

GUARANTEED MINIMUM INCOME FOR ALL: A CASE OF THE EU AND EEA¹

RENDA MÍNIMA PARA TODOS: O CASO DA UNIÃO EUROPEIA E DO ESPAÇO ECONÔMICO EUROPEU

Martin Stefko*

Abstract: For the European Union, the question and the Future of Social Security Law, comes at critical moment: the natural tendency for creation new barriers that is inherent for each national welfare state as an international threshold of inequity has been even enhanced by pending European integration. All mature European welfare states are restrictive and every nation has filters which separates out desirable migrants in terms of their labour market potential. This article proves that neither old member states, nor the new ones are an exception. In our comparison, German social assistance scheme (especially the special Law on Social Benefits for Asylum-Seekers) guarantees, thanks to the active Constitutional Court, better positions for migrants than respective Czech laws. Even so, German laws set forth enough protective clauses to being able marginalised asylum-seekers as in the Czech Republic or any other member state of the EEA.

Keywords: Guaranteed Minimum Income. European Welfare State. Social Security.

Resumo: Para a União Europeia, a questão e o futuro da Lei de Seguridade Social se encontra em um momento crítico: a tendência natural para criar novas barreiras, que já é inerente a cada Estado de bem-estar social como um limiar internacional de desigualdade, foi ainda reforçada pela integração europeia. Todos os estados europeus de bem-estar maduros estão mais restritivos e cada nação tem filtros que separa migrantes desejáveis em termos de seu potencial mercado de trabalho. Este artigo demonstra que nem os antigos Estados-Membros, nem os novos são uma exceção. Em nossa comparação, o sistema de assistência social germânico (especialmente a Lei especial de benefícios para requerentes de asilo) garante, graças ao ativo Tribunal Constitucional, melhores posições para os migrantes do que as leis checas. Mesmo assim, as leis alemãs estabeleceram cláusulas suficientemente protetivas para marginalizar requerentes de asilo tanto quanto na República Checa ou em qualquer outro estado membro do EEE.

Palavras-chave: Proteção da renda mínima. Welfare State Europeu. Seguridade Social.

* Ph.D. and Doctor of Law from Charles University. Associate Professor at the Department of Labor Law and Social Security Law at the Faculty of Law of Charles University in Prague; Ovocný trh 3-5, 116 36 Praha 1, Czech Republic; stefko@akpavela.cz

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Introduction

Some Brazilian scholars point out that social security law in the European Union member states provides considerably more protection for beneficiaries in general than is typical under non-European domestic laws (Lavinias, 2015, pp. 112-171). It might be true but welfare states as institutions are too complex for any sort of clear objective comparison. Nowadays, the member states of the European Union (EU) and contracting parties of the European Economic Area (EEA) are confronted with huge numbers of illegal migrants flow across its borders. Thousands desperate people, mainly from outskirts of Europe and Middle East, trying to enter the European Union's territory by any means makes Europeans to pause and think.

In our increasingly globalised world of open borders, the issue of such robust immigration questions once again the viability of the traditional European national welfare states.² If national welfare states are understood, more or less, as an exchange of internal cohesion against external closure, international migration is an effort to overcome these thresholds. Even more, if modern welfare states distribute social services and benefits mainly on the bases territoriality said full scale migration could be conceived as a direct assault on social rights connected with fight against poverty.

This article aims depict EU member states' social security schemes on the bases of a sole criterion – a nationally regulated minimum income scheme. This non-contributory, means-tested scheme is an instrument of last resort, aimed at people who are unable to find work or who do not receive social security benefits. We believe that the guaranteed minimum income (hereinafter “the GMI”) that is regulated in overriding majority of EU member states has become not only the crown jewel in the European welfare state's localization but also this is, without serious doubt, the proper instrument fulfilling the main function of European national welfare states - the desire to prevent cause for another devastating war as WWI or WWII.³

But being under massive immigration will not intern social competition, discrimination and xenophobia drive migrants apart and render the preservation of elements of social citizenship less likely? To predict the close future we have to go back and describe the main ideology behind the European idea of welfare state and its transformation (first section). The portrait would not be complete without seeing international standards (second section) and the true substance of the GMI in national regulations (second section)⁴ and understanding the functioning of the GMI in the EU and EEA countries (third section). After a brief comparison of the GMI throughout Europe, two welfare states have been chosen for an in-depth analysis: the Czech Republic and Germany.

² This term is used to cover all national welfare states models within the EU and EEA. The distinguishing characteristic of the welfare state is the assumption by community, acting through the state, of the responsibility for providing the means whereby all its members can reach minimum standards of health, economic security, and civilised living, and can share according to their capacity in its social and cultural heritage. Cf. Marshall (2006).

