

2 THE EUROPEAN COURT OF HUMAN RIGHTS AND SOCIAL RIGHTS – EMERGING TRENDS IN JURISPRUDENCE?

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The approach of the European Court of Human Rights (ECtHR) to socio-economic rights has long been characterised by its caution. This comes as no surprise since the European Convention on Human Rights is a ‘classic’ civil and political rights treaty, which is essentially framed in negative terms.

Still, there seem to be new trends in the Court’s social rights jurisprudence. In fields such as housing, health and social security, the European Court takes a more and more affirmative stand. Increasingly, a core of social rights thus seems to be protected in the Court’s interpretation of the European Convention.

This contribution focuses on these emerging trends in the ECtHR’s social rights jurisprudence. It identifies general lines/criteria in the Court’s case law, outlines the challenges encountered and shows ways forward.

2.1 INTRODUCTION

The case law of the ECtHR on social rights is a particularly captivating topic. Despite the much emphasized indivisibility of human rights, economic and social rights are still not given the same attention as civil and political rights.

At universal level, both ‘generations of rights’ are enshrined in two separate Covenants – the International Covenant on Economic, Social and Cultural Rights (CESCR)¹ and the International Covenant on Civil and Political Rights (CCPR)² – with differently framed

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1 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966. For status of ratification, check <https://treaties.un.org/>.

2 International Covenant on Civil and Political Rights, adopted 16 December 1966. For status of ratification, check <https://treaties.un.org/>.

state obligations in the respective Articles 2. Article 2 CCPR provides for a clear cut obligation of result, requiring a state to ‘respect’ and ‘ensure’ the rights in the CCPR.³ Article 2 CESCRCR, conversely, is characterised by the principle of progressive realisation. It establishes an obligation of conduct and only obliges a state to take steps to achieve ‘to the maximum of its available resources’ the rights enshrined in the CESCRCR.⁴

Also the monitoring of states’ compliance with their obligations is different. While an Optional Protocol (OP) providing for individual communications was adopted at the same time with the CCPR in 1966 and entered into force 10 years later, one had to wait until 2008 and 2013 respectively to witness a similar development in the case of the CESCRCR. Likewise, states’ acceptance of the Optional Protocols differs greatly: while 115 states have so far signed up to the OP to the CCPR, the OP to the CESCRCR to date only has 20 ratifications.^{5,6}

The same holds true for the regional level of Europe. Both generations of rights – civil and political and economic, social and cultural rights – are enshrined in two different instruments: the (revised) European Social Charter (ESC)⁷ and the European Convention on Human Rights (ECHR, European Convention). For evident reasons, the ESC has long been called the ‘little sister’ of the ECHR. The rights and state obligations in the (revised) ESC are far less stringent than those laid down in the ECHR. State parties to the (revised) ESC may proceed to an ‘à la carte ratification’ and – save for five out of seven core articles – selectively ratify which rights they prefer to consider as binding (opting-in system, Art. 20 ESC).⁸ Also the monitoring of state obligations is different: individual and inter-state complaints procedures in the framework of the ECHR versus a system mainly based on state reporting in the case of the (revised) ESC.⁹ What is more, the European Committee

3 Art. 2 CCPR: ‘1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in this present Covenant’

4 Art. 2 CESCRCR: ‘1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in this present Covenant by all appropriate means, including particularly the adoption of legislative measures’

5 United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en (retrieved 10 July 2015).

6 For a comprehensive and nuanced account set out in the CESCRCR see B. Saul, D. Kinley, and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (2014); see also P. Alston, and G. Quinn, ‘The nature and scope of states parties’ obligations under the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly* (1987) 156-229.

7 Council of Europe Publishing, *The European Social Charter* (2012); and Council of Europe Publishing, *European Social Charter – Collected Texts* (4th ed, 2003).

8 43 states have so far ratified the original or revised ESC. For the status of signatures and ratifications check the website www.coe.int/T/DGHL/Monitoring/SocialCharter/ (last accessed 10 July 2015).

9 For an overview over the procedures available through the economic, social and cultural rights, see K. Lukas, ‘The European Committee of Social Rights – The European Monitor in the Social Sphere’, *16 Austrian Review of International and European Law* (2011) 83-95. See especially Chapter V: ‘The Interaction of the

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of Social Rights is only competent to adopt non-binding decisions subject to approval by the Committee of Ministers of the Council of Europe (CoE) whereas in the case of the ECHR, there is a fully-fledged Court competent to hand down binding judgments.¹⁰

Traditional reasons behind this difference are the distinction between ‘negative’ and ‘positive’ rights. Civil and political rights require the state only to abstain from action, i.e. not to torture or not to interfere with the freedom of expression (‘negative rights’). Economic, social and cultural rights, conversely, are more resource-intensive with positive state obligations requiring, for instance, the provision of housing or the establishment of hospitals and educational institutions and thus depend more on the financial means of states.¹¹ In view of these considerations, economic, social and cultural rights have for long been considered as not being possible subjects of judicial enforcement.

This traditional/classic distinction between civil and political rights as well as economic, social and cultural rights has rightly been challenged.¹² For example, even the most archetypal ‘negative/civil’ rights, such as the prohibition of torture or the right to a fair trial, require positive state action, such as the training of the police and the establishment of a functioning court system. What is more, obvious ‘social dimensions’ are inherent in various civil rights, including the right to private and family life (Art. 8 ECHR) which covers aspects of the rights to housing or health; the prohibition of inhumane and degrading treatment (Art. 3 ECHR); or – the overarching – right to life (Art. 2 ECHR).¹³ Against that background it seems of particular interest to examine to what extent economic and social rights are protected in the case law of the ECtHR. This contribution will focus on some of the most central social rights, *viz* health- and housing-related rights.

