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**Defending and enforcing  
rights to social protection**

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# Defending and enforcing rights to social protection

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Law serves to implement the programmes of social benefits and services in accordance with a country's legal tradition. Thus, social law has become a decisive element in structuring living conditions around the world. To a large degree, individual security and personal freedom are inconceivable without social security.

Social rights lay the groundwork for any rational system of social protection and social law because they set out the guiding principles of the overall system of social protection and the corresponding material law, as well as of the procedure to be used by the legislator, the executive and the judiciary.

## **Differences between civil and political rights and economic and social rights**

There is no globally recognized definition of social rights. It is, however, common to distinguish between *civil* and *political rights* and *economic* and *social rights*. This differentiation has been based on the assumption that these two sets of rights differ in nature. Civil and political rights are usually framed in terms of freedom from state interference, whereas social rights are likely to involve a claim on the state for intervention, for example, by providing economic and social benefits. Social rights thus imply an active role of the state and are grounded in the idea that the state is responsible not only for public order and security but also for the well-being of the people and, generally, that it has an obligation to enable them to enjoy the individual fundamental rights that accrue to them.

As a rule, civil and political rights are more likely to be applied by the courts – whereas social rights are more likely to be realized through social legislation and social policy. Finally, civil and political rights have been considered to be directly applicable, to be subjective and to be enforceable by the people, whereas social rights are often reflected in spirit within domestic social programs, only to be realized gradually.

A case can be made that these differences are overstated in that social rights also can be directly applicable, mandated by the judicial system and immediate. This view is confirmed by the fact that there is evidence in both national law (particularly in constitutions) and in international law (e.g., in the *Charter of Fundamental Rights of the European Union*) to integrate civil and political rights and economic and social rights in the same legal instrument by taking an encompassing approach and including the different sets of rights side by side.

Nevertheless, it remains true that social benefits and advantages have some distinct features:

- It is important to highlight that law is not the only reference point for social rights, because social provision without any reference to such rights may incorporate social rights as well.
- The essence of social rights laid down in statutes or even in constitutions depends highly on the economic and political situation of the country. However, it makes a difference whether a social right is (1) legally incorporated in the constitution, (2) legally established by statutory law or (2) just the result of social provision by the state.
- There is a decisive role for positive state action in rendering social rights effective.
- Access to social rights is highly influenced by the institutional architecture of the social welfare system in general and by the procedural aspects of the provision of social benefits in particular.
- It must always be borne in mind that social rights are subjective rights in the sense that they refer to individual needs, although they also have a societal component insofar as their establishment and efficiency depend on solidarity, social inclusion and social cohesion. Social rights thus have to fulfill the individual's needs and promote social cohesion.

## **The purpose of social protection**

International legal instruments adopted by the United Nations and the International Labour Organisation affirm that every human being has the right to social security. However, the practical implementation of the right to social security requires a major undertaking by both the state and society. In many regions of the world, a large proportion of the population has no social security or is covered only partially. This is the case for the vast majority of people in developing countries, but some of the richest industrial countries have large gaps in social protection.

Today, the pressing need to find effective ways to extend social protection is widely recognized. Those lacking social protection tend to belong to the economically weaker sections of society. In considering the level of protection provided, it must be remembered that the goal of social protection is not mere survival but the preservation of human dignity and the promotion of social inclusion.

The main function of social protection is to provide both income security and access to health care and other basic social services. Various actors are involved here, including the individual, his or her family, community and local solidarity networks, self-help and voluntary welfare organizations, employers, employers' associations and trade unions and other institutions of civil society – collectively the social partners, social security institutions, the legislator and government and international organizations. The state can strengthen social security systems and increase their effectiveness by (1) organizing and providing social benefits and social services, (2) imposing obligations on employers to provide benefits, (3) granting tax allowances for social security contributions, benefits or both and (4)

strengthening the role of the various actors in social protection listed above. Traditionally, the state has not only the opportunity to increase the effectiveness of social protection systems but the legal responsibility for ensuring the reliability of the institutional setting and the provision of social protection for its people.

