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Social Rights in Today's Europe: the Role of
Domestic and European Courts

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Social rights in the case law of European courts

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The European Convention on Human Rights in the field of social rights

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Introduction

1. I would like to thank you for the invitation to participate in this important conference. Social rights are an integral part of fundamental rights and of the European Social Model. In many respects, their recognition is even a prerequisite for the effective enjoyment of civil and political rights.¹

2. In our current socio-economic and socio-political context, it is more essential and urgent than ever to implement the European Union's European Pillar of Social Rights.² In this connection, it is not sufficient – or it is no longer sufficient – to proclaim fundamental social rights; they need to be implemented and enforced at all levels of government. This brings me to Alain Supiot's crucial question "who are the guardians of social rights in Europe?" An international seminar on this issue,

¹. Brussels document on the future of the protection of social rights in Europe, presented to the Belgian Chairmanship of the Council of Europe on 13 March 2015.

². European Parliament Resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)).

held in 2015 at the Collège de France in Paris, identified the role of the courts as a defence and means of recourse against attacks by governments on the basic principles of a social state.³

3. It is therefore essential – and the objective of this conference, which I fully share – to bring the domestic and European courts to guarantee the enhanced integration of social rights in Europe and to give those rights a stronger foundation. The courts must be “guardians of promises”.

4. In this context, what is the role of the European Convention on Human Rights and what is the contribution of the European Court of Human Rights, whose mission is to enforce and interpret the Convention? I agree with our session Chair, Judge Lycourgos, that the European Court of Justice is not a human rights court and the Court of Human Rights is not a social rights court. However, the reality is more complex, as I will seek to demonstrate.

I. The European Convention on Human Rights is “permeable” to social rights⁴

5. In the thinking of its founding fathers, the European Convention was to be an instrument whose “judicial status” would be undeniable and whose provisions would lend themselves to judicial scrutiny in the strongest sense before both the national courts and the international courts. This concern led them to include in the 1950 Convention only those rights which could in substance be based on a sufficiently solid political consensus and could therefore be expressed through firm and clear legal definitions. The only rights meeting these requirements in the immediate post-war period were traditional civil and political rights founded on the idea of freedom (the right to life, the prohibition of torture and inhuman or degrading treatment, the right to liberty and security, the right to a fair trial, the right to respect for one’s private and family life, the right to freedom of thought, conscience and religion, the right to freedom of expression, etc.).

In contrast to these “first generation” rights, these genuinely individual rights that could be invoked before the courts, the so-called “second generation” economic, social and cultural rights at

³. “Les gardiens des droits sociaux en Europe”, special issue edited by A. Supiot, *Semaine sociale Lamy*, supplement to No. 1746, 28 November 2016.

⁴. Here I am expanding on and updating my previous work: Fr. Tulkens and S. Van Drooghenbroeck, “La place des droits sociaux dans la jurisprudence de la Cour européenne des droits de l’homme. La question de la pauvreté” in *Commission Nationale Consultative des Droits de l’Homme, La déclaration universelle des droits de l’homme (1948-2008). Réalité d’un idéal commun ? Les droits économiques, sociaux et culturels en question*, Paris, La documentation française, coll. “Les colloques de la CNCDH”, 2009, pp. 105 et seq.

the time merely constituted simple guidelines for public authorities.⁵ Accordingly, except for Article 4 on the prohibition of forced labour, slavery and servitude, Article 11 on freedom of association, which also includes the right to form trade unions with others and to join these for the protection of one's interests, and Article 2 of the 1952 Protocol on the right to education, nothing in the European Convention on Human Rights and its Protocols in principle concerns social rights.

Therefore, in the instruments, a rigorous legal compartmentalisation took shape and there was a fairly rigid division of functions between the two categories of rights.

Illusory compartmentalisation

6. However, this compartmentalisation did not withstand the challenges of reality for a long time, nor above all the creativeness of doctrine and the daring of the courts. The literature and case law standards came under attack and avenues were opened, with the aim of according social rights the legal punch they had initially been deprived of.

Comprehending and embracing the instincts behind the principle of the indivisibility of fundamental rights, the European Court of Human Rights quickly realised that the effectiveness of the civil and political rights of which it was the guardian could be conceivable in certain cases only if the social implications of these rights were acknowledged. The *Airey v. Ireland* judgment of 9 October 1979 is an important point of reference: "[...] the Convention must be interpreted in the light of present-day conditions ... and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals ... Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention."⁶

⁵. See P. Orianne, "Mythe ou réalité des droits économiques, sociaux et culturels", *Présence du droit public et des droits de l'homme*. in *Mélanges offerts à Jacques Velu*, Brussels, Bruylant, t. III, 1992, p. 1871.

⁶. ECHR, judgment *Airey v. Ireland*, 9 October 1979, § 26.