First, it will deal with challenges to the protection of social rights in the framework of the ECHR (Part 2.2). In Part 2.3, it will be shown that there are nonetheless ‘social rights

European Committee of Social Rights with the European court of Human Rights.’ See also Part II of *The European Social Charter* of G. De Búrca and B. de Witte, *Social rights in Europe* (2005).

10 For an overview and assessment of international and domestic judgments on social rights see M. Langford, (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008).

11 Interestingly, unlike the CESC, the African Charter on Human and Peoples’ Rights does not subject socio-economic rights to the doctrine of ‘progressive realization’, i.e. the dependence of social and economic rights on available resources of the state (Art. 2 CESC). However, the African Commission of Human and Peoples’ Rights, aware that scarce resources and the ‘problem of poverty’ are quite a factor in African economies, in the *Gambian Mental Health* case held that available resources are the delimitation of the state’s obligations while they retain the core obligation to take concrete, targeted and non-discriminatory steps (African Commission of Human Rights, Communication 241/01, *Purohit and another v. The Gambia* (2003) AHRLR 96 Para. 84). See also F. Viljoen, ‘The African Regional Human Rights System’, in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: A Textbook* (2009). See also D.M. Chirwa, ‘African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights’, in M. Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008).

12 See, for example, M. Nowak, ‘Introduction to Human Rights Theory’, in M. Nowak, K. M. Januszewski, T. Hofstätter (eds.), *All Human Rights For All – Vienna Manual on Human Rights* (2011) 269-279; and M. Nowak, *Introduction to the International Human Rights Regime* (2003) 23-27.

13 K. Drzewicki (ed.), *Social Rights as Human Rights: A European Challenge* (1994).

dimensions' inherent in the provisions of the ECHR. These are also recognised in the case law of the ECtHR. In doing so, the Court is sometimes torn between the judicial protection/enforcement of individual rights and the broader societal implications when this protection touches upon a state's economic and social policies in view of limited state budgets. This leads to a position of judicial self-restraint on the part of the Court which grants a large margin of appreciation to states. Still, in certain fields the ECtHR overcomes its position of self-restraint as will be shown in Part 2.4. Those include instances where the state bears the direct or indirect responsibility of the individual's situation of economic/social destitution or situations where the person is placed in the direct responsibility or custody of the state, such as prisoners. A certain level of protection may likewise be gained via the principle of non-discrimination and procedural guarantees. Eventually, it will be shown that the Court seems to cautiously move towards an increased protection of social rights.

2.2 THE PROTECTION OF SOCIAL RIGHTS IN THE FRAMEWORK OF THE ECHR

Several factors pose challenges to the protection of economic and social rights in the case law of the ECtHR. These include the conception of the ECHR as 'typical' civil and political rights treaty, institutional limitations of the ECtHR and the Court's traditional approach to the protection of social rights.

2.2.1 *The ECHR as 'Typical' Civil and Political Rights Treaty*

The ECHR is a 'typical' civil and political rights treaty. It protects 'rights and freedoms' (Art. 1). State obligations are framed in terms of a duty to abstain from action, i.e. as negative obligations.¹⁴

For example, Article 8 of the European Convention states that, 'Everyone has the right to respect for his private and family life, his home and his correspondence.' It thus provides protection for one's *existing* home but does not contain a reference as to a necessary provision of housing (or the necessary establishment of social housing). Another example is Article 2 of Protocol 1 to the ECHR, which establishes a right to education, providing that 'No person shall be denied the right to education.' Also Article 2 of Protocol 1 is accordingly

¹⁴ For a seminal work on the rights enshrined in the ECHR and the protocols, see C. Grabenwarter, *The European Convention on Human Rights – A Commentary* (2014).

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framed as right of access to *existing* educational facilities but not as including a state's duty to establish these educational facilities.¹⁵

The ECHR does not at all incorporate other social rights such as the right to health, social care, or social security. A pro-active role of the ECtHR as regards social rights – here, health-related and housing-related rights – finds thus its first limits in the text of the Convention itself.

2.2.2 Institutional Limitations of the ECtHR

In addition to the textual boundaries of the ECHR, there are certain institutional limitations of the ECtHR.

One argument relates to the well-known debate on the justiciability of social rights. Certainly, this debate seems to have been somehow overcome with the adoption of the Optional Protocol to the CESCR and the increased judicial enforcement of social rights at the domestic level by national tribunals. It seems thus no longer disputable that also social rights can be subject to judicial enforcement.

Somehow related is the question whether courts are necessarily best placed to decide matters with broader financial implications which touch upon a state's economic or social policies.¹⁶ Rather, the argument goes, it should be parliaments, since they provide a platform for debate, represent different sectors of the population and also have the democratic mandate to decide matters of policy.¹⁷

What is more, the role of the European Court is by definition a subsidiary one. It is a means of last resort in terms of human rights protection. Especially in the field of social rights – which touch upon a state's financial policies and impact on resource allocation within a society, domestic governments are usually better placed to decide and closer to the situation. This is also recognized by the ECtHR. In terms of Clements and Simmons: "The European Court nevertheless recognized that questions that concern the distribution of scarce resources are often better addressed by individual governments."¹⁸

15 See, however, B. Rainey, E. Wicks, and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (2014) 521 on the positive obligations of states to accommodate parental wishes flowing from religious or philosophical wishes. See also C. Grabenwarter, *above* n. 14, 398.

16 See respectively A. Lester and C. O'Conneide, 'The effective protection of socio-economic rights', in Y. Ghai and J. Cottrell (eds.), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (2004) 17-23.

17 See the Court's unwillingness to decide upon obligations when it comes to housing: 'Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision', *Jane Smith*, *below* n. 25, Para. 106.

18 L. Clements and A. Simmons, 'European Court of Human Rights: Sympathetic Unease'. In M. Langford, *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (2008) 409, 409.