Social exclusion is multidimensional in nature. As a result, measures to combat social exclusion have to be developed in a wide range of policy areas such as education and vocational training, employment, health, housing and social protection. Experience has demonstrated the need to ensure the active participation of all stakeholders, especially those excluded or exposed to social exclusion, as well as of the organisations that work for their interests, including social partners and civil society actors such as non-governmental and voluntary organisations.

## **Migrant workers**

Cross-border activities also imply additional and specific demands in the field of social security. Although migration is a phenomenon of increasing importance, it does not necessarily require specific measures at the national level in the field of social security. Instead, equal treatment should be guaranteed, existing legal rules should be applied more effectively and social cohesion should be promoted by concrete measures.

The law related to foreigners provides a generally uniform legal basis for regulating the legal status of non-nationals in terms of residence, employment and other activities and confers upon them – depending, among other things, on their origin and the reason for their stay – differing titles of residence, stay and employment. In contrast, there is no "foreigners' social law" as a specific branch of social law. In most cases, provisions of social law that pertain specifically to non-nationals take the form of modifications of general social legislation related to the person's non-national status or foreign criteria that affect that person's legal position.

Legal recognition of the principle of equal treatment of migrant workers as regards rights, social protection, health, housing and education, etc., including the right to social security, is essential for integrating these workers legally and socially into the societies in which they live. Effective application of this principle calls for the implementation of measures that promote access of migrant workers and their families to social rights, including the right to social security. Appropriate actions include providing them with information about their rights and taking special measures in their favour, when such measures are necessary to facilitate the integration of migrant workers and their families into the societies in which they live.

Measures that are apt to promote social cohesion include implementing international human rights standards; establishing equal treatment of all people regardless of their ethnic, national and social origin; and developing economic, social and cultural policies that are inclusive. On the other hand, measures taken to regulate or manage migratory movements may have negative effects on the societal integration of immigrants and thus on social cohesion.

## **Workers in the informal economy**

The informal economy is not really a "sector" but a phenomenon to be found in various sectors of the economy. It includes workers of all categories: employees, the self-employed, home workers, men, women, children, unpaid family workers, etc. In many countries, a higher proportion of foreigners than nationals work in the informal economy – to some extent, because of discrimination they encounter in the formal economy. Workers in the informal economy generally have little or no employment security. Their earnings tend to be very low

and to fluctuate more than those of other workers. Whenever they are unable to work, for whatever reason (sickness, maternity, accident), they have no income. A brief period of incapacity can leave the worker and her or his family without enough income to live on. Furthermore, work in the informal economy is often intrinsically hazardous, and the fact that it takes place in a wholly unregulated environment makes it still more so.

Women face additional disadvantages owing to discrimination related to their reproductive role (e.g., dismissal for pregnancy or marriage). In the informal economy, they do not benefit from the safeguards related to pregnancy; birth and child-rearing that commonly apply to women in formal wage employment (e.g., maternity leave and benefits, family allowances, nursing breaks, assistance with the cost of childcare).

Social rights are by their nature applicable to all. However, inequalities in society may translate into a lack of access to such rights for some persons or groups. Gender is one generally recognized source of inequality; women generally experience greater difficulty than men in exercising their rights. Alongside gender, inequalities may be grounded in race, ethnic origin, age, disability, sexual orientation and socio-economic factors such as unemployment and poverty. The procedures for realising equality are most developed in relation to gender. The European Union especially has been called "a world leader in gender equality policy." In the past decades, it spearheaded the fight against direct and indirect discrimination and devised a policy of gender mainstreaming, an approach which demands that gender equality be part of all policies. A similar approach could be developed in relation to other grounds for inequality and discrimination.

## **Obstacles to social equality**

The implementation of the principle of equality before the law is one of the characteristics of modern states in societies. It is therefore a specific task of social law to adapt the granting of social benefits and services to the individual circumstances pertaining in each case, in order to prevent economic and social inequalities from undermining this principle. Against this background, social law is not restricted to compensating "material" disadvantages, such as lack of income due to sickness, old age or unemployment, by substantive (i.e., "material") social law (statutes, regulations, etc.). It also includes compensating "formal" disadvantages by procedural ("formal") social law. To the degree that social benefits and services are directed to persons who are at a social disadvantage, an additional problem is the fact that those individuals are not fully informed of their rights and are largely incapable of enforcing them.