³ Cf. Article 34 III of the Charter of Fundamental Rights of The European Union (European Union, 2000). Further cf. Schönig & Hoesteds (1996, p. 3).

⁴ It has to mention that the attempt to compare these systems is extremely difficult for: (a) different approaches with respect to the minimum subsistence level, b) different entities each time, for the financing, management and GMI's delivery; and c) it is the decisive role of each country's economic climate and the existing labour market conditions.

They were distinguished not because of their overall classification (both of them represent the most numerous first type of the GMI in Europe) but to demonstrate common defensive strategies across different traditions, history and foreign policy priorities. The Czech Republic is a Central and Eastern European welfare state model that could be recognised still as a new member state, low-wage country with social security influenced by long communistic and totalitarian history.⁵ To the contrary, Germany as an old member state, democratic and well-known as the Holy Grail for the recent migrant wave.

1 European welfare states as thresholds of inequities

The apparent generosity of social protection in Europe should never be mistaken for its goal. Social protection had been developed and grasped by the modern state for one crucial purpose: the State aimed to protect citizens against certain social risks to gain internal loyalty of their citizens (the principle of personality). Since its inception the social state has had as a goal the strengthening of national unity. Internal social integration is being achieved at the cost of demarcating new external borders. In this way, the development of the welfare state has always been interconnected with the idea of building a national state, at least since Bismarck's times (the end of the 19th Century).⁶

The social citizenship had been created in order to support the implementation of political rights. Supporting equality in relation to material security via public law social security systems has been worked out as a supplement to political equality that had been fully used only by the natives. Material equality was designed to simplify political freedom. Yet modernizing as well as intensifying the care for the citizens' (the inhabitants') social welfare also led to severe obstacles in integrating the aliens into the hosting society in a situation where an externally or internally caused rapid migration growth had occurred. The European welfare state emerged as a prevalently national state and has hitherto retained this characteristic.⁷ Above all during the 20th century the welfare state became the main feature of European states, giving the national state a new and more coherent structure through the deepening of internal solidarity.⁸ Society became more inclusive and protective but the advantage of having the nationality of a particular European welfare state still has its significance, especially in times adverse for the national economy of such a state.⁹ The reason for this is that the necessity to limit the distribution of social welfare results from the restricted

⁵ Mixed legacy can be demonstrated on other benefits and services than health care. Citizens who did not reside within the territory of the Czechoslovak Socialist Republic were not eligible for benefits and services. By 'citizens' was understood own nationals and citizens of other states. So Section 103 of Law No. 100/1988 Coll., concerning social security.

⁶ Cf. Eichenhofer (2002, p. 22) and Bommes (2008, pp. 129-158).

⁷ See Eichenhofer (2002, p. 22).

⁸ See Eichenhofer (2010, p. 61).

⁹ This remains true in spite of the fact that foreign labour migrants represent a significant financial source both for the public budget as well as for the social insurance systems. Recent World Bank research has furthermore demonstrated that the labour migrants' input into the tax system significantly surpasses the amounts used by the migrants via social security benefits. See Barbone, Bontch-Osmolovsky, & Zaidi (2009, p. 4).

sources necessary to socially protect the population, or – in order to maintain the particular country's economic performance.¹⁰

Nevertheless, it cannot be neglected that mature welfare states had started to be confronted with massive migration long before 2015 and had been so for quite long period time. One example could be years from 1945 to mid 1970s.¹¹ Despite being under strong immigration flow they did not hinder immigration in accordance with Article 22 of the United Nations' Universal Declaration of Human Rights of 1948. Reasons could be found in a prevailing assumption among host states that they are in a position of dominance (they are able to steer, manage, and control migration processes) or in changed understanding of welfare state. Britons and many nations started to view the provision of welfare started rather in terms of consumption within their own family than as a source for better soldiers or loyal workforce. European welfare states developed into a means to the end of the betterment of social conditions (Rose & Shiratori, 1986, p. 100).

Apart from changes in opinions of welfare states, there are two other main circumstances that shaped limits of national welfare states: the project of European integration and the process of globalisation. Both of them, shoulder on shoulder, have been gradually strengthening personal universalism present in the existing European national welfare states. Western welfare states followed by their Eastern fellows after the fall of the Iron Curtain have had an internal tendency to produce entitlements and social rights for those legally residing on their territory. It was exactly the expansionist climate of the 1950s, 1960s and 1970s when the legally resident but non-nationals were endowed with social rights (Hammar, 1990).¹² This could happen because the institution of state (political) citizenship had gradually lost its original meaning, or rather transformed into the principle of territoriality and into a requirement of competitiveness among the insured. Nevertheless, the evolution of "denizenship" did not erode the restrictive face of welfare states totally. The emphasis on territoriality could be maintained onwards if the acquisition of citizenship was understood as a technical fix or repair.

