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Is European Union's social security model compatible with human  
rights?

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## **Abbreviations**

CESCR	Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
Community	European Community
EC	The Commission of the European Union
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECT	Treaty of the European Communities
ESC	European Social Charter
EU	European Union
EUCFR	European Union Charter of Fundamental Rights
EUT	Treaty on European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
UDHR	Universal Declaration of Human Rights
UN	United Nations
TCE	Draft Treaty establishing a Constitution for Europe/ draft European Constitution

## 1 Introduction

Recently news headlines have reported again and again that trade unions in one or another European Union member state have chosen to use the right to strike in order to bring government's attention to worker's problems. Recently in Belgium alone there have been two general strikes within one month where workers protested against pension reforms in Belgium<sup>1</sup>.

Both satisfaction and concerns arise from this kind of worker's activities. The good thing is that workers are free to use their civil rights, i.e., the right to association, to reach a dialog with government and require realization of economic and social rights, i.e., fair remuneration, safe working conditions, social security etc. However, the realization of economic and social rights is one of the most challenging for the states. This is because in comparison to civil and political rights, which must be immediately respected and ensured<sup>2</sup>, most of the economic and social right must be realized progressively, therefore it may take a considerable time, resources and willingness for the state to realize it.<sup>3</sup> Moreover, often it is not the sole responsibility of the state to guarantee certain economic or social rights, but collaboration and input from all the levels - employers, workers and the state, is needed.

This leads to the reason for choosing the topic of the current paper. It began with the unpleasant discovery of problems related with implementation of social and economic rights, especially the ones related with social protection issues, in the relatively wealthy states, mainly EU member states. Concerns derive from the concluding observations adopted by the UN Committee on Economic, Social and Cultural rights on the state reports. Most of the current EU Member States reports submitted to the CESCR on the progress of implementation of the International Covenant of Economic, Social and Cultural Rights have received the CESCR's concerns either regarding the inequalities in the social security area, social exclusion

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<sup>1</sup> *General strike paralyzes Belgium*, BBC News, 7 October, 2005, *Belgium hit by second mass strike*, BBC News, 28 October 2005,

<sup>2</sup> Article 2 of the International Covenant on Civil and Political Rights.

<sup>3</sup> General Comment No.3: The nature of States parties' obligations, adopted by the Committee on Economic, Social and Cultural Rights, E/1991/23, para. 9

or other unfortunate phenomena depriving or limiting people's rights to social protection<sup>4</sup>.

The focus on the EU in the following paper has been chosen due to various reasons. Firstly, the current crisis of this organization concerning the failure to ratify the draft European Constitution by two of the founding members of the EU, and the arguments that this failure is partly related to weak social protection provided by the TCE and EU in general. Secondly, the EU is a useful field for research also because it is probably among the most criticized intergovernmental organizations, it having been accused of the failure to impose single human rights morale (the morale, which would prevail over the market interests and differentiate between economic rights and social rights). Some authors argue that strong market power and lobby from powerful corporations have created a market society of the 'new poor', who are being used as tools in this new society. The relationship in this new society is driven by disciplinary power, which has eliminated respect for employees<sup>5</sup>. When looking at the above mentioned CESCR observations regarding the comparatively wealthy European states, this pessimistic vision seems credible. It is because states are facing problems of providing economic and social security to workers even if the right to social security is defined as a human right in certain international legal instruments. However, is the social security a kind of right which should be provided with no conditions?

Firstly, this paper emphasizes the confusion among the existing terminology in international legal instruments and attempts to clarify the differences between social security, social assistance and social protection in general. Secondly, this paper observes whether social security has the status of a 'right', and if so is this right treated as a human right (which can be

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<sup>4</sup> See Supplement A for the overview of the CESCR concluding observations regarding the EU Member States. On concerns and positive developments see also EU Network of Independent Experts in Fundamental Rights Report (CFR-CDF), 'Report on the Situation of Fundamental Rights in European Union and its Member States in 2002', p. 216-221.

<sup>5</sup>J. Harrod, 'The New Politics of Economic and Social Human Rights', in K. Arts and Paschal Mihiyo (eds.), *Responding to the Human Rights Deficit. Essays in Honour of Bas de Gaay Fortman* (Kluwer Law International, The Hague, 2003) pp. 69-70.

concluded so according to Universal Declaration of Human Rights and other major human rights instruments). If so, what is the human rights-based definition of the right to social security and of what principles does it consist? Do people benefit from it as from a human right, whose duty is it to provide this rights and what does the state responsibility entail<sup>6</sup>? Thirdly, the paper discusses to what extent the social security model in the EU reflects human rights principles.

The paper will reflect on the following issues: how does the right to social security differ from other economic and social rights; is this a 'domestic' right (meaning that it most effectively can be provided, reviewed and monitored by the state itself) or do regional organizations (the EU in particular) supplement in providing this right, and if so, to what extent?

The paper emphasizes the importance of the rights-based definition of social security. This approach opposes those who believe that the prevailing notion of human rights within economic and social field could be dangerous because it would mean that maximum support is given to individual rights, and common public interests (through state or organizations of states) are limited and restricted because of that. The prevailing idea of this paper is that it is this public vs. private challenge that increases the importance of finding human rights-based arguments for economic and social rights (or principles), because in such a way a high level of individual protection can be granted, which must be the ultimate goal of any human right.

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<sup>6</sup> Art. 22 of the UDHR does not render much assistance in understanding what the core obligations for states are in guaranteeing right to social security (and in granting social rights in general). See also B.-A. Andreassen, 'Article 22', in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights. A common Standard of Achievement* (Martinus Nijhoff Publishers, The Hague, 1999), p.488.

## 2 Introduction to the concept of social security

The term 'social security' is more ambiguous than it may seem at a first glance. International legal instruments do not reveal a uniform understanding of how to interpret this term and how it is related to other similar terms, such as social protection, social insurance, social assistance, basic security, means-tested benefits, etc. Conventionally social security is a main characteristic of states welfare systems, which in certain cases of risks provides benefits to individuals (usually workers and their dependants). During the last decades social security has moved beyond the domestic borders and has gained importance among the discussions on international solidarity, social inclusion, gender equality as well as the problem of an ageing population (which is a typical European debate) and migration<sup>7</sup>.

The diversity of social security systems and its close dependence on the economic capacity of a particular state are most likely the reasons why there are not so many authors who has elaborated on this issue from the rights based perspective. The *travaux preparatoires* of the social security provisions of the Council of Europe and the European Union documents, which will be discussed later, reveal the importance of state sovereignty and economic sensitivity in this area, and do not put emphasis on social security as a right for everyone. However, for instance K. Tomaševski has argued that human rights do not help to determine how much money should be spent for economic or social rights<sup>8</sup>. Instead human rights set the principles for the decision making<sup>9</sup>. When speaking about the European Union member states, J. Tooze argues that while keeping in mind the importance of national differences among social security systems and lack of EU competence in this area, the EU member states still do not have a *carte blanche* in this area<sup>10</sup>. She emphasizes that member states have to follow

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<sup>7</sup> See also Social security: issues, challenges and prospects, report VI, ILC, 89<sup>th</sup> session, 2001, accessible at <<http://www.ilo.org/public/english/standards/relm/ilc/ilc89/pdf/rep-vi.pdf>>, last visited on 1 November 2005.

<sup>8</sup> K. Tomaševski, 'Indicators' in A. Eide, C. Krause and A. Rosas (eds.) *Economic, Social and Cultural Rights*, Martinus Hijhoff Publishers, 2001, p. 288.

<sup>9</sup> *Ibid.*

<sup>10</sup> J. Tooze 'Social Security and Social Assistance' in T.K. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Hart publishing, 2003 p. 168.



‘the spirit’ of the social security principles which are provided in the European Charter of Human Rights. A similar view is shared by M. Scheinin<sup>11</sup> who goes even further saying that social security and well as social assistance both are justiciable rights. Therefore the author of this paper elaborates in more detail on those principles which are important when providing social security.

## 2.1 The history of the social security concept

History lessons do not prove that social security systems have been introduced in order to provide a better life for everyone. There is also an opinion that social security is a threat, and too heavy state intervention leads to loss of individualism and people stopping to take care of themselves. Probably the most known social security pioneer is the 19<sup>th</sup> century Prussian chancellor Otto von Bismarck, who introduced compulsory insurance schemes in Germany for working class against such risks as disability, old age, accidents at work. This model, although introduced in order to calm down the working class and refrain it from joining the socialist revolutionist movement, spread throughout Europe<sup>12</sup>. Bismarck’s social security model was based on the *lex loci laboris* – the major principle applicable also to most of the current European social security schemes. It provides that only (mainly) employees, based on the place of their working place, are covered by these schemes<sup>13</sup>.

Early documents on social security adopted by the ILO reflect the influence of Bismarckian compulsory insurance schemes. For example, all the early ILO compulsory insurance conventions<sup>14</sup> reflect the ‘poor law’

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<sup>11</sup> M. Scheinin, ‘The right to social security’ in A. Eide, C. Krause and A. Rosas (eds.) *Economic, Social and Cultural Rights*, Martinus Hijhoff Publishers, 2001 p.216.

<sup>12</sup> In Bismarck Germany social security was restricted to the working class and was not meant to cover more than basic needs. Old age pensions were paid only to those of more than 70 years of age and the amount paid would cover only the subsistence level. See A. Mueller, *Bye, Bye Bismarck*, < <http://www.mises.org/story/1275>>, last visited on 18 October 2005.

<sup>13</sup> F. Pennings, ‘Co-ordination of social security on the base of the state-of-employment principle: time for an alternative?’ *Common Market Law Review* 42, (Kluwer Law International, 2005) pp. 67-89.

<sup>14</sup> Old-Age Insurance (Industry, etc.) Convention, 1933, the Old-Age Insurance (Agriculture) Convention, 1933, the Invalidity Insurance (Industry, etc.) Convention, 1933, the Invalidity Insurance (Agriculture)

principle. It provides that the insurance schemes must be provided disregarding age, sex or nationality to all those who are engaged in employment for remuneration<sup>15</sup>. Moreover, states are allowed to fix a maximum level of remuneration, which is covered by the insurance, therefore all those who earn more than the fixed remuneration level should be capable to finance their needs by themselves. This illustrates the early understanding of compulsory social insurance, which served the interest of a limited group of workers. Nowadays states are advised to apply more universal social security schemes and, if possible, not to limit the coverage only to the working population and not to fix a certain level of remuneration<sup>16</sup>.

The Nordic social security model on the other hand differs by putting more focus on residence-related schemes and the *lex loci domicilii* principle<sup>17</sup>. However, later in the paper I will discuss the problem of too diverse social security systems within the European states and therefore the Nordic social security model is not popular among the other European states. They (the too diverse EU states) can not design as similar social security systems as the Nordic countries among themselves have done. It is mainly because of diverse European historical traditions and difference in the availability of resources.

To conclude on the historical part, I should emphasize that states have moved away from the initial 'poor law' approach to social security and have introduced more universal schemes for several risks in order to fight against the five menaces - illness, ignorance, disease, squalor, and want, as mentioned by Sir William Beveridge in his famous 1942 report presented to the British Parliament. The report outlined the foundation of British welfare system. However, the core Bismarckian social security principles have survived and the main international labour instruments established by the

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Convention, 1933, the Survivors' Insurance (Industry, etc.) Convention, 1933, and the Survivors' Insurance (Agriculture) Convention, 1933. the Conventions are revised by the Invalidity, Old-Age and Survivors' Benefits Convention No. 128, 1967.

<sup>15</sup> Article 1 of the ILO Invalidity, Old-Age and Survivors' Insurance Recommendation, 1933.

<sup>16</sup> *Extending the personal coverage of social protection in Social security: a new consensus*, ILO 2001, pp. 56-67.

<sup>17</sup> *Ibid.*

ILO follow this approach. Social security derives from employment relationships and strongly relates to workers rights disregarding the confusion in other international human rights instruments, which is discussed later.

## **2.2 Introduction to key terms related to social security**

The social protection vocabulary is vast and ambiguous because this label can cover as an umbrella anything, which can provide individuals with better standards of living. For the purpose of this paper, the basic definition of social protection and definitions of social security terminology are based on the ILO interpretation.

Social protection can be defined as a whole network of activities the goal of which is to provide everybody with just living conditions<sup>18</sup>. However, this definition contains uncertain indicators (for example the evaluation of what is 'just' is too broad and depends on subjective values). Therefore, it is more rational to follow the ILO definition, which says that the main function of social protection is to provide income security and access to health care and basic social services<sup>19</sup>. This objective is partly achieved through the establishing and operating of social security schemes<sup>20</sup>. The social security concept itself is twofold – it has both a narrow and a broad meaning.

The next paragraphs will deal with the most common understanding of social security and its related terms. First of all it will be observed by whom social security is administered and financed, and secondly it will look at the role of different actors in building social security.

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<sup>18</sup> Similar approach is adopted by the UDHR where social protection equals social justice.

<sup>19</sup> *Supra* n.16. p. 61. The ILO puts emphasis on both – social security schemes and non-statutory benefit schemes the aim of which is social protection..

<sup>20</sup> 'Social protection', as defined by the ILO, covers not only social security schemes but also other social services which are not based on contributions. See *ibid.* p. 8.

### **2.2.1 Social security administered by whom?**

In the narrow understanding social security schemes are legal frameworks, administered by private or public actors in order to provide 'minimum income for those in need and a reasonable replacement income for those who have contributed in proportion to their level of income'<sup>21</sup> in case of sickness, unemployment, old age, employment injury, maternity, invalidity and loss of a provider<sup>22</sup>. It is important to mention that the establishing and operating of social security schemes is not the prerogative of states alone because private actors can turn out to be in a better position to operate certain social security funds<sup>23</sup>. Nevertheless, it is the responsibility of a state alone to supervise private actors and 'interfere' in the event when private actors become unable to fulfil their obligations towards clients<sup>24</sup>.

### **2.2.2 Social security financed by whom?**

As mentioned above, social protection grants income security. However, income levels differ dramatically within any society and therefore the needs for different levels of society are different. It is most likely that a white-collar worker would have more capabilities to think about the future and, for example, invest in his or her old age benefit funds than a single mother, who is more concerned about how to pay current medical bills. Social security schemes reflect the demand of the society and also the culture and ideology behind social and economic rights<sup>25</sup>. The ILO mentions several main sources which finance national social security systems. Most often these

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<sup>21</sup> Ibid. p. 8.

<sup>22</sup> ILO Convention No. 102.

<sup>23</sup> Government of Latvia on 1 November 2005 decided that beginning from March 2006 state operated pension funds (the second level) will be distributed among the operators of private pension funds in a tender. One of the reasons to give full operation of state pension funds to private operators is to prevent competition disputes in the area which can be completely provided by private actors. Z. Piļka 'Otrā līmeņa pensiju glabās tikai privātie pārvaldītāji', *Diena*, 2 November 2005.

<sup>24</sup> *Supra* n.16, pp.57-58. On state responsibility for private social security funds within the EU system see below p. 49.

<sup>25</sup> For example when looking at two wealthy states – USA and Sweden – both have extremely different approach to social security issues. In Sweden the schemes are mostly funded by tax revenues while in USA the social security schemes are mainly private and reflects the demand. Ibid. n. 16, p. 57.

sources are mixed together in order to finance social security schemes and it is again the choice of each particular state to what extent social security is financed based on social solidarity (tax payments and contributions by social partners) or financed by voluntary insurance.

