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INTERNATIONAL LAW MASTER STUDIES

SOCIO-ECONOMIC RIGHTS IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Master Thesis

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List of Abbreviations

ECHR; Convention – Convention for the Protection of Human Rights and Fundamental Freedoms

ESC – European Social Charter

ICESCR – International Covenant on Economic, Social and Cultural Rights

ILO – International Labour Organization

The Court – European Court of Human Rights

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INTRODUCTION

Socio-Economic rights are those rights that give people access to certain basic needs necessary for a human being to lead a dignified life[1]. In other words, socio-economic rights are designed to ensure the well-being of a person. Yet, different social and economic capacities between states may suggest that full realization of socio-economic rights is nearly impossible to achieve. Highly dependent on the resources, socio-economic rights are often being kept away from civil and political rights, suggesting that two groups of rights should be guided in different directions. Allocation of resources, as a necessary precondition for social and economic rights, is surely a sensitive issue. As long as the authorities make positive steps, socio-economic rights may seem intact. From this point of view, obligations relating to socio-economic rights may seem rather weak and fragile. Taking into account that socio-economic rights are subject to progressive realization, the questions may be raised whether such rights contain clear legal justiciability and enforceability.

Interrelation, interdependence and indivisibility, on the other hand, show the integral connection between all human rights. Thus, socio-economic rights may be guaranteed as long as civil and political rights are ensured and *vice versa*. However, a mere idea to interlink two sets of rights is not enough. A special attention should be paid not only to specific instruments, but also to the interpretation made by the international tribunals. Protection for socio-economic rights within the European Court of Human Rights (hereinafter – the Court) may serve as an interesting example. A growing number of cases, involving a high number of social and economic aspects of conventional rights may contribute as a practical example of the interrelation and indivisibility of human rights in general. Convention rights, primary seen as civil and political, may extend over interpretation and rights, which have social and economic elements, may be protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – ECHR; Convention).

The ECHR, as a "living instrument", must be applied to situations that were not foreseeable when the Convention was first adopted[2]. While the ECHR generally seeks to protect civil and political rights, the Court in *Airey v. Ireland*[3] judgment suggested that the ECHR must be interpreted in light of present day conditions and may be able to protect social and economic rights to some degree. Although the distinction between civil and political and social and economic rights is not warranted, judicial principles set by the Court must be viewed as having a crucial importance of

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[1] Khoza Sibonile, Socio-Economic rights in South Africa: A resource book. Community Law Centre, University of the Western Cape, 2007.

[2] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, *E.T.S* 5.

[3] *Airey v. Ireland*, 9 October 1979, Series A no. 32.

translating abstract rights into tangible reality. Moreover, a clear and predictable jurisprudence can help to develop effective protection of economic and social rights.

Interpretation of socio-economic rights in the ECHR remains problematic. As only few socio-economic rights are directly protected by the document[4], other socio-economic rights is protected by "minimum core" standard[5]. In the context of socio-economic rights, "minimum core" seek to confer minimum legal content of such rights[6]. However, socio-economic rights, as conditions under which human beings are able to meet their basic needs, have a wide scope. Each socio-economic right has a specific content and may be subject to different judicial principles and have different issues relating to the applicability or legal clearance. A general picture of social and economic rights to become even more complicated as the Court provides indirect protection for social and economic rights. This means, that even if a particular right is not directly established in the ECHR but involves social and economic elements, such right can still be justiciable by the Court. However, in order to clearly understand such protection, a careful examination of jurisprudence is necessary.

States under the ECHR are left with a wide margin of appreciation once it comes to general measures of economic and social strategies. However, an argument that lacks of resources cannot justify failure to comply with the obligations set out by the Court, has been applied to many judgments. Although failure to meet human rights requirements may be justified by various different circumstances, clear socio-economic human rights standards make contribution to a proper functioning of the rule of law, which is essential for economic growth.

Research relevance. The recent emergence of the socio-economic jurisprudence within the Court shows that a strict distinction between civil and political and social and economic rights is not warranted. Considering that management of resources lies at the disposal of the state and is a pretty sensitive issue, human rights standards should be transparent and comprehensive. Yet, the jurisprudence in this regard is not clear and well-established as a different level of protection is afforded towards different socio-economic rights. Analysis on variety of different articles, developed judicial principles and their relationship is a necessity in order to find out consistency of practical application of socio-economic rights. The increasing number of cases where the Court in its decisions

[4] Ernestas Spruogis, Ekonominių, socialinių bei kultūrinių asmens teisių gynimo galimybės Europos Žmogaus Teisių Teisme: praeitis, dabartis ir perspektyvos. Jurisprudencija, 2003, t. 42(34).