Modern welfare states might be limited in their interventionist capacity by their borders and losing their ability to bind their citizen to them but, even so, the principle of territory remains indispensable as a central foundation for the political inclusion of individuals. In this regard, the prevailing opinion in social assistance is that it is not the host state but the state of origin which is responsible for offering support to the needy (Vonk, 2002, p. 320). Due to the minimum significance of multilateral agreements guaranteeing social rights to third country citizens and to the European Union's legislative branch's competence limitation, there is almost exclusivity provided for national regulations on substantive social security. Thus, social policy of various member states remains one of few legal fields that were only to a small degree influenced by the European Union (EU)'s legislature. Every European

¹⁰ See e.g. the Czech Constitutional Court's finding from 16.6.2010, docum. sign. 6 Ads 155/2009 and the finding from 24.6.2010, docum. sign. 6 Ads 170/2009. For further information, see e.g. Šimáčková and Cizinci (2010, pp. 16-17).

¹¹ Compare Miller (1981). For situation in Germany see Franz, Kruse, & Rolf (1986, pp. 229 et seq.).

¹² See Andersen (1990, pp. 113-126).

state has been maintaining its specific social laws, including laws governing the guaranteed minimum income, as an important part of national protection system against social risks.

2 International Agreements

To protect the rights of migrant foreigners, international treaties are, by their nature, required above all. Among multilateral international treaties protecting the rights of migrants should be mentioned, in particular, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,¹³ dated December 18th, 1990, ILO Convention 19 and recommendation 25, ILO Conventions 48, 118 and 157 and recommendation 167, ILO Convention 97 and recommendation (revised) 86, and ILO Convention 143. Convention 157 is also important. The common feature of all these Conventions is an attempt to ensure equal treatment of migrants with the citizens of the host country by establishing additional conditions which determine entitlement to a benefit or service, i.e. the most common method of defence against migrants. So entitlement to social insurance benefits, for example, is not conditional on residency in the host country.¹⁴

Unfortunately, most of the Conventions have permitted exclusion of non-nationals in cases of social assistance where benefits or parts of benefits are payable out of public funds. Restrictions in connection with acquired rights are set out in Article 6, paragraph 1, letter b), point ii) of ILO Convention 97. Even Convention No. 118 on equality of treatment (social security) of 1962 states that conditions of residence of a prescribed duration may be set forth for social assistance's access.¹⁵ The reason is not difficult to discern. While the origins of social insurance schemes are based upon a reciprocal insurance relation, the origins of social assistance schemes are based upon the notion of unilateral charitable obligation.

The UN Migrant Workers Convention¹⁶ seems to be an exception *prima facie* because its Article 27 I states that migrant workers and members of their families shall enjoy in the State of employment the same treatment in social security granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. Another reason is that, for the first time, the scope of the principle of equal treatment was extended also to illegal (unregistered or informal) migrants, brought about significant improvement in the situation of migrants generally. However, in the case of illegal immigrants, it concerns only the application of certain provisions as a result of which they have weaker protection of their rights.¹⁷ In addition, wording of Article 27 I proves that it is a "framework provision" and not self-executing (Becker & Olivier, 2008, p. 29). Article 27 I of the UN Migrant Workers Conven-

¹³ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families – Migrant Workers Convention.

¹⁴ Cf. Article 4, paragraph 1 of ILO Convention 118. Furthermore, also Article 6 of ILO Convention 97 or the more consequential Article 10 of ILO Convention 143.

¹⁵ See Article 4 II of said Convention.

¹⁶ International Convention on Protection of the Rights of All Migrant Workers and the Members of their Families.

¹⁷ This is not a directly applicable provision. cf. Dupper (2010, p. 29).

tion refers only to other legal instruments. Another issue is a lacking definition of social security. Some experts doubt Article 27 I of the UN Migrant Workers Convention covers on-contributory benefits because they consider it only to be a statement of general principle.¹⁸ Article 27 II of the UN Migrant Workers Convention applies to migrant workers' rights in the course of acquisition.¹⁹

Another promising example is Article 10 of the convention No. 143. In accordance with said article, each member for which the convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of social security for persons who as migrant workers or as members of their families are lawfully within its territory. It should be not surprising that this article have been most frequently mentioned as preventing ratification of this convention. A lack of will leads to an insufficient ratification of international multilateral conventions by the developed countries.²⁰