Employers and workers are usually the main contributors to compulsory social insurance schemes<sup>26</sup>. They make compulsory contributions to statutory social insurance programmes established by law. The aim of those programmes is to provide income security in certain cases of contingencies. However, state practices differ significantly, as to what the proportion of contributions among the social partners should be<sup>27</sup>. The amount of benefits are based on the 'get what you give' principle and depends on the amount of contributions paid throughout the working period. Although this system is said to reflect charity and solidarity, it is hardly true to say that those who contribute to social insurance schemes are guided by any ethical value, because the ever-lasting dilemma of welfare states is the ability to persuade their people to keep paying high taxes in return for high public spending on social services. In short, those who do not contribute to social security schemes seem to remain outside the socially insured population and at a first glance can hardly claim the right to receive full social benefits.

As mentioned above, the problem remains how to secure those who because of one or another reason have not been able to contribute to any social insurance scheme. The ILO emphasized that it is a state alone which is best suited to provide *social assistance* – the coverage of basic needs for those who can not otherwise meet their basic needs<sup>28</sup>. As mentioned above, social security initially meant the 'poor law' and today this area can be defined as a separate part of social security, which covers basic needs (such as food, clothes, housing etc.<sup>29</sup>) for those who are unable to meet those needs in the case of unemployment, illness, disability or family matters. This kind of assistance usually is not based on contributions paid by the

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<sup>26</sup> The ILO conventions on social security emphasize the shared responsibility of employers and employees.

<sup>27</sup> For selected state' practise see Supplement B.

<sup>28</sup> *Supra*. n. 16. p. 100.

<sup>29</sup> Art. 25, UDHR..

beneficiaries, but undoubtedly, the approach and groups of beneficiaries eligible for these benefits vary considerably from state to state<sup>30</sup>.

The demand for security may depend on the capacity of people to afford it and therefore there are several insurance schemes, which does not work on solidarity principles but rather accumulate benefits for their clients. However, the general compulsory social insurance system can not cover everyone and therefore other alternative and much smaller schemes are set up by those who, for example are employed in the informal working sector<sup>31</sup>.

### **2.2.3 The broader meaning of social security**

Even if social security is mostly related with the schemes created by states in order to grant security for workers and their dependants, there is still a broader way to understand social security. For example, the ILO emphasizes the need to put housing, food and other assistance under the social security label in order to broaden the meaning of social security and to use this concept to fight poverty on the international level<sup>32</sup>. It would be correct to say that social security in its broader meaning is important not only for those who have contributed to social security schemes. Social security creates a safety net for the whole population with the help of effectively administered social services, health care and other benefits (by promoting gender equality, providing trust among employees to join the workforce and enhance the overall economic growth of a state)<sup>33</sup>. Social security networks taken together with social assistance and other

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<sup>30</sup>. In Austria the emergency payment in the event of unemployment on the one hand is means-tested benefit, however on the other hand the amount of this benefit is strongly related to the contributions made during working period. *C.G. v. Austria*, European Commission of Human Rights, para. 21.

<sup>31</sup> *Supra*. n. 16. pp.100-101.

<sup>32</sup> *Ibid*. p. 38.

<sup>33</sup> See also

<http://www.ilo.org/public/english/standards/norm/subject/socialsec.htm>, last visited on 7 November 2005.

social services creates a safety net, which is in place from ‘cradle to grave’ or ‘birth to retirement’, as it is put by the Social Insurance office of one of the most generous welfare states Sweden<sup>34</sup>.

In order to conclude on a rough definition of social security it is probably correct to admit that it is one of the tools how to provide social protection – maintain income and provide other benefits for those who have contributed to social security schemes during their working period. The above explanation of terms showed that social security is not only a public law matter and that private actors are involved in organizing private social insurance schemes. However, the state remains responsible for supervising both public and private social security initiatives. Sure enough it is primarily state which should design and operate social security schemes which, based on solidarity and other principles, provide replacement of income for those who are otherwise not able to take care of themselves.

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<sup>34</sup> <http://www.fk.se/sprak/eng/intro/>

### **3 Defining the right to social security from human rights perspective**

Before looking for the definition of social security as a right, first it has to be explored what the characteristic of this right is and how does it differ (if it differs) from other economic and social rights. Later in this paper it will be observed how the right to social security is reflected in international legal instruments.

#### **3.1 Social and economic rights in general**

There is not much debate on the assertion that economic, social and cultural rights are closely related and together form a more 'comprehensive package' of rights<sup>35</sup>. People have their social rights to look for things/treatment, which provide at least a minimum standard of living, such as housing, food, water, clothing and basic assistance<sup>36</sup>. Enjoyment of economic rights, such as a right to work and the right to own property, provides a more or less stable guarantee to enjoy a whole variety of social rights. However, there should be certain rights granted for everyone even if the person can not fully benefit from the economic rights.

Therefore, in order to come up with a human rights-based definition of the right to social security the following chapter briefly discusses this concept in several human right instruments and in related instruments. The purpose of doing that is to see if it is possible to find an answer in these international instruments to questions on what the right to social security entails, who the beneficiaries are, whose obligation it is to guarantee this right, and what its enforcement possibilities are.

#### **3.2 Social security as a right among international instruments**

Numerous organizations in numerous documents have elaborated on the protection of social security. The following subchapters will observe to what extent social protection is a right. The subchapters will look at the definition

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<sup>35</sup> A. Eide, 'Economic, Social and Cultural Rights and Human Rights' in A. Eide, C. Krause and A. Rosas (eds.) *Economic, Social and Cultural Rights*, (Martinus Nijhoff Publishers, 2001), p. 17.

<sup>36</sup> See for example *Ibid.* p. 17.



of the right to social security in the ILO documents and the most important international and regional human rights documents.

### **3.2.1 International Labour Organization and the right to social security**

The International Labour Organization even before the establishment of the UN, had recognized in the Declaration of Philadelphia<sup>37</sup> the threat of poverty and want, as well as acknowledged its obligation to promote the extension of social security measures in order to provide basic income and comprehensive medical care to all in need. Each decade, since the 1940's the ILO has been adopting at least one instrument or recommendation, which aims at setting standard in the field of social security.

The human rights-based conditions, on which all the ILO measures are built (or at least the ILO has tried to do so), can be found in the Declaration of Philadelphia, and they are freedom, dignity, economic security, non-discrimination and equal opportunity<sup>38</sup>. However, we must see if the social security instruments indeed meet the above mentioned conditions. Although being applied for more than half a century and ratified by a majority of member states, the first conventions adopted by the ILO do not meet these standards and even promote inequality. As an example may be mentioned the absence of gender equality in the ILO Convention 102. Moreover, in several social security instruments the most what the member states, workers and employees could agree on was the 'menu' type requirements on the social security schemes and their coverage<sup>39</sup>. Such an approach is one of the options (albeit not the most effective one) in controversial and resources-consuming social and economic right instruments.

However, the ILO has admitted itself that at the turn of the millennium the tools mentioned above were not the ones which would make it possible to defeat insecurity nowadays<sup>40</sup>. It is understandable that within the ILO the

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<sup>37</sup> Adopted in 1944 by the General Conference of the ILO, which sets aims and purposes of the ILO the threat of poverty and want.

<sup>38</sup> Declaration of Philadelphia, Art II a.

<sup>39</sup> For example, in ILO Convention 102.

<sup>40</sup> Report of the Committee on Social Security, 'Social security – Issues, challenges and prospects', International Labour Conference, ILC89-PR16-312-En.Doc 16/1, (Eighty-ninth Session, Geneva, 2001) *para.* 9.

meaning of social security has also changed – from an instrumental approach to a right-based approach. In its 89<sup>th</sup> session the International Labour Conference rightly named its discussion on social security as a challenge. The following examples from the ILO tripartite discussions illustrate why social security is a challenge.

Firstly, on the one hand there is a proposal from the ILO that social security should not mean only domestic application but it should be of an international importance. However, there is a contrary view to this, mainly on the part of employers. This contrary view expresses that granting of social security is too much related to a stable economy of the state and to creation of more jobs, that it should be mainly attached to specific domestic conditions and circumstances<sup>41</sup>. This debate reflects the clash which has lasted over the past decades between social issues and market economy. It is assumed that for the latter the primary concern is to set up attractive macroeconomic figures and therefore ‘social welfare and employment are no longer the first objectives’<sup>42</sup>.

However, there may still be some optimistic views if one sees the social security as a human right. Economic development should not be a condition for granting any human right, and economic hardships can not serve as an excuse for the state in not granting the right,<sup>43</sup> provided that the state is allowed to limit the social rights for the purpose of promoting general welfare in a democratic society<sup>44</sup>. Even in the case of limitation, the state must prove that it has done the utmost to meet a legitimate aim – promotion of general welfare. Moreover, as it is evident from the concluding observations in Appendix A, several wealthy states have received concerns from the CESCR for not implementing the economic rights. Therefore the problem is not always related to the lack of resources of the state but rather the lack of willingness of the state to admit that economic rights can be formulated more precisely than a mere aspiration.

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<sup>41</sup> *Ibid.*, paras 7, 24.

<sup>42</sup> C. Tham as cited in K. Tomaševski ‘From Europe, To EUrope and to EMUrope: Whither Economic and Social rights?’ in F. Coomans and F. Grünfeld et.al (eds.) *Rendering Justice to the Vulnerable*, (Kluwer Law International, 2000), p.282.

<sup>43</sup> See General Comment No. 3 of the UN Committee on Economic, Social and Cultural Rights, para. 12.

<sup>44</sup> Art. 4., ICESCR.

Another example of a challenge for social security issues within the ILO (and also in general) is the balance between individual responsibility and state obligations for granting social security rights. On the one hand everyone, or every worker as it has been provided by the ILO, is responsible for contributions to social security systems in order to receive support from the state in case of a particular contingency. It is sometimes said that too generous benefits may spoil people and that a state can make its people become unmotivated to return to work (in case of unemployment benefits) or addicted to benefits in general.

However this debate again changes its meaning if we evaluate it from the rights-based perspective. It would be the same as saying that too many civil and political rights spoil people and, for example, the freedom of expression should be limited because people abuse this right and insult each other. Within the human rights system the limitations are strict and it is a burden of a particular state to prove that the goal of limitations meets a legitimate aim and that the limitations have been proportional. Although the above statement applies more precisely to civil freedoms, economic rights must not receive much different treatment because of their alleged indivisibility from other rights<sup>45</sup>.

Even if the resources of a state are limited it should have the capacity to use the maximum of its good governance to provide the rights based on the principles mentioned above - freedom, dignity, economic security, non-discrimination and equal opportunity. If the state has to limit these rights it shall use the same principles and prove that the measures have been set by law, that they meet the legitimate aim of promoting social rights for individuals, that the restriction of individual rights is not disproportional, and that the individuals affected are treated as subjects of the decision-making rather than purely objects affected by the decisions<sup>46</sup>.

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<sup>45</sup> 'All human rights are universal, indivisible and interdependent and interrelated, The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'. Declaration of World Conference on Human Rights, Vienna 1993, *para.* 5.

<sup>46</sup> K. Tomaševski 'From Europe, To EUrope and to EMUrope: Whither Economic and Social rights?' in F. Coomans and F. Grünfeld et.al (eds.) *Rendering Justice to the Vulnerable*, (Kluwer Law International, 2000), p. 280.

Certain optimistic and not so optimistic remarks about the ILO discussion on the right to social security can be made. The good thing is that the right to social security in the ILO system has a trend to move beyond purely domestic and instrumental concern. The concerns are bedded in the whole structure and mission of the ILO. Giving credit to its effort to emphasize employment-related rights from human rights perspective, it is obvious that representatives of employers (who together with representatives of workers and governments make up the decision-making body of the ILO) will bring all the attention to market-driven aspects and concerns about high tax burden and social expenses for companies. Workers, naturally on their part, will be more concerned about the rights of workers who actually contribute to social security schemes. They would not be that much concerned of the 'rest', which from the workers' perspective can be regarded as a burden on welfare systems and even 'parasites' for the whole society<sup>47</sup>. The care about 'the rest' is left to social assistance which is rather confusing because in certain states it is not clearly distinguished from other social security schemes. Social security conventions are not amongst the principal ILO documents, most likely because of the need to update them and to reconsider the whole issue on social security within the ILO. However, the ILO most likely will not be able to set a 'ceiling' but rather stick to minimum requirements because of too huge differences of the applicability of social security right among ILO member states.

When summarizing the ILO approach to the right to social security, it is obvious that the conventions adopted during the last century have contributed a lot to the development of social security models which entail benefits for workers and their families in cases of contingency<sup>48</sup>, based on workers contributions. The ILO instruments themselves do not provide a definition of a right to social security but rather give the characteristics of social security models which can be summarized as a Triple A – accountability, accessibility and affordability<sup>49</sup>. But as it was seen from the discussion above, the right to social security from a human right

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<sup>47</sup> See also M. Scheinin 'The right to social security' in A. Eide, C. Krause and A. Rosas (eds.) *Economic, Social and Cultural Rights*, p. 213.

<sup>48</sup> ILO Convention 102 (1952).

<sup>49</sup> L. Lamarche, n. 58 below, pp. 96-97.

perspective within ILO can not be viewed as a universal right that would cover everyone; nevertheless, there have been certain attempts to broaden the coverage of this right<sup>50</sup>.

### 3.2.2 Universal Declaration of Human Rights

Universal Declaration of Human Rights (UDHR) in its ‘umbrella’ article on economic and social rights establishes that everyone as a member of society has a right to social security<sup>51</sup>. When looking at the *travaux préparatoires* of the particular article, it becomes clear that in 1948 the Commission on Human Rights - when working on the draft articles of UDHR - had as much debates and confusion on the terminology as it is nowadays<sup>52</sup>. On the one hand, the draftsmen of Article 22 did not want to leave out the reference to legal guarantees against social risks, which emerged more and more important after the World War II<sup>53</sup>. On the other hand, the ideological strains among the draftsmen made them compromise, even more because the consensus regarding state obligations to social rights was neither reached five decades ago, nor has been reached now. As it can be seen from the draft UDHR, initially there was included a specific article which would say that a state has to undertake measures for the security of people against such risks as unemployment, disability, sickness, old age and other losses of livelihood<sup>54</sup>. Throughout the west/east and other collisions of interests, the outcome of the highly disputed question was an ‘umbrella’ article. It provides no particular definition on the right to social security; moreover, in

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<sup>50</sup> During the debates at the 89<sup>th</sup> session of the International Labour Conference on the Conclusions on Social Security the Conference adopted the Paragraph 3 saying “it is noted that while social security is a cost for enterprise, it is also an investment in, or support for, *people*”(emphasis added) (para. 103). However, in Paragraph 5 the Conference rejected the proposal made by Denmark, Austria, Finland, Iceland and Sweden to insert a reference stating that “support for vulnerable groups should be financed by society as a whole”. This reference would ensure the responsibility of governments in relation to vulnerable groups. Workers and Employers Vice-Chairpersons opposed this particular amendment (para. 111). ILC Provisional Record, 89<sup>th</sup> session, Geneva, 2001, ILC89-PR16-312-En.Doc

<sup>51</sup> Art. 22, UDHR

<sup>52</sup> B.-A. Andreassen, *Supra* n. 6, pp. 453 – 488.

