



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Seminar Background Paper¹

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Implementing the European Convention on Human Rights in times of economic crisis

Introduction

1. The present economic crisis is of an unprecedented scale in recent times. Worldwide very few States have emerged unscathed and this is also true of the member States of the Council of Europe. This raises questions for the protection of human rights generally and the implementation of the European Convention on Human Rights (“the Convention”) in particular. Beyond the inevitable impact on traditional economic and social rights and notwithstanding the fact that the Convention does not enshrine any “right not to be poor”, severe economic crisis risks engendering situations of extreme poverty which may in themselves give rise to breaches of the political and civil rights set out in the Convention, notably those relating to human dignity and physical integrity, as well as respect for the home and private and family life. At the same time poverty may limit the ability of those affected to avail themselves of other Convention rights. Moreover economic crisis exposes vulnerable people and minorities to special hardship. However, it is not only those falling within a narrow definition of extreme poverty who are affected as States take measures to combat problems of recession and debt.²

2. Economic crisis also tends to encourage recourse to extremism of different forms; widespread economic difficulty is often accompanied by a search for scapegoats. These trends threaten to undermine the twin pillars on which the Convention is based: democracy and the rule of law.

1. Prepared by the Seminar Organising Committee: Judges Laffranque (Chair), Raimondi, Bianku, Nußberger and Sicilianos, assisted by R. Liddell. The purpose of the paper is to provide a framework for the discussion at the seminar. Any views expressed are aimed at stimulating discussion and do not necessarily reflect the position of the authors or that of the Court.

2. See for example decision on the merits of the European Committee of Social Rights of 23 May 2012, complaint no. 66/2011, *GENO-DEI and ADEDY v. Greece*.

3. On the other hand, economic pressures create a situation in which public authorities are less likely to have the means to secure fundamental rights and freedoms. This points to a truth that is sometimes overlooked: effective human rights protection costs money. Indeed it is expensive.

4. Economic difficulties may also impact on States' capacity both to pay compensation where violations have been found and to take the necessary remedial action, particularly in situations of structural or systemic violation.

5. In terms of the implementation of the Convention two main questions arise. Firstly, to what extent does the scope of the protection offered by the Convention extend to severe hardship caused by economic crisis? Secondly, what impact does the economic crisis have on Governments' Convention obligations and their margin of appreciation?

The scope of protection

6. As noted above the Convention does not expressly protect or require a certain level of economic well-being. Nor does it in principle enshrine more generally economic and social rights, unlike the European Union's Charter of Fundamental Rights. However, as the Court held in the *Airey* judgment, "the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions ... and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. ... the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention."³

7. The reference to "present-day conditions" in *Airey* sends out an important reminder of the dynamic character of the Convention which operates in this context too. In other words an evolution in the general economic situation is something which the Court can take into consideration.

8. Thus as regards situations of poverty, it has been accepted that a complaint about a wholly insufficient amount of pension and the other social benefits could, in principle, raise an issue under Article 3 of the Convention.⁴ In another decision the Court recalled the conditions for the application of Article 3: "where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3". Moreover, it is sufficient if the victim is humiliated in his or her own eyes. The Court did not exclude that State responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent on State support, found herself faced with official

3. *Airey v. Ireland*, judgment of 16 May 1978, Series A No. 32, at § 26.

4. *Larioshina v. Russia* (dec.), no. 56869/00, 23.4.2002.

indifference when in a situation of serious deprivation or want incompatible with human dignity.⁵

9. The Court has not so far decided a case where it has found that the level of pension and social benefits available to the applicant was insufficient to protect her/him from damage to her/his physical or mental health or from a situation of degradation incompatible with human dignity such as to attain the high threshold of Article 3. However, where, due to the inaction of the public authorities, an asylum seeker had found himself for several months living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs, the Court considered that he had been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation had aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. Such living conditions, combined with the prolonged uncertainty in which he had remained and the total lack of any prospects of his situation improving, had attained the level of severity required to fall within the scope of Article 3.⁶

10. The Court has indicated that an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases.⁷ It has also found that where a decision to place a couple's five children in care was based on the sole ground of the unsatisfactory nature of their accommodation due to insufficient resources, their right to respect for family life under Article 8 had been breached. In particular there were other less radical means available to the authorities to secure the welfare of the children.⁸

11. In a different context the Court has declared inadmissible a complaint under Article 6 § 1 and Article 1 of Protocol No. 1 that the public authorities refused to enforce a final court order to evacuate a building occupied by squatters on the ground, *inter alia*, that the occupiers were in a situation of precariousness and vulnerability and on this basis qualified for enhanced protection.⁹