The theme of effectiveness, which was already included in the Court's case law,⁷ became permanently engrained in it. It is important to give recognised rights their full impact because the Convention aims to "protect not theoretical or illusory rights, but specific and effective ones".

Impressive breakthroughs

7. From the beginning of the 1980s, the European Convention on Human Rights, due to the Court's "interpretative dynamism",⁸ gradually carved a new path departing from the original one established by its founders and, to cite the fine words of one commentator, showed itself to be "permeable to social rights".⁹ Certainly, this departure was restricted in essence by the logic the Court intended to use to justify it; social rights only had an ancillary role in the Convention, that is to say, they were only to be relied on in individual cases when their protection was deemed essential to the effectiveness of one of the rights or freedoms explicitly guaranteed.¹⁰ Nevertheless, despite the relatively narrow and winding path that it had to take, the breakthroughs made by the Court in several fields were impressive.¹¹

8. The concepts previously devised by the Court to determine the scope of the articles of the Convention, such as the horizontal effect, positive obligations, the principle of proportionality, or the combination of the principle of non-discrimination guaranteed by Article 14 with other provisions,

⁷. The Preamble to the Convention aims to protect and develop rights and freedoms while Article 1 lays down the obligation for states to respect human rights ("recognising"). Since the *Wemhoff v. Germany* judgment of 27 June 1968, the Court has laid down interpretative guidance in this regard: "Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties." (§ 8). The *Golder v. the United Kingdom* judgment of 21 February 1975 continues in the same vein by confirming the decision of the Court to favour a finalistic or teleological interpretation of the treaty. In this connection, considering the aim and object of the Convention led the court to focus all of its efforts on the substantive provisions of the Convention to ensure that the guaranteed rights are truly effective.

⁸. See Fr. Sudre, "A propos du dynamisme interprétatif de la Cour européenne des droits de l'homme", *J.C.P.*, No. 28, 2001, pp. 1365-1368.

⁹. See Fr. Sudre, "La perméabilité de la Convention européenne des droits de l'homme aux droits sociaux", in *Mélanges offerts à J. Mourgeon*, Brussels, Bruylant, 1998, p. 46.

¹⁰. The doctrine describes this phenomenon as indirect protection: see Fr. Sudre, "La protection des droits sociaux par la Cour européenne des droits de l'homme : un exercice de 'jurisprudence fiction' ?", *Rev. trim. dr. h.*, 2003, p. 760.

¹¹. For an assessment of the situation, see *ibid.*, pp. 754 et seq.; Adde, J. Mouly, "Les droits sociaux à l'épreuve des droits de l'homme", *Droit social*, 2002, No. 9-10, pp. 799 et seq.; Fr. Tulkens, "Les droits sociaux dans la jurisprudence de la Cour européenne des droits de l'homme", in *Les droits sociaux ou la démolition de quelques poncifs*, edited by C. Grewe and Fl. Benoît-Rohmer, Strasbourg, Presses universitaires de Strasbourg, coll. de l'Université R. Schuman and the Institut de recherches Carré de Malberg, 2003, pp. 117 et seq.; A. De Salas, "Les droits sociaux et la Convention européenne des droits de l'homme", in *Libertés, justice, tolérance. Mélanges en hommage au Doyen Gérard Cohen-Jonathan*, Brussels, Bruylant, 2004, pp. 579 et seq.; Ch. Tomuschat, "Social rights under the European Convention on Human Rights", in S. Breitenmoser et al. (eds.), *Droits de l'homme, démocratie et Etat de droit. Liber amicorum Luzius Wildhaber*, Zurich/Baden-Baden, Dike/Nomos, 2007, pp. 837 et seq.; J. Akandji-Kombe, volume "Droits économiques, sociaux et culturels", in *Dictionnaire des droits de l'homme*, edited by J. Andriantsimbazovina et al., Paris, PUF, coll. Quadrige, 2008, pp. 322 et seq.

have therefore been used to allow recourse to the Convention in certain aspects of labour law.¹² For example, the Court gave a ruling on forced and mandatory labour in the *Siliadin v. France* judgment of 20 July 2005,¹³ along with a verdict on “the right to earn one’s living by work”¹⁴ in the *Sidabras and Džiautas v. Lithuania* judgment of 27 July 2014.¹⁵

The Court has also developed a significant amount of case law on the protection of persons with disabilities.¹⁶ The *Çam v. Turkey* judgment of 23 February 2016, concerning the refusal to enrol a blind pupil in a music school, is a great step forward.¹⁷ The Court considered that discrimination on grounds of disability included the denial of reasonable accommodations to facilitate access for persons with disabilities to education, which is vital for the exercise of human rights.¹⁸ In this case, by refusing to enrol the applicant, without considering the possibility of accommodating her disability, the national authorities prevented her from receiving a musical education, without any objective and reasonable justification, violating Article 2 of the First Protocol to the Convention.¹⁹