<sup>53</sup> *Ibid.* p. 463.

<sup>54</sup> Now Art. 25, UDHR “Everyone has the right to (...) security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”.

the context of the article, the term ‘social security’ would actually mean ‘social justice’<sup>55</sup>.

At the time of drafting the UDHR the term ‘social security’ was surrounded by harsh debates about its meaning and strong opposition regarding inclusion of this term came from the International Labour Organization (ILO), which warned about the fragmentation of terminology because this term in the ILO system did not mean adequate standard of living and social services as it is put by the drafter of the UDHR<sup>56</sup>. However, now it is probably proper to say that the UDHR as a living instrument has partly changed the meaning also of this controversial term. For example, disregarding the concern about diversified definitions of the term ‘social security’ which was expressed 50 years ago when drafting the UDHR, in 2001 the International Labour Conference regarding social security issues emphasized the importance of the right to social security by stressing that this right has been established both in the UDHR and ICESCR<sup>57</sup>.

When concluding on the UN policy towards social security, it must be mentioned that the UN has adopted several instruments in the area of social issues: the Millennium Declaration, which emphasized the fight for reduction of poverty adopted in 2000, and the Copenhagen Declaration adopted in 1995, which sets the objectives for social development. However, none of these instruments has a binding effect even if in the later document social security is understood as social protection<sup>58</sup> for all during

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<sup>55</sup> *Supra* n. 6, p. 475. See also the terminology issue at the draft Art 23 „Social security and an adequate standard of living“ at the UN Enable program - working group noted that social security differs from state to state and that ‘adequate standard of living’ is more appropriate and broader term.

<sup>56</sup> *Supra* n. 6, p. 471.

<sup>57</sup> International Labour Conference, *Social Security: Issues, Challenges and Prospects*, Report VI, 89th Session, 2001, p. 25. The right to social security has been included in all the principal human rights mechanisms adopted by the UN organs, i.e. ICESCR Art.9, ICERD Art.5 (e), (iv), ICEDAW Art 11 1. (e), ICRC Art.26, ICPMWF Art. 27.

<sup>58</sup> Some authors make a distinction between social security and social protection stating that social protection is a goal which can be achieved by means – effective social security programs. See L. Lamarche ‘The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights’ in A. Chapman and S. Russell (eds.) *Core*

unemployment, ill health, maternity, child-rearing, widowhood, disability and old age<sup>59</sup>. According to the outcome document of the 2005 UN Anniversary Summit, the General Assembly is going to work on the definition of the term ‘human security’<sup>60</sup>, which would emphasize the importance of freedom from poverty and want. However, at the moment it does not mean that it would make any contribution to defining the security as a ‘right’.

The importance of the UDHR is tremendous if only for the reason that the rights included in the UDHR are regarded as customary law. However, as it has been mentioned above, the draftsmen of the declaration could not reach an agreement regarding a sole definition on social security and its legal effect most likely because it was regarded as too related to labour issues and therefore it should find place in more corresponding legal instruments.

The other part of the social protection – the right to social assistance - in the light of the UDHR is not any clearer. Article 25 mentions living standards adequate to health and well-being including food, clothing, housing, medicine and social services as a right for everyone. Although the term ‘adequate’ is again a question of interpretation, it may indicate that the adequacy of living standards means at least covering the needs listed above.

### **3.2.3 International Covenant on Economic, Social and cultural Rights**

The ICESCR in Article 9 provides that parties to the Covenant recognize the right of everyone to social security. However, the ICESCR neither provides any clear definition of social security, and the CESCR has not adopted the compilation of its concluding observations on state reports in a separate general comment on this article. Still, the CESCR has issued guidelines regarding the content of reports to be submitted, including Article 9<sup>61</sup>. An

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*Obligations: Building a Framework for Economic, Social and Cultural Rights*, (Intersentia 2002) p.96.

<sup>59</sup> UN doc. A/CONF.166/9, Copenhagen Declaration on Social Development, Part C, Commitment 2.

<sup>60</sup> UN 2005 World Summit Outcome, 24 October 2005, A/RES/60/1, para. 143.

<sup>61</sup> Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the

overview of some of the concluding observations regarding EU states has been given in an appendix of this paper.

However, the CESCR has issued a number of general comments on economic and social rights the principles of which also help to understand the application of Article 9 of the Covenant. The CESCR has specified that the term ‘social security’ implicitly covers all the risks involved in the loss of means of subsistence for reasons beyond a person’s control<sup>62</sup>. From the CESCR comments it can be concluded that a sharp distinction between social security and social assistance has not been drawn, at least not when it concerns elderly people. It is because the CESCR has stressed that Article 9 covers also all those people who, when reaching the retirement age, are not entitled to social security benefits or other sources of income<sup>63</sup>.

The CESCR has used similar indicators for several of the related economic and social rights, such as the right to adequate housing<sup>64</sup> and food<sup>65</sup> and the right to education<sup>66</sup>. Even if the right to social security can be distinguished from other rights, it would not be fair to deny that all economic rights can be treated as interrelated. Therefore the 3A indicators (accountability, accessibility and affordability) would be not less appropriate in order to interpret the content of the Article 9.

Lack of consent regarding justiciability of economic and social rights under the ICESCR is obvious when illustrating how differently states view their obligations in the economic and social field<sup>67</sup>. This can also be observed when looking at the debates on the draft option protocol to the

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International Covenant on Economic, Social and Cultural Rights, UN doc. E/1991/23, pp.88-110.

<sup>62</sup> CESCR General Comment No. 6, *The economic, social and cultural rights of older persons*, E/1996/22, para. 26.

<sup>63</sup> *Ibid.* para. 30.

<sup>64</sup> The *availability, affordability* and *accessibility* are used as the guiding principles for the application of the right to adequate housing. CESCR General Comment No. 4, E/1992/23.

<sup>65</sup> The reference to *availability, acceptability* and *accessibility* are used to in order to interpret the application of the right to food. General Comment No. 12, E/C.12/1999/5.

<sup>66</sup> The Special Rapporteur on the right to education emphasized the four important elements with respect to education – *availability, accessibility, acceptability* and *adaptability*. E/CN.4/1999/49, para. 50.

<sup>67</sup> See Appendix A for CESCR concerns regarding the hesitation of member states to integrate the Covenant into national law and make it directly applicable.



ICESCR, which would provide (if ever agreed upon) the complaint procedure for the ICESCR<sup>68</sup>. Still, it has been argued that the ICESCR Articles 6-9 are formulated more precisely than other rights, and are the most clear as to what this right entails. Therefore the justiciability of these rights should not be undermined<sup>69</sup> and would be viewed as another important indicator within the meaning of Article 9.

However, from the debate on the draft optional protocol of the ICESCR and the concluding observations adopted by the CESCR, it seems more than optimistic that it would be any time soon when it will be a universally recognized practice for a person who lacks basic needs to claim his or her rights for, it might be said, social assistance before a tribunal or lodge a complaint before UN body. By this I do not mean any complaints regarding discriminatory treatment or any other mistreatment regarding the procedure but rather the complaint on the substance. As it is discussed further in this paper, in other instruments, such as European Social Charter, the division of social security and social assistance is more obvious, and the social assistance is regarded as a justiciable right. However, it must be identified whether this right is indeed enforceable within the domestic legal systems, let alone international organizations.

### **3.2.4 European Social Charter**

The leading European regional economic and social right instrument certainly is the European Social Charter. First adopted in 1961 and revised

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<sup>68</sup> According to the UN Secretary General report on the UN member states' responses to the initiative of drafting an optional protocol to the ICESCR, both extremes can be found among the views provided by, for example, the EU member states regarding the state obligations in pursuing economic and social rights. The Government of Italy believes that state obligations in relation to economic and social rights as compared to civil and political rights are only declarations of intent that "carry moral and political weight but do not constitute direct legal obligations for the State party" and do not constitute direct legal obligations. The Government of the Czech Republic in opposite literally repeats the not so clear CESCR General Comment No 3 on states obligations and believes that the absence of a complaint mechanisms place limits on protection of human rights. E/CN.4/2004/WG.23/2

<sup>69</sup> Ph. Alston 'No Right to Complain About Being Poor: the Need for an Optional Protocol to the Economic Rights Covenant' in A. Eide (ed.) *The Future of Human Rights Protection in a Changing World. Essays in Honor of Torkel Opsahl*, (Norwegian University Press, 1991), p. 86.

in 1996, it reflects the European compromise of the uneasy issue on economic and social rights. It is only one of the multiple instruments adopted under the auspices of the Council of Europe which legislate on the social security matters<sup>70</sup>. Article 12 of the ESC provides that, first of all, states parties should establish and maintain social security systems, which means that the systems should cover the main risks as provided in ILO Convention 102, and a large part of the population. Secondly these systems should be maintained at a level at least equal to that provided in the ILO Convention 102 to be able to grant benefits for at least three types of risks and to cover a certain percentage of the population. Thirdly, social security systems should be progressively improved.

From the *travaux preparatoires* of the ESC it can be concluded that the arguments against the formulation of economic and social rights as individual rights prevailed throughout the drafting process at the end of the 1950<sup>th</sup>. Social security was not regarded as a human right and the opponents of the rights-based formulation presented detailed analysis of disadvantages which would occur when defining economic and social rights as individual rights<sup>71</sup> because the ESC does not entail subjective rights as in ICESCR. The state obligations towards the realization of social security rights in the first drafts were described in the vague terminology of ‘to recognize’ and ‘to endeavor’<sup>72</sup>. It was also admitted that standardization of social and economic matters would impede state progress because ‘what is modern today may be outmoded tomorrow’<sup>73</sup>, and that it is impossible to define as a right something which is idealistic by nature.

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<sup>70</sup> For list of other instruments and detailed analysis of the social security and social assistance in the ESC see for example D. Harris, J. Darcy, *The European Social Charter*, (Transnational Publishers, Inc., 2001). pp. 153-174.

<sup>71</sup> *European Social Charter. Study of the nature, definition and legal scope of social and economic rights*, Social Division, CE/Soc (56) 15, 26/10/1956 in Council of Europe, ESC Collected ‘travaux preparatoires’, Volume III, (Strasbourg, 1956), p.828.

<sup>72</sup> The observation that the current European consensus regarding this issues has not changed dramatically (especially when drafting the European Constitution) is described below. See *para.* 3.2. p. 37.

<sup>73</sup> *Memorandum by the International Federation of Christian Trade Unions*, Committee on Social Questions, 4<sup>th</sup> Session, 10/02/1956, Council of Europe, ESC Collected ‘travaux preparatoires’, (Strasbourg, 1956) p.308.

The result of the debates shows that Article 12 of the ESC on social security is less technical and a more detailed regulation is left to the European Code Social Security (1964) and the revised European Code of Social Security from 1990. Besides giving a clearer distinction between social security and social assistance than in other instruments, it also established the principle that assistance is not charity but a justiciable right<sup>74</sup>.

However, the distinction between social security and social assistance is not always distinguishable in practice<sup>75</sup> and therefore in few countries this right is directly applicable and enforceable.<sup>76</sup>

The European Committee of Social Rights<sup>77</sup> fulfils the interpretative function of the ESC when reviewing state reports and providing conclusions. If the provisions of establishment and maintenance of minimum level of social security systems mainly mirror the fulfillment of criteria set by the ILO conventions on social security<sup>78</sup>, then more problematic is the evaluation of the progressive improvement of the social security systems. Nevertheless, the committee has tried to develop certain important rules and Member States have to provide sufficient arguments if their social security reforms impose restrictions on benefits to certain beneficiaries. The rules developed stipulate that it is a violation of the ESC Art 12(3) if the reforms are designed in a way that 'gradually reduces the social security system to a system of minimum assistance', besides, the reforms should not be designed as depriving anyone of social protection against the contingencies<sup>79</sup>.

The Committee has also established certain indicators of state obligations, for example the universality principle - the social security

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<sup>74</sup> Social assistance is regulated by Art. 13(1) of the ESC.

<sup>75</sup> Council of Europe Committee of Independent Experts Conclusions C XIII-4 36-37.

<sup>76</sup> *C.G. against Austria*, European Commission of Human Rights.

<sup>77</sup> Before 1998 the Committee was known as the Committee of Independent Experts.

<sup>78</sup> The reference to the ILO Convention No 102 in Article 12(2) was replaced in the 1996 Revised European Social Charter where higher standards were set and it provides that social security systems should at least equal to the level as necessary for the adoption of the European Code of Social Security (the revised one).

<sup>79</sup> Council of Europe Committee of Independent Experts Conclusions C XIV-1 47.

should be extended to the whole population<sup>80</sup>. However, the reduction of benefits has not always lead the Committee to conclude on the violation of the Art.12(3). The Committee's opinion is that 'in view of the close relationship between the economy and social rights, the pursuit of economic goals is not necessarily incompatible'<sup>81</sup>. Anyhow, the attitude of 'subsidiarity' (or state sovereignty in this matter) is recognizable – it is and remains a competence of a state to decide if the reforms should be pursued in a way which reduces the benefits; however, it must be done in a reasonable way, adequately to the economic gains.

For a long time the ESC was criticized for being toothless because of the lack of any complaints procedure. As it has been identified by some authors, the complaint procedure lessens the gap between vague definitions of a right and social justice<sup>82</sup>. Since 1998, the collective complaints mechanisms have been introduced for violation of the ESC provisions<sup>83</sup> but no submissions have been brought by any non-governmental organization regarding Article 12 of the ESC. The drafting process reveals that this right was not supposed to be justiciable. However, it must be seen in the future if the Committee would refuse to admit a complaint which provides arguments that the social security reforms have reduced the protection to certain beneficiaries covered by them and that the maintenance of social security systems is endangered<sup>84</sup>.

Even if there is a lack of case law on social security (the work of the Committee still can not be comparable with the enforcement mechanism existing under the ECHR), the Committee has been praised for having set the guidelines that states should follow and how their obligations should be evaluated. It also suggested that the same guidelines should be adopted by the ICESCR when evaluating state reports<sup>85</sup>.

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<sup>80</sup> Council of Europe Committee of Independent Experts Conclusions XIII-4 143-44.

<sup>81</sup> J. Tooze 'Social Security and Social Assistance' in T.K. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Hart publishing, 2003, p. 172.

<sup>82</sup> See for example Alston, *supra* n. 69 above, p. 92.

<sup>83</sup> System of Collective Complaints Protocol of 1995.

<sup>84</sup> The bodies allowed to lodge the collective complaints are mostly NGO's accredited by the Council of Europe.

<sup>85</sup> *Supra* n. 81 above, p. 172.

### 3.3 Conclusions on the human right-based definition of social security

Is social security a real right and why should it be defined like that? Being a part of social and economic rights, the social security concept faces the same criticism as all the other rights from the same basket, which is that they are not real rights but rather aspirations and programs<sup>86</sup>. Moreover it is sometimes assumed that defining aspirations as rights can be harmful<sup>87</sup>. It is said so probably because each right should be exercised as a claim, but it is more complicated with economic and social rights, where the difference between state liability and state willingness to realize economic and social aspirations as rights must be distinguished<sup>88</sup>. However, the counterargument is that human needs and necessities are a proper basis for claiming it to be a right<sup>89</sup>, even more so if the state has accepted to be bound by international standards. Moreover, the importance to define an economic and social right as a human right may also be supported by the argument that because of various reasons, with intention or without, states may be required or willing to cut off the protection which it has provided to its people during the 'better off' times. This may happen especially when it concerns economic and social rights, which both require high public spending. This way, under protection of a right and especially a human right, the harmful effect of changes and economic shortages may be lessened for individuals because the human right clauses do not prescribe what amount of money should be allocated for this or that purpose, rather they provide what the 'process of decision making' should be<sup>90</sup>.