In sum, there are obvious institutional limitations for the Court to decide matters with far-reaching social dimensions. In view of these considerations, it comes as no surprise that the ECtHR's approach to social rights has long been – and still is – a cautious one.

2.2.3 *The ECtHR's Traditional/Classic Approach to Social Rights*

The Court generally adopts a position of deference (or judicial self-restraint) and grants a broad *margin of appreciation*¹⁹ to domestic authorities. For example, the Court confirmed the state's wide margin of appreciation in the field of the right to health and medical care in *Pentiacova and 48 Others v. Moldova*.²⁰ The applicants had complained about the insufficient public funding of haemodialysis treatment. The Court first held that Article 8 ECHR indeed was relevant to complaints about public funding to facilitate the mobility and quality of life of disabled applicants (as it did in a number of other cases, e.g. in *Sentges*²¹). Still, the complaint was inadmissible due to the state's wide margin of appreciation and the state's necessary setting of priorities in view of limited state budgets. The Court thus left it to domestic authorities how to best decide upon the allocation of financial resources.²²

This had been made even clearer in *Sentges v. the Netherlands*.²³ A physically disabled man had asked to be provided with a robotic arm; the funding of which was denied by Dutch authorities. The ECtHR acknowledged the link between the applicant's demand and his private life (Art. 8). However, again, the Court held that the complaint fell within the wide margin of appreciation of the state in the context of allocation of limited resources and considered the complaint inadmissible also in view of the fact that the applicant already enjoyed a certain level of public assistance. In the Court's words:

19 On the Court's practice of the margin of appreciation see D. Gomien, D. J. Harris, and L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (1996) 215-218. For substantive analysis and critique of the concept and how the Court resorts to it, see G. Letsas, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006) 705-732. For a comparative assessment, see G. Candia, 'Comparing Diverse Approaches to the Margin of Appreciation: The Case of the European and the Inter-American Court of Human Rights', Pontificia Universidad Católica de Chile Law School, Working Paper No. 1, available at SSRN (2014).

20 ECtHR, *Pentiacova and 48 Others v. Moldova*, Appl. No. 11462/03, admissibility decision dated 4 January 2005.

21 See *below* n. 23.

22 The Court is less tolerant concerning the state's margin of appreciation when it comes to non-financial obligations. See, for example Para. 128 of *Öneryıldız*, *below* n. 38: '[W]hen faced with an issue such as [a methane explosion killing people and destroying property], the authorities cannot legitimately rely on their margin of appreciation, which in no way dispenses them from their duty to act in good time, in an appropriate and, above all, consistent manner.'

23 ECtHR, *Sentges v. the Netherlands*, Appl. No. 27677/02, admissibility decision dated 8 July 2003.

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Even assuming that in the present case such a special link indeed exists [...], regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and to the wide margin of appreciation enjoyed by States in this respect in determining the steps to be taken to ensure compliance with the Convention [...]. This margin of appreciation is even wider when, as in the present case, the issues involve an assessment of the priorities in the context of the allocation of limited State resources.²⁴

The ECtHR's position of deference towards domestic authorities is also evidenced in the field of housing-related rights and more particularly in relation to forced evictions. In case of forced evictions, the Court focuses mainly on the existence of procedural safeguards but normally does not question the authorities' substantive assessment. For instance, in *Jane Smith v. UK*²⁵ – as well as, in similar terms, in other cases such as in *Thomas and Jessica Coster v. UK*²⁶ or *Chapman v. UK*²⁷ –, the Court found in case of Gypsy families who had not obtained permissions to station their caravans in the UK, that there was no violation of their right to private and family life (Art. 8 ECHR), nor of their right to property (Art. 1 of Protocol 1) or of the right to a fair trial (Art. 6 ECHR). The families had argued, *inter alia*, that the UK government's decision violated their right to private and family life (Art. 8 ECHR), since to live in caravans would be part of their traditional lifestyle and the number of places to station caravans was statistically lower than the number of gypsies. Whereas the Court accepted the 'lifestyle argument', it found that the eviction measures were in accordance with the law, pursued a legitimate aim (protection of the rights of others and of the environment) and stated that the domestic authorities enjoyed a wide margin of appreciation in the determination of the necessity of the measures taken. In doing so, the Court held:

It is important to recall that Article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. [...] Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.²⁸

The ECtHR thus declined the state's/UK's positive obligations under Article 8, the right to private and family life, and did not establish corresponding violations.

²⁴ Ibid.

²⁵ ECtHR, *Jane Smith v. the United Kingdom*, Appl. No. 25154/94, judgment dated 18 January 2001.

²⁶ ECtHR, *Coster v. The United Kingdom*, Appl. No. 24876/94, judgment dated 18 January 2001.

²⁷ ECtHR, *Chapman v. The United Kingdom*, Appl. No. 27238/95, judgment dated 18 January 2001.

²⁸ See ECtHR, *Jane Smith*, above n. 25, Para. 106.

It becomes clear from the above that the Court is careful with reading positive state obligations – ‘social rights dimensions’ – into the text of the ECHR. Rather, the Court generally stresses the wide margin of appreciation of states as regards the adoption of social policies and related questions and adopts a position of deference with respect to issues involving broader questions of resource allocation.²⁹

2.3 SOCIAL RIGHTS DIMENSIONS IN SELECTED PROVISIONS OF THE ECHR

Numerous provisions in the ECHR necessarily enshrine a social dimension which is also recognized in the case law of the Court. This will be emphasized with particular focus on health-related and housing-related rights as implied in Article 8 (right to private and family life), Article 3 (prohibition of torture and inhumane and degrading treatment), Article 2 (right to life) and Article 1 of Protocol 1 (peaceful enjoyment of one’s properties).

