

The Left Party in the German Bundestag

Working Group I

Social affairs, health and pensions

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Social human rights as a key means and end of social policy

Introduction – What are social human rights?

The provision of humane living conditions, access to medical care, adequate housing or access to education is aimed not merely at providing material services, but primarily at overcoming one-sided relationships of social dependence. The struggle for social justice is a political conflict about a just social order. The demand for just social conditions can also be strengthened through a right-based approach. For wherever governments shirk their responsibility for social justice and deny access to social rights, the legal claims of individual people and the legal responsibilities of states become the focus of attention. Combatting poverty and protecting human rights are closely connected and mutually dependent. They are both aimed at the human being's autonomous self-realisation of freedom from social constraints. Systematically combatting poverty does not only emphasise the abolition of economic deprivation, but also includes human beings as actors with agency and as possessors of individual rights. Economic, social and cultural rights (known as ESC rights or ESCR, especially from the International Covenant on Economic, Social and Cultural Rights) include those rights that fall primarily within the economic, social and cultural spheres of life, such as, *inter alia*, **economic human rights** such as the right to work and the right to form trade unions; **social human rights** such as the right to health, the right to food, and the right to water; and **cultural human rights** such as the right to education, the right to take part in cultural life, and the right to enjoy the benefits of scientific progress and its applications.

Current austerity policy in Europe bears the risk of pushing back standards in human social rights and reversing what has been achieved to date.¹

The ICESCR and the European Social Charter

In 1966, the United Nations General Assembly adopted both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) as normative documents of equal status. Enshrined in the ICCPR are,

¹ Cf. Recommendation 1884 (2012)1 “Austerity measures – a danger for democracy and social rights”, Parliamentary Assembly of the Council of Europe (PACE), 26 June 2012.

inter alia, the prohibition of torture, the right to personal freedom and freedom of religion, and the right to freedom of expression. The ICESCR, by contrast, is similar to the likewise binding 1961 European Social Charter of the Council of Europe in that it enshrines, *inter alia*, the right to work, the right to social security, the right to health and the right to education.

Whereas an Optional Protocol to the ICCPR was negotiated from the outset, people had to wait until 2008 for the adoption of an Optional Protocol to the ICESCR. This Protocol envisages an individual complaints mechanism of communication to the responsible UN Committee if the rights guaranteed by the ICESCR have been violated and all available domestic legal remedies have been exhausted. This Committee can ask the states in question to take action or, in the case of grave or systematic violations of economic, social and cultural rights, can initiate an on-site investigation procedure.

The Committee on Economic, Social and Cultural Rights (CESCR), which was established by the UN Economic and Social Council in 1985 as a monitoring body for the ICESCR, reviews the reports that are submitted periodically by the States Parties in accordance with Art. 16 et seqq. of the ICESCR, and summarises the results of these reviews in what are known as **Concluding Observations**. Beyond this, the Social Council publishes what are known as **General Comments**, in which it comments on the individual articles or partial provisions of the ICESCR on the basis of its decision-making practice.²

The General Comments describe in authorised form the standards in the practice of the Social Council and thereby serve to aid in the interpretation of the ICESCR. These General Comments are not binding under international law, but give indications regarding general state practice. To date, the Social Council has adopted more than 20 General Comments on the ICESCR and thereby made the social human rights stated in the ICESCR more concrete. The norms can be

² In 2007 and 2008, for example, some administrative courts dealt with the question of whether university fees are compatible with the ICESCR. The subject of the considerations here was the interpretation of the ICESCR, especially through General Comment No. 13: The right to education. Concerning the direct applicability of rights stated in the ICESCR, the Verwaltungsgericht [administrative court] in Freiburg clarified that the commitments in the ICESCR did not represent non-binding guidelines in the sense of a commitment to make an effort, but rather were directly binding for the Land legislature, at least to the extent that it was not permitted to enact any law introducing university fees which ran counter to this commitment. The provisions of the ICESCR, which the court presumes to be legally binding, are said to be clearly and unambiguously formulated as imperative norms. Cf. VG Hamburg Fifteenth Chamber, ruling of 22 December 2008 - 15 K 656/07; VG Karlsruhe Seventh Chamber, ruling of 11 July 2007 - 7 K 444/07 and 7 K 2966/06; VG Freiburg (Breisgau) First Chamber, ruling of 20 June 2007 - 1 K 121/07 and 1 K 2324/06; VG Hannover Sixth Chamber, decision of 8 June 2007 - 6 B 8296/06.

directly applied in practice. Every state must directly implement at least the essence of each of these rights. In several special procedures, the Office of the High Commissioner for Human Rights (OHCHR) has also advanced the implementation of social human rights; examples that could be cited are the right to adequate housing³ and the right to public health care⁴.