[5] Chowdhury, Joie, Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights – A Comparative Perspective (2009). Cornell Law School Inter-University Graduate Student Conference Papers. Paper 27.

[6] Katharine G. Young, The Minimum Core of Economic and Social Rights: A Concept in Search of Content, 33 Yale Journal of International Law113 (2008).

refers to the case-law of the European Committee of Social Rights also shows relevance of the research.

Scientific novelty and level of investigation into the problem. Socio-economic rights in the European Court of Human Rights were discussed by such authors as Eva Brems, Liam Thornton, Ellie Palmer, Elisabeth Ida Koch and Ingrid Leijten. Separate rights were discussed by Michael Freeman, Mel Cousins and Mirjana Marochini. From Lithuanian authors, general questions about socio-economic rights were discussed by Ernestas Spruogis. The right to health care was analyzed by Jonas Juškevičius and Janina Balsienė. However, a deeper view on the Court's jurisprudence is currently lacking. Having in mind that the ECHR contains few articles which directly protect social and economic rights, such as the right to peaceful enjoyment of possessions and the right to education, this thesis tries to look into directly not mentioned rights.

Research significance. The master thesis may be important to both legal practitioners and scholars. Thesis conclusions may be used to help discover critical areas the Court decisions, interpretation of the precedents and further research on socio-economic case law.

Research object. Analysis of general problems relating to socio-economic rights would be too broad and have less practical value. Rather than identifying and analyzing the situation of all socio-economic rights in the jurisprudence of the European Court of Human Rights in general, this thesis is dedicated to the analysis of specific socio-economic rights: right to work, right to social security and right to health care. These rights are chosen due to lack of legal discourse and growing number of legal uncertainties of the jurisprudence.

The thesis is made by careful examination of the jurisprudence of the European Court of Human Rights. Research is done with an aim to find legal elements of mentioned rights and problems relating to them. Particular attention is paid for the indirect protection of socio-economic rights afforded by the Court, their relationship, the scope of protection and limits.

Research goal. To assess legal relevance and practical application of directly not enshrined social and economic rights in the jurisprudence of the European Court of Human Rights.

Research tasks:

1. To assess legal relevance to social and economic rights**.**
2. To establish judicial principles of right to work, social security and health care.
3. To find any relevant relations between the right to social security and the right to work.
4. To find common views of the Court on right to work, social security and health care.

5. To compare judicial principles applied in cases concerning right to work, social security and health care.

Research methods. The main methods used for this thesis are logical-analytical and comparative. A logical-analytical method was used to describe a research object and tasks. It was also applied to make observations on jurisprudence, legal literature and describe it as concrete legal obligations. A descriptive method was exercised to analyze the jurisprudence and general questions relating social and economic rights. A historic method was availed to describe changes of the Court's approach to social and economic rights. A comparative method was recourse to compare jurisprudential principles of an actual application for the cases and between different social and economic rights.

Research structure. The thesis is divided into general and special parts. In general part, social and economic rights are discussed in the overall context of international law. Then thesis is shifted towards questions relating to an overall position of social and economic rights and judicial principles used by the Court. The general part is finished with the general description of the case-law on social and economic rights case law.

The special part is divided into three separate sections. The first section provides general information relating right to work, discusses issues concerning right to work as such and rights which belong to a worker. The section finishes with a discussion relating social benefits of workers. Second section relates to right to social security and begins with the general framework of right. It is followed by a relationship between the right to social security and the right to property and continues with a comparison between the approaches used through different articles and a notion of minimum core. Third section begins with a general framework of the right to health care and then discusses it through right to health, right to private life and freedom from torture.

Defend statements.

1. Due to the lack of direct establishment, protection of rights, which have social and economic elements, is chaotic and unpredictable in the case-law of the European Court of Human Rights.
2. Developments concerning right to work are not foreseeable as it is not clear whether developments are subject to international or autonomous legal concepts.
3. The jurisprudence on the right to social security is not unanimous and the Court did not establish common criteria for the assessment of the overpaid benefits.
4. The right to health care is not guaranteed to all groups of persons equally in the jurisprudence of the Court.

1. SOCIO-ECONOMIC RIGHTS IN INTERNATIONAL LAW

Social and economic rights are considered as the second generation of human rights norms[7]. Social and economic rights as being social and economic in nature, require equal conditions of treatment[8]. Giving legal status in the Universal Declaration of Human Rights of 1948, social and economic rights were welcomed with a great recognition in international law. The Universal Declaration of Human Rights (hereinafter – UDHR), however, has no distinction between rights and does not establish any hierarchy[9]. As this legal instrument does not establish any distinction or hierarchy, it must be understood that human rights are indivisible, independent and interrelated. Such universal approach ensures that all people may exercise all human rights and freedoms simultaneously.