9. This development fundamentally reflects the idea that rights and freedoms are not exercised in a vacuum: they inevitably apply to a person in a situation, in a community and in social relations through measures as essential as healthcare, education, social protection, housing, work and culture. As A. Touraine says in *Qu’est-ce que la démocratie?* “the recognition of fundamental rights would be devoid of substance if it did not result in security for everyone and in the constant expansion of legal guarantees and state interventions that protect the most vulnerable”.²⁰ If the realisation of social rights guarantees the enjoyment of civil and political rights, conversely, as some people rightly maintain, the violation of fundamental “first generation” civil rights “certainly compromises the fragile and random exercise of economic, social and cultural rights”.²¹ The interaction is obvious.

Dialogue between instruments and courts

¹² C. Pettiti, “La Charte sociale européenne revisitée”, *Rev. trim dr. h.* 1997, p. 18.

¹³ ECHR, judgment *Siliadin v. France* of 26 July 2005.

¹⁴ J.-P. Marguenaud and J. Mouly, “Le droit de gagner sa vie par le travail devant la Cour européenne des droits de l’homme”, *Rec. Dalloz*, 2006, pp. 477 et seq.

¹⁵ ECHR, judgment *Sidabras and Džiautas v. Lithuania* of 27 July 2014.

¹⁶ See, in particular, ECHR judgment *Shtukaturov v. Russia* of 27 March 2008; ECHR judgment *Z.H. v. Hungary* of 8 November 2011; ECHR judgment *Arutyunyan v. Russia* of 10 January 2012; ECHR judgment *Guberina v. Croatia* of 22 March 2016; judgment *Kocherov and Sergeyeva v. Russia* of 29 March 2016; ECHR judgment *I.C. v. Romania* of 24 May 2016; ECHR judgment *Kacper Nowakowski v. Poland* of 10 January 2017.

¹⁷ ECHR judgment *Çam v. Turkey* of 23 February 2016.

¹⁸ *Ibid.*, §§ 65-67.

¹⁹ *Ibid.*, § 69.

²⁰ A. Touraine, *Qu’est-ce que la démocratie ?*, Paris, Fayard, 1994, p. 52.

²¹ N. Bernard, “L’effectivité du droit constitutionnel au logement”, *Revue belge de droit constitutionnel*, 2001, No. 2, p. 156.

10. In the Court's case law, the decompartmentalisation of generations of rights has been accompanied by a "dialogue of instruments" and by a "dialogue of courts". It is indeed not uncommon – and it is even becoming commonplace – that the Court should support these "social" interpretations of the Convention with a reference not only to the text of the European Social Charter itself,²² but also to the case law of the Charter implementation bodies.²³ The soft law of the Council of Europe relating to social protection may also be used to enrich the interpretation of the Convention.²⁴

The *Demir and Baykara v. Turkey* judgment of 12 November 2008, which some writers unhesitatingly interpret as "the formation of a European Court of Social Rights",²⁵ clearly demonstrates the Court's desire not to reason within a vacuum and to link its case law to significant developments regarding other relevant European and international instruments.

11. However, let us be clear. Some people are opposed, if not frankly hostile, to the European Convention on Human Rights opening up to "social" issues.²⁶ For a long time, O. De Schutter has been suggesting a change of perspective in order to overcome the opposition between the categories of law; we need to look beyond the rights of the individual and consider the state's obligations.²⁷ The human rights that the state commits to recognising internationally impose three obligations: *to respect* human rights (not hinder the exercise of a guaranteed right); *to protect* human rights (not allow violations); and *to realise them* (provide the means for effective exercise of the right). As a consequence, "to assert that the state is not just under an obligation to respect rights and to ensure their protection, but also to ensure their realisation, is to assert simply that the state cannot ignore life circumstances which separate the guarantee of individuals' freedoms from the

²² See, for example, ECHR (GC) judgment *Stec and Others v. the United Kingdom* of 6 July 2005, § 25.

²³ See, for example, ECHR judgment *Sidabras and Džiautas v. Lithuania* of 27 July 2004, § 47.

²⁴ See ECHR judgment *Havelka and Others v. Czech Republic* of 21 June 2007, esp. § 61, referring to Recommendation Rec (2006)19 of 13 December 2006 by the Committee of Ministers to member states on policy to support positive parenting. See Fr. Krenc, Fr. Tulkens et seq. Van Drooghenbroeck, "Le *soft law* et la Cour européenne des droits de l'homme : questions de légitimité et de méthode", *Rev. trim., dr. h.*, 2012, pp. 433 et seq.