In addition to equality in the above-mentioned multilateral treaties, it is also possible to identify an effort to achieve the highest possible coverage of foreigners through the host country's social system, and regulate the preservation of rights acquired or being acquired. It is typical that the Czech Republic ratified only ILO Convention 19, the equal treatment of foreign and domestic employees in the matter of compensation for accidents at work, i.e. a convention that is actually not even about foreign migrant workers, but foreign employees.²¹ ILO Conventions 48,²² 97,²³ 118,²⁴ 143²⁵ and 157²⁶ were not ratified by the Czech Republic, nor was the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families²⁷ in particular. To the contrary, Germany ratified ILO Convention 19, 97 and 118.²⁸

Apart from special conventions concerning migrants, equality of treatment is, however, also provided for in Convention 102 concerning Minimum Standards of Social Security, in the European Social Charter, the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and also in the Convention for the Protection of Human Rights and Fundamental Freedoms.

Regarding specific obligations, then, Article 68 of Convention 102 concerning Minimum Standards of Social Security regulates numerous exceptions. Equality of treatment with citizens of

¹⁸ See Article 25 of the UN Migrant Workers Convention.

¹⁹ Article II of the UN Migrant Workers Convention: "Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances."

²⁰ See Dupper (2010, p. 35).

²¹ Cf. Article 1, paragraph 2 of the Convention, published in the Czechoslovakia under No. 34/1928 Coll. Laws and Regulations.

²² Ratified by 3 EU Member States, namely Hungary, Slovenia and Spain.

²³ Ratified by 6 EU Member States (Netherlands, Germany, Portugal, Slovenia, Spain and Great Britain).

²⁴ Ratified by 8 EU Member States (Denmark, Finland, France, Germany, Ireland, Italy and the Netherlands).

²⁵ Ratified by 4 EU Member States (Italy, Portugal, Slovenia and Sweden).

²⁶ Ratified by 2 EU Member States (Spain and Sweden).

²⁷ Not ratified by any EU Member State.

²⁸ Germany has accepted in the case of ILO Convention No. 118 branches (a) to (c), (g) and (h).

other countries may not thereby apply to benefits or partial benefits that are exclusively or mostly financed from public funds; concerning transitional adjustments and even in the case of social security systems that are based on obligatory contributions and provide protection for employees, a guarantee of equal treatment can be seen as dependent on the existence of bilateral or multilateral agreements on reciprocity. Equality of treatment is also dealt with in the European Social Charter from 1961. However, the Czech Republic, as well as Belgium and Germany, substantially limited the applicability of this principle with regard to foreigners. Of Article 19 of the European Social Charter, which governs the rights of migrant workers and their families to protection and assistance, the Czech Republic has committed itself to complying only with paragraph 9, which, within legal limits, requires the state to permit the transfer of part of workers' earnings and savings according to their wishes. The Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14, prohibits discrimination, but is basically not applicable to the principle of social justice. However, protection may be invoked under Article 1 of the Additional Protocol. According to the judicature of the European Court of Human Rights, a contracting state cannot deny social rights acquired by foreigners as a result of premiums paid to a social insurance system solely on the grounds that the foreigner's home state breaches the principle of reciprocity with regard to the citizens of the contracting state.²⁹

Reluctance to ratify multilateral international conventions, which is widespread among developed countries,³⁰ can be corrected by adjustments to bilateral international treaties, which are relatively successful tools to that end.³¹ Therefore, the International Labour Organisation has recommended the adoption of bilateral agreements as a means of managing migration flow more effectively.³² Bilateral international agreements can be adapted to the particularities of specific groups of migrants, and both the sending and receiving state can share the burden of ensuring adequate living and working conditions as well as monitoring the migration processes. Even so, international bilateral agreements are not without shortcomings such as a lack of reciprocity, historical context, an insecurity caused by changes in the foreign policy orientation, and the political order in the hosting or home country.

3 Guaranteed Minimum Income in the EEA

There is nothing like universally recognized guaranteed minimum income in international law. Taking into consideration, and considering the European Union's legislative branch's competence limitation as well as the indefiniteness of the individual countries' constitutional law,

²⁹ Cf. ECHR decision on *Gaygusuz* dated September 16th, 1996.

³⁰ Cf. Dupper (2010, p. 37).

³¹ Cf. Dupper (2010, p. 30).

³² Recommendation No. 86.

including the Czech Republic,³³ the individual hosting country's national regulation of secondary law plays a crucial role for migrants.³⁴

The GMI schemes have grown significantly in national welfare states over the past 20 years. Standards of social protection differ throughout the EU; the same is true for Contracting States of European Economic Area. The variability has to do with the overall policy that its country follows in terms of social protection. Even so, Austria, Belgium, Cyprus, the Czech Republic, Germany, Denmark, Estonia, Spain, Finland, France, Hungary, Iceland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Sweden, Slovakia and the United Kingdom have the GMI.