However, international treaties which followed the UDHR, diverse them into separate instruments. The International Covenant on Civil and Political Rights[10] (hereinafter − ICCPR) and the International Covenant on Economic, Social, and Cultural Rights[11] (hereinafter − ICESCR) seemed to have created two separate sets of rights. While human rights originally created in the UDHR had no differentiation or hierarchy of human rights and freedoms, Covenants seemed to bring some controversy into human rights law. As both Covenants were created during a period of cold war, a separation was the result of political tensions between Western and Eastern blocs. While the West emphasized the importance of civil and political rights, Eastern power argued about the importance of social, economic and cultural rights. Such political discourse led into two separate treaties. It was argued, that civil and political rights were enforceable, or justiciable, or of an "absolute" character, while economic, social and cultural rights were not or might not be[12]. Civil and political rights were considered to be "absolute" and "immediate", whereas economic, social and cultural rights were to be held to be programmatic, to be realized gradually, and therefore not a

[7] Theory to divide human rights into three generations was proposed by Karel Vasak. This theory declares, that civil and political rights belongs to first generation, socio-economic rights belongs to second generation of rights and third generation of rights represents rights for collective development. Karel Vasak, „Human Rights: A Thirty- Year Stuggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", UNESCO COURIER 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.
[8] Karel Vasak theory of three generations of human rights are based on motto of France Revolution "Liberty, Equality, Fraternity". Word "equality" in the context of three generations of human rights represents socio-economic rights.
[9] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948)
[10] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[11] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
[12] Henry J. Steiner and Philip Alston, International Human Rights in Context. Law, Politics, Morals. Text and Materials, Second Edition. Oxford University Press, 2000.

matter of rights[13]. Such obligation as "to take steps <…> to the maximum of its available resources, with a view to achieving progressively the full realization of the rights <…>[14]", the obligations to respect, to protect and to fulfill social, economic and cultural rights seemed to be reliable on the policies of governments. It must be noted, that the very nature of states parties obligations shows the main difference between the Covenants.

General legal obligations undertaken by the states parties to the Covenants are described in Articles 2 (1). Under the ICCPR, states parties undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, while under the ICESCR general obligations are limited to progressive realization to the maximum of its available resources. Those obligations include both what may be termed obligations of conduct and obligations of result[15]. While the ICESCR provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect[16]. One of these is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination"; and the other is the undertaking in Article 2(1) ICESCR "to take steps"[17]. As rights recognized in ICESCR are seen with a view to achieve them progressively[18], UN Committee on Economic, Social and Cultural Rights noted, that: "progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time"[19]. While admitting that social and economic rights may involve progressive realization greater than civil and political rights, it would be difficult to dispute that the full realization of all human rights requires states to develop progressive policies[20].

However, the language of Article 2 (1) of ICESCR is subject to many criticisms. Governments may present themselves as defenders of social and economic rights without

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[13] E. W. Vierdag, The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights. Netherlands Yearbook of International law, Vol. 9 (1978), pp. 69- 103, at p. 103.

[14] Art.2 p.1 of ICESCR.

[15] UN Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, available at: http://www.refworld.org/docid/4538838e10.html [accessed 19 January 2016]. An obligation of conduct as understood is one where an organ of the State is obliged to undertake a specific course of conduct, whether through act or omission which represents a goal in itself. It is to be contrasted with an 'obligation of result', which requires a State to achieve a particular result through a course of conduct (which again can be act or omission), the form of which is left to the State's discretion. Also in Report of the International Law Commission (1977) 2 Yrbk. ILC 20, para. 11-30.

[16] Edward Elgar, Research Handbook on International Human Rights Law, Edward Elgar Publishing Limited, Cheltenham, UK, 2010.

[17] Ibid, p. 43.

[18] Art 2(1) ICESCR.

[19] CESCR, *op. cit*.

[20] Magdakeba Sepulveda, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights. School of Human Rights Research Series, Volume 18 p. 129.

international imposition of any precise constraints on their policies and behavior[21]. From this point of view, the concept of progressive realization and availability of resources are considered as open-endedness and without meaningful content. This obligation may be acknowledged as obligation to be fulfilled incrementally through the ongoing execution of a programme[22]. Even though, it becomes nearly impossible to determine when those obligations are fulfilled. On the other hand, the obligations to the ICESCR may be viewed as facing impossible challenges to the developing countries that are facing economic difficulties, having in mind problem of limited resources. While one may agree with a limitation of resources, problems may arise when the questions are turning into a fiscal dimension, such as ensuring an adequate tax base or combating corruption.