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<sup>86</sup> USA does not recognize economic and social rights as real rights rather than programs and ideals. USA has not signed ICESCR either.

<sup>87</sup> `To confuse rights with aspirations, and rights conventions with syncretic syntheses of world values is to destroy the very meaning of rights as a way of protecting human being from injustice and tyranny`. M. Ignatieff as cited by H. Opschoor 'Economic, Social and Cultural Rights from an Economist's Perspective', p.78.

<sup>88</sup> K. Tomasevski 'From Europe, to Europe and to EMUrope: Whither Economic and Social Rights?' in F. Coomans, F. Grünfeld et.al. (eds.) *Rendering Justice to the Vulnerable. Liber Amicorum in Honour of Theo van Boven*, (Kluwer Law International, 2000) p.286.

<sup>89</sup> *Supra* n. 5, p.78

<sup>90</sup> *Supra* n. 7, p. 288.

### 3.3.1 The dual nature of the right to social security

The above mentioned international legal instruments indicate that social security has strong emphasis on both economic and social areas. How does this right to social security fit into the economic and social rights debate? The ILO report on social security asserts that social security is an important instrument in reducing poverty, but states must not use this as the main mechanism<sup>91</sup>. It emphasizes that social security schemes should not be constructed in such a way as taking away something from the rich and distributing it to the poor. This may indicate that there is something that distinguishes the right to social security from basic social rights, to which a person is entitled as a human being.

On the one hand it is a work-related economic right and should be granted to those who have contributed to it. Therefore one can say that what the state has to guarantee is functioning social security scheme for the workers. On the other hand, however, social security has strong social influence. In broader meaning social security provides dignity and full realization of the individual<sup>92</sup>, therefore it must be considered also as an important social right. By full realization of the individual can be understood the capability of anyone to take care of oneself through work even if due to special circumstances the person can not be able to work. Social security is also an important tool in order to guarantee gender equality<sup>93</sup> because through family and maternity benefits women are able to build their professional career in the same way as men. Effectively functioning social security system also influences positively the overall health condition of the population, demographic growth and even technological innovations at the workplace<sup>94</sup>.

And this is why it must be distinguished from other economic and social rights, i.e., the right to social security much depends on the effort of a person (an employee), and there is a shared responsibility between state responsibility and individual responsibility. For example, the right to food

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<sup>91</sup> *Ibid.*

<sup>92</sup>

<http://www.ilo.org/public/english/standards/norm/subject/socialsec.htm>, last visited on 7 November 2005.

<sup>93</sup> *Supra.* n. 16, pp. 15-16.

<sup>94</sup> *Ibid.*

is so basic and of such an importance that it is without doubt a state responsibility to provide its people with the basic needs. On the other hand, the 'quality' of the right to social security is much in the hands of workers, on condition that the state has done the utmost to provide the basic legislative background and stays alert to ensure that administration of social security schemes are non-discriminative, etc. which is discussed later.

### **3.3.2 Social security among the other human rights**

In the previous chapter it was assessed that social security is more complicated than other human rights, and it differs from other rights because it requires strong commitments from all the 'parties' – the individual (employee and employer) and the state. Still, should it mean that this right is too particularly related to employment relations and therefore should not be among the other human rights? Maybe only the right to social (residual) assistance should be regarded as a human right because it is a pure state's responsibility to provide its people with basic necessities. As mentioned above, there are several human rights (for example, certain political rights) which do not apply to everyone automatically and without conditions, but they are anyway among the most important human rights because once the right is applicable, the state can not apply this right in a discriminatory manner or in any other way abuse its application.

The previous chapter described the rather confusing situation of how social security is treated in principal international instruments. Before moving to the human right-based definition of the right to social security, the basic terms must be defined. As mentioned earlier, the concept of social security is twofold. On the one hand, it is a right granted in the form of benefits to those who have contributed to receive it. In other words, there is a precondition in order to enjoy this right and an obligation of workers to contribute, which means a cooperation among the social partners – the workers, employers and government (the main function of the later being proper administration of social security schemes).

Later in the paper, when looking at the social security systems in EU states, it will be seen that the private actors play an ever more important role in administration of social security benefits and rendering additional

security to those who can afford to contribute to it. However, the author here wishes to emphasize that the role and obligation of the state must remain strong if one wishes to enjoy the protection of this right from the human right perspective and that the state's functions can not be limited only to administration. Rather, it means a constant review of its commitment regarding implementation of international obligations, its social security legislation and the available resources in order to lessen any obstacles to enjoying this right.

Even if the social security is most often associated with compulsory or other contributions, there is on the other hand a question if the right to social security is applicable to those who are for one reason or other left outside the social partnership and have not been able to contribute to their own welfare. As mentioned earlier, there are certain instruments, for instance, the European Social Charter, which makes a rather clear distinction between this type of residual security rendered in the form of social assistance. Although this minimum cover of basic needs is the least form of protection one can receive, the most important principle is that it must not be treated as a charity but rather a right that is linked to obligation of state and the solidarity of other individuals. However, there are principal differences in the way how the social assistance and social protection is provided. Therefore, it is most likely that states would also differentiate those rights when it come to the enforceability of them.

The right to social security is provided if the person has contributed to it and the security schemes should apply equally to everyone in the same situation. In the case of social assistance, each application for the assistance should be evaluated separately, based on the particular needs. This principle has both positive and negative aspect. Such a principle, if organized against the good governance practice, can lead to strong subjectivism by state authorities and may always be linked with the impression that it is a shame to ask for assistance. This is why the state bodies that are authorized to provide assistance must have clear criteria and guidelines in order to avoid a non-transparent decision procedure, against which the applicant can bring his/her complaints. The positive aspect of this principle is that via the principle of good governance the resources can be allocated in the most



effective way, based on individual approach, and reach the target. In the light of the current paper the following definition of the human rights based indicators can be applied also to describe the right to social assistance.

In the legal literature authors have tried to distinguish the right to social security from other human rights, for example, from the right to adequate standard of living<sup>95</sup> because it is too specific and closely related to employment rights. Anyhow, this right is closely related to other economic and social rights (the right to health, adequate standard of living, right to education). It is obvious that without benefits in case of contingencies the person will meet hardships of providing themselves with adequate housing, nutrition, health services, education. As well as they may occur in the condition when these contingencies lead the person to poverty and life conditions below their dignity<sup>96</sup>. As mentioned above, realization of economic and social rights usually has strong link with state's available resources<sup>97</sup>, because economic rights in comparison with civil and political rights can not be fully realized, rather progressively achieved.

With the right to social security we must understand the guarantees to all in case of contingencies (such as sickness, unemployment, old age, injuries, child care, invalidity and/or losing any supporter), which are administered by state to the maximum of its available resources and on terms of good governance. It is important to note that from the discussions within international organizations the strong emphasis has been put on state discretion to deal with this right, a way of sovereignty or subsidiarity for most of the economic rights.

### **3.3.2.1 Indicators for the right to social security**

The characteristics of the right to social security should be reflected as most of the economic and social rights<sup>98</sup> in terms of availability, accessibility, accountability and, acceptability, as well as enforceability of the provided

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<sup>95</sup> L. Lamarche, *supra*. n. 58.

<sup>96</sup> Although personal dignity may be subjective and depends on how a person evaluates herself, it is recognized that poverty and vulnerable situation leads to losing human dignity.

<sup>97</sup> Art. 2(1) of the ICESCR.

<sup>98</sup> However, the UN CESCR has not until now adopted General Comment on social security.

right. For the sake of *availability* the state has to, disregarding its economic development, establish social security models and administer them according to the principles of good governance. The good governance principles mean respect, protection and fulfillment of individuals' rights, transparency, the right of the affected individuals to participate in the decision making and *accountability* of activities of the state when providing the particular right.<sup>99</sup>

As it was seen in the CESCR concluding observations, the availability of this right may be hindered by vast informal economy, which employs people who would afterwards become rightless and dependant on the basic assistance. Even if it is each individual's obligation to take care of his or her security by working legally and making contributions, it is not always the choice of individuals but a forced necessity, and much blame for that should be taken by the state. Individuals must be able to *access* the right by receiving information and be educated in these issues. Not always do people understand how the social security mechanism works, how one earns his/her pension or other benefit and what their rights in case of the contingency are<sup>100</sup>. There is no place for any kind of discrimination in terms of having an access to the right. *Acceptability*, on the other hand, should entail the obligation of the state to be aware of who and how many of the people within its jurisdiction are in need of social security or other kind of assistance. It is necessary in order to prevent, reduce or eliminate people's vulnerability. To provide 'flesh to the bones' the right must be *enforceable* and it must also be possible for individuals concerned to enforce their rights at least before domestic courts.

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<sup>99</sup> Governance for sustainable human development, UNDP policy document, *Good governance and sustainable human development*, <http://magnet.undp.org/policy/chapter1.htm> last visited on May 29, 2005.

<sup>100</sup> In concluding observation E/1998/22 (1997) 56 (UK) the CESCR stressed that less restrictive provisions on free legal aid regarding economic and social rights should be introduced in order to help people to access their social benefits.

#### **4 Application of human rights based definition to social security rights in the EU - the challenge of economic and social rights as human rights in the EU**

The EU bureaucracy has a material for a continuous reflection concerning its approach to social rights and their importance among the European electorate, since the EU social policy is said to be one of the reasons causing the negative public vote on the Treaty establishing a Constitution for Europe in France and the Netherlands in May and June 2005, consequently bringing the EU closer to the current constitutional crisis.

The objective of this subchapter is to identify to what extent the definition of the right to social security can be applied to the social security policy in the EU.

Before going into a more detailed review on the role of the right to social security in the EU and its compliance with human rights principles, it is important to emphasize how complicated is application of social rights and any attempt of reaching a common policy among such diverse players as the Member States of the EU.

The emphasis on sharing and solidarity as the core principles for rebuilding Europe are mentioned already in the preamble of the 1951 founding Treaty of the Coal and Steel Community, which is the ancestor of the European Community. The application of this principle most likely has not been able to prevent the social, economic, geographical, historical<sup>101</sup> and philosophical diversity among the EU member states and the gaps where the diversity may lead. This diversity is especially obvious after each new enlargement round of the EU<sup>102</sup>. However, as mentioned above, the

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<sup>101</sup> The principal law legislating German social security system (Reich Insurance Code) dates from 1911 and roots in laws passed between 1883 and 1889 while the principal laws regulating social security systems in certain EU member states were adopted only after 1990 (i.e. in the Republic of Latvia the Law on Social Security was adopted as late as 1995). On diversity see also the first chapter of the EC report on the social protection in Europe 1995 (COM (95) 457 final).

<sup>102</sup> For example, according to the 2005 survey released by the Mercer Human Resource Consulting the human labour cost in the new EU member states is by ¼ lower as in the old EU member states. Average annual labour cost in Belgium is EUR 53 577 in comparison to average annual labour cost of EUR 4752 in Latvia (including the salary, social insurance contributions paid by the employer, other statutory or

diversity of the approach to social rights is not reflected only in development indicators but also in philosophical differences of the member states towards social rights in general. It reflects the inability to reach a common European understanding of social rights' concept, or at least of certain important issues related to social rights within international human rights law<sup>103</sup>. The European doubts whether social rights are rights at all and that they definitely must be separated from other human rights were mentioned in the previous chapter, when discussing the drafting of the European Social Charter within the auspices of the Council of Europe<sup>104</sup>.

The above mentioned differences and the EU social policy, which has been a subject of extensive studies and often faced with criticism, has led to the situation when not all human rights in the EU can be treated as 'universal, indivisible, interdependent and interrelated'<sup>105</sup> (as an example can be mentioned the role of certain social rights in the draft European Constitution, which will be discussed further in the paper). Therefore social rights may have a weak protection from the human right perspective in the EU. Seemingly, notwithstanding the diversity among the EU member states in the domestic application of human rights, the compromise reached in the EU level regarding social rights as human rights is to follow the cautious and idealism-free approach. It means not to transform all internationally recognized human rights automatically to the EU fundamental rights catalogue even if the EU member states each are parties to international human rights instruments. There are various suggestions as to how to test the fundamental character of the rights within the EU<sup>106</sup>. However, the European Court of Justice - the main body deciding on which fundamental rights should form a part of the general principles of the Community - has not given clear guidelines for this distinction.

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voluntary social security benefits). A. Taylor, 'New members offer big labour cost advantage', *Financial Times*, 11 April 2005.

<sup>103</sup> *Supra* n. 68.

<sup>104</sup> See paragraph 2.2.3. above.

<sup>105</sup> Vienna Declaration and Programme of Action. UN doc. A/Conf.157/23

<sup>106</sup> Three level test for ES rights: fundamentality, universality and precise legal definition. B. Bercusson, 'Fundamental Social and Economic Rights in the European Community', in A. Cassese, A. Clapham, J. Weiler (eds.), *Human Rights and the European Community: Methods of Protection*, (1991) p. 200.

Even if one should not forget this particular problem, when analyzing the social security right from human rights perspective in the EU, it is important to recall why the right to social security is distinguishable from other social rights. It has been mentioned above that the right to social security has the strongest link with employment rights; it protects and at the same time puts duties on workers. This is why this right is so important for the EU model, because the EU is trying to cover everything having an emphasis on the movement of workers. For example, even if the family law matters are far beyond the Community competence, the family reunion is protected by the EU because it removes the obstacle for free movement of labour force. The same applies to the social security issues which at a first glance are treated as tools for building a common market. It must be identified what the EU competence in this important market-uniting tool is. It will also be tested whether this tool is implemented in pursuance to the same human right-based criteria which have been explained in the previous chapter.

#### **4.1 The EU approaches towards the creation of the Community social security competence**

The next two subchapters deal with issues of the EU competence in social security field. First of all, it should be observed to what extent the member states have been able to compromise on their initial diversity in this field, through coordination or standardization, or another approaches. That must also include what has been the motivation for choosing one or another approach. There is a need to mention both advantages and disadvantages of these approaches in bringing the social security beyond the domestic borders, which is an inevitable consequence of application of EU fundamental freedoms.

Article 2 of the ECT<sup>107</sup> sets the main aim of the European Community - by the establishment of common market and an economic and monetary union to promote, among other aims, high level of employment and social protection. All of the ten aims mentioned in this principal article have been

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<sup>107</sup> Treaty establishing the European Community, OJ C 325, 24 December, 2002.

formulated as being of economic nature. It means that the tools for achieving these aims are also more of an economic rather than social nature – adoption of an economic policy, free competition, price stability, etc<sup>108</sup>. The Council may adopt measures designed to encourage cooperation between the Member States (in order to improve knowledge, development, exchange of information, etc.)<sup>109</sup>. However, the Council must act only unanimously throughout the legislation procedure if in the social security field it wishes to adopt directives on minimum requirements for gradual implementation<sup>110</sup>. The same pattern is followed in the draft European Constitution<sup>111</sup> which stipulates that the community law in the field of social security can be adopted with the purpose to enhance freedom of movement of workers as far as the community laws do not affect the cost or financial structure or financial balance of domestic social security system<sup>112</sup>.