Only Italy and Greece have not yet incorporated a minimum income scheme to their national social protection systems.³⁵ Italy rejected the GMI after a pivotal project; the Greek government attempted two times to enact the GMI (first in 2000, second in 2005).³⁶ One year ago, the Greek legislature foresaw a pilot program to be launched in September 2014, and universally applicable in 2015.³⁷ The third problematic country is Bulgaria. Although Bulgarians have implemented certain minimum income, the scheme is very limited or restricted to narrow categories of people and fails to cover all those in need of support.

Based on the research done under auspices of the EMIN, national approaches to the GMI can be classified as simple and comprehensive in 15 states, quite simple but restrictive in 7 states and categorical and rather complicated in 4 states. Most countries have relatively simple and comprehensive schemes which are open to all those with insufficient means to support themselves. Examples are the Czech Republic, France or Germany. The second group is composed of Baltic countries, Hungary, Poland and Slovakia. These countries have quite simple and non-categorical schemes but have rather restricted eligibility and coverage of people in need, due to the low level at which the means-testing is set. The last group summoned countries with a complex network of different, often categorical, and sometimes overlapping schemes, which cover most people in need of support. The third type of the GMI can be found in Spain, Ireland, Malta or the UK. By the way, asylum seekers who do not have refugee status yet, and undocumented migrants are not eligible for the GMI in all mentioned countries (European Commission, 2015, p. 11).

3.1 The Czech Republic

In comparison with other EU Member States, the Czech Republic has a relatively homogeneous population. Citizens from countries outside the EU represent around 0.7% of the po-

³³ This again is a Europe-wide characteristic, clearly resulting from Becker et al. (2010).

³⁴ For EU Citizen and their family members, as well as for residents, the coordination process of the EU member state countries' social systems plays an important role as well.

³⁵ Italy previously regulated a MIS (Reddito Minimo d'Inserimento) that was introduced on an experimental basis. It was rejected after evaluation. In 2002, the competence for social policies was transferred to the regions Van Lancker (2015, p. 8).

³⁶ Greece has also provided a rental fee, paid to unsecured and financially weak elderly persons or in couples that do not own a house. For recent discussion, see Laterza (2015).

³⁷ See Hellenic Parliament (2014).

pulation, which is less, on the one hand, than in the old EU Member States but, at the same time, more than in Poland, Slovakia or Hungary.³⁸ The social and cultural values acknowledged by Czech society has been reconsidered since the end of the Communist regime in 1989 and are set forth in the Charter of Fundamental Rights and Freedoms (hereinafter ‘the Charter’).³⁹ Article 30 of the Charter lays down both the base for the obligatory Czech pension insurance and welfare assistance. The former has to be developed in order to satisfy and, to some extent, cover the needs of people endangered by age, disability to work and death of the “breadwinner”. The latter represents the last safety net intended for people with insufficient income. Jurisprudence refers to Article 30 as the regulation of right on social security. Despite of Article 30 of the Charter⁴⁰ that lays down welfare assistance, an individual is not entitled to derive his or her rights to social security directly from the Charter. Article 30 of the Charter represent rather constitutional ideas on the Czech social security system and constitute therefore limits for ordinary statutes.

In 2006, the Parliament passed a couple of new laws in order to create a modern social assistance scheme (in Czech “pomoc v hmotné nouzi”, the word-to-word translation to English would be “the material need”) targeting on individuals with insufficient income but the scheme does not enjoy constitutional protection.⁴¹ The material need scheme is regulated in the Act No. 111/2006 Coll. (hereinafter “the Act on assistance in material need”). Income support benefits provided under this scheme are three: Income Support for Living, Supplement for Housing and Extraordinary Immediate Assistance. The competence to decide whether and in which form to provide aid in material need benefits was given the Labour Office of the Czech Republic.

The Act on assistance in material need defines a number of qualifying criteria. First of them is the personal scope of beneficiaries. A person in material need can be an individual or family that does not have enough income where their overall social and property relations prevent them from enjoying what society accepts to be basic living requirements. At the same time, these persons are objectively unable to increase their income (through the due application of entitlement and claims or through the sale or other disposal of their own assets), thereby improving their situation through their own actions. There is also a negative legislative definition of a person in material need. Persons who are not deemed to be persons in material need are those who do not try to improve their situation by their own actions, who are not in an employment or similar relationship, are not self-employed or not listed in the register of job seekers, who are listed in the register of job seekers and who have refused to take up short-term employment or to participate in an active employment policy programme without serious reason, who are not entitled to sickness benefit or who have

³⁸ On the specific situation in Hungary cf. Szalai (2008, pp. 160-161).