²⁵ J.-P. Marguénaud and J. Mouly, "L'avènement d'une Cour européenne des droits sociaux (à propos de CEDH 12 novembre 2008, *Demir et Baykara c/ Turkey*)", *Recueil Dalloz*, 2009, pp. 739 et seq.

²⁶ M. Bossuyt, "De uitbreiding van de rechtsmacht van het Europees Hof van de Rechten van de Mens tot socialezekerheidsregelgeving : een rechterlijke revolutie ?", *R.W.*, 2007-08, No. 21, pp. 845 et seq.; *Idem*, "Les droits sociaux : une catégorie spécifique de droits de l'homme", *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'homme – Liber amicorum Vincent Berger*, Oisterwijk, Wolf Legal Publishers, 2013, pp. 43 et seq.

²⁷ O. De Schutter, "L'interdépendance des droits et l'interaction des systèmes de protection : les scénarios du système européen de protection des droits fondamentaux", *Droit en Quart-Monde*, September-December 2000, pp. 3 et seq.

effective ability to enjoy them".²⁸ *In this connection, the state is bound by an obligation of progressive realisation.*

Consequently, "with an obligation of progressive realisation of the right of the individual, the decisive criterion becomes whether the national authorities have made the efforts that could reasonably be required of them".²⁹ Can it and must it not also be said "that it is precisely the (sometimes premature) statement of a reality which through a ripple effect often helps to bring that reality into being".³⁰

12. In this context and, more generally, in light of the reconsideration of what some without hesitation designate as "hackneyed phrases" or even "clichés",³¹ particularly the not necessarily legally enforceable nature of social rights,³² I am now going to examine some recent judgments of the European Court of Human Rights which I believe show that the case law has moved on.³³ Even if this evolution has its limits and is not without its critics, it is not unreasonable to think that the case law could undergo further developments in future. The Convention itself is a living instrument to be interpreted according to present-day conditions.

However, the economic and financial crisis of recent years and the austerity measures that have been adopted in many countries are a major challenge for social rights and (more generally) pose a worrying risk of a regression in fundamental rights, which requires special vigilance.

II. An evolving case law

13. I shall confine myself to three highly sensitive situations in the current context. All three are similar in that they involve cases of poverty which are quite simply an affront to human rights.³⁴ Situations of poverty may not only lead to violations of civil and political rights, particularly those

²⁸. *Ibid.*, p. 5.

²⁹. *Ibid.*, p. 10.

³⁰. N. Bernard, "L'effectivité du droit constitutionnel au logement", *op. cit.* As analysed by J. Fierens, "although there are question marks over the effectiveness of human rights, their assertion has never been abandoned. On the contrary, in doing this we are strengthening them" ("L'article 23 de la Constitution : une arme contre la misère ?", *D.Q.M.*, No. 3, 1994, p. 10).

³¹. See *Les droits sociaux ou la démolition de quelques poncifs*, *op. cit.*

³². See N. Aliprantis, "Les droits sociaux sont justiciables !", *Droit social*, 2006, pp. 158 et seq.; C. Nivard, *La justiciabilité des droits sociaux. Etude de droit conventionnel européen*, Brussels, Bruylant, 2012.

³³. E. Brems, "Indirect protection of social rights by the European Convention on Human Rights", *Exploring social rights – Between theory and practice*, edited by D. Barak-Erez and A. Gross, Oxford, Hart Publishing, 2007, pp. 135 et seq.

³⁴. See Fr. Tulkens, "Les relations entre économie et droits de l'homme. Coûte que coûte !", *Liber Amicorum López Guerra*, 2017, not yet published.

concerning human dignity and physical integrity, but also the persons affected by poverty may find themselves restricted in their ability to exercise the other rights guaranteed by the Convention.³⁵

³⁵. Center for Economic and Social Rights, *Human Rights and the Global Economic Crisis. Consequences, Causes and Responses*, 2009 (available online at: www.cesr.org). For an overview of the issue, see Fr. Tulkens and S. Van Drooghenbroeck, "Pauvreté et droits de l'homme. La contribution de la Cour européenne des droits de l'homme", *Pauvreté – dignité – droits de l'homme. Les 10 ans de l'accord de coopération*, Brussels, Combat Poverty, Insecurity and Social Exclusion Service, 2008, pp. 65 et seq.