The unwillingness of member states to allow stricter Community involvement in the social security area through a harmonization<sup>113</sup> approach arose as early as in 1970's, when there were only six member states in the organization and the ideas and expectations of the common market were much more idyllic as they are now<sup>114</sup>. Although there have been attempts to pursue harmonization<sup>115</sup>, the lack of strong political will to introduce more harmonized Community approach to this field dominated<sup>116</sup>.

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<sup>108</sup> Art. 4, ECT.

<sup>109</sup> Art. 137(2)(a) ECT.

<sup>110</sup> Art. 42 (with respect to migrant workers) and 137(2)(b) ECT.

<sup>111</sup> Treaty establishing a Constitution for Europe, OJ C 310, 16 December, 2004.

<sup>112</sup> Article III-136 of the draft European Constitution.

<sup>113</sup> "Harmonization means standardizing legislation on the systems, the risks covered and the (minimum) level of protection required (...). The term "coordination" means establishing legal, technical and administrative links between social protection systems to ensure a fair level of protection for migrants within the Member States". Economic and Social Committee, *Opinion of the Economic and Social Committee on the Communication from the Commission to the Council and the European Parliament on the future of social protection: a framework for a European debate*, 28 November 1996, (COM(95) 466 final), para.3.2.

<sup>114</sup> On history see D. Collins, *The European Communities. The Social Policy of the First Phase. Volume 2, The European Economic Community 1956-72*, (Martin Rebertson, 1975).

<sup>115</sup> European Commission has adopted several recommendations without binding effect on certain social security issues, most significant are the recommendations 92/441/EEC from June 24, 1992 and 92/442 EEC from July 27, 1992.

<sup>116</sup> B. Bercusson report on coordination instead of harmonization, *Supra*. n. 106. See also Economic and social committee 1996 opinion, *supra*. n. 113, para. 3.2.

The absence of a stronger Community initiative has been both blamed and applauded. Lack of the Community initiative faces criticism mostly from those who believe that it would be possible to prevent the emergence of the current member state diversity in social security legislation and to avoid the current gaps<sup>117</sup>. This view can be partly supported with arguments that the Community legislation on social security would prevent the phenomenon of ‘benefit tourism’<sup>118</sup> and provide people with security in their initial country while decreasing the necessity to go abroad only because of the expectation for higher social benefits. In that case Europeans would be motivated to use their freedom of movement within the EU not because of higher benefits but because of less pragmatic reasons (the interest to practice working abroad, etc). Following the benefits of harmonization, it may be argued that with more harmonized Community legislation in the social security field other rights, such as the rights to education, health care, housing and social inclusion, would also come into the Community priorities and move it towards the currently used objective to become a ‘social market economy’, as mentioned in the draft European Constitution.

However, the arguments against standardization of social rights, and social security rights in particular, have met the strongest support among the member states. The best choice turned out to be a mere coordination approach in the social security field<sup>119</sup>. It is supported with arguments regarding social rights as being distinct from other human rights. Member states fear losing their decision-making power in supposedly pure social-economic field<sup>120</sup> and the flexible nature of this area requiring fast action, which is not compatible with the slow Community bureaucracy. Moreover, as mentioned above, the diverse socio-economic environments of the Community member states may attempt to make a common denominator in social security area. It may lead to arriving at a common ‘lowest’

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<sup>117</sup> D. Collins, *supra*. n. 114, p. 179.

<sup>118</sup> This problem is touched upon in the Economic and social committee 1996 opinion, *supra*. n. 113 para 7.2.1.

<sup>119</sup> Regulation (EEC) No 1408/71 (OJ L 149 , 05/07/1971 P. 0002 – 0050) on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community is the most illustrative example.

<sup>120</sup> See Ph. Alston, *supra*. n. 69, p. 96.

denominator in order to favour the least capable member states<sup>121</sup>. This approach would be most likely to prevail because social security is related to availability of resources, and states use these arguments to justify their incapability and most often also their unwillingness.

Disregarding the above given discussion, the prevailing approach over the last decade for certain issues, which are not covered by any legislation power in the Community level, is the open method of coordination<sup>122</sup>. As the Economic and Social Committee has suggested in its opinion on the future of social protection in Europe,

“there are real arguments in favor of the development of a more dynamic European Union strategy for promoting convergence in social protection, obviously with due respect to national culture and practices. This convergence should be based on the basic goals already contained in the Treaty and in the welfare-state traditions of the Member States, and should be confirmed by the international norms these countries have accepted (...) and prevent regressive policies from grading everything down to the lowest common denominator”<sup>123</sup>.

The above principle has also been followed by the European Court of Justice and has been put down in the draft European Constitution, where Article II-112(4) emphasizes the role of the constitutional traditions common to the Member States. Instead of looking at the Member State constitutions and automatically deducing a common denominator from constitutional rights protected by the Member States, the EJC takes the constitutional traditions as an inspiration<sup>124</sup>. Although it has been

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<sup>121</sup> On the same issue see also B. Bercusson report, *supra*. n. 106, p. 213.

<sup>122</sup> Established by the European Council in 2005 the OMC is a form of coordination of the Member State national policies in a specific area with respect to national and regional diversities and objectives. Member states through national reports exchange information on the best practice which can later on lead to guidelines or recommendations (The European Convention, Work group XI ‘Social Europe’, CONV 516/1/03 REV 1). Social Protection committee was set up by the Council decision 2000/436/EC to help modernize social protection systems, bring together “good practices” of the Member states, promote communication among social partners.

<sup>123</sup> Economic and social committee 1996 opinion, *supra*. n. 113, para. 3.12. See also J. Tooze, *supra*. n. 81, p. 171.

<sup>124</sup> As an example of the benefit of this method is mentioned the case where the EJC ruled on the protection of trade and businesses as a community principle even though it is constitutionally protected only in the constitution of Germany. Hearing of Judge Mr. Vassilios Skouris, The European Convention, Working Group II, WD 019-WG II.



emphasized that international commitments of each Member State also form a part of their constitutional traditions, the EU has been criticised for using mainly European standards of human rights. This may lead to a situation when the human rights that have been established in international human rights instruments are losing their importance on the EU level. The discussion on this issue continues in the following chapters when applying the human rights based definition of social security to the EU policy.

#### **4.1.1 Overview of the social security policy within the EU competence**

The previous chapter reviewed the prevailing non-intervention approach towards the social security policy at the Community level. It helps to understand the legal effect of those Community instruments that have been adopted in the field of social security. It must be identified what main instruments have been adopted for protection of social security rights within the EU competence and what the role of social security within the overall EU debate on common social policy is.

Because of the limited competence in the social security field, the main attempts to strengthening the limited harmonization of the social policy among Member States have been achieved through recommendations<sup>125</sup>, guidelines<sup>126</sup>, and reports<sup>127</sup>. The coordination is

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<sup>125</sup> Two important recommendations in 1992 92/441/EEC June 24, 1992 and 92/442 EEC 27 July 1992 – member states agree to develop, maintain and adapt their social protection systems but attitude to this from member states ministers has been restrictive. 92/441/EEC sets common criteria on sufficient resources and social assistance in social protection systems: mentions respect to human dignity, rights to those who do not have resources; .Problem is the 'soft' form of being a recommendation and the only applicable review procedure –member states have to submit reports on achievements. 92/442 EEC acknowledges that different social security systems can endanger common market and cause regional imbalance, and that all MS have the same problems. Economic and social committee 1996 opinion, *supra*. n. 113. para 3.3.

<sup>126</sup> 2003/578/EC: Council Decision of 22 July 2003 on guidelines for the employment policies of the Member States, *Official Journal L 197*, 05/08/2003 P. 0013 - 0021

<sup>127</sup> For example the 2003 report of the Social Protection Committee *Key issues on Social Protection and Employment* lists Member State practices with respect to keeping elderly worker employed and other measures how to keep the income safe.

pursued through regulations; most important in social security area is Regulation 1408/71<sup>128</sup> as well as the directives concerning the equality of treatment<sup>129</sup>. The above mentioned Community instruments are only partly related to the EU social policy because all of them had been drafted before the ‘human face’ of Europe was shaped more clearly<sup>130</sup>. Therefore these instruments are important tools of the fundamental freedom of movement.

The objective of Regulation No 1408/71 is to guarantee that workers would be able to ‘export’ their social benefits when working in another Member State as well as not suffer from discrimination based on nationality or residence. The social assistance benefits are not covered by the Regulation<sup>131</sup>. However, the application of this Community instrument has turned out to be problematic mainly because it is a challenge to distinguish between work-related and not work-related benefits (or solidarity benefits, as it is classified by for instance F. Pennings<sup>132</sup> who believe that they can not be exported because they are paid only to community members from the tax revenues). The problem still remains due to the fact that in different member states benefits can be treated differently. For example in some cases the family allowances are not treated as solidarity benefits but rather as employment-related benefits<sup>133</sup>.

The definition of social security and distinction of social security and social assistance has been established by the ECJ judgments. The primary rule is that before concluding if a particular benefit is considered as social assistance or a benefit for any contingency, the ECJ must evaluate the purpose of a particular benefit and conditions why this benefit has been granted. For the sake of this test it is not important if the domestic

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<sup>128</sup> OJ L 149 , 05/07/1971 P. 0002 – 0050. The Regulation is annually amended.

<sup>129</sup> Directive 79/7 on equal treatment in social security (OJ L 6/1, 1979), Directive 75/117 on equal pay for men and women (OJ L 45/19, 1975) and 76/207 on equal treatment (OJ L 39/40, 1976).

<sup>130</sup> Although the estimation varies and the 1st Social Action Programmes of the Community emerged as early as in 1974, the more substantial social policy provision appeared only in the Treaty of Amsterdam (1997).

<sup>131</sup> Art. 4.

<sup>132</sup> F. Pennings, *supra*. n. 13.

<sup>133</sup> *Ibid.*

legislation has put the particular benefit under a different label<sup>134</sup>. So, in *Hoeckx v. The Netherlands*<sup>135</sup> the ECJ held a test for evaluating if particular benefits belong to social security system, and consequently could be applied to migrant workers under the Directive 1408/71. The ICJ held that the purpose of the benefit should be to cover one of the social risks and the list of those risks is exhaustive<sup>136</sup>. Other general social benefits (for example, the minimum means of subsistence) must be regarded as social advantages and for the purpose of the Community law must be considered under the Directive 1612/68<sup>137</sup>.

Even if the ECJ has applied its test to differentiate among these benefits (by asking if one of the contingencies is covered, whether the beneficiary has a legally defined status and whether there is no discretionary assessment before the benefit is granted<sup>138</sup>), the ‘message’ behind this problem is clearly cut - coordination can not be purely technical because it has a direct effect on social justice. The EU has not been focused on this issue because the main aim behind the Regulation 1408/71 is after all the harmonization of market. When setting up this Community instrument the builders of the common market were not that much occupied with the universal test whether everyone is insured but rather intended to ensure that migrant workers remain in the ‘status quo’ situation from a social security perspective.

Even if none of the EU instruments provide a clear definition of social security, the European Social Committee has defined it as a ‘social cover’, extended to any person legally resident within the Community<sup>139</sup>. It has not been emphasized that it is the right of workers and their families, but it is obvious anyway, since most of the Community legislation on social

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<sup>134</sup> Case C-249/83, *Vera Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout*. 27/03/1985, ECR 1985, p. 00973. para. 11.

<sup>135</sup> *Ibid.*

<sup>136</sup> The risks covered are – sickness and maternity, invalidity, old-age, loss of provider of support, accidents in work and occupational diseases, death grants, unemployment, family benefits. Directive 1408/71, Article 4(1).

<sup>137</sup> OJ 257, 19/10/1968 p.0002-0012.

<sup>138</sup> *Hoever and Zachow*, C-245/94, C-312/94 ECR I 4895

<sup>139</sup> Economic and social committee 1996 opinion, *supra*. n. 113, para 2.1.

security is covered by the fundamental freedom - free movement of workers. In general, protection - including the judicial protection - regarding the social security in the EU is a part and parcel of the free movement of workers, and the aim of this protection is to grant the migrant workers (their families as well as students) no fewer benefits than they would receive if working in their home countries. Still, there is not space for evaluation if the standards are high enough or protects the person enough, as long as the benefits are not lower than it would be in the home state.

When looking at the role of social security within the overall EU social policy, it must be stressed that changes in Europe over the last decades – enlargement, ageing of population, and other factors have made the EU call for modernization of European social model<sup>140</sup> as well as modernization of social protection systems<sup>141</sup>. It can be said that the three objectives (which may seem to exclude each other) are one of the challenges of the EU; they have also been called a ‘challenging triangle’<sup>142</sup>. First of all, the challenge is to change the situation when people ‘get addicted’ to welfare benefits and lose incentives to return to work at all because the increase of income is not significant, partly also because of the extensive tax rates on income. Secondly, which may well contradict with the first challenge, is to keep the importance of social security schemes because they are important in order to fight with poverty, and thirdly, the resources that are available<sup>143</sup>.

It is obvious that EU faces a very special challenge, and it may be said that it is trapped by its own success of being the organization of well-fare states (at least until the last enlargement), where social protection has been highly developed and above the standards set by the ILO on social security

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<sup>140</sup> On the emergence of the EU social model see J. Kenner, *EU Employment Law. From Rome to Amsterdam and Beyond*, (Hart publishing, 2003), Chapters 1 - 4.

<sup>141</sup> Commission in its report *The social situation in the European Union - 2004* expresses concerns of the social security systems in 10 new Member States – more diversity, under-coverage and low benefits (social assistance), low social dialog. However, the ICESCR had said the same about the some of the old member states (see the Supplement A).

<sup>142</sup> Communication from the Commission, *Modernizing Social Protection for More and Better Jobs*, COM/2003/0842 final/.

<sup>143</sup> *Ibid.* See also Employment Guideline *supra*. n. 126.

area. Although lacking any binding community measure, the encouragement addressed to Member States is to re-design their social protection systems and shift the emphasis from financial benefits to benefits which actually promote integration back in the workplace (childcare, education, etc.)<sup>144</sup>.

Another question, which is of a particular interest for the present paper, is how the coordination approach helps (or to the contrary - impedes) the promotion of the best result for individuals. On the one hand, mere coordination (where the best practice of all the member states has been followed) can be a most beneficial choice, because member states avoid compromising on the lowest denominator and do not reduce the overall level of protection. The backlash of this approach in the EU is probably lack of any binding mechanism (and lack of political will in the Council) for getting out any real effect from the best practices in the social security field, apart from recommendations and opinions.

As it has been mentioned above, the EU institutions pay significant attention to the problems in the social security field and, although not explicitly revealed, the conclusion is less obvious – the social security systems turns out to be unable to protect Europeans in the ‘changing Europe’. And here comes the paradox - because the social security systems were suitable for the ‘old’ Europe (by ‘old’ meaning the situation around the second half of the last century of steady economic growth, establishment of strong working population and lower unemployment), now in the changed environment, the social security systems turn out to grant some kind of ‘over-protection’. Together with the less prosperous economic growth it deprives people of working incentives and at the same time of their security (no work – no security, and social benefits can not replace the security in long term). In short – the state is not able to provide conditions so that people would take care of themselves.

These ways of treating social security, which have been extracted from the coordination directives, prove that social security is a tool for creating a common market. It is protected through the coordination tools, such as the application of Council Regulation 1408/71. However, even the application of those instruments is not without problems and diversity

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<sup>144</sup> *Supra*. n. 142.

among the Member States. The AG Colomer in his opinion has recently expressed concerns on this problem<sup>145</sup>.