For instance, the ECtHR has recognized that Article 8 ECHR, the right to private and family life, also comprised a right to be protected against severe cases of environmental pollution and thus indirectly upheld a right to health. In *López Ostra v. Spain*,³⁰ the Court found that the applicant’s effective enjoyment of her right to private and family life was infringed by the health problems and nuisance caused by a waste water plant operating in her vicinity. Spain had failed to balance the community’s interest of having a water treatment plant and the appellant’s enjoyment of her right to respect for home and to private and family life. The Court thus found a violation of Article 8. In *Guerra and others v. Italy*,³¹ the Court held that Italy’s failure to provide the local population with information about the pollution risk factor and how to proceed in the event of an accident at a nearby chemical factory amounted to a violation of Article 8 ECHR. In *Tătar v. Romania*,³² by withholding studies on environmental and health impacts, Romania was found to breach its positive obligations to assess risks and consequences of hazardous industrial processes and to keep the public informed. This amounted to a violation of Article 8. The ECtHR’s case law on Article 8 ECHR thus reflects obvious health dimensions of the right to private and family life and shows that the applicants’ health may be protected through reliance on the right to private and family life.

29 See J.-P. Costa, ‘European Court of Human Rights: Consistency of Its Case-Law and Positive Obligations’, 26 *The Netherlands Quarterly of Human Rights* (2008) 449.

30 ECtHR, *López Ostra v. Spain*, Appl. No. 16798/90, judgment of 9 December 1994. For an assessment, see also a. W. Heringa, ‘Private Life and the Protection of the Environment, Lopez Ostra v. Spain’, 2 *Maastricht Journal of European & Comparative Law* (1995) 196. Further aspects are covered in R. Desgagne, ‘Integrating Environmental Values into the European Convention on Human Rights’, 89 *American Journal of International Law* (1995) 263-294.

31 ECtHR, *Guerra and Others v. Italy*, Appl. No. 14967/89, judgment dated 19 February 1998.

32 ECtHR, *Tătar v. Romania*, Appl. No. 67021/01, judgment dated 27 January 2009.

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In severe cases, even Article 3 ECHR, the prohibition of torture and of inhumane and degrading treatment and punishment – the classic example of a ‘negative’ right – may have social rights dimensions. For instance, inadequate/poor detention conditions in prisons which also had an impact on the detainees’ health were seen as incompatible with prisoners’ human dignity and thus considered as violations of Article 3 (*Ananyev and Others v. Russia*,³³ *Iacov Stanciu v. Romania*³⁴ and *Torreggiani and Others v. Italy*³⁵).³⁶ Health-related issues of prisoners were thus likewise addressed through Article 3 ECHR.

In most extreme cases, involving the death of persons, also the right to life (Art. 2 ECHR) offered protection. For instance, in *Budayeva and Others v. Russia*,³⁷ the failure of the Russian authorities to implement land-use planning and emergency relief policies in the light of the foreseeable risk of a mudslide that led to loss of life was considered as a violation of the substantive and procedural aspects of Article 2. Another example for the Court’s recognition of a state’s failure to protect the right to life is *Öneryildiz v. Turkey*.³⁸ In *Öneryildiz* the municipal authorities of Istanbul had failed to prevent a looming methane explosion that happened in a rubbish tip, or at least to warn the inhabitants who were living near the tip about the dangers. The Court held, accordingly, that the Turkish authorities had not taken the necessary preventive measures to protect the inhabitants³⁹ and found a violation of Article 2 ECHR.

Housing-related rights were primarily read into the right to property (Art. 1 of Protocol 1) which was interpreted in broad terms, in a way as to protect also the property/home of persons who had not purchased the property but were living there illegally but with the acceptance of the state. In *Öneryildiz v. Turkey*,⁴⁰ for instance, the Court found that the applicant’s right to property was breached because of the destruction of his house by a methane explosion on a rubbish tip irrespective of the fact that Öneryildiz and his relatives had settled in the area without permission.

The Court held that ‘possession’ in the meaning of Article 1 of Protocol 1 also covered the ‘proprietary interest in his dwelling’ which was sufficient ‘to constitute a substantive

33 ECtHR, *Ananyev and Others v. Russia*, Appl. Nos. 42525/07 and 60800/08, judgment dated 10 January 2012.

34 ECtHR, *Iacov Stanciu v. Romania*, Appl. No. 35972/05, judgment dated 24 July 2012.

35 ECtHR, *Torreggiani and Others v. Italy*, Appl. Nos. 43517/09, 35315/10, 37818/10, 46882/09, 55400/09, 57875/09 and 61535/09, judgment dated 8 January 2013.

36 See Section 2.4.1 below for a discussion of the relevant case law.

37 ECtHR, *Budayeva and Others v. Russia*, Appl. Nos. 15339/02, 11673/02, 15343/02, 20058/02 and 21166/02, judgment dated 20 March 2008.

38 ECtHR, *Öneryildiz v. Turkey*, Appl. No. 48939/99, judgment dated 30 November 2004. See below for the housing-related aspects of the case.

39 That the Turkish authorities had set up the rubbish tip and authorised its operation, which gave rise to the dangers in the first place, and subsequently neglected the danger, were considered aggravating circumstances by the Court. Finally, the inadequate investigation into the criminal responsibility of the persons in negligence of their duties also was considered part of the breach of Art. 2.

40 *Öneryildiz*, above n. 38.

interest and hence a “possession” in the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1, independent of the fact whether the applicant actually owned the property.⁴¹ When considering whether Turkey had met its obligations under Article 1 of Protocol 1 following the accident, the Court held that the compensation awarded could not be regarded proper, that the government had not formally accepted any responsibility for the tragedy and that the sum awarded to the applicant had still not been paid. There was thus a violation of Article 1 of Protocol 1. *Öneryildiz* thus makes clear that the ECtHR may be willing to interpret ‘possession’ in a way as to even encompass illegal settlements (or the ‘proprietary interest’ connected with them). From another perspective, in *Öneryildiz*, the Court read housing-related dimensions into the scope of Article 1 of Protocol 1.⁴²

In short, health- and housing-related aspects are within the scope of different provisions of the European Convention, including Articles 2, 3, 8; and of Article 1 of Protocol 1.⁴³ This is also recognized in the case law of the Court. In certain cases, even wider social dimensions are read into the different provisions of the ECHR.