12. In *Airey* the Court found violations of Article 6 § 1 and Article 8 arising out of the prohibitive cost of litigation to obtain a decree of judicial separation from an allegedly alcoholic and abusive husband, an early indication that the Court will consider to what extent applicants' material situation impacts on their ability to rely on Convention rights. This has been confirmed in later cases. For example where the French Court of Cassation struck out appeals on the ground of lack of compliance with decisions of lower courts despite the fact that the applicants' financial circumstances made it impossible for them even to begin to

5. *Budina v. Russia* (dec.), no. 45603/05, 18.6.2009, see also *O'Rourke v. United Kingdom*, no. 39022/97, 26.6.2001, where the Court held that the applicant's suffering, notwithstanding that he had remained on the streets for 14 months to the detriment of his health, had not attained the requisite level of severity to engage Article 3 and had, in any event, not been the result of State action rather than his own volition as he had been eligible for public support but had been unwilling to accept temporary accommodation and had refused two offers of permanent accommodation; also see, *mutatis mutandis*, *Nitecki v. Poland*, no. 65653/01, 21.3.2002, where, in rejecting the applicant's complaint about the State's refusal to refund him the full price of a life-saving drug, the Court noted that, while Article 2 might be engaged if the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally, in this case 70% of the drug price had been covered by the State and the applicant only had to pay for the outstanding 30%.

6. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 263, ECHR 2011.

7. *Yordanova and Others v. Bulgaria*, no. 25446/06, judgment of 24.4.2012.

8. *Wallová et Walla v. Czech Republic*, no. 23848/04, judgment of 26.10.2006, §§ 37-46.

9. *Société Cofinfo v. France* (dec.), no. 23516/08, 12.10.2012.

comply with those decisions, the Court found a violation of the applicants' right of access to court under Article 6.¹⁰ Or again the Court has held that the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, are factors which are material in determining whether the requirements of Article 6 are satisfied.¹¹

13. It therefore seems that, although the Court has so far been somewhat cautious in its approach, it has by no means ruled out the application of Convention standards to situations of severe hardship caused by the economic crisis. It has moreover made clear that financial circumstances may be a relevant consideration in determining whether the procedural aspects of the Convention requirements have been satisfied.

The impact on a Government's Convention obligations and the margin of appreciation

14. As a starting point a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".¹²

15. On the other hand, insufficient resources will not normally justify failure to secure Convention rights and freedoms. This is especially the case when considering Article 3 issues. Thus in relation to prison conditions the Court has taken note of the serious socio-economic problems faced by countries in transition and recognised the economic pressure confronting Contracting States.¹³ It has however confirmed that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention.¹⁴

16. However, that does not mean that financial resources are never taken into consideration in this context. For example the obligation to give detainees adequate health care has been found not to extend to the provision of "very expensive" anti-retroviral treatment for an HIV-positive detainee.¹⁵

17. Another consequence of the economic crisis which the Court has dealt with in the context of Article 3 is the increasing influx of migrants and asylum seekers. As it has observed: "the economic crisis and recent social and political changes have had a particular impact on certain regions of Africa and the Middle East, throwing up new challenges for European States in terms of immigration control."¹⁶ Here the Court has not hesitated to assert that "having regard to the absolute character of the rights secured by Article 3, [this situation]

10. *Annoni di Gussola and Others v. France*, nos. 31819/96 and 33293/96, §§ 56- 59, ECHR 2000-XI.

11. See among other authorities, *Kreuz v. Poland*, no. 28249/95, ECHR 2001-VI.

12. *Stec and Others v. the United Kingdom*, [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI.

13. On transition see, against the background of German reunification, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, ECHR 2005-VI.

14. *Poltoratski v. Ukraine*, no. 38812/97, § 148, ECHR 2003-V; *Orchowski v. Poland*, no. 17885/04, judgment of 22.10.2009, § 153; *Samaras and Others v. Greece*, no. 11463/09, judgment of 28.2.2012.

15. *Aleksanyan v. Russia*, no. 46468/06, judgment of 22.12.2008, § 148. The Court took into account the fact that the detainee was able to obtain necessary medication from his relatives (§ 149).

16. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 176, ECHR 2012.

cannot absolve a State of its obligations under that provision".¹⁷ At the same time it has held that Article 3 does not place an obligation on the Contracting State to alleviate the social and economic differences between countries through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. As the Court pointed out, a finding to the contrary would place too great a burden on the Contracting States. In making this observation the Court recalled that the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights is inherent throughout the Convention.¹⁸

18. In the context of Article 8 the Court found no violation of Article 14 in conjunction with that provision in respect of a refusal to grant the immigrant applicant priority for the allocation of social housing, noting that the provision of housing to those in need being predominantly socio-economic in nature, the margin of appreciation accorded to the Government was relatively wide.¹⁹

19. The principle that a lack of resources cannot justify failure to comply with the Convention has been applied to other Convention provisions. In a well-known case concerning the non-payment of compensation awarded to an applicant who had suffered health problems as a result of taking part in emergency operations at the site of the Chernobyl nuclear disaster, the Court held that a State authority could not cite lack of funds as an excuse for not honouring a judgment debt. The applicant should not have been prevented from benefiting from the success of the litigation on the ground of alleged financial difficulties experienced by the State.²⁰ The Court found violations of Article 6 § 1 and Article 1 of Protocol No. 1.

20. However, in a case involving the capping of pensions in which it found no violation of Article 1 of Protocol No. 1, the Court observed that the decision to enact laws concerning pensions or welfare benefits involved consideration of various economic and social issues. The margin of appreciation available to the legislature in implementing such policies should therefore be a wide one, and its judgment as to what is "in the public interest" should be respected unless manifestly without reasonable foundation.²¹ Nevertheless the reduction or the discontinuance of a pension may constitute an interference with the peaceful enjoyment of possessions which needs to be justified.

21. The Court has shown some sensitivity to the pressures facing public services in recognising that a State could have legitimate reasons for curtailing the use of resource-hungry public services (such as welfare programmes, public benefits and health care) by short-term and illegal immigrants, who, as a rule, did not contribute to their funding. Nonetheless a requirement that aliens without permanent resident status pay secondary-school fees was found to be discriminatory and in breach of Article 14 read in conjunction with Article 2 of Protocol No. 1. The Court stressed that, unlike some other public services, education was a right that enjoyed direct Convention protection. It was also a very particular

¹⁷ *Ibid.*, § 122.

18. *N. v. the United Kingdom* [GC], no. 26565/05, § 44, ECHR 2008.

19. *Bah v. the United Kingdom*, no. 56328/07, §§ 47-49 ECHR 2011.

20. *Burdov v. Russia*, no. 59498/00, § 35, ECHR 2002-III.

21. *Valkov and Others v. Bulgaria*, nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, § 91, 25 October 2011. See also decisions in *Frimu and Others v. Romania*, nos. 45312/11, 45581/11, 45583/11, 45587/11 and 45588/11, 7.2.2012, and *Panfile v. Romania*, no. 13902/11, 20.3.2012.

type of public service, which not only directly benefited those using it but also served broader societal functions and was indispensable to the furtherance of human rights.²²

22. It is therefore clear that while States retain a relatively wide margin of appreciation in regard to issues falling within the ambit of socio-economic policy, only in rather extreme circumstances will the lack of resources justify a failure to comply with Convention standards. This suggests that, from the Court's perspective, the economic crisis will have little impact on how it assesses the acts and omissions of the public authorities. At the same time, where it is necessary to weigh up the individual interest against that of the community, it may be that the economic situation tips the scales in favour of the community in certain circumstances.

Conclusion

23. Human rights protection is expensive, but it is not a luxury, as President Bratza recalled at the opening of the judicial year in 2012.²³ Measures taken to address the economic crisis should not therefore be at the expense of the minimum standards set out in the Convention. Failure to comply with human rights requirements will only in exceptional and limited circumstances be justified by a lack of resources.

24. In reality compliance with human rights standards is not only even more necessary in times of economic crisis because of increased vulnerability, it also makes a contribution to recovery by establishing the conditions necessary for stability and the proper functioning of the rule of law, both essential for economic growth.

22. *Ponomaryovi v. Bulgaria*, no. 5335/05, §§ 54-55, ECHR 2011.

23. "The economic crisis with its potential for generating political instability seems to spiral further and further out of control. All our societies are experiencing difficulties that few of us can have foreseen only a short time ago. In this environment the vulnerable are more exposed and minority interests struggle to express themselves. The temptation is to be inward-looking and defensive, for States as well as individuals. Human rights, the rule of law, justice seem to slip further down the political agenda as Governments look for quick solutions or simply find themselves faced with difficult choices as funds become scarce. It is in times like these that democratic society is tested. In this climate we must remember that human rights are not a luxury."

http://www.echr.coe.int/NR/rdonlyres/9F353912-1F71-4ABD-827F-4CEBA52EDBD0/0/2012_AUDIENCE_SOLENNELLE_Discours_Bratza_EN.pdf