At European level, social and economic rights are protected by the European Social Charter (hereinafter − ESC) [23] and the Revised European Social Charter[24]. While the European Convention on Human Rights contains mainly provisions related to civil and political rights with a few exceptions of directly protected social and economic rights[25], the European Social Charter and the Revised European Social Charter consists of social, economic and cultural rights provisions. Protection of physical integrity and dignity of a person (Art. 2, 3, 4, 5 of ECHR), due procedure before courts of law (Art 6, 7, 13 of ECHR), protection of the personal life (Art 8, 9, 12, 14 of ECHR) and protection of communication and participation in society (Art. 10, 11 of ECHR) shows that main aim of the legal instrument is a protection of civil and political rights which are directly established in the international instrument. The European Social Charter, on the other hand, protects such rights articulated in the original Charter (1961) included provisions of as the right to work and for professional training, to fair working conditions and pay, for union membership, to social and medical assistance, social security and family assistance[26]. The Revised European Social Charter expanded its protection sphere and set out new rights[27].

The structural imperfections (the conditioning of the access procedure, together with the weakness of the control mechanism of the execution) do not, however, cast away the jurisdictional

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[21] Philip Alston and Ryan Goodman, International Human Rights. The successor to international human rights in context: Law, Politics and Morals. Oxford University press, 2013.
[22] Ibid. p. 285.
[23] Council of Europe, European Social Charter, 18 October 1961, ETS 35
[24] Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.
[25] Ernestas Spruogis, *supra* note 55.
[26] The Centre on Housing Rights and Evictions (COHRE), Geneva, Switzerland Litigating Economic, Social and Cultural Rights: Legal Practitioners' Dossier 2nd Edition
[27] European Social Charter Short Guide. Council of Europe Publishing, September 2000. ISBN 92-871-4310-2, p. 27-29.

trait of the European Committee of Social Rights (hereinafter − ECSR)[28] as it is understood that the Charter contains legal obligations of an international character. Once it comes to the jurisprudence of the ESC, it should be noted that decisions took by the European Committee of Social Rights are closely connected to the ECHR social and economic rights dimension. As the ECSR protection of social and economic rights may be expanded by means of a case law, a constant reference to the ECHR's jurisprudence may reflect a will for maintaining the harmony and coordination of both jurisprudences[29].

Signed in Torino on 18 October 1961, the European Social Charter was intended to be a social replica of the European Convention of Human Rights[30]. However, while all 47 states are parties to the ECHR and its complaint procedure, only 15 have accepted the collective complaint procedure under the ESC[31]. The distinction between those two instruments may appear not only from the rights protected or a number of the States Parties, but also from the control mechanism. Under the ESC, supervisory mechanism is based on reports submitted by the states parties and, for the states that have ratified the Additional Protocol to the Charter of 1995 or made a declaration provided for in Article D of the Revised Charter, with a system of collective complaints[32]. In this connection, the ECHR has a stronger position, as individual application possibility exists[33].

As the preamble of the ECHR states: "The Governments signatory considering the Universal Declaration of Human Rights Proclaimed by the General Assembly of the United Nations <…> had agreed as follows". Link to the Universal Declaration of Human Rights shows the intention of the drafters of the ECHR to follow this document by not establishing any hierarchy or distinction between different human rights. However, the very existence of the European Convention and the European Social Charter reflects a traditional distinction between civil and political rights and

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[28] Cristina Samboan. The Role of the European Committee for Social Rights (ECSR) in the European System for the Protection of Human Rights. Interactions with ECHR Jurisprudence, Perspectives of Business Law Journal, Volume 2, Issue 1, November 2013.

[29] ECSR, for example have referred to the Court's jurisprudence in *QCEA* v. *Greece*, 8/2000, CC 24 and in *AIAE v. France*, 13/2002, CC 47. The Court have referred to ECSR practise in cases of *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, ECHR 2005-X; *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, ECHR 1999-VII.

[30] Cristina Samboan, *opt. cit*.

[31] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 9 November 1995 CETS No. 158. Chart of signatures and ratifications can be accessed through: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p_auth=YDQiCJE8 (accessed on 28th May 2016).