2.4 EMERGING TRENDS IN SOCIAL RIGHTS JURISPRUDENCE? THE ECtHR’S CASE LAW ON HEALTH AND HOUSING RELATED RIGHTS

2.4.1 Introduction

The ECtHR’s case law in relation to health and housing related rights evidences the obvious tension between the Court’s role as a guarantor of individual rights and the broader societal implications – e.g. on financial/economic policies of states – its judgments may have. It thus comes as little surprise that the Court limits its protection of social rights to carefully confined situations. The ECtHR relies on additional ‘vehicles’ to delimit/circumscribe its social rights jurisprudence and to ease the tension between individual human rights protection and broader societal implications. The following areas/factors can be identified as

41 Ibid., Para. 129. Before, the ECtHR had established that ‘In the Court’s words in Para. 124: ‘The concept of “possessions” is not limited to “existing possessions” but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and “legitimate expectation” of obtaining effective enjoyment of a property right [...]’ (Ibid., Para. 124).

42 On further development of the states’ obligation concerning housing, see M. Sarigiannidis and I. Pervou, ‘Adequate housing: Seeking Justiciability through the Right to Property’, 1.1. *International Journal of Human Rights and Constitutional Studies* (2013) 27-40.

43 Note that social security payments, too, are comprised within Art. 1 Protocol 1. See Paras. 40-42 of *Burdov*, below n. 46.

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conducive for the Court's finding of such social rights dimensions and for establishing violations of the ECHR.

First, the Court will be disposed of finding a violation when the gross socio-economic deficits may, directly or indirectly, be attributed to the state; i.e. when they were caused by state action.

Also, when persons are under the direct responsibility of a state/in the custody of the state such as prisoners, increased social dimensions are found.

Likewise the principle of non-discrimination is drawn upon; social benefits have to be granted on a non-arbitrary basis.

Additional means to circumscribe state action as regards social rights are procedural obligations of domestic authorities, including the duty to inform the population or the application of fair trial standards in the adjudication of social security benefits.

Generally, in cases of specific vulnerability, the Court might protect even an inner core of social rights (i.e. mostly in case of vulnerable groups).

In the case law of both health- and housing-related rights, the above mentioned factors contribute to reading an increased social dimension into the provision of the ECHR.

2.4.2 Health-Related Rights, Including Social Security Benefits⁴⁴

As stated, the ECHR does not explicitly provide for health-related rights. The Court derived the protection of these rights mainly from the right to private and family life (Art. 8 ECHR) and – in the most severe cases – from Article 2 ECHR, the right to life or from Article 3 ECHR, the prohibition of torture and inhumane or degrading treatment or punishment.

2.4.2.1 Responsibility of the State for the Situation of Socio-Economic Deprivation

States enjoy generally a wide margin of appreciation as regards the features of welfare systems and the provision of medical care.⁴⁵ However, when the state has direct responsibility for an issue, free medical cover must be provided. In *Burdov v. Russia*,⁴⁶ the non-payment of a health allowance on account of Chernobyl radiations because of lack of funding was considered a violation of Article 1 of Protocol 1 by Russia. (The Court consid-

44 See also B. C. A. Toebes, *The Right to Health as a Human Right in International Law* (1999); B. C. A. Toebes, 'The right to health', in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, (2nd ed, 2001) 169-190. and V. A. Leary, 'The right to health in international human rights law', 1 *Health and human rights* (1994) 24-56; further information can be found in the World Health Organization, '25 questions and answers on health and human rights' (2002); A. Chapman, S. Russell (eds.), *Core obligations: Building a Framework for Economic, Social and Cultural Rights* (2002); A. Hendriks, 'The right to health in national and international jurisprudence', 5.4. *European journal of health law* (1998) 389-408; E. E. Yamin and S. Gloppen (eds.), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (2011).

45 See Section 2.2 on the Court's traditional approach and the concept of margin of appreciation.

46 ECtHR, *Burdov v. Russia*, Appl. No. 59498/00, judgment dated 7 May 2002.

ered the claim against the state a ‘possession’ within the meaning of the article.⁴⁷) In *Oyal v. Turkey*,⁴⁸ the failure to provide a patient, who had been infected with HIV by blood transfusions at birth, with full and free medical cover for life was considered a violation of Article 2 ECHR: Turkey had failed to prevent the HIV infection, subsequently not provided appropriate treatment and in addition the Turkish courts had taken too long to investigate. Thus, positive obligations to provide for social security benefits/medical care are based on the state’s (direct or obviously indirect) responsibility for the respective situation.

2.4.2.2 Persons in the Custody of the State

A state obligation to safeguard a person’s right to health exists also when the person is in the custody of a state, such as in prisons. In such cases, the health and well-being of the detained have to be adequately secured. In *Ananyev and Others v. Russia*⁴⁹ the inadequate detention conditions, especially the insufficient sanitary facilities and hygiene,⁵⁰ were considered incompatible with prisoners’ human dignity⁵¹ and thus as violations mostly of Article 3 ECHR, the prohibition of torture, inhumane or degrading treatment or punishment. In *Iacov Stanciu v. Romania*,⁵² the Court found that ‘conditions in prison, in particular the overcrowding and lack of access to hygiene, as well as inappropriate treatment of [the prisoner’s] health problems’ amounted to a breach of Article 3 ECHR.⁵³ Finally, in *Torreggiani v. Italy*,⁵⁴ the Court found that prison conditions of three square meters per person and the lack of hot water over a long period of time together also violated Article 3. A state has thus additional obligations for those detained. Since the person is in the custody of the state, the latter bears responsibility for the applicant/prisoner and has to secure its well-being at least to a minimum extent.