The Federal Republic of Germany has advocated for the Optional Protocol to the ICESCR at UN level, but has thus far neither signed nor ratified it. In its refusal to ratify the Optional Protocol, the Federal Republic of Germany holds that the decision-making practice of the UN Social Council “can only be assessed to a limited extent” and that “General Comments on certain articles of the ICESCR” are missing in part.⁵ These are, however, foundational for the legal assessment of the effect of potential individual complaints that are envisaged in the Optional Protocol. Doubts concerning the direct effect are, however, definitively dispelled by the introduction of the individual complaint process through the Optional Protocol to the ICESCR. The view that the ICESCR only contains statements of desirable goals, which used to be widely held in Germany, has now been discarded at the international level.

The World Conference on Human Rights in Vienna in 1993 marked a milestone in the development of social human rights. At this conference, the indivisibility of human rights, that is, their worldwide validity (universality) and their cohesiveness was emphatically recognised.⁶ Social human rights have been advanced through recent international law efforts. Of recent significance in this area are the introduction of individual complaints procedures for the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the UN Convention on the Rights of the Child (CRC), and the UN Convention on the Rights of Persons with Disabilities (CRPD), which have also been ratified by Germany. Through the ratification of these Optional Protocols, social human rights, which are not somehow new rights, but rather are existing social human rights under the ICESCR, have been recognised in a legally binding manner from the perspective of the special circumstances of those affected and their individual opportunities for complaints. The acceptance on equal terms of political and social rights in these recent UN Conventions also manifests the equality of social human rights with traditional political human rights. These UN Conventions do not contain any normative

³ Cf. <http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx>

⁴ Cf. <http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx>

⁵ Cf. Reply of the Federal Government to the oral question by Azize Tank (Bundestag printed paper 18/814).

⁶ Cf. Vienna Declaration and Programme of Action as adopted by the World Conference on Human Rights on 25 June 1993, available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

gradations, and they regard both dimensions of human rights as rights to freedom: there is, for example, no social right to health or care without the political right to bodily integrity. Conversely, there is no social right to form trade unions without the political right to freedom of assembly. The entry into force of the revised European Social Charter on 1 July 1999 and the introduction of the collective complaints procedure are also tremendously important in this context.⁷ The Council of Europe strengthened the original rights in the European Social Charter through the Turin Protocol of 1991, and took account of the fundamental social changes that had occurred in Europe since 1961 through the revised European Social Charter. This development has been accompanied by a very broad variety of case law on social human rights at the international, national and regional levels, which attests to the equality and interdependence of these rights with other political human rights.⁸ However, to date the Federal Republic of Germany has neglected to support this further development of the European Social Charter, and it has now refused for almost ten years to ratify the revised European Social Charter, which was signed in 2007.

Enforceability of economic, social and cultural rights

The development described shows that social human rights no longer represent the neglected stepchild of the international human rights system. Equitable globalisation requires measures to strengthen this development. The economic, social and cultural rights of all people must be sustainably secured and further developed, both domestically and under international law.

The social human rights in the ICESCR and the European Social charter play a key role. Both agreements became binding components of the German legal system after their ratification, and can be invoked before German courts. Neither the ICESCR nor the European Social Charter is enforceable via a constitutional complaint, however, as they have not been granted constitutional status, but rather only the status of statutory federal law. This is the reason that the inclusion of basic social rights in the Basic Law is so imperative. Social human rights from existing UN

⁷ For example, on the basis of the Additional Protocol to the European Social Charter on collective complaints, the Greek association of retired farmers lodged a complaint against the reduction of public sector pensions on the grounds that it violated Article 12 (3) of the European Social Charter (The right to social security) (cf. <http://conventions.coe.int/Treaty/GER/Treaties/Html/035.htm>)