## **4.2 Human rights based assessment of the EU social security policy**

In order to analyze to what extent the limited EU competence in the social security area is guided by the rights-based approach instead of being purely a tool for unifying the European market (via free movement of workers), first of all, it must be identified what the indicators are that define social security as a right in the EU notion and, most important, how individuals can gain from this right. Therefore the following chapter, bearing in mind the limited EU competence in social security field, will look at the importance of national constitutional traditions and observe how they influence the shift (if any) towards a more rights-based social security policy in the EU. This influence will be assessed by looking at the case-law of the ECJ because the Court will remain the ‘creator’ of the fundamental rights before any binding EU document is adopted which would clarify the character of fundamental rights in the EU<sup>146</sup>. It will be examined which human right principles of social security are protected in ECJ’s interpretations. The draft European Constitution, notwithstanding its current problems, is used as a reference to the position of the member states, regarding the role of social security as the right.

Member states in their constitutions have granted the constitutional protection of the right to social security and they have undertaken regional and international obligations regarding it (both the minimum standards as the ILO convention 102 as well as more advanced standards in at the revised European Social Charter). However, it can be observed from the CESCR

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<sup>145</sup> AG Ruiz-Jarabo Colomer in his opinion (15/10/2002) on case *C-326/00 Idryma Koinonikon Asfaliseon v Vasilios Ioannidis* pointed that Member States in their comments and submissions express significant disparities whenever the case concerns financing medical services for treatment received in other Member States to which nation social security institutions usually oppose and put forward burdens and conditions. (para. 23.)

<sup>146</sup> On Constitution of EU see for example J. H. H. Weiler, *The Constitution of Europe. Do the New Clothes has an Emperor? and other essays on European Integration*, (Cabridge University Press, 1999).

concluding observations that even if member states are bound by international human rights instruments, for a couple of decades, for example such member states as the United Kingdom, Ireland, France, Italy have not been willing to provide a direct legal effect to economic and social rights within the national legislation<sup>147</sup>.

Nevertheless, the background of Member States international human right obligations is important with relation to the scope and interpretation of the rights and principles prevailing in the EU. The TCE provides that any fundamental rights recognized by the EU result from constitutional traditions of member states and they should be interpreted in harmony with these traditions<sup>148</sup> (the EJC has held that the Community is also *guided* by obligations of international human rights treaties, to which member states are signatories<sup>149</sup>). The scope of application of these fundamental principles, on the other hand, is limited in so far as it concerns interpretation of the acts adopted or implemented by the EU bodies within its competence, or when member states implement these acts. It also concerns the examination of the legality of those acts. It must be observed what the current status of social security issues is (as put in the Charter of fundamental rights and later in the draft TCE) and whether it reflects the common position of member states.

Looking at the wording, preparatory work and discussions during drafting of the TCE, it is obvious that the opinion on the issue 'be or not to be' economic and social rights as EU constitutional rights has progressed only partly in favour of the right based status of social rights. The positive achievement is that several social rights have been defined as rights and that in general they have been included in the text of the draft treaty instead of the preamble, so as giving legal effect of them (in the case when/if any such binding document is adopted). Still, a cautious attitude to it is obvious<sup>150</sup>.

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<sup>147</sup> See Supplement A.

<sup>148</sup> Article II-112(4) TCE.

<sup>149</sup> *Nold, ERT*. More recently - Case C-112/00 *Eugen Schmidberger v Austria*, [2003] ECR I-05659, para.71.

<sup>150</sup> As an example can be mentioned the omission of the proposal from the Economic and Social Committee to include the guarantee that "high level of ... social protection" must be one of the main objectives. The criticism targets the modest progress made on economic, social, employment issues and that the wording does not truly reflect the aim to establish "social market economy".

The question if the social security indeed has the status of a right among the fundamental rights of the EU should be answered in the negative. Article II-94 provides that the EU recognizes and respects the *entitlement* to social security<sup>151</sup>. The obligations towards application of this principle are weak. This is a typical approach to the field of economic and social rights which are expressed as 'to recognize' and 'to respect'. This is advocated by those who assert that a precise definition of social rights must be avoided.

Fixed state obligations are said to be impossible to define because of differences in resources, as well as because it would preclude a flexible interpretation, which is needed for the changing environment of these rights and the problems of which must be settled through social dialogue<sup>152</sup>. A number of arguments have been provided against the definition of social rights<sup>153</sup>. Explanation of the social security articles in the EU Charter of Fundamental Rights refers to the ESC. Therefore it seems that Member States half a century later have been guided by partly the same reasoning as during drafting of the ESC<sup>154</sup> when the debate whether economic and social rights should be formulated as individual rights arose and was decided in the negative<sup>155</sup>.

Even if social security does not meet the definition of an individual right in the charter of the fundamental rights and the constitutional treaty of the EU, it must be clarified whether this principle has any legal effect - whether it has any practical effect for individuals or whether it is only an aspiration with no particular legal value?

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<sup>151</sup> „1. Union recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss employment, in accordance with the rules laid down by Union law and national law and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognized and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices”.

<sup>152</sup> B. Bercusson, *supra*. n. 116, pp. 207-208.

<sup>153</sup> *Supra*. n. 64 on member states diverse views regarding state obligations under the ICESCR.

<sup>154</sup> See chapter 2.2.3. on ESC.

<sup>155</sup> *Ibid*.



If principles are not enforceable, and this is the main feature that distinguishes the right from a principle, then it can be regarded as an inconsistency with international human rights standards. The later defines social security as a right<sup>156</sup>, and those rights are enforceable<sup>157</sup> albeit at times not as explicitly as it is with civil and political rights. The draft TCE provides that principles shall be observed and may call for implementation through legislation and they become justiciable *when legality* of such acts is scrutinized before courts<sup>158</sup>. It has been emphasized that the justifiability of principles is not absent, it is only different<sup>159</sup>. However, the wording of draft Article II-112 is criticized because it reveals that the judicial importance of principles is when the legality of community law (or national law implementing community law) is tested. However, can the principle be used to annul these acts? In legal scholarship, it has been admitted that principles can also be used to annul those Community acts which infringe the fundamental community principle<sup>160</sup>.

The following principles, which are found in the case law of the ECJ regarding the social security cases, illustrate the Community position on this much disputed field of law from the human rights perspective (if any) through the perspective of EJC. The mentioned principles would serve as a guide when comparing the EU perspective on social security with the proposed human rights-based definition of social security.

As it was pointed out earlier, the social security within the Community competence is mainly related with the freedom of movement of workers in the course of establishment of a common market. It is apparent from the ‘common knowledge’ on the EJC case law that its decisions on some social issues have turned out to be the cornerstones of the whole understanding of the Community law (for example the *Defrenne*<sup>161</sup> judgment on direct effectiveness of the Community law, *Van Gend & Loos*<sup>162</sup> and *Costa v.*

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<sup>156</sup> J. Tooze, *supra*. n. 81, p.163.

<sup>157</sup> M. Scheinin, ‘The Right to Social Security’ in A. Eide, C. Krause, A. Rosas (eds.) *Economic, Social and Cultural Rights*, (Martinus Nijhoff Publishers, 2001), pp.211-221.

<sup>158</sup> Art. II-112(5) TCE.

<sup>159</sup> *Supra*. n. 8.

<sup>160</sup> *Ibid*.

<sup>161</sup> C-v43/75 *Defrenne*, [1976] ECR 00455.

<sup>162</sup> C- 26/62 *Van Gend & Loos*, [1963] ECR 00001.

*ENEL*<sup>163</sup> on the importance of fundamental rights within the Community, *Francovich*<sup>164</sup> on state responsibility for damages caused to its individuals due to un-implemented Community laws), and the EJC has faced criticism that it is expanding the social issues more than the ECT has intended to cover.

#### 4.2.1 Principle of solidarity

When dealing with social issues, the questions regarding the *principle of solidarity* have played a major role within the case law of the ECJ, and, for instance C. Barnard believes it reveals that the ECJ is not predictable in cases when the common market ideas clash with more general social issues<sup>165</sup>. The principle of solidarity forms the basics of any social security system and the social security schemes, compulsory or other, are based on this principle of ‘sharing’ – the absence of any direct link between the contribution paid into social security scheme and the benefits granted. This system provides the solidarity between better paid workers and lower paid workers who would otherwise be deprived of proper social cover<sup>166</sup>.

Is solidarity treated as a right within the EU? The ILO 2001 report on social security reveals that everybody has a responsibility to contribute to social and economic progress and should be given an opportunity to do so. In return, everybody *has a right* to a fair share of the common income and wealth. In the EU perspective the importance of the question of solidarity most often arise within the EU competition law. In particular, when it must be tested whether the companies/entities (which fulfill purely social functions) should be treated as undertakings to which all the restrictions regarding fair competition apply. The ECJ in *Poucet*<sup>167</sup> held that bodies fulfilling exclusive social function (in this particular case – French social security bodies that operated sickness and maternity insurance scheme and basic pension fund) cannot be considered as undertakings because they were non-profit making and functioned on the principle of solidarity. The

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<sup>163</sup> C – 6/64, *Costa v ENEL*, [1964] ECR 00585.

<sup>164</sup> Joined cases C-6/90 and C - 9/90, *Francovich*, [1991] ECR I-05357.

<sup>165</sup> C. Barnard, *EC Employment Law, 2nd ed.*, (Oxford EC Law Library, 2000), p.36.

<sup>166</sup> Case C-218/00, *INAIL*, ECR 2002, I-00691, para. 42.

<sup>167</sup> Joined cases C-159/91 and C-160/91, *Poucet*, ECR 1993, I – 00637.

case law was however clarified in *FFSA*<sup>168</sup> by holding that non-profit organizations that operate *optional* pension scheme *should* be classified as undertakings (because social benefits depend on the contributions and the results of investments made, and the scheme is optional)<sup>169</sup>. Therefore the ECJ held that there the principle of solidarity was not applicable, and nor the social function or non-profit nature changed this because undertaking in the competition law is any entity in economic activity, regardless of their legal status<sup>170</sup>.

This would mean that even those public-law bodies which offer optional social insurance schemes together with other social security activities would fall within the meaning of an ‘undertaking’ within EU understanding and face the same regulation as all the other commercial actors. Such a conclusion would constitute a burden to their main purpose, which is to function for social protection purposes. Still, the above mentioned case law in certain cases is applied to favour social reasoning. For instance, in the *INAIL*<sup>171</sup> the court put emphasis on the principle of solidarity. The court concluded that benefits paid to insured persons do not strictly depend on the contributions made by them and it also recognized extensive state supervision of the social security scheme (which provides benefits for accidents at work). Therefore the ECJ concluded that the compulsory affiliation of such a scheme is not an undertaking under the EU competition law.

What can be concluded from the discussion above is that, as it was stated earlier, the EU competence on social security and rights which it entails does not reach the level of ‘rights’, rather than principles which are used in order to settle disputes on the issues important for developing the common market. The case-law of the EJC reveals that social security is not regarded as an economic activity but rather social solidarity, and therefore lays outside the reach of the ECT this way the disputes regarding bodies

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<sup>168</sup> Case C-174/97 *FFSA and Others v Commission* [1998] ECR I-1303.

<sup>169</sup> *Ibid.*

<sup>170</sup> C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I 6451. para. 74. See also *Albany, Drijvende Bokken and Brentjens*.

<sup>171</sup> *INAIL case, supra.* n. 166.

providing these services can not be settled before the major EU law enforcement forum.

However, the ECJ has developed criteria according to which it tests if the public bodies operating social security schemes (usually non-compulsory and operating similarly to insurance companies) provide economic activities. The ECJ is much criticized for its inconsistent tests because the very principle of the EU is to liberalize market, minimize state intervention and hence member state immunity against application of the EU competition rules to its quasi economic activities. As it has been emphasized that the principle of solidarity is not a strict yardstick in for deciding if an entity is outside the reach of the ECT. However, it is probably true to admit that the ECJ, even if criticized, would make a distinction between compulsory, purely state-operated social security systems and private (optional) social security systems which serve as additional security only for those who are capable of contributing to those schemes and therefore lack the criteria of ‘sharing’ but rather accumulate extra savings for better off days. The latter therefore falls rather under the protection of property law.

#### **4.2.2 Rights vs. duties**

As mentioned earlier, the realization of social security in contrast to social assistance, in its common understanding constitutes duties from all the ‘social partners’. The EU Commission in its communication of modernization of European social security system<sup>172</sup> emphasizes the fight with the ‘challenging triangle’, which is important to promote the job incentive. The report shows that Member States have come up with creative measures how to urge people not to rest unemployed; one of the popular measure is entering a contract, which provides that the condition of receiving the unemployment benefit is the person’s involvement in job seeking, training and other activities. Would this be a proper suggestion if the social security is regarded as a human right? Rights, if social security is one, should not be conditioned in such a way that a breach of contractual obligations would preclude individuals from enjoying them. However,

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<sup>172</sup> Para. 7

social security should include certain obligations because solidarity as itself is about mutual rights and duties not only on the vertical (individual-state) level but also horizontal (individual-individual) level.

#### **4.2.3 Subsidiarity and justiciability**

The leading *principle of subsidiarity*<sup>173</sup> within the social policy of the EU has been much criticized. For example, the EU Economic and Social Committee expresses concern that the disadvantage of the subsidiarity principle in social protection is the cut in social benefits because of tax competition among the member states. It makes member states run contrary to solidarity<sup>174</sup>. The importance of clear division of powers with respect to social security issues is a long established rule by the ECJ – the Community law does not affect the power of the member states to organize their social security systems, and under the principle of subsidiarity it is the member state which is the best suited to deal with these issues<sup>175</sup>. This principle has already been envisaged in the very core of the division of competence between national courts and the EJC because in any case the national court is regarded in a better position to evaluate facts concerning individual claims, the issues on which are forwarded for the preliminary ruling. The division, however, may work for the benefit of individual applicants. For example, in the *Van Der Duin*<sup>176</sup> even if the Commission suggested that the applicant should not enjoy the protection by the Community law on freedom of workers (the Commission doubted whether the applicant has fulfilled the condition under Directive 1408/71 Art. 22 and probably might have returned to the competent member state only for the medical treatment), the ECJ emphasized that the factual evaluation is the domestic competence and therefore the individual applicant can forward the dispute to a national forum, which is better situated to scrutinize the facts.

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<sup>173</sup> One of the principles established in the ECT providing that the Community shall take action only if this activity is better achieved with the Community involvement and the Member State can not sufficiently fulfill this activity. Para. 5 ECT.

<sup>174</sup> Opinion of the Economic and Social Committee, *supra* n. 113, paras. 3.8. - 3.11. The concern is illustrated by the example from the new EU member state practice – Latvia - the lowest taxes in EU, the cheapest labour cost and one of the lowest living standards.

<sup>175</sup> Case C-158/96 *Kohl* [1998] ECR I-1931, para. 17.

<sup>176</sup> Case C-156/01 *R.P. Van der Duin* [2003], OJ C 200, 23/08/2003, para. 5.