The state has also further obligations as regards the provision of health care for detained persons, which is, again, derived chiefly from Article 3 ECHR. In *Mouisel v. France*,⁵⁵ the Court found in case of a detainee with a serious physical illness (leukaemia) that Article

47 *Ibid.*, Paras. 40-42.

48 ECtHR, *Oyal v. Turkey*, Appl. No. 4864/05, judgment dated 23 March 2010.

49 *Ananyev and Others v. Russia*, above n. 33.

50 The Court put it poetically, saying that the prisoners had to have ‘their meals and answer the calls of nature in [...] cramped conditions.’ (*Ibid.*, Para. 166).

51 The Court stated: ‘The State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured [...]’ (*Ibid.*, Para. 141).

52 *Stanciu*, above n. 34.

53 *Ibid.*, Para. 187.

54 *Torreggiani v. Italy*, above n. 35.

55 ECtHR, *Mouisel v. France*, Appl. No. 67263/01, judgment dated 14 November 2002.

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3 required states to protect the physical integrity of persons deprived of their liberty. They had thus to be given adequate medical treatment. In comparable terms, in *McGlinchey and others v. UK*,⁵⁶ the Court established a violation of Article 3 when a female prisoner was not admitted to hospital expediently in case of vomiting due to heroin withdrawal symptoms and was severely dehydrated. Likewise, in *Khudobin v. Russia*,⁵⁷ the lack of qualified and timely medical assistance to a HIV-positive suffering from epilepsy was considered a violation of Article 3 ECHR. Finally, also in *Vladimir Vasilyev v. Russia*,⁵⁸ the failure to provide a prisoner with adequate orthopaedic footwear was considered a violation of Article 3. In all these cases a state's positive obligations as regards the provision of medical care/with respect to the health of prisoners were read into the text of the ECHR since the persons were in the direct custody of the state.

2.4.2.3 Prohibition of Discrimination

Positive obligations can also stem from the prohibition of discrimination as regards social security benefits. States have generally a wide margin of appreciation as regards the establishment of social security schemes.⁵⁹ Still, once established, they must be non-discriminatory. For instance, in *Gaygusuz v. Austria*,⁶⁰ the Court found that the authorities' refusal to grant emergency assistance to an unemployed man who had exhausted the entitlement to unemployment benefits on the sole ground that he did not have Austrian nationality was a discrimination not based on any 'objective or reasonable justification'⁶¹ and therefore a violation of Article 1 of Protocol 1 in conjunction with Article 14 ECHR.

2.4.2.4 Positive State Obligations Due to Other Factors

Also where the state's direct responsibility is not engaged, states may, under certain conditions nevertheless have positive obligations as regards the provision of medical care, mostly under Articles 2 and 8 ECHR.

In *Van Kück v. Germany*,⁶² the German authorities' refusal to order reimbursement of top-up costs of a transsexual's gender re-assignment treatment to a health insurance company without taking further expertise overstepped the margin of appreciation afforded to them. The ECtHR consequently held that this violated Articles 6 and 8 ECHR.

In *Passannante v. Italy*,⁶³ a complaint about a five months waiting period merely to book a specialist's visit in an Italian public hospital was considered inadmissible, as mani-

56 ECtHR, *McGlinchey and Others v. The United Kingdom*, Appl. No. 50390/99, judgment dated 29 April 2003.

57 ECtHR, *Khudobin v. Russia*, Appl. No. 59696/00, judgment dated 26 October 2006.

58 ECtHR, *Vladimir Vasilyev v. Russia*, Appl. No. 28370/05, judgment dated 10 January 2012.

59 On the margin of appreciation, see *Pentiacova*, above n. 20, and the articles cited in n. 19.

60 ECtHR, *Gaygusuz v. Austria*, Appl. No. 17371/90, judgment dated 16 September 1996.

61 *Ibid.*, Para. 50.

62 ECtHR, *Van Kück v. Germany*, Appl. No. 35968/97, judgment dated 12 June 2003.

63 ECtHR, *Guisseppina Passannante v. Italy*, Appl. No. 32647/96, admissibility decision dated 12 June 2003.

festly ill-founded. Still, the ECtHR established that where a state scheme for the provision of health care based upon compulsory contributions existed, any excessive delay in providing a medical service to which the patient was entitled might raise an issue under Article 8 if the delay was likely to have a serious impact on the applicant's health.

States are also obliged to adopt appropriate measures for the protection of patients' life and to have an effective and independent judicial system so that the cause of death of patients can be determined and the responsible(s) be held accountable (see *Calvelli and Ciglio v. Italy*⁶⁴). In *Byrzykowski v. Poland*,⁶⁵ the Court held that the lack of effective and speedy investigation into the death of the applicant's wife and the damage to his son's health, following delivery by caesarean section, constituted a violation of Article 2 ECHR.

The above cases show that different factors may induce the ECtHR to read health related dimensions into the ECHR.

2.4.2.5 Fair Trial Standards

Also fair trial standards limit a state's discretion concerning the allocation of social security benefits. In fact, the ECtHR applied fair trial standards to assess the states' handling of social security-related complaints. In *Salesi v. Italy*,⁶⁶ the Court found that the excessive length of a proceeding aimed at seeking payment of welfare allowance constituted a violation of Article 6 ECHR and awarded compensation. (See also *Feldbrugge v. Netherlands*,⁶⁷ in which the Court held that to restrict access to an appeal body can constitute a violation of Art. 6 ECHR.) In *Kerojärvi v. Finland*,⁶⁸ the failure to disclose relevant documents to the applicant in a proceeding seeking compensation in respect of war injuries was considered a violation of Article 6 ECHR.