³⁹ Charter of Fundamental Rights and Freedoms was adopted as an appendix of the statute No. 23/1991 Collection. Regarding the extraordinary situation during 1992, when the Charter’s predecessor in the Czech Republic was abolished, the Charter was declared again on 16 December 1992 as a component of the Czech constitutional order (Manifestation No. 2/1993 Coll.). The Charter was amended by Act No. 162/1998 Coll. Social assistance has a long history in the Czech Republic and its legal predecessors, compare Rákosník & Tomeš (2012, p. 366 et seq) or Kober (2015, p. 120).

⁴⁰ According to Articles 3 and 112 of the Czech Constitution, the provisions of the Charter have a unique position within the Czech legal order; the Charter has the same legal effect as the Czech Constitution.

⁴¹ The first law on minimum income support after 1989 was passed in 1991. It was Act No. 482/1991 Collection.

been awarded a reduced level of benefit because they intentionally brought about their illness, who are self-employed and their income after the deduction of reasonable housing costs is lower than the amount of living due to the fact that they were not enrolled in sickness insurance, who have been sanctioned for failing to comply with their obligations as a child's legal representative connected with the truancy of the child (during the time of compulsory school attendance), or who are in preventive detention or in remand (for a full calendar month).⁴²

There is also the habitual residence test and the "needs test". The habitual test is carried out on all applicants and its purpose is to show that the applicant is qualified to live in the Czech Republic⁴³ and that a genuine link between the individual and the State had been established for the time being. There are usual exceptions for EEA citizens, EU Residents, family members, aliens eligible under international agreements binding the Czech Republic, and refugees (but not asylum-seekers)⁴⁴ or those who have been granted discretionary leave or leave under humanitarian rules. Foreigners beyond the personal scope are excluded from the social assistance scheme and they might be granted discretionary income support if his/her health is under serious threat.⁴⁵ Persons or families are entitled to benefits if their income is less than the amount of living when reasonable housing costs have been deducted (the needs test).⁴⁶

Taken from financial point of view, the Act on assistance in material need has never been an overnight success but over time it gets even worse. The flagship benefit, Income Support for Living amounts up to CZK of 3410 or EUR 122 for one adult living without children. This number has been increased for the last time on 1 January 2012. Experts doubt that the GMI has any substantial potential to reverse the situation in the Czech Republic. Although income inequality and relative poverty continue to be low in comparison with other Western European countries the main reason is not the material need scheme but rather slow stratification of Czech ex-communistic society. The decline of the share of workless households happened thanks to the overall economic recovery.

3.2 Germany

Unlike its predecessor, the Weimar's Constitution, the Basic Law of the Federal Republic of Germany⁴⁷ contains, with very few and limited exceptions (neither of them is connected with social assistance), no fundamental social rights. The situation between states' constitutions differs

⁴² See Koldinska (2013, p. 153 et seq).

⁴³ For a foreigner it means that he/she has been living in the Czech Republic for at least five years and have acquired a permanent reside permission.

⁴⁴ Asylum seekers were denied chances for social inclusion in order to reverse the migration process. The same story is taking place in the United Kingdom and other European countries.

⁴⁵ Section 2 III in connection with section 5 III and IV of the Act on assistance in material need. Information would not be complete without a brief notice that the Czech Constitutional Court brought significant improvement to the status of illegal (unregistered or informal) migrants in March 2008. The Constitutional Court allowed the negotiation of valid employment relationships with illegal migrants, who thenceforth are protected like other employees.

⁴⁶ The amount of living is established on a case-by-case basis based on an evaluation of the person's income, efforts and opportunities. The amount of living for families is determined by the sum of the amounts of living of each family member. The amount of living is derived from the existence minimum and the subsistence minimum.

⁴⁷ In force since 23 May 1949, BGBl (Federal Law Gazette) p. I.

greatly. For example, the Bavarian Constitution of 8 December 1946 contains two comprehensive parts on “Community Life” and “Economy and Work” or the constitutions of “New States” formed after 1990 mostly contain a complex catalogue of social rights. Nevertheless, the enactment of status regarding social security lies within the competence of the federation.⁴⁸