However, the suggestion to amend the ECJ competence and extend it to direct individual applications, including the breach of the EUCFR, is not new and was expressed also by the working group drafting TCE<sup>177</sup>. The current trend among the member states, however, would be rather different. It can be concluded from the debates on the optional protocol to the ICESCR<sup>178</sup> and Council of Europe<sup>179</sup>. Even if the Art. 230 of the ECT would be extended, at the moment the EU does not even have a binding set of fundamental rights against which the Community law could be tested.

#### **4.2.4 The good governance**

The term ‘good governance’ usually covers the whole range of processes and practices followed by the state in order to grant human rights to everyone within the jurisdiction of the state<sup>180</sup>. For the current paper this term includes states’ obligations to follow this practice in order to provide social security in the same manner as providing all the other human rights, i.e. – transparency, accountability, etc. It must be identified if the EU, disregarding its limited competence in the social security field, has anything to do in order to help or supervise the member states in following this practice.

Social security is definitely an area the administration of which requires a special state attention, which can be labelled as ‘good governance’. Draft TCE<sup>181</sup> establishes that the Community institutions shall conduct work ‘as openly as possible’ which is not the most precise definition. However, there are other elements of good governance included in the draft<sup>182</sup> – participation of social partners in the decision-making and transparency ‘as close as possible’ (probably it remains an issue whether it was intended to mean only consultations or any additional binding cooperation). This is the principle which can be well enforceable before

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<sup>177</sup> WG II-WD 017, 16 September 2002.

<sup>178</sup> See n. 68 above.

<sup>179</sup> See chapter 3.2.4 above.

<sup>180</sup> A. Eide, ‘Good Governance, Human Rights, and the Rights of Minorities and Indigenous Peoples’, in H.O. Sano and G. Alfredsson (eds.) *Human Rights and Good Governance*, (Kluwer Law International, 2002), p 47-71.

<sup>181</sup> Art. I-50.

<sup>182</sup> Part I title VI.

national courts of member states because the EU competence in this area is limited<sup>183</sup>.

Still, it is possible that the principle of good governance can be introduced indirectly, through the Community law, and can be enforced before the EJC. In Case *C-276/02* the alleged breach of Community law by Spanish state authorities was non-collection of taxes through the waiver of tax payments and failure to initiate forced collection of taxes. Within the Community law the issue was one of the state aid and possible creation of a competitive advantage for the Spanish company because they would escape the tax and social security burden. The Commission claimed that State had failed to act as a diligent private creditor. Even if the ECJ held that there was an error in facts because State had done as much as possible, this illustrates one of the possibilities how good governance can be tested. On the community level, maintenance of non-disturbed competition certainly is a motivating factor. Anyway, the result of such proceedings can be the measures taken against the State for breaching the community law because it has failed to secure as much resources as possible for the common social security system (tax non-collection as itself can be viewed as one of the most attractive areas for corruptive activities among state authorities and therefore counteracting the principle of good governance).

#### **4.2.5 Equality and non-discrimination**

Within the EU, the dominating laissez- faire philosophy in 80s turned into the 90s main ideas (mainly advocated by the UK<sup>184</sup>), which state that inequalities will be diminished by the free market, and concentration of wealth is the result of `equality of opportunities`. Some authors argue that neo liberalism is contrary to the principle of equality and it parts economic rights from civil rights<sup>185</sup>. Still, the principle of equality is put as the cornerstone for the fundamental freedom of the EU,<sup>186</sup> and of all the human rights this one is probably regulated most extensively.

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<sup>183</sup> Constitutional Court of the Republic of Latvia held that social security authorities had put too much burden on individuals while requiring information, which the authority could find out itself with less burdens for individuals.

<sup>184</sup> J. Harrod, *supra*. n. 9.

<sup>185</sup> *Ibid.*

<sup>186</sup> Regulation 1612/68 on freedom of movement of workers.

In the social security area, non-discrimination plays an important role within all types of risks. Within the Community law, such cases turn out to be the most problematic where member states have to cooperate for reimbursement of medical or other social in-kind benefits which arise from freedom of movement of individuals. The ECJ had to hold in case *C-326/00* whether the national legislation is compatible with Regulation 1408/71, in the case when before reimbursing the medical costs to a pensioner who has received the treatment in other Member States by the state of residence, the national legislation requires the guarantees that the medical treatment was urgent and that the life of the applicant was endangered. In particular, should the provision of Regulation 1408/71, which precludes such a requirement for workers, applies by analogy to pensioners. In his opinion the AG expressed concerns why the Community has distinguished between workers and pensioners, as the different treatment discourages pensioners from traveling to other member states; if something happens to their health, it would be hard to acquire the coverage from the home state<sup>187</sup>. The court ruled that the domestic legislation infringed the Community law.<sup>188</sup> However, it did not have the chance to evaluate if such legislation was contrary to Article 1 of the Protocol No 1 to the ECHR as it was asked by the applicant because the ECtHR case law protects entitlements to social benefits under the protection of property clause.

#### **4.2.6 Legal certainty**

Although the EJC had not explicitly named in their social security cases the importance of *legal certainty*, the judgment in the case *Teresa at Silvana Petroni v. Belgium*<sup>189</sup> established the principle that individuals who use the freedom of movement should not lose any social security advantages which have been guaranteed to them by a particular member state. In this case the issue was the Community method of aggregation of social security benefits which must be carried out in order to prevent duplication of social security benefits for the same period from several member states. EJC stressed that according to the EEC Treaty Article 51, the Council has the competence to

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<sup>187</sup> AG holds that it is clear that MS want to prevent pensioners travelling abroad for the purpose to receive medical treatment.

<sup>188</sup> C-236/00 from 25/02/2003.

<sup>189</sup> C-24/75 from 21/10/1975.



adopt only such measures which are *necessary* to provide freedom of movement for workers. Calculation of benefits should not be exercised in a disadvantageous way for the person.

Notwithstanding the positive ruling, the principle of not putting a person in a disadvantageous situation because they have used the freedom of movement and the lack of more protective and coherent Community provision on social security have in individual cases failed to provide protection before domestic tribunals. A good example is the case where the applicant, an Austrian resident receiving an invalidity pension in Austria, claimed that on the ground of bilateral agreement and Council Regulation (EEC) 1408/71 Austrian authorities should provide her with same conditions as the more generous German pension system. She claimed it because of her 15 year long employment in Germany where she also received invalidity pension<sup>190</sup>. The Austrian court held that there was no such obligation under the bilateral treaty or under the Regulation, and that Austrian law should be applied because of the absence of adequate provisions in the Community law<sup>191</sup>. The issue was not forwarded for preliminary ruling to the ECJ because of the separation of functions between the ECJ and the national court, where the latter is by no question in a better position to assess the facts and the necessity of the request for preliminary ruling from the ECJ. The above example illustrates the lack of individual protection, deriving from the subsidiarity principle, and the prevailing member state exclusive competence in social security field.

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<sup>190</sup> The review of the application of community law by national courts OJ C 250, 10/08/1998, p.199.

<sup>191</sup> *Ibid.* Judgment of 11/02/1997.

## 5 Conclusions

### 5.1 Why should the right to social security be defined as a right?

Social security descriptions differ both domestically and internationally - in employment protection instruments it is more often defined as a right, in human rights instruments recognized as the human right, and in EU legislation acknowledged as principles. One can still inquire what it is that makes it so important to define the right to social security as a right. Moreover, one can argue that the formulation of the right should not matter as long as the state is both willing and capable to secure its people in situations of need. The prevailing understanding is that social security must be a mainly domestic matter in the same way as each state has sovereignty over its natural resources, army and other tools by which to provide security.

However, the current paper focused on stressing the importance of right-based approach even to this seemingly domestic and economic matter. Weiler<sup>192</sup> mentions that the importance of the right lays in the assumption that the right reflects the deepest values of individual, which must be protected and cannot be overturned easily by higher authority. Social security should be formulated as a right if only for the reason that each right faces its obligations. The obligations for economic and social rights are twofold, and in order to enjoy the rights to social security (based on statutory schemes rather than own social insurance contributions) not only states but also individuals have to be bound by their duties (to pay taxes, even cooperate with state authorities to prevent companies escaping from their economic liabilities towards the state and subsequently towards other individuals). On the other hand, economic and social duties cannot be conditions for people to enjoy their human rights<sup>193</sup>. If the right is formulated as a right and people treat it like that, then obligations will be identified more easily than in the case when the state formulates all its economic commitments as principles and programmes.

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<sup>192</sup> Weiler, *Constitution of Europe*. p. 103

<sup>193</sup> Critics to the pre-draft UN resolution on individual social responsibilities prepared by Alfonso-Martinez.

It is important to consider social security as a right also for other reasons. From the brief historical introduction it was evident that social security can be a powerful tool in the hands of those who are in power and can be used to manipulate with the most vulnerable part of population. This tool was engineered during Bismarck Germany, when social security schemes were first introduced in order to prevent working class from joining the revolutionary movements. This approach is still evident in, for instance Belarussia where more or less stable old age benefits keep a substantive part of electorate loyal to the authoritarian regime.

## **5.2 To what extent social security is a human right within the EU?**

The following conclusions on the EU social security model should be made together with the distinctions of the right to social security from other social rights.

First of all, the right to social security entails strong obligations from employees, employers and the state. Workers' rights are one of the main areas protected by the Community law; therefore, social security issues are important for the Community goals. As one of the most developed principles lately, in the protection of Community competence there are principles of equality and nondiscrimination, especially in the gender equality area. These are the cornerstones for implementation of any human right, be it economic or social. Therefore even if the Community competence is limited in the economic and social field, it is important that the limited Community rights are applied with respect to these principles.

Secondly, it must be observed that even if all human rights are claimed to be universal, the social security field is protected by the principle of subsidiarity in even greater extent than other social rights. The social security sphere in the EU reflects the same pattern as for the social right protection within the Council of Europe – the states remain their sovereignty over this issue and stronger harmonization initiatives have been refused<sup>194</sup>.

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<sup>194</sup> However, a number of members pleaded of a provision in the Treaty allowing the Council to adopt by co-devition the legislative measures necessary for establishing minimum standards of social protection not only in health care but also in social security benefits and social services

The EU is strongly guided by the principle of subsidiarity,<sup>195</sup> which provides that the Community would take action only in so far as the particular objectives can not be achieved better by member states. This principle, together with other EU problems, has not escaped criticism; it is said that lack of EU competence in certain economic and social fields leads to, for example, tough tax competition among Member States which may cut down on social protection expenses just to become more competitive<sup>196</sup>.

The Community objective is to support and supplement the social sphere<sup>197</sup>. In all the spheres where this principle applies some questions always remain. What are the indicators showing that one or another competence is better achieved by member states individually rather than the Community, and what are the criteria according to which it would be possible to evaluate this achievement? In general it is hard to apply any sufficient criteria or measure the “success” of economic and social rights. The statistics only partly help. Certain regional and international bodies assist with setting the criteria by reviewing state reports, of course with no particular binding effect (as examples can be mentioned the reviews of the European Committee of Social Rights reviews within the Council of Europe as well as certain EU bodies – the Social Protection Committee’s reviews on Member State reports and the Network of Experts reviews in particular to the human rights application in Member States).

Thirdly, if inappropriately managed, the right to social security more than other economic rights can provide the opposite effect – drive people into addiction to welfare. It was emphasized earlier that, similarly as to every economic right, it is the state’s obligation to provide a constant review of its available resources and to constantly improve the right to social security – to make it available to larger parts of its population in various cases of contingencies. Still, even if this is how do we understand this right internationally, the enforcement of this right remains questionable, i.e., is it proper to ask states to review their resources and provide more advanced

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providing protection in cases such as old age, incapacity for work, maternity, unemployment and dependency. P.33. <sup>194</sup> Working group on the constitution – p.33, CONV 516/1/03 REV 1.

<sup>195</sup> Article 5, ECT.

<sup>196</sup> The issue is also mentioned in the EU ESC report 1995, p. 3.7. 1995.

<sup>197</sup> Article 136, ECT

social security systems? When speaking about the EU system, it is clear from the overview in the present paper that testing the quality of the right (i.e. the amount of the benefits paid in case of contingency as well as the various forms of work related and non-work related benefits) is not the EU competence because the Member States have not been able to agree on the harmonization of their social security schemes<sup>198</sup>. It is the reason why at least within the EU competence the Member States most likely will not be blamed for their unwillingness to achieve higher standards in the area of social protection – both the social security based on compulsory/voluntary contribution schemes and the residual social assistance.

Within the EU, the right to social security is not defined in a way that any individual could test if the limitations to social protection imposed by the state meet the legitimate aim, whether they are proportional and can not be achieved in a less restricted way. However, even if such a legal effect is strongly recommended for several economic rights, it can have an adverse effect on social security. It may not lead people out of the poverty but drive them even in more miserable conditions. It is because social security schemes must be designed in such a way as to allow people to take care of themselves. On the other hand, the social security must not reach the level of social assistance and become only a cover for very basic needs, which is provided on case by case basis.

Even if it is not likely that the right to social security (the same as the right to social assistance) will be any time soon widely acknowledged as an individual and enforceable right within the EU (or other states), it is therefore even more important that this right is available, accessible and applied with no discrimination.

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<sup>198</sup> See also C-340/94 *De Jaeck* [1997], ECR I-461, para. 18.

## Supplement A

### Commission's on Economic, Social and Cultural Rights concluding observations on the implementation of International Covenant on Economic, Social and Cultural Rights (ICESCR).

#### Selection of concluding observations regarding the enforceability of the ICESCR and implementation of Art. 9 of the ICESCR by the Member States of the European Union.

State	Principal subjects of concern (from the concluding observations)	Source
Belgium (2000)	The Committee expresses its concern about the discriminatory effects against women of the so-called "cohabitation rule" in the unemployment insurance regime of Belgium. (para 10).	E/C.12/1/Add.54
Finland (2000)	<p>The Committee is concerned that, while the Covenant may be directly invoked before the courts of Finland, there is no case law data suggesting that this has ever happened. In this respect, the Committee is concerned that lawyers and judges may not be sufficiently aware of the rights enshrined in the Covenant. (para 12).</p> <p>The Committee reiterates its concern, expressed in paragraph 13 of its previous concluding observations (E/C.12/1/Add.8), that</p>	E/C.12/1/Add.52

	<p>although collective agreements in some sectors of professional activity contain provisions for the determination of minimum wages, no minimum wage is guaranteed nationally. (para 16).</p>	
<p>France (2001)</p>	<p>The Committee expresses its concern that, despite the constitutional provision (art. 55) stipulating the primacy of international law over national law and the monistic principle adopted by the State party incorporating international law in the domestic legal order, the Covenant and its provisions are not considered directly applicable by some courts of law (e.g. the <i>Conseil d'Etat</i>), resulting in a dearth of court decisions in which reference is made to the Covenant and its provisions. The Committee is also concerned about the delegation's statement that some economic, social and cultural rights are not justiciable. (para 13)</p>	<p>E/C.12/1/Add.72</p>
<p>Germany (2001)</p>	<p>The Committee reiterates its concern about the lack of any court decisions in which reference is made to the Covenant and its provisions, as indicated by the statement made by the State party in its written replies to the list of issues and as confirmed by the delegation</p>	<p>E/C.12/1/Add.68</p>

during its dialogue with the Committee. The Committee is concerned that judges are not provided with adequate training on human rights, in particular on the rights guaranteed in the Covenant. A similar lack of human rights training is discerned among prosecutors and other actors responsible for the implementation of the Covenant. (para 13).