Overall, positive state obligations in the field of health-related rights were established on the basis of various grounds, including a state's direct responsibility for the situation of socio-economic deprivation, like in *Burdov*⁶⁹ and *Oyal*;⁷⁰ or the fact that a person was placed in the direct responsibility/custody of the state such as in prisons, like in *Khudobin*.⁷¹ A state's margin of discretion as regards health-related rights is likewise limited by the principle of non-discrimination and fair trial standards. The Court thus 'mediates' the tension between the protection of individual rights and questions of resource allocation within society by confining it to certain groups of cases.

Similar tendencies can be detected in the case of housing-related rights.

64 ECtHR, *Calvelli and Ciglio v. Italy*, Appl. No. 32967/96, judgment dated 12 June 2003.

65 ECtHR, *Byrzykowski v. Poland*, Appl. No. 11562/05, judgment dated 27 June 2006.

66 ECtHR, *Salesi v. Italy*, Appl. No. 13023/87, judgment dated 26 February 1993.

67 ECtHR, *Feldbrugge v. The Netherlands*, Appl. No. 8562/79, judgment dated 29 May 1986.

68 ECtHR, *Kerojärvi v. Finland*, Appl. No. 17506/90, judgment dated 19 July 1995.

69 See above n. 46.

70 See above n. 48.

71 See above n. 57.

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2.4.3 Housing-Related Rights⁷²

Also in the case of housing-related rights, the tension between the protection of individual rights and broader questions of resource allocation within a society are evident. Again, the Court will protect housing rights in clearly confined situations and thus engage in a careful balancing act.

2.4.3.1 Responsibility of the State for the Destruction of Property

The Court recognized housing-related rights when the applicants' homes were directly destroyed through state action. In *Selçuk and Asker v. Turkey*,⁷³ the Court established that the alleged burning of houses by security forces in South Eastern Turkey constituted a violation of Articles 3, 8, 13 ECHR and of Article 1 of Protocol 1. More particularly, when establishing a violation of Article 3, the Court considered the personal circumstances of owners, their emotional connection to their houses and their loss of property which had forced them to leave their native village. On this basis, Article 8 and Article 1 of Protocol 1 were found breached in consideration of the 'particularly grave and unjustified interferences with the applicants' rights to respect for their private and family lives and homes, and to the peaceful enjoyment of their possessions.'⁷⁴ Also Article 13 ECHR was found to be violated since the authorities in charge had not undertaken any investigation into the incident. (See also the similar case *Dulaş v. Turkey*.⁷⁵)

In *Khamzayev and others v. Russia*⁷⁶ and *Kerimova and others v. Russia*,⁷⁷ Russian military air raids on a town in Chechnya in the fight against supposed terrorists killed civilians and destroyed residential buildings. The Court established violations of Article 8 ECHR and of Article 1 of Protocol 1 in relation to several applicants. In doing so, the Court criticized, *inter alia*, that the relevant Russian laws '[did] not define with sufficient clarity the scope of those powers and the manner of their exercise so as to afford an individual adequate protection against arbitrariness [...]', which was why the 'legal instrument in question, formulated in vague and general terms, cannot serve as a sufficient legal basis for such a drastic interference as the destruction of an individual's housing and property.' Consequently, the ECtHR found that

72 S. Leckie, 'The right to housing', in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (2nd ed, 2001) 149-168; S. Leckie (ed.), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (2003); J. Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (2013).

73 ECtHR, *Selçuk and Asker v. Turkey*, Appl. Nos. 23184/94 and 23185/94, judgment dated 24 April 1998.

74 *Ibid.*, Para. 86.

75 ECtHR, *Dulaş v. Turkey*, Appl. No. 25801/94, judgment dated 30 January 2001.

76 ECtHR, *Khamzayev and Others v. Russia*, Appl. No. 1503/02, judgment dated 3 May 2011.

77 ECtHR, *Kerimova and Others v. Russia*, Appl. Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05 and 5684/05, judgment dated 3 May 2011.

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in the absence of an individualized decision or order which clearly indicated the grounds and conditions for inflicting damage on the [applicants'] property and [...] home, and which could have been appealed against in a court,

the interference with applicants' rights under Article 1 of Protocol 1 and under Article 8 of the Convention was not 'lawful', within the meaning of the Convention and established according violations.⁷⁸

In this context, also the *Hădăreni* case (*Moldovan and others v. Romania No 2*)⁷⁹ is noteworthy. The destruction of Roma village houses by a mob of villagers and police officers which the state had failed to prevent was no direct violation of Article 8 ECHR because Romania was not yet party to the Convention at the time of the destruction. Still, the subsequent poor living conditions of the Roma inhabitants that resulted from the incident (many of them had to move in with relatives in overcrowded conditions or had to stay in unworthy accommodation such as 'cellars, hen-houses, stables, etc'⁸⁰) were considered a violation of Article 8. The ECtHR found, more particularly, that since police officers had instigated the mob and not protected the property, the subsequent situation of the people affected was attributable to the state. This was aggravated by the state's failure to effectively prosecute those involved in the destruction of the houses. What is more, subsequent living conditions were bad enough as to amount to a breach of Article 3 ECHR. In the ECtHR's words,

It furthermore considers that the applicants' living conditions in the last ten years, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicants' health and well-being, combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement.⁸¹

On this basis, Romania was found in violation of Article 3 ECHR.

Overall, also housing-related rights are protected under the Convention when the state bears direct responsibility for the situation.