[32] COHRE*, opt. cit.*

[33] ECHR Art. 34.

economic, social and cultural rights[34]. The mere distinction between two sets of rights does not deny close connection and relationship between them. While the ECHR primarily focuses on civil and political rights, there are areas of overlap between the European Social Charter, such as freedom of association, the right to non-discrimination and the right to education[35]. The ECHR's ability to protect social and economic rights was extended by additional protocols[36] and the Court's jurisprudence.

The ECHR's link to the UDHR, the principle of indivisibility of human rights and the jurisprudence of the Court, together from the cases of the ECSR – brings to light the interconnectedness of the two sets of rights[37]. Bearing that in mind, Parliamentary Assembly issued a number of recommendations for drafting of a protocol to the ECHR including some social and economic rights[38]. However, the Recommendation 583 (1970) for the drafting social and economic rights protocol was rejected as neither desirable nor expedient, the Recommendation 838 (1978) after lengthy discussions was eventually shelved and after a presentation of the Recommendation 1415 (1999), it was agreed to follow developments of socio-economic rights at the national, regional and global levels[39]. Socio-economic rights development may be in danger, considering indivisibility, interrelationship and independence of human rights in general and yet increasing overlap[40].

Social and economic rights are not put aside on both International and European levels. Yet, different legal obligations may show a false impression that the indivisibility of human rights has been just a mere idea. Suggesting that obligations concerning social and economic rights highly depend on policies of particular state and its resources, social and economic rights somehow are treated as having only a secondary role. At the European level, failure to adopt an explicit text of the ECHR, which would help to provide a bit clearer picture on social and economic rights does not contribute to clear and precise legal framework. Yet, the decision to follow current legal framework and judicial developments gives to jurisprudence crucially import role.

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[34] Berenstein A., Economic and Social Rights: Their Inclusion in the European Convention on Human Rights: Problems of Formulation and Interpretation, Human Rights Law Journal, Vol. 2, No 3-4, p. 258.

[35] Melissa Khemani, The European Social Charter as a Means of Protecting Fundamental Economic and Social Rights in Europe: Relevant or Redundant? Georgetown University Law Center, April, 2009.

[36] Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9.

[37] Ida Elisabeth Koch, Human rights as indivisible rights: the protection of socio-economic demands under the European Convention on Human Rights, Leiden; Boston: Martinus Nijhoff Publishers, 2009.

[38] COE, Parliamentary Assembly Recommendation 583 (1970), Recommendation 838 (1978) and Recommendation 1415 (1999).

[39] Ida Elisabeth Koch., *opt cit*., p. 321-324.

[40] Social and economic rights are protected by the ESC, ECHR and by the European Union instruments. In a long term perspective, the protection levels may differ as different instruments may be subject to different interpretation.

1.1. Justiciability of Social and Economic Rights within ECHR

The European Court of Human Rights has shown some weariness in interpreting traditional human rights norms protected from the ECHR as encompassing social and economic rights protections[41]. Due to its expansive reach, the ECHR protects not only civil and political rights but also reaches social and economic interests. In a case of *Airey v. Ireland*, the Court stated, that:" Whilst the Convention sets forth what are essentially civil and political rights, many of them had implications of a social or economic nature[42]". The Court noted, that "that the mere fact that an interpretation of the Convention may extend over the sphere of social and economic rights should not be a decisive factor against such an interpretation[43]". However, while the Court recognized that many civil and political rights contained in the Convention, many of them has implication of a social or economic nature and yet, minimum guarantees in the area of social and economic rights remain unclear. Level of protection provided by the Court is often referred as *ad-hoc* and, moreover, not quite explicit and transparent[44]. As it was noticed by Palmer: "<…> there has been progress towards a principled jurisprudence of positive obligations to provide for the basic human needs of vulnerable dependent individuals in range of contexts, although the limits of state responsibility remain fluid and contested[45]". It is clear, that by interpreting articles of the Convention, which may be primarily seen as a civil and political, protection may extend to the area of social and economic rights. However, Convention does not expressly protect or require a certain level of economic well-being. The ECHR allows for states parties to adopt different social and economic policies, as it goes in compliance with the positive obligations set out by the case law. As we speak about certain social and economic rights, governments are free to act within certain limits which are set out by the Court. 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 in social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation"[46].

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[41] Liam Thornton, Seasca Bliain, Faoi Bhl*áth, Socio-Economic Rights and the European Convention on Human Rights. The ECHR and Ireland: 60 Years and Beyond Dublin, 29 June 2013 p. 1-43.*
[42] *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32.
[43] Ibid.
[44] Ingrid Leijten, The German Right to an *Existenzminimum*, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection German Law Journal, Vol. 16 No. 01, note 25.
[45] Ellie Palmer, Protecting Socio-Economic Rights Through The European Convention on Human Rights: Trends and Developments in the European Court of Human Rights, University of Essex, 2009.
[46] *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X.