Vulnerable persons

14. With regard to Article 2 of the Convention (“Everyone’s right to life shall be protected by law”), matters relating to *health* are a good indicator of the Court’s gradually increasing interest in the responsibility of states in the social field.³⁶

An example lies in the inadmissibility decision in *Nitecki v. Poland* of 21 March 2002. The Court expanded on the principle of the general obligation of the state. It noted that it cannot be ruled out that the actions and omissions of the authorities in the field of health policies may incur their liability in certain cases. An issue may arise under Article 2 if it is proved that the authorities of a contracting state endangered a person’s life by refusing medical care that the former committed to providing for the whole population. This case law echoes one of the aspects of the Council of Europe Action Plan for Social Cohesion, which recommends expanding health as a pillar of social cohesion and promoting “health and human rights for all”.³⁷

15. The case of *Vilnes and Others v. Norway* of 5 December 2013 concerned the protection of the safety and health of workers employed in the private sector, which is described by N. Hervieu as “a relatively new issue in Strasbourg”.³⁸ Referring to Article 2 of the Convention, the Court established a positive obligation of the state to inform workers about the professional risks they are exposed to, in this case during diving operations in the North Sea led by a private company.³⁹ The state is therefore required to take action to safeguard the rights guaranteed by the Convention even and including in relationships between individuals.

16. The Court also considered whether Article 3 of the Convention could serve as a foundation for state obligations in favour of *vulnerable persons*. Can it not be considered that economic and social exclusion “humiliates the individual themselves and in front of others” and “it inherently creates feelings of fear, anxiety and inferiority”? “Is it truly absurd to conclude that if corporal

³⁶. It is interesting to note that issues of health first arose with regard to the Convention in the field of prisons. See Fr. Tulkens and P. Voyatzis, “Le droit à la santé en prison. Les développements de l’article 3 de la Convention européenne des droits de l’homme”, *Rev. dr. pén. crim.*, 2009, pp. 364 et seq.

³⁷. *Synthèse du rapport de la task force de haut niveau sur la cohésion sociale au XXI^e siècle. Vers une Europe active, justice et cohésive sur le plan social*, op. cit., p. 9.

³⁸. ECHR judgment *Vilnes and Others v. Norway* of 5 December 2013; N. Hervieu “L’émergence laborieuse mais prometteuse d’une obligation européenne de protection des travailleurs”, *Lettre “Actualités Droits-Libertés” du CREDOF* [online], 16 December 2013.

³⁹. *Ibid.*, § 235.

punishment in a school is considered degrading, then the same should be said of the situation of someone living in a shanty town?" asks P.-H. Imbert.⁴⁰

The *Larioshina v. Russia* judgment of 23 April 2002 is significant in this regard: "The Court recalls that, in principle, it cannot substitute itself for the national authorities in assessing or reviewing the level of financial benefits available under a social assistance scheme (...). This being said, the Court considers that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman and degrading treatment".⁴¹

The case of *Budina v. Russia* pursues the opening up achieved in this way and offers a response to arguments that, according to some, call for a development of the case law.⁴² Indeed, the Court did not rule out the possibility that the state could be held responsible in a situation where the applicant, who was completely dependent on public assistance, was confronted with indifference by the authorities when she found herself in a very impoverished state, incompatible with human dignity.⁴³

17. The Court has also examined the social situation of *migrants* and *asylum seekers* under Article 3.⁴⁴ In the case of *M.S.S. v. Belgium and Greece* of 21 January 2011, in which an asylum seeker found himself living on the street for months without resources, healthcare access or any means to provide for essential needs due to the inaction of the public authorities, the Court considered that the person concerned had been a victim of degrading treatment that demonstrated a lack of respect for his dignity and that this situation caused him to feel fear, anguish or inferiority capable of inducing desperation. It believed that these living conditions, combined with the prolonged uncertainty that he experienced and the complete absence of an improvement in his situation, had reached the level of severity required under Article 3 of the Convention.⁴⁵

18. With regard to the situation of an applicant who had the triple disadvantage of being a *woman, elderly and living with a disability*, the *McDonald v. the United Kingdom* judgment of 20 May 2014 is, unfortunately, a counterexample. In this case, the applicant, an elderly woman with extremely limited mobility, complained that a local authority had reduced the amount allocated to

⁴⁰ P.-H. Imbert, "Ouverture", in *Les droits fondamentaux ou la démolition de quelques poncifs*, op. cit., p. 12.

⁴¹ ECHR decision *Larioshina v. Russia* of 23 April 2002.

⁴² D. Roman, *Le droit public face à la pauvreté*, Paris, L.G.D.J., 2002.

⁴³ ECHR decision *Budina v. Russia* of 18 June 2009.

⁴⁴ European Court of Human Rights, Preparatory document for the seminar on 25 January 2013, op. cit., § 17.

⁴⁵ ECHR (GC), judgment *M.S.S. v. Belgium and Greece* of 21 January 2011, § 263.

her for weekly care after considering that her nightly needs in terms of hygiene could be covered by providing incontinence protection and absorbent sheets instead of someone staying with her at night to help her go to the toilet.