78 Ibid., Paras. 217-219.

79 ECtHR, *Moldovan and Others v. Romania* (No. 2), Appl. Nos. 41138/98 and 64320/01, judgment dated 12 July 2005.

80 Ibid., Para. 103.

81 Ibid., Para. 110.

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2.4.3.2 Fair Procedures

Also the requirement of fair procedures can provide certain protection as regards housing-related rights. In case of forced evictions, the Court focused mainly on the existence of procedural safeguards to assess the domestic authorities' interference with these rights. (Conversely, the Court usually did not question the authorities' substantive assessment).⁸²

In *Saghinadze and others v. Georgia*,⁸³ the Court found that the forcible eviction of the applicants (Internally Displaced Persons from Abkhazia) from their home without judicial decision ordering the eviction, without the provision of a similar accommodation or adequate monetary compensation and in the absence of an effective subsequent judicial review constituted a violation of Article 1 of Protocol 1 and Article 8 ECHR. In *Connors v. UK*⁸⁴ the eviction of gypsies by local authorities from a designated place where they had lived in a caravan for 13 years on the basis of a summary eviction procedure was found to be a violation of Article 8 ECHR for lack of sufficient procedural safeguards. Although the Court accepted the margin of appreciation of domestic authorities in relation to such complex topics as housing policies for the gypsy and traveller population in the case at issue, the Court found that schemes which allowed for summary evictions without subsequent judicial review of the individual case were not justifiable. Also in *Buckland v. UK*,⁸⁵ the eviction from a caravan site following allegations of nuisance and anti-social behaviour was considered to have occurred in lack of adequate procedural guarantees: More particularly, the automatically issued court order that allowed the landlord to evict a tenant was found to be disproportional and therefore a violation of Article 8 ECHR.⁸⁶

2.4.3.3 Towards the Protection of an Inner Core of Housing Related Rights?

What is more, the ECtHR seems to move towards the necessary protection to provide shelter in case of particularly vulnerable individuals. In *Yordanova v. Bulgaria*,⁸⁷ the Court held that the eviction of members of the Bulgarian Roma community from vacant land – where they had lived without proprietary interests but with the State's acquiescence – constituted a violation of Article 8 ECHR in view of the particular vulnerability of the applicants. The Court held that, while there was no right to be provided with a home under Article 8, '[...] an obligation to secure shelter to particularly vulnerable individuals may

82 See respectively the cases discussed under Section 2.2.3, *Jane Smith, Coster and Chapman v. UK* where the Court did not find according violations.

83 ECtHR, *Saghinadze and Others v. Georgia*, Appl. No. 18768/05, judgment dated 27 May 2010.

84 ECtHR, *Connors v. The United Kingdom*, Appl. No. 66746/01, judgment dated 27 May 2004.

85 ECtHR, *Buckland v. The United Kingdom*, Appl. No. 40060/08, judgment dated 18 September 2012.

86 Note that in *Buckland*, due to the order's automatic nature, the Court found that the interference with Art. 8 disproportional even though there was the opportunity to have an independent tribunal assess and even postpone the eviction procedure, which it in fact did.

87 ECtHR, *Yordanova and Others v. Bulgaria*, Appl. No. 25446/06, judgment dated 24 April 2012.

flow from Article 8 of the Convention in exceptional cases [...].⁸⁸ The Court reasoned that

[...] the underprivileged status of the applicants' group must be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal is necessary, in deciding on its timing, modalities and, if possible, arrangements for alternative shelter.⁸⁹

It found therefore a violation of Article 8 ECHR.

In fact, also other cases are of interest for positive state obligations in the light of the specific vulnerability of applicants, even though the ECHR is not always found to be breached. In *O'Rourke v. UK*,⁹⁰ the Court referred to a positive state obligation to accommodate the applicant in relation to a homeless person, who suffered asthmatic conditions and chest infection. Still, the Court also held that domestic authorities had discharged this obligation by the provision of temporary hotel accommodation to the applicant pending statutory inquiries into whether or not he was homeless. The complaint was thus manifestly ill-founded.

Thus, also in relation to housing-related rights, the ECtHR established positive state obligations in certain clearly confined situations, such as a state's responsibility for the homelessness. What is more, one may ask whether there is a careful move of the Court towards the protection of an inner core of housing-related rights in situations of particular deprivation. *Yordanova v. Bulgaria* would point into that direction.

2.5 CONCLUSION

When it comes to the protection of social rights, the ECtHR is in a difficult position. It has to strike a delicate balance between its mandate to protect individual rights and the broader resource implications and consequences for domestic economic policies such decisions

88 Ibid., Para. 130.

89 Ibid., Para. 133. Interestingly, the Court did not find such an obligation towards a vulnerable group in the case of *Chapman v. UK* (see above n. 27) and other cases of Roma people being evicted from the land they occupied. While the ECHR established a difference between those cases and *Yordanova* due authorities' measures in lacking proportionality and happening beyond judicial safeguards in *Yordanova*, the Court also considered the state's margin of appreciation to be less wide than in *Chapman*. It seems, therefore, that the Court had accepted some of the criticism it received for its over-use of the margin of appreciation doctrine, and transformed it into a more critical stance toward domestic authority action. See for an assessment A. Remiche, 'Yordanova and others v. Bulgaria: The Influence of the Social Right to Housing on the Interpretation of the Civil Right to Respect for One's Home', 12 *Human Rights Law Review* (2012) 787-800. See also B. Selejan-Gutan, 'Social and economic rights in the context of the economic crisis', 02 *Romanian Journal of Comparative Law* (2013) 139-158.

90 ECtHR, *O'Rourke v. United Kingdom*, Appl. No. 39022/97, judgment dated 26 June 2001.

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may have. The Court attempted to strike this balance by generally granting a wide margin of appreciation to states. Still, in clearly confined situations it showed that it was willing to take a more sure-footed stand and to read also social dimensions into the European Convention. In such cases, positively, the indivisibility and interdependency of civil and political and of economic, social and cultural rights is also evidenced in the case law of the ECHR.