While the Court uses two-pronged approach and divides state obligations into positive and negative[47], it is important to note, that when we speak about rights of social and economic nature, convention brings up certain positive obligations. The ECHR, usually seen as a legal instrument, which enshrines civil and political rights, is typically viewed as a document reflecting negative obligations. Civil and Political rights being usually of "non-interference" nature requires states to refrain from interference[48]. A positive obligation is one whereby a state must take action to secure human rights[49]. As we speak about social and economic rights, it must be understood that obligations relating to social and economic rights require certain positive steps towards realization of certain rights, having a social or economic element. If we examined a text of the Convention, it would become clear, that it has established certain social economic rights. Article 1 of Protocol 1 of the Convention enshrines protection for a peaceful enjoyment of his possessions and in Article 2, right to education[50]. Bearing in mind case of *Airey v. Ireland*, it may be concluded, that Convention may bring certain positive obligations of social and economic nature to the states by the far reaching character of interpretation of the Convention, which, by its nature, is civil and political rights instrument.

Dichotomy of positive and negative obligations to the ECHR may seem controversial. On one hand, states may be placed under obligation to take positive steps which may affect private parties and to provide benefits which are not set out directly in the Convention, as it happened in the case of *Centro Europa 7 S.r.l. and Di Stefano v. Italy*[51]. On the other hand, if there is an implied positive obligation to provide television frequencies is there not an obligation to provide food or housing[52]? Despite this controversial issue, most widely accepted view is that positive obligations follow from the general principle that the Convention protects the effective, rather than the

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[47] Jean Francois, Akandji-Kombe, Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention of Human Rights. Human Rights handbooks, No. 7, Council of Europe, 2007.

[48] Ibid, p.10.

[49] Harris et al, Law of the European Convention on Human Rights (2nd ed., Oxford University Press: New York, 2009) p. 18.

[50] Some authors emphasize there are 3 directly protected socio-economic rights within the Convention : right to protection of a peaceful enjoyment of his possessions, right to education and The right to form trade unions and join them. For example, Ernestas Spruogis, Ekonominių, Socialinių ir kultūrinių asmens teisių gynimo galimybės Europos žmogaus teisių teisme: praeitis, dabartis ir perspektyvos, Jurisprudencija, 2003, t. 42(34); 30–41.

[51] *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, ECHR 2012). Grand Chamber found that Italy had violated Article 10 of the Convention by failing to allocate television frequencies to the Europa 7 Channel. Positive rights element here may be described as obligation to show television channel which is not provided in the ECHR.

[52] High Tomlinson, Positive obligations under the European Convention on Human Rights, Alba Summer Conference, July 2012.

theoretical, enjoyment of rights – as set down in the relatively early cases of *Golder* and *Airey*[53]. Firstly seen in *Belgian Linguistic*[54], where the Court deducted certain positive obligations from the Convention text itself, the obligations are shifted from non-interference towards positive obligations to take actions[55].

To sum up, where the ECHR was primarily seen as a document encompassing negative obligations and yet the traditional dichotomy between positive and negative obligations is blurred. Due to a wide interpretation, social and economic rights are justiciable within the ECHR and may require certain positive obligations to be fulfilled. The exact limits of positive obligations, remains rather unclear and not precise.

1.2. Socio-Economic Rights and Judicial Principles

Social and economic rights face certain difficulties within the ECHR. As certain rights, which seem to be not directly wrote and thus being protected, it is important to understand certain judicial principles used by the Court. First of all, as to know the scope of protection of social economic rights case law, one should mention the notion of **minimum core**.

The identification of the most important aspects of economic and social rights seems based on an acknowledgement of the idea that fundamental rights have a core that cannot be limited[56]. Such notion as minimum core helps to understand, how particular articles extend to the protection of social and economic rights. By interpreting certain articles of the Convention, which are civil and political by its nature, minimum core concept shows, that particular element of certain right enshrined in the Convention extends to the area of social and economic rights. While protection for full social and economic rights are not possible within the Convention, as the document has only mainly civil and political articles, notion of minimum core helps to explain and ensure, that certain aspects or elements of particular articles of the Convention extends and reaches rights, which are social and economic in its nature. Doctrine of minimum core obligations can be related to the dilemma the

[53] Talbot, Conor C., The State's Positive Obligations Under the ECHR in the Context of Irish Prisons (May 1, 2015). Human Rights in Ireland, May 2015. Available at SSRN http://ssrn.com/abstract=2664520

[54] *Belgium Linguistics* (No.1) (1967), Series A, No.5 (1979-80) 1 EHRR 241.