Normally, the legal system assumes that people know their rights and that, if necessary they can obtain expert advice so that they will be in a position to assert their rights, if need be, by going to court for legal redress. Granting a subjective legal entitlement and making access to the courts available might appear sufficient to ensure that the guaranteed legal entitlements can be secured. Nevertheless, restrictions to which a person is exposed – people with disabilities and foreign migrant workers are good examples – can mean that this method of securing one's interests in conformity with the law is not possible.

In addition to guaranteed substantive rights, the following major elements must be provided to help overcome the gap between the legal standard and "social reality" and make it possible to enforce one's legal entitlements to benefits and services: information, consultation, advice, effective expert assistance and legal representation. Substantial social law remains largely ineffective if there is no appropriate implementation in practice and if those concerned do not get factually and effectively the benefits and services to which they are legally entitled. When social benefits and services are ineffective, social needs are not

met and benefits that may be claimed do not achieve their objective. Knowledge, choice and participation are essential for social benefits and services to be effective. The more differentiated the structure of the security system and the more this system is subject to regulations, the more complex it becomes, and people have considerable difficulty finding their way within a very complex system of social law. For this reason, one of the most important tasks of the legislation and administration in social law is to provide a well-designed system of information, consultation and advice to guide persons who are entitled to benefits and social services effectively toward the rights due to them.

The discrepancy between the "standard" and "realisation" can be illustrated by the degree of take-up/non-take-up of social benefits and services. Rates of non-take-up are very high for means-tested benefits. In social assistance law, this phenomenon is described as the "undetected number" of persons entitled to social assistance and as the result of the process of "filtering the poverty potential." Apart from information and bureaucratic impediments, there are also social obstacles including the apparent stigma attached to being in receipt of welfare benefits, and institutional barriers, such as the lack of formal recourse for those in receipt of, or seeking entitlement to, benefits. These factors combined can dissuade people from actually claiming those benefits to which they are entitled.

## **Measures to promote access to social rights**

The need for simplification is especially urgent in social law, where the persons concerned are often less informed and less educated and thus, are less likely to be able to handle the law. To measure the gap that may exist between legal entitlement and the exercise of the corresponding right, the contribution of monitoring, review and enforcement as a common set of practices is important. There should be a process for identifying shortcomings in existing legal provisions and for recognizing emerging needs. High priority should be given to service delivery, enforcement and the monitoring of user satisfaction.

In terms of social benefits and services, competent institutions (e.g., social security institutions) might be required to comply with certain measures such as informing beneficiaries clearly and comprehensively of their rights, either on request or on their own initiative, as is the case with tax authorities. The institutions might even be held responsible for providing such information within a fixed period of time. Institutions should be obliged to forward applications for social benefits wrongly addressed to them by applicants to the competent body and inform the applicants that they have done so. If a person is entitled to a benefit, the institution may be obliged to provide the benefit even if it has not received an express application from that person, to prevent situations of need. Generally, institutions should be required to reply promptly to any application for benefits. The applicant should be informed of the decision within a fixed period of time, and the benefit should be granted within a fixed period as well. Any decision made should specify the reasons for the decision and the conditions of review and appeal.

### **User-oriented services**

Promotion of access to social rights involves different measures, which must be adjusted to fit the given national setting. The provision of benefits and services should be as user-oriented as possible. Such an approach involves the removal of obstacles to use and participation that arise from organisational, procedural and other barriers. The creation of a single point of access can be an important element in the development of user-oriented services.

**Assistance to vulnerable persons**

Special attention should be paid to the needs and circumstances of vulnerable groups. Vulnerable persons may need assistance not only to overcome barriers to their access to social benefits and services but also to feel empowered to claim their rights.

**Targeted programmes**

At times it may be necessary to discriminate in favour of such groups through the use of targeted programs, because sometimes people need support and assistance to be able to claim and enforce their rights. People may call on self-help and non-governmental organisations in this context. Such an enabling approach has been described rightly as taking on the challenge of transforming risk into opportunity, for instance, by treating the risk of loss of income as an opportunity to engage in a new economic activity.