An obligation of Germany to act in the field of social security arise from the principle of the welfare state (mentioned i.e. Article 20 I of the Basic Law), whereby Germany shall be a “democratic and social federal state”. Yet, this obligation only exists objectively, without any individual’s connotations. Although no citizen’s subjective rights may be deduced from the language of the constitution, the Federal Constitutional Court (hereinafter “BVerfG”)⁴⁹ has over time derived the state’s responsibilities on this field as follows: the state is to see to a just social order,⁵⁰ it shall share the burden arisen from a common fate that only coincidentally affects a specific group of individuals,⁵¹ the state shall care of individuals’ in need of help,⁵² it shall provide for vicissitudes of life,⁵³ and finally it is to ensure certain social equality of opportunity.⁵⁴ Nevertheless, the legislator always enjoys a relatively wide scope of action. As long as an effective procedure for the enforcement of claims is ensured it is free to decide what criteria shall apply, which kind of social security is to apply, amounts of benefits, organisation. This principle has been once again confirmed when German Parliament (Bundesrat) has recently approved strict defensive legislative changes as a response to unstoppable flow of migrants. Amendments are going into force on 1 November 2015⁵⁵ and they are probably constitutional.⁵⁶

Low income benefits are paid from a tax-financed scheme of means-tested minimum resources to secure a decent standard of living⁵⁷ for persons in need who are incapable of working, and who do not earn a sufficient income to meet the needs, or who do not receive the necessary support from other people (Kreikebohm, Spellbrink, & Waltermann, 2015, p. 1 et seq). The scheme is not confined to citizens only; certain foreigners may qualify themselves in accordance with their right to reside. EEA nationals as well as other privileged aliens are treated, as a rule, as German nationals (Kreikebohm, Spellbrink, & Waltermann, 2015, p. 1 et seq). To the contrary, the

⁴⁸ See Article 28 II of the Basic Law of the Federal Republic of Germany.

⁴⁹ The BVerfG is very powerful because it may be called upon by anyone who feels that his/her fundamental rights have been violated. The constitutional complain (Verfassungsbeschwerde) can be addressed against a statute, but also against administrative measures or judicial decisions.

⁵⁰ BVerfG decision 18 July 1967, BVerfGE 22, 180.

⁵¹ BVerfG decision 3 December 1969, file number 1 BvR 624/56, BVerfGE 27, 253. Said decision can be found in German here: <http://www.servat.unibe.ch/dfr/bv027253.html>.

⁵² BVerfG decision 12 October 1976, file number 1 BvL 9/74, BVerfGE 43, 13, 19. For application towards disables see BVerfG decision 24 May 1977, file number 2 BvR 988/75, BVerfGE 44, 353, 375.

⁵³ BVerfG decision 27 May 1970, file numbers 1 BvL 22/63 and 1 BvL 27/64, BVerfGE 28, 324, 348. For the duty to protect citizens against accidents see BVerfG’s decision 45, 376, 387, against diseases see BVerfGE 68, 193, 209 and 115, 25, 43, and to some extend against unemployment see BVerfGE 51, 115, 125.

⁵⁴ BVerfG decision 1 December 1954, file number 2 BvG 1/54, BVerfGE 51, 115, 125.

⁵⁵ The amendment lowers benefits. The federal government is to provide a lump sum of EUR 670 a month per refugee to cover costs. Other limits on cash payments are to be implemented to deter new applicants. Cf. The Federal Government (2015). The government published an extensive reasoning in German to explain its decision. See http://www.bundesregierung.de/Content/EN/_Anlagen/2015-09-24-bund-laender-fluechtlinge-beschluss_en.pdf?__blob=publicationFile&v=5

⁵⁶ Cf. BVerfG decision of 17 March 2004, file number 1 BvR 1266/00.

⁵⁷ Section 1 of the Federal Social Assistance Act (in German Sozialgesetzbuch or SGB) XII as published on 23 March 1994 (Federal Law Gazette, I, pp. 646 ans 2975), last amended by Article 1 of Act of 27 December 2003, BGBl. I S. 3022. The term income support has been several times interpreted by the BVerfG, i.e. decision of 9 February 2010; file number 1 BvL 1/09.

German government refused to grant persons who are covered by the Council of Europe European Convention on Medical and Social Assistance of 1953 equal treatment as to its own nationals to enable the beneficiary to make a living, or assistance to overcome particular social difficulties.⁵⁸ Refugees are also excluded.⁵⁹ There is a separate social assistance scheme only for them based on the Act for asylum-seekers⁶⁰ and operated by the Central Agency for Asylum-seekers (Zentrale Leistungsstelle für Asylbewerber).⁶¹ Nevertheless, it has to be highlighted that foreigners who move to Germany with the intention to draw social assistance benefits are not entitled to those benefits.⁶²

Individuals below the age of 65 who cannot meet their own needs and are temporarily unable to work receive a subsistence allowance (in German *Hilfe zum Lebensunterhalt*) as part of social assistance. Persons over the age of 65, and those over the age of 18 who are permanently unable to work for medical reasons, are entitled to claim a needs-based pension supplement in old age and in the event of reduced earning capacity (*Grundsicherung im Alter und bei Erwerbsminderung*).