[55] *Belgium Linguistics* (No.1) *was followed by cases Marckx v. Belgium*, 13 June 1979, Series A no. 31 and *X and Y v. the Netherlands*, 26 March 1985, Series A no. 91.

[56] Eva Brems and Janneke Gerards, Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the scope of Human rights, Cambridge University press, 2013, p. 129.

Court faces when having to determine the scope of rights[57]. Logically, it can be concluded, that particular civil and political articles of the Convention, in its core, have certain minimum elements of the social and economic rights. However, as some authors show, Court fails to show single theory to explain the expansion of affirmative duties in ECHR rights[58]. Rather than clearly defining social and economic rights which are applicable, the Court concentrates on civil and political character of the Convention and throughout reaches the minimum core of the social and economic rights. As the concept of minimum core is used, the issues may arise when it is necessary to clearly define what concrete rights are protected and reasons with it.

Another important doctrine used by the Court is the **margin of appreciation.** On the international law level, the first recourse to the margin of appreciation doctrine seems to have occurred in the jurisprudence of the Court, and certainly the doctrine has been most extensively developed under the Convention[59]. The term "margin of appreciation" refers to the latitude a government enjoys in evaluating factual situations and applying the provisions enumerated in international human rights treaties"[60]. As early, expressly used in *Ireland v. the United Kingdom* case, the Court stated, that: "By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter <…> leaves those authorities a wide margin of appreciation[61]". The Convention may be interpreted as having certain common human rights standards for states parties to the Convention and margin of appreciation doctrine ensures that certain areas of human rights are left for government policies. As different states may have different economic, social, cultural or other capacities and needs, certain common standards would be hardly imaginable. Doctrine of margin of appreciation commonly refers to state sovereignty and leaves the area for the discretion of the government.

The doctrine of the margin of appreciation can be viewed in certain ways. From one point of view, it may be argued that the doctrine is used in order to respect the differences and different democratic traditions within different states, while others may argue that the doctrine is used to deny

[57] Ibid. p. 135.
[58] Ellie Palmer, Protecting Socio-Economic Rights Through The European Convention on Human Rights: Trends and Developments in the European Court of Human Rights, University of Essex, 200
[59] Yutaka Arai- Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, Antwerpen – Oxford – New York, 2001, Intersentia.
[60] Ibid. p.2.
[61] *Ireland v. the United Kingdom*, 18 January 1978, § 207, Series A no. 25.

the Court's duty to determine proportionality of national policies on European level[62]. In one way or another, the doctrine of margin of appreciation allows for national authorities bring certain actions in the area of human rights protection. The Court can, by resorting to the margin, justify why it must defer to national authorities and why it does not need to analyze the issue in much detail[63]. Once it comes to social and economic rights, governments are granted wide margin of appreciation[64]. This means, that governments have very wide possibilities to act in the area of social and economic rights and are granted wide discretion.

The margin of appreciation was added into the preamble of the Convention with the Protocol No.15[65]. Looking logically, it should have added clarity towards the principle of margin of appreciation as the further developments of principle may be based on the explicit text. On the other hand, the strict formulation of the principle may waive the Court's ability to be flexible in certain cases. In such scenario, a long-standing practice of the Court should have reworked and depending on formulation, ability to apply principle could be narrowed down. Luckily, the Protocol No.15 did not provide any formulation of the margin of appreciation and according to the explanatory report, the doctrine of the margin of appreciation must be consistent with developments made by the Court in its case law[66]. Thus, this provides certain clarity towards the practice of the Court, as the principle is explicitly mentioned in the Convention text. No longer being just a creation of a case law, the Court's ability to develop margin of appreciation doctrine will be more consistent. It is clear about this amendment that there was no intention to regulate the notion itself and leave it to the discretion of the Court. Thus, such amendment could not be understood as a major change, but rather modest augmentation. Protocol No.15, however, is not yet in force[67].

If the Convention extends to the area of social and economic rights, such developments should not be understood as static. In this regard, another important principle developed in the jurisprudence of the ECHR is the **Convention as a living instrument**[68]. The idea of

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62 Ellie Palmer, Judicial Review, Socio-Economic Rights and the Human Rights Act, Hart Publishing, Oxford, 2007, p. 65.

63 Jan Kratochvil, The Inflation of the Margin of Appreciation by the European Court of Human Rights, Netherlands Quarterly of Human Rights, Vol. 29/3, 324–357, 2011.

64 *Stec and Others v. the United Kingdom*, *supra* note 51.

65 Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, § 7, CETS No. 213.

66 Ibid.

67 According to Article 7 of the Protocol 15, it will enter three months after all states parties to the ECHR have expressed their consent to be bound by it. Currently the protocol has 28 ratifications/accessions. Chart of signatures and accessions may be accessed through: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=YDQiCJE8 (accessed 28 May 2016).

68 First time mentioned in a case of *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26.

a living instrument has three main features[69]. First of all, the Court considers "present day conditions". This means, that interpretation of the Convention is not limited to the intentions of the drafters during the adoption of the Convention or protection is limited by human rights standards which were acceptable at the time of the Convention adoption. Second of all, the present-day standards that the Court takes into consideration must somehow be common or shared between contracting states[70]. However, this feature has never been developed or explained by the Court. Finally, the Court never gives crucial importance of the respondent state considerations whether there is to be an acceptable standard for the case at hand. In other words, the Court checks whether the state's practice is in line with commonly accepted human rights standards of Council of Europe and public opinion or the opinion of the authorities will not be the major factor while deciding the case.

Convention as a living instrument principle ensures, that human rights protection approach by the Court is not static and requirements in respect of human rights are evolving. This principle can serve as a method to modify the initial intention of the drafters to guarantee only civil and political rights and leave social and economic rights aside. Bearing in mind principles of margin of appreciation and convention as a living instrument, it seems that the interpretation is dynamic, and yet, certain aspects are left to the national authorities. The issues may arise, whether the Court tends to be in favor of margin of appreciation principle rather than living instrument principle, or *vice versa*.

1.3. Approach of the European Court of Human Rights to the Socio-Economic Rights

The Court often deals with issues which involve a high number of social and economic elements. Questions may relate whether the state was under obligation to provide health care in order to save a life or protect a person from ill treatment. Moreover, doubts may be raised whether a lack of health care damages private life or whether lack of income is humiliating. Such doubts are raised very often and thus are not limited only to a few situations or articles. Through interpretation of civil and political rights, the Court may open a possibility of protection for social and economic rights or at least some of its elements. Once again, as the ECHR may not explicitly provide protection for a certain social and economic right, such rights may not be understood as having a connection only to

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[69] George Letsas, The ECHR as a Living Instrument: Its Meaning and Legitimacy, University College London - Faculty of Laws, March 14, 2012, electronic copy available at: http://ssrn.com/abstract=2021836
[70] George Letsas, *supra* note 73.

one article. For example, if a case involves social security, it may be examined under Article 3 by deciding whether it tantamount to ill treatment or whether deprivation of social security is done within the requirements of Article 1 of the Protocol 1. Due to a number of articles and possible connections to social and economic rights, it would be too difficult to make a complete list showing connections between social and economic rights and particular articles of the ECHR. However, it could be noted, that social and economic rights happened to be protected under Articles 2, 3, 8, 6 and Article 1 of the Protocol 1.

Bearing in mind that the Court is approaching towards the socio-economic rights through the minimum core of civil and political rights and the wide margin of appreciation is granted to the states, it is necessary to briefly examine particular articles and rights granted by the ECHR through socio-economic case law. This examination should not be understood as defining and complete.

Paragraph 1 of Article 2 of the Convention states that "Everyone's right to life shall be protected by law". Article 2 may be described as one of the most fundamental human rights of all, as logically, no other human right may be enjoyed as the life of a person is not protected. The Court has described Article 2 as a "one of the most fundamental provisions of the Convention[71]". While the rest of the article seems to establish certain exceptions to this protection, primarily this article is used to protect persons from an intentional taking of life. The wording of the article suggests, that the right to life under this article protects from death as it relates to violence from the state or third parties[72]. However, narrow interpretation of this article would not effectively protect the right to life. As human life can be threatened by lack of medical assistance or lack of resources, it is important to emphasize, that right to life is not limited only to protection against violence. Generally, the Article 2 imposes three different types of obligations[73]:

1) A negative obligation to refrain from taking life with exceptions contained in Article 2(2);
2) A positive obligation to take appropriate measures to safeguard the life;

[71] *McCann and Others v. the United Kingdom*, 27 September 1995, § 147, Series A no. 324.
[72] One of the most known cases in this field is the case of *McCann and Others v. the United Kingdom* (*McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324). As Court stated in this case (§213): "the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defense of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention". This case shows, that article 2 protects from intentional taking of life by the state. As to the taking of life by the third parties, in a case of *Osman v. the United Kingdom* (*Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII (1998)), the