The Court declared the applicant's complaint inadmissible as manifestly ill-founded, because the interference in the applicant's exercise of her right to respect for her private life had been both proportionate to the aim pursued and "necessary in a democratic society".⁴⁶ More specifically, in this weighing of interests, the Court bore in mind that the states enjoy wide discretion ("a wide margin of appreciation") with regard to social, economic and health policy issues, particularly when they must decide how to allocate limited resources.⁴⁷ The Court deemed that it should not try to substitute the competent national authorities' consideration of the merits of the impugned measure with its own. In this connection, it noted that the national courts, including the Court of Appeal and the Supreme Court, weighed the healthcare needs of the applicant against the state's social responsibility, which also entailed ensuring the well-being of other healthcare patients in the community on the whole.⁴⁸ The insensitivity and the formalism of this conventional and "catch-all" approach reveal an indifference to the specific circumstances of the applicant.

Towards a right to housing

19. As things stand, there is no real "right to housing" protected by the Convention, even if it is not impossible that this situation will evolve in future depending on the cases brought before the Court, which may make it possible to expand and/or refine its case law. It would, however, be excessive to claim that housing, if it is unable to obtain such status, would be condemned to exist as an area outside the Convention law and therefore outside the European Court of Human Rights' scope of action.⁴⁹ As Fr. Ost⁵⁰ points out, a protected legal interest falls between a full subjective right and a purely factual issue. In light of the European Court of Human Rights' case law, it seems undeniable that housing is already considered as a right.⁵¹

⁴⁶. ECHR, judgment *McDonald v. the United Kingdom* of 20 May 2014, § 58.

⁴⁷. *Ibid.*, § 54.

⁴⁸. *Ibid.*, § 57.

⁴⁹. See this issue in Fr. Tulkens and S. Van Drooghenbroeck, "Le droit au logement dans la Convention européenne des droits de l'homme. Bilan et perspectives", *Le logement dans sa multidimensionnalité. Une grande cause régionale*, edited by N. Bernard and C. Mertens, Ministry of the Walloon Region, Studies and documents, Namur, 2005, pp. 311 et seq.

⁵⁰. Fr. Ost, *Droit et intérêt*, vol. 2, *Entre droit et non-droit : l'intérêt*, Brussels, Publications des Facultés universitaires Saint-Louis, 1990.

⁵¹. N. Bernard and Fr. Tulkens, "Le 'droit au logement' dans la Convention européenne des droits de l'homme : une illustration de l'idée 'ostienne' d'intérêt", *Le droit, malgré tout – Liber amicorum François Ost*, Publications de l'Université Saint-Louis, 2017, yet to be published. For further developments on social justice, see C. Nivard, "La justice sociale dans la

20. The recognition of the right to housing as an interest protected by the Convention is clearly apparent in the case law relating to restrictions that could be imposed on the right to property. In the *James and Others v. the United Kingdom* judgment of 21 February 1986, which is a landmark in our case law, the applicants, who were property owners, claimed that the forced transfer of their immovable property to the tenants living in these properties violated Article 1 of the First Protocol. However, the Court rejected this claim, highlighting, in particular, the objective of social justice underlying such a transfer.⁵² "Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially, modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces."⁵³

In the same way, nearly twenty years later, the Court accepted that a house built without permission and without any legal grounds represented a substantial proprietary interest, since in this instance, the Court considered that an explosion in a public rubbish tip led to a loss of property.⁵⁴

21. The *Hutten-Czapska v. Poland* judgment of 19 June 2006, involving rent control measures during a housing crisis, is important.⁵⁵ Under Article 46 of the Convention, "[a]s regards the general measures to be applied by the Polish State in order to put an end to the systemic violation of the right of property identified in the present case, and having regard to its social and economic dimension, including the State's duties in relation to the social rights of other persons [...], the Court considers that the respondent State must above all, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords, including their entitlement to derive profit from their property, and the general interest of the community – including the availability of sufficient accommodation for the less well-off – in accordance with the principles of the protection of property rights under the Convention."⁵⁶

22. I would also like to mention the *McCann v. the United Kingdom* judgment of 13 May 2008, in which the Court expressed its opinion on an eviction from social housing, stating that "the loss of

jurisprudence conventionnelle", *La justice sociale saisie par les juges en Europe*, edited by L. Burgorgue Larsen, Paris, Pedone, coll. Cahiers européens, No. 4, 2013, pp. 61 et seq.

⁵². ECHR judgment *James and Others v. United Kingdom* of 21 February 1986, § 47.

⁵³. *Ibid.*, § 54.

⁵⁴. ECHR (GC), judgment *Öneriyildiz v. Turkey* of 30 November 2004, § 129.

⁵⁵. ECHR (GC), judgment *Hutten-Czapska v. Poland* of 20 June 2006, § 234.