Unemployed persons who are capable of work and without means can apply for the basic provision for jobseekers Assistance towards living (in German *Hilfe zum Lebensunterhalt*) expenses is tax-financed schemes of means-tested minimum resources to secure a material and socio-cultural subsistence level for beneficiaries who are capable or incapable of working and who do not earn a sufficient income in order to meet their needs and do not receive sufficient support from other people.

Each member of an eligible household is entitled to claim social assistance in his/her own right. The total amount increases with the size of the family. The income and assets of the claimant and spouse or partner who share the same house hold are taken into account for the calculation of benefits. The standard rates (*Regelsätze*) are set by the Länder.⁶³ The amounts of the standard rates vary according to the age and the beneficiary's position in the household. In 2015, a single adult is entitled to EUR 399.⁶⁴

⁵⁸ Cf. Annex II to the European Convention on Social and Medical Assistance Reservations formulated by the Contracting Parties.

⁵⁹ Cf. Supreme Social Security Court (BSG) decision of 2 December 2014, file number B 14 AS 8/13 R.

⁶⁰ Asylum-seekers who are not entitled to stay in Germany, but who are allowed to stay nevertheless for political, humanitarian or other reasons, are only entitled to draw aid to subsistence and sick aid at reduced benefit rates under a special Law on Social Benefits for Asylum-Seekers (In German *Asylbewerberleistungsgesetz*). These persons may, however, under certain conditions be granted other aids on a merely discretionary basis.

⁶¹ Cf. Grube and Wahrendorf (2014), commentary to Section 3, marg. No. 30. BVerfG has found it unconstitutional when legislature neglected the updating of Asylum-Seekers' special benefits. See decision of 18 July 2012, file number 1 BvL 10/10 and file number 1 BvL 2/11.

⁶² See Section 23 III first sentence of the SGB XII. It is up to the social assistance authorities to prove that there is such a benefit fraud (Becker & Olivier, 2008, p. 109; Kreikebohm, Spellbrink, & Waltermann, 2015, p. 1 et seq).

⁶³ They relate to the socially acknowledged social cultural minimum of subsistence levels for persons or households and the actual cost of accommodation in Germany.

⁶⁴ This is so-called first and highest rate. Cf. Section 28 et seq. of the SGB XII. Wendl/Dose, *Das Unterhaltsrecht in der familienrichterlichen Praxis*, 9. Auflage, C.H.Beck, 2015, marg. No. 51.

Conclusion

Immigration does not necessarily weaken or fragment support for welfare state. To participate in a social insurance system, the individual's ability to be gainfully employed to a sufficient extent is more important than their nationality, although it must be admitted that the citizenry and population lawfully living in the host country is generally favoured over foreigners in access to employment. Most continental European welfare systems have accommodated migrants within their respective welfare systems without distressing those systems in last decades. The crucial role played political institutions and their capacity to produce consent in the nation and among nations. Social democratic and corporatistic European welfare states with expensive social spending or welfare states with weak welfare tradition (Bommes & Geddes, 2000, p. 10) seem to be less vulnerable than liberal welfare states when new migrants have to be incorporated without serious exclusion from social rights.

Yet it is beyond doubts that politics providing migrants with social citizenship has never been so problematic as today. The reasons for many of them are traditions, the specific historical circumstances associated with the development of protective measures, and last but not least, a requirement of territoriality, combined with the complexity of social security law. The modern social protection system is built to cover the majority of events in that society with which a citizen of the state may be confronted, from birth to death. These measures are territorially limited and one way or another implicitly depend on the entitled person's lifelong residency in that particular state.

It would suit European welfare states to maintain the values of open democratic societies respecting not only the rights of their own citizens, but also of those who have come to their territory (very often after a strenuous journey) maybe in hope of a better life, but may be also hoping to fulfil their dream. To love one's neighbour as oneself in this way does not come easily, however. If we take a look at the individual member states' national regulations, we realize that the restriction of migrants' social rights is not a specifically Czech characteristic, but rather a Europe-wide feature. The personality principle (i.e. social protection distributed according to one's nationality)⁶⁵ resulting from national law is then necessarily reflected also in EU law and this law must not unify due to a lack of political will, but may only coordinate individual national social protection systems and partially mitigate problems occurring to citizens from non-member states.⁶⁶

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⁶⁵ See Bommes (2008, p. 132).

⁶⁶ The refusal to grant emergency hospital treatment was qualified as a breach of the right to the protection of one's property only by the ECHR in the "Gaygusuz" - case, or to be more precisely, in the context of social insurance, p. 37. For further information, see e.g. the ECJ's decision from 14. October 1990, C 105/89, Bulhari Haji, [1990] ECR 4211.

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