The Committee is concerned that the State party has not adequately addressed the issue of illegal workers who are employed in the "shadow economy", such as workers in households, hotel and catering industries, agriculture and the cleaning and building industries, who do not enjoy any rights or protection and do not get paid regularly or adequately. (para 20).

The Committee is concerned that the State party's reformed social security, and the pension system under reform, do not take sufficiently into consideration the needs of families, women, elderly persons and the more disadvantaged groups in society. The Committee notes that the pension reform is currently still in progress, but that



	<p>the Federal Constitutional Court recently referred to potential discrimination against families under the scheme as envisaged. (para 23).</p>	
<p>Ireland (2002)</p>	<p>The Committee notes with regret that, despite its previous recommendation in 1999, no steps have been taken to incorporate or reflect the Covenant in domestic legislation, and that the State party could not provide information on case law in which the Covenant and its rights were invoked before the courts.(para 12).</p> <p>The Committee is concerned about the persistence of discrimination against persons with physical and mental disabilities, especially in the fields of employment, social security benefits, education and health. The Committee is particularly concerned that people with disabilities, including those working in sheltered workshops, do not have the status of employees and therefore do not qualify for the minimum wage arrangements; if, however, they do benefit from minimum wage arrangements, they are liable to lose their rights to free medical care. (para 15).</p>	<p>E/C.12/1/Add.77</p>

	<p>The Committee is concerned about the inadequacy of the minimum wage and welfare payment levels set by the State party in relation to its obligations under articles 7, 9 and 11 of the Covenant. (para 17).</p>	
<p>Italy (2004)</p>	<p>The Committee is concerned that the State party still considers that some economic, social and cultural rights, including the right to adequate housing, are not justiciable since they entail financial burdens upon the State. In this regard, the Committee notes the scarcity of court decisions in which the Covenant has been invoked.(para 13).</p> <p>The Committee is concerned at the continued existence of a large informal economy in the State party which, inter alia, infringes upon the enjoyment of the economic, social and cultural rights of those employed therein, including children.</p>	<p>E/C.12/1/Add.103</p>
<p>Lithuania (2004)</p>	<p>The Committee urges the State party to put in place a system of indexing the level of basic pensions reflecting changes in the cost of living, and to ensure that basic pensions are sufficient to provide for an adequate standard of living. The Committee</p>	<p>E/C.12/1/Add.96 7 June 2004</p>

	<p>encourages the State party to proceed with its plans to ratify ILO Convention No. 102 concerning Minimum Standards of Social Security and to consider ratifying ILO Convention No. 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security.(para 38).</p> <p>The Committee recommends that the State party increase the coverage and amount of unemployment benefits, so as to ensure that they are sufficient to secure an adequate standard of living and further loosen the eligibility conditions.(para 39).</p> <p>40. The Committee urges the State party to promote equal access to social benefits and social services by striving to correct regional imbalances. (para 40).</p>	
Luxembourg (2003)	<p>While taking note of the information provided by the State party that international treaties take precedence over national laws, the Committee regrets that the Covenant's rights have not been invoked before the courts. (para 15).</p> <p>The Committee notes with concern that the State party has not ratified a number of ILO conventions in the</p>	E/C.12/1/Add.86

	area of labour rights and social security. (para 21).	
Malta (2004)	<p>The Committee regrets that the Covenant has not been incorporated into domestic law and therefore cannot be directly invoked before the domestic courts. (para 10).</p> <p>The Committee notes with concern that the State party has not ratified a number of international labour conventions in the area of labour rights and social security, including Conventions Nos. 102. (para 18).</p>	E/C.12/1/Add.101
Poland (2002)	The Committee notes with concern the different retirement ages for men (65) and women (60), which in practice result in lower pensions for women.(para 19).	E/C.12/1/Add.82
Spain (2004)	The Committee is concerned about the precarious situation of the large number of persons employed under short-term temporary contracts (around 30 per cent of the total number of wage earners).(para 13).	E/C.12/1/Add.99
Sweden (2001)	<p>The Committee regrets that the Covenant is not given full effect in the State party's legal order and therefore cannot be directly invoked before the courts. (para 15).</p> <p>The Committee, while commending the State party's efforts with regard to gender equality, notes with</p>	E/C.12/1/Add.70

	<p>concern that there continues to be inequality in wages and that women earn only 83 per cent of men's salaries. (para 19).</p> <p>The Committee notes that the State party has not ratified ILO Convention No. 131 (Minimum Wage-Fixing Convention, 1970) and that it has no intention to do so, on the ground that the minimum wage is settled by means of collective agreements or individual contracts. (para 22).</p>	
<p>United Kingdom (2002)</p>	<p>The Committee deeply regrets that, although the State party has adopted a certain number of laws in the area of economic, social and cultural rights, the Covenant has still not been incorporated in the domestic legal order and that there is no intention by the State party to do so in the near future. The Committee reiterates its concern about the State party's position that the provisions of the Covenant, with minor exceptions, constitute principles and programmatic objectives rather than legal obligations that are justiciable, and that consequently they cannot be given direct legislative effect. (para 11).</p> <p>The Committee is concerned that</p>	<p>E/C.12/1/Add.79</p>

the national minimum wage is not set at a level that provides all workers with an adequate standard of living in accordance with articles 7 (a) (ii) and 11 of the Covenant. The Committee is also concerned that the minimum wage protection does not extend to workers under 18 years of age. The Committee considers that the minimum wage scheme is discriminatory on the basis of age, as it affords a smaller proportion of the minimum wage to persons between 18 and 22 years of age. (para 15).

The Committee reiterates its concern about the persistence of considerable levels of poverty, especially in certain parts of the country, such as Northern Ireland, and among certain sections of the population, such as ethnic minorities, persons with disabilities and older persons. Moreover, despite measures taken by the State party to combat poverty and social exclusion, the gap between the rich and poor in the State party has increased, according to information provided by the State party. The Committee also notes with particular concern the high levels of child poverty among certain groups

	of society in the State party. (para 18).	
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## Supplement B

### Current contribution rates in national social security pension schemes (selected states)<sup>199</sup>

Country	Total rate of contribution (% of total insurable earnings)	Employer share (%)	Employee share (%)	Government contribution
Belgium	16,36	8,86	7,5	Annual subsidies
France	14,75	8,2	6,55	Variable subsidies
Gabon	7,5	5	2,5	None
Germany	19,5	9,75	9,75	Cost of non-insurance benefits
Italy	32,7	23,81	8,89	Cost of social assistance benefit and overall deficit
Republic of Korea	9	4	5	Partial cost of administration
Luxembourg	24	8	8	8% of insurable earnings
Pakistan	5	5	none	Subsidies as needed
Poland	32,52	16,26	16,26	Funds for minimum pension guarantees
Trinidad and Tobago	8,4	5,6	2,8	Full cost of social assistance benefits
United States of America	12,4	6,2	6,2	Cost of special and means tested benefits.

<sup>199</sup> Published in *Extending the personal coverage of social protection in Social security: a new consensus*, ILO 2001, p. 89.



## **Bibliography**

D. Collins, *The European Communities. The Social Policy of the First Phase. Volume 2 The European Economic Community 1958-72*, (Martin Robertson, 1975).

K. Arts, P. Mihiy (eds.), *Responding to the Human Rights Deficit. Essays in Honour of Bas de Gaay Fortman*, (Kluwer Law International, 2003).

A. Eide, J. Helgesen (eds.), *The Future of Human Rights Protection in a Changing World. Fifty years since the Four Freedoms Address*, (Norwegian University Press, 1991).

A. Eide, C. Krause, A. Rosas (eds.), *Economic, Social and Cultural Rights*, 2<sup>nd</sup> revised edition, (Martinus Nijhoff Publishers, 2001).

F. Coomans, F. Grünfeld et.al. (eds.), *Rendering Justice to the Vulnerable. Liber Amicorum in Honour of Theo van Boven*, (Kluwer Law International, 2000).

R. Beddard, D. M. Hill (eds.), *Economic, Social and Cultural Rights. Progress and Achievement*, (The Center for International Policy Studies University of Southampton).

C.J.G. Sampford, D.J. Galligan (eds.), *Law, Rights and the Welfare State*, (Croom Helm).

A. Glenn Mower, Jr, *International Cooperation for Social Justice. Global and Regional Protection of Economic/Social Rights*, (Greenwood Press).

H.O. Sano, G. Alfredsson (eds.), *Human Rights and Good Governance*, (Martinus Nijhoff Publishers).

M. Sepulveda, T. van Banning et.al. (eds.), *Human Rights Reference Handbook*, 3<sup>rd</sup> revised edition, (University for Peace, 2004).

L. Betten, D. Mac Devitt, *The Protection of Fundamental Social Rights in the European Union*, (Kluwer Law International, 1996).

L. Betten, N. Grief, *EU Law and Human Rights*, (Longman, 1998).

D. Dinan, *Ever Closer Union? An Introduction to the European Community*, (Macmillan, 1994).

E. O. Eriksen, J.E. Fossum, A. J. Menendez (eds.), *The Chartering of Europe. The European Charter of Fundamental Rights and its Constitutional Implications*, (Nomos Verlagsgesellschaft, 2003).

D. Harris, J. Darcy, *The European Social Charter*, 2<sup>nd</sup> Edition, (Transnational Publishers, Inc.).

A. Arnall, D. Wincott (eds.), *Accountability and Legitimacy in the European Union*, (Oxford University Press, 2002).

R. Blanpain, F. Hendrickx, *Codex European Labour and Social Security Law*, (Kluwer Law International).

A. Chapman, S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, (Intersentia 2002).

S. Peers, A. Ward (eds.), *The European Union Charter of Fundamental Rights*, (Hart Publishing, 2004).

## Table of Cases and Documents

### ECHR

*C.G. against Austria*, European Commission of Human Rights, No. 17371/90.

### ECJ

*Costa v ENEL*, C – 6/64 [1964] ECR 00585.

*De Jaeck*, C-340/94 [1997] ECR I-461.

*Defrenne*, C-43/75 [1976] ECR 00455.

*Eugen Schmidberger v Austria*, C-112/00 [2003] ECR I-05659.

*ERT*, C- 260/89 [1991] ECR I-02925.

*FFSA and Others v Commission*, Case C-174/97 [1998] ECR I-1303.

*Francovich*, joined cases C-6/90 and C - 9/90 [1991] ECR I-05357.

*Hoever and Zachow*, C-245/94, C-312/94, ECR I - 4895.

*INAIL*, C-218/00 [2002] ECR I-00691.

*Kohl*, C-158/96 [1998] ECR I-1931.

*Pavlov and Others*, C-180/98 to C-184/98 [2000] ECR I-6451.

*Poucet*, joined cases C-159/91 and C-160/91 [1991] ECR I – 00637.

*R.P. Van der Duin*, Case C-156/0 [2003], OJ C 200.

*Teresa at Silvana Petroni v. Belgium*, C-24/75 [1975] ECR I - 01149

*Van Gend & Loos*, C- 26/62 [1963] ECR 00001.

*Vera Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout*, Case C-249/83 [1985] ECR 00973.

Opinion of Mr Advocate General Ruiz-Jarabo Colomer on *IKA*, C-326/00 [2003] ECR I-0170.

## **Council of Europe documents**

Council of Europe Committee of Independent Experts Conclusions C XIII-4.

Council of Europe Committee of Independent Experts Conclusions C XIV-1 47.

<sup>1</sup>Council of Europe Committee of Independent Experts Conclusions XIII-4 143-44.

European Social Charter. Study of the nature, definition and legal scope of social and economic rights, Social Division, CE/Soc (56) 15, 26/10/1956 in Council of Europe, ESC Collected 'travaux préparatoires', Volume III, (Strasbourg, 1956).

Memorandum by the International Federation of Christian Trade Unions, Committee on Social Questions, 4<sup>th</sup> Session, 10/02/1956, Council of Europe, ESC Collected 'travaux préparatoires', (Strasbourg, 1956).

## **European Union documents**

Treaty establishing the European Community, OJ C 325, 24 December, 2002.

Treaty establishing a Constitution for Europe, OJ C 310, 16 December, 2004.

Charter of Fundamental Rights of the European Union, (2000/C 364/01).

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ L 149, 05/07/1971 P. 0002 – 0050).

Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, (OJ L 257 , 19/10/1968 P. 0002 – 0012).

Council Recommendation 92/441/EEC of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems (OJ L 245 , 26/08/1992 P. 0046 – 0048).

Council Recommendation 92/442 EEC from July 27 1992 on the convergence of social protection objectives and policies (OJ L 245 26/08/1992 P. 0049 – 0052).

Council Conclusions of 17 December 1999 on the strengthening of cooperation for modernising and improving social protection, (OJ C 008 , 12/01/2000 P. 0007 – 0008).

Final report of Working Group XI on Social Europe, The European Convention, CONV 516/1/03.

Economic and Social Committee, Opinion of the Economic and Social Committee on the Communication from the Commission to the Council and the European Parliament on the future of social protection: a framework for a European debate, 28 November 1996, (COM(95) 466 final).

Report on the Situation of Fundamental Rights in European Union and its Member States in 2002', EU Network of Independent Experts in Fundamental Rights Report (CFR-CDF).

### **International Labour Organization documents**

ILO Constitution and Declaration concerning the aims and purposes of the International Labour Organization, 1944.

ILO Convention No. 102 Social Security (Minimum Standards) Convention, 1952.

ILO Convention 118 Equality of Treatment (Social Security) Convention, 1962

ILO Convention No. 128 Invalidity, Old-Age and Survivors' Benefits Convention, 1967

ILO Convention 157 Maintenance of Social Security Rights Convention, 1982

Resolution concerning social security, The General Conference of the International Labour Organization, 89<sup>th</sup> Session, 2001, ILC89-PR16-312-En.Doc 16/33.

Extending the personal coverage of social protection in Social security: a new consensus, ILO 2001.

International Labour Conference, Social Security: Issues, Challenges and Prospects, Report VI, 89th Session, 2001.

### **United Nations documents**

Universal Declaration of Human Rights, General Assembly resolution 217 A (III), 1948.

International Covenant on Economic, Social and Cultural rights, General Assembly resolution 2200A (XXI), 1966.

UN 2005 World Summit Outcome Resocultion, A/RES/60/1, 2005.

The nature of States parties obligations (Art. 2, par.1), CESCR General comment 3, E/1991/23.

The right to adequate housing (Art.11 (1)), CESCR General comment 4, E/1992/23.

The economic, social and cultural rights of older persons, CESCR General comment 6, E/1996/22.

The right to adequate food (Art.11), CESCR General comment No. 12, E/C.12/1999/5.

Copenhagen Declaration on Social Development and the Programme of Action of the World Summit for Social Development, U.N. Doc. A/CONF.166/9 (1995).

Declaration on the tenth anniversary of the World Summit for Social Development, E/CN.5/2005/L.2.

Declaration on Social Progress and Development, General Assembly resolution 2542 (XXIV) of 11 December 1969.

Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights, Commission on Human Rights resolution 2003/18, E/CN.4/2003/L.11/Add.3.

Integration of social and economic policy, Resolution 40/1, The Commission for Social Development.

Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, E/1991/23.

Good governance and sustainable human development, UNDP policy document, <http://magnet.undp.org/policy/chapter1.htm>

Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session, Commission on Human Rights, E/CN.4/2004/44.

Report of the Secretary-General in response to Commission resolution 2003/18, E/CN.4/2004/WG.23/2.