⁵⁶. *Ibid.*, § 239.

one's home is the most extreme form of interference with the right for respect for the home", to the extent that such a measure is only admissible under the Convention if the proportionality of the measure is determined by a judicial review.⁵⁷

23. More recently, in the *Almeida Ferreira and Melo Ferreira v. Portugal* judgment of 21 December 2010, the Court stated that the statutory prohibition on terminating a long lease did not violate the applicants' right to property because, in this instance, the contested legislation was founded on protecting a social category considered by the state as needing special protection.⁵⁸ In a different case with a similar context, the *Société Cofinfo v. France* decision, the Court declared the complaint inadmissible under Article 6 § 1 and Article 1 of the First Protocol. It judged that these provisions had not been violated in a situation where the public authorities had refused to enforce a binding court decision ordering eviction from a building, specifically because the illegal occupants were in a precarious and unstable situation and consequently deserved increased protection.⁵⁹ In any event, the Court protects the right to housing, irrespective of the legal status of the occupant, owner or tenant.⁶⁰

Social protection and the right to the peaceful enjoyment of possessions

24. Paradoxically, the constructive interpretation by the Court of Article 1 of the First Protocol to the European Convention on Human Rights prompted a considerably more open approach, especially in the field of social justice, which is essentially foreign to the Convention.⁶¹ For a long time, the Court has been developing a significant body of case law on social protection.⁶² Integrating and enhancing the achievements of the case law already established, the policy decision taken in the case of *Stec and Others v. the United Kingdom* accepted that the notion of "property" included in the Convention could cover all social benefits and allowances, whether contributory or not.⁶³ Significantly, the Court noted that, in a modern democratic state, "many individuals were, for all or part of their lives, completely dependent for survival on social security and welfare benefits. [...]"

⁵⁷. ECHR judgment *McCann v. the United Kingdom* of 13 May 2008, § 50; with regard to this judgment, see N. Bernard, "Pas d'expulsion de logement sans contrôle juridictionnel – Le droit au logement et la Cour européenne des droits de l'homme", *Rev. trim. dr. h.*, 2009, pp. 527 et seq.

⁵⁸. ECHR judgment *Almeida Ferreira and Melo Ferreira v. Portugal* of 21 December 2010, § 33.

⁵⁹. ECHR decision *Société Cofinfo v. France* of 12 October 2010.

⁶⁰. N. Bernard and Fr. Tulkens, "Le 'droit au logement' dans la Convention européenne des droits de l'homme : une illustration de l'idée 'ostienne' d'intérêt", op. cit.

⁶¹. L. Burgorgue-Larsen, "Les paradoxes de la justice sociale", *La justice sociale saisie par les juges en Europe*, op. cit., p. 194.

⁶². ECHR judgment *Gaygusuz v. Austria* of 16 September 1996. See also ECHR judgment *Koua Poirrez v. France* of 30 September 2003; ECHR judgments *Niedzwiecki v. Germany* and *Okpisz v. Germany* of 25 October 2005; ECHR judgment *Luczak v. Poland* of 27 November 2007.

⁶³. ECHR (GC) decision *Stec and Others v. the United Kingdom* of 6 July 2005.

Where an individual had an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable".⁶⁴

25. Undoubtedly, this legal definition does not imply that states parties to the Convention would now be obligated to guarantee non-existent social benefits in their legal system.⁶⁵ However, when combined with Article 14 of the Convention, Article 1 of the First Protocol prevents the state denying individuals access to these benefits, where they exist, for reasons relating to their sex,⁶⁶ marital status,⁶⁷ or even their nationality.⁶⁸ This combination is all the more effective now that the recent case law of the Court has simultaneously developed an interpretation of Article 14 that is particularly favourable to the protection of vulnerable groups, whether it be by admitting the legality of positive actions,⁶⁹ by asserting the prohibition of indirect forms of discrimination,⁷⁰ or by imposing a sharing of the burden of proof in matters of discrimination.⁷¹

26. In the *Tétéryny v. Russia* judgment of 30 June 2005, the European Court of Human Rights goes further and does not hesitate to extend the concept of property to a court decision granting social tenancy, which clearly shows that the concept of "property" cannot be limited to material items. The Court considered that the inability for the applicant to be provided with state housing, in the form of a flat, after a 10-year wait was an interference in the enjoyment of his right to property, for which the government had not given a plausible explanation.⁷²

27. The *Bélané Nagy v. Hungary* judgment handed down by the Grand Chamber on 13 December 2016 adds to this case law.⁷³ After the applicant had contributed to the social security scheme for over 20 years, she received a disability pension from 2001 onwards, calculated on the basis of a degree of disability of 67%. Due to a law introduced in 2012, which added a new award criterion, the applicant was no longer entitled to a disability pension, because she could not satisfy the new conditions despite there being no change in her health. The case was referred to the Grand

⁶⁴. Ibid., § 51.

⁶⁵. Ibid., § 54.

⁶⁶. ECHR judgment *Willis v. the United Kingdom* of 11 June 2002; ECHR (GC), judgment *Konstantin Markin v. Russia* of 22 March 2012.

