, or attempt to regulate social inclusion of Romani people at the EU level, etc. These tendencies cannot be perceived as indisputably negative ones. Even in Czech legislation, time after time it has been shown that our country's duty to fulfil its obligations to the EU has had a positive impact on the value development of our national legislation.

## CONCLUSION

Let us leave social law embedded in public law and let us perceive it not as a special branch of administrative law but as one of the most dynamic branches of law, with which almost every citizen is in daily contact. The role of the state is and will be to guarantee, design, coordinate (not operate), and decide. Some areas of social law can be directed more towards the private sphere and contractual autonomy (employment and labour relations, contractual relations with social insurance companies, contractual relations with social service providers); however, there should be public-law supervision over private-law entities implementing social rights, and not only public funding (such as in the case of activity of some private law entities – social housing quarters, homes for the elderly suffering from dementia).