⁸ The website of the International Network for Economic, Social and Cultural Rights (ESCR-Net) www.escr-net.org/caselaw has a database of exemplary court rulings on social human rights. A Canadian court, for example, referred to the right to adequate housing as stated in ICESCR in its ruling that a local park ordinance violated this right by prohibiting a group of homeless people from erecting a tent city in a park in the absence of alternative accommodation facilities for them in the city (cf. case ruling in *Victoria (City) v. Adams*, 2009 BCCA 563; 2008 BCSC 1363 <http://www.escr-net.org/docs/i/1186570>).

human rights treaties have recently been strengthened by decisions made by the Federal Constitutional Court. Particularly notable here are the “Hartz IV” ruling (BVerfG, 1 BvL 1/09) of 9 February 2010 and the ruling on the Asylum Seekers Benefits Act (BVerfG, 1 BvL 10/10, 1 BvL 2/11) of 18 July 2012.

The Federal Constitutional Court’s “Hartz IV” ruling

In its decision of 9 February 2010 (BvL 1/09), the Federal Constitutional Court extended its case law on the basic right of all people living in Germany to a subsistence minimum that is in keeping with human dignity to a new, independent human right. This independent right is based on Art. 1 (1) of the Basic Law (human dignity) in connection with Art. 20 (1) of the Basic Law (the principle of the social state). This right thereby exists fundamentally independently of the nationality or residency status of a person. An objective legal obligation of the state, connected with the subjective legal entitlement to benefits of the affected bearer of basic rights, derives from this basic right.

The Federal Constitutional Court’s ruling on the Asylum Seekers Benefits Act

The social right to a subsistence minimum that is in keeping with human dignity was affirmed by the decision of 18 July 2012 on the Asylum Seekers Benefits Act. In this ruling, the Federal Constitutional Court explicitly drew the legislator’s attention to the need for the provisions of international law to be upheld in the adaptation of the Act to comply with the ruling: “The regulations regarding a subsistence minimum which are in effect in Germany also include the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 [...]. The ICESCR stipulates a right to social security in Art. 9 and the human right to take part in cultural life in Art. 15 (1) (a).” The Federal Social Court has recently put in concrete terms the basic right to a subsistence minimum that is in keeping with human dignity, and affirmed benefits of basic security for job-seekers (Second Book of the Social Code) and of social assistance law (Twelfth Book of the Social Code) for citizens of the Union.⁹ This shows that direct argumentation using norms from applicable human rights treaties is also suitable for strengthening the legal position of the socially disadvantaged. Accordingly, UN human rights treaties are also to be used in interpreting constitutionally guaranteed human rights.

The principle of the social state and basic social rights in the Federal Republic of Germany

Guaranteeing social basic and human rights is a necessary condition for a life of dignity and participation in a socially just society. On the basis of the devastating experiences of the Second World War, the Basic Law pursued an approach closely aligned with fundamental rights and

⁹ BSG B 4 AS 59/13 R, B 4 AS 44/15 R and B 4 AS 43/15 R of 3 December 2015.

liberties, and explicitly gave concrete form not to social rights, but rather to political basic rights. The cultural right of freedom of art and science in Art. 5 (3) of the Basic Law; the social rights of protection of marriage, family and children in Art. 6 of the Basic Law; and economic rights such as the right to form trade unions in Art. 9 (3) of the Basic Law and the right to freely choose one's occupation or profession in Art. 12 (1) sent. 1 of the Basic Law, which are also granted by the ICESCR, can be cited here as exceptions to this rule.

Along with the Basic Law, statutory law contains a number of additional social entitlements and guarantees. The Social Code thus includes, *inter alia*, rights to educational and employment support, to access to social insurance (health, accident, long-term care and pension insurance), to subsidies for adequate housing, and to social benefits, and the right of persons with disabilities to participate in society. Additional elementary social basic rights have been derived from provisions of the Basic Law through Federal Constitutional Court case law.¹⁰ The protection of human dignity in Art.1 of the Basic Law and the elementary, immutable principle of the social state (Art. 20 (1) in conjunction with Art. 79 (3) of the Basic Law) commit the Federal Republic of Germany to guarantee social security (basic standards: protection in case of illness, pension provisions, a subsistence minimum that is in keeping with human dignity) and social justice (labour law, *inter alia*).

The precept of the social state has, however, not yet been given concrete enough form in constitutional law and is oriented solely to the legislature.¹¹ This insufficient content for the precept of the social state diminishes its clout under constitutional law. A constitutional complaint cannot be directed to the legislative omissions of the social state, but rather only to the omission of actions by administrative or judicial authorities. The precept of the social state has thus far therefore been unable to prevent the acceleration of upward redistribution and dismantling social protection. For this reason, too, the principle of the social state in the Basic Law must be given more concrete form. This state objective does not grant directly legally

¹⁰ Leading decisions of the Federal Constitutional Court include, above all, BVerfGE 33, 303 (the right to admission to higher education); BVerfGE 1, 97 (the right to life/entitlement to public welfare), BVerfGE 9, 124 (legal aid); BVerfGE 87, 153 (the subsistence minimum in taxations); BVerfGE 65, 182 (social plan); BVerfGE 68, 193 (statutory health insurance); BVerfGE 115, 25 (alternative medicine) and BVerfGE of 9 February 2009 (unconstitutionality of calculation of Hartz IV rates for children and adults).

¹¹ Because of its breadth and indeterminacy, the principle of the social state in the Basic Law regularly does not contain any direct instructions that could be implemented by courts without a legal foundation in statutory law. Realising it is chiefly the task of the legislature (cf. BVerfGE 1, 97 [105]).

enforceable subjective rights in the sense of entitlement to benefits. At the same time, the principle of the social state represents more than mere programme guidelines. The state is objectively obligated to realise it to the extent possible.

Conclusions – Areas of actions for The Left Party

The Basic Law does not hold a monopoly on human rights. In the past, economic, social and cultural rights have continually been developed in international legal practice. They are found in the ICESCR and the European Social Charter and have become a binding part of the domestic legal system of the Federal Republic of Germany through ratification. The case law of the Federal Constitutional Court now appears significantly more open to international human rights norms from the ICESCR than it was a few years ago. This trend is to be supported, as it offers the opportunity to intervene at the domestic political level and in support of social struggles with arguments derived from international law.

Social human rights represent a broad cross-cutting issue in leftist politics, and fall into many different areas of policy. This is precisely how social human rights can realise their added value in political conflicts. Through its characteristic interdependence, reference to social human rights allows for broader access to a variety of policy areas, from employment policy to the Asylum Seekers Benefits Act and health care policy to local housing policy and the right to education. Coherent social policy can be strengthened domestically through reference to social human rights. Interlinking traditional policy areas with social human rights in a targeted way can achieve synergy effects and support mobilisation of civil society and the public for social justice, participation and inclusion. Against this backdrop, it is all the more important to place the instruments of social norms which are available at the international level at the heart of struggles for a just social order, to recognise their added value for political work, to help them be applied in society as a whole, and to develop them further. They can develop an important role both in parliamentary work and in social struggles.

The Left Party represents a clear commitment to the indivisibility, equality and universality of all basic and human rights. Promoting the justiciability of social human rights must become more of a focus for the political work of The Left Party as the heart of social policy, and must be understood as more than just a complementary cross-cutting task for German policy.

Although the goal of emancipatory policy in the struggle against the existing relations of production must not be misunderstood as a struggle to supplant socialist ideas with mundane legal concepts, the struggle for the legal recognition and enforceability of social basic and human rights is playing an ever greater role in practice under the prevailing conditions. It thus comes as no surprise that the path to the social or labour court is often regarded as a means of last resort in

order to, for example, sue for rightful social demands for livelihood security. For precisely this reason, the ICESCR individual complaints procedure and the European Social Charter collective complaints procedure are important tools in the struggle for social justice and at the same time serve as correctives to undesirable domestic developments. Poverty, discrimination and social upheavals can thereby come into stronger focus as breaches of the law for which a state or a specific policy has to answer judicially. The Left Party wants to strengthen the increasing self-organisation of civil society, particularly unemployed people's initiatives, migrants and migrant workers and persons with disabilities. Social human rights must be strengthened through the elevation of their assertion to a goal of social policy.

That is why we demand the following in order to strengthen social human rights policy:

- Incorporating social basic rights into the Basic Law;
- Making the principle of the social state of the Basic Law more concrete;
- Signing and ratifying outstanding conventions and Optional Protocols as well as withdrawal of reservations;
- Social human rights must be understood as the heart of social policy;
- Together with other members of the Council of Europe, advancing the institutional strengthening of the European Committee of Social Rights for monitoring the European Social Charter;
- Strengthening the responsibility of transnational corporations for violations of social human rights through legally binding norms.