⁶⁷. ECHR judgment *Wessels-Bergervoet v. the Netherlands* of 4 June 2002.

⁶⁸. ECHR judgment *Koua Poirrez v. France* of 30 September 2003.

⁶⁹. ECHR (GC) judgment *Stec and Others v. the United Kingdom* of 12 April 2006, esp. §§ 61 et seq.

⁷⁰. ECHR (GC), judgment *D.H. and Others v. the Czech Republic* of 13 November 2007.

⁷¹. Ibid. For an overview of these issues, see E. Palmer, "Protecting socio-economic rights through the European Convention on Human Rights: Trends and developments in the European Court of Human Rights", *Erasmus Law Review*, 2009, vol. 2, No. 4, pp. 397 et seq.

⁷². ECHR judgment *Tétéryny v. Russia* of 30 June 2005, §§ 50-51.

⁷³. ECHR (GC), judgment *Bélané Nagy v. Hungary* of 13 December 2016, §§ 74 et seq.

Chamber which, like the chamber in its judgment of 10 February 2015, concluded that there had been a violation of Article 1 of the First Protocol.⁷⁴

This case is based on the balance that must be maintained between freedom for the state to alter the conditions for awarding social benefits, particularly due to budgetary constraints, and the need for individuals receiving these benefits to enjoy a certain degree of certainty and security with regard to the maintenance of their rights. In the light of the case file, it was established that the applicant had been in possession of property since 2001 as, meeting all the criteria, she had been granted a disability pension that gave her a “legitimate expectation” that she would continue to receive this benefit as long as she satisfied the award criteria. The Court nonetheless considered that the adoption of the law in 2012 must be analysed not as a suppression of this “legitimate expectation”, but rather as interference with the right to property.⁷⁵ It is true that this interference had the legitimate aim of “saving public money by reforming and rationalising disability benefits”.⁷⁶ Nevertheless, the Grand Chamber assessed the proportionality of this interference by drawing on important aspects of existing case law, in particular: the total reduction in the allowance; the discriminatory nature of losing every right to it; the use of transitional measures; any arbitrariness in the new awards criteria; the good faith of the applicant; and, above all, any violation of the substance of the rights to a pension.⁷⁷ Disregarding the state’s wide margin of appreciation in this field, the Grand Chamber concluded that in the case under consideration the applicant had had to bear an excessive individual burden and that there had been a violation of Article 1 of the First Protocol.⁷⁸

Conclusion

28. The track record of the European Court of Human Rights in the field of social rights is varied. Advances have indubitably been made in the case law and the legal instruments. Protocol No. 12 to the Convention, relating to the general prohibition of discrimination in respect of any right provided for by law and in any action by a public authority, may be conducive to progress in the social field. However, the achievements are also tainted by uncertainty, especially in the current period of regression. The Court must stand firm because it is the last line of defence in many

⁷⁴. Ibid., § 126.

⁷⁵. Ibid., § 120.

⁷⁶. Ibid., § 124.

⁷⁷. Ibid., §§ 119-126.

⁷⁸. Ibid., § 126.

circumstances. As N. Bratza says, in times of crisis, human rights are not a luxury but a necessity.⁷⁹ In this connection, Professor Giovanni Giuglia's contribution to this conference on *Social Rights Litigation before the Italian Constitutional Court in Times of Economic Crisis* is particularly important and significant.

29. That said, the uncertainty must, in any event, lead us to hope that the international mechanisms, which have been specifically dedicated to guaranteeing social rights, will gain in effectiveness. The European Social Charter is an instrument with a wealth of provisions that have still not been sufficiently explored or at least remain untapped.⁸⁰ This situation needs to change. With this in mind, the excellent results of the collective complaints procedure of the European Committee of Social Rights are to be welcomed.⁸¹ Just as we must welcome the recent adoption, by the UN Human Rights Council, of the much-awaited Additional Protocol which establishes a mechanism of individual statements before the Committee on Economic, Social and Cultural Rights.

30. In the recognition and respect of social rights, it is essential to have complementarity and collaboration between all of the instruments that ensure the protection of fundamental rights.

⁷⁹. Speech by Sir Nicolas Bratza, Solemn Hearing for the Opening of the Judicial Year at the European Court of Human Rights, Strasbourg, 27 January 2012, available online: www.echr.coe.int (The Court – The President – Speeches – 2012).

⁸⁰. J.-P. Marguénaud and J. Mouly, "Le Comité européen des droits sociaux : un laboratoire d'idées sociales méconnu", *Revue du droit public*, 2011, pp. 685 et seq.

⁸¹. See J.-Fr. Akandji-Kombe, "Actualité de la Charte sociale européenne", *Rev. trim. dr. h.*, 2008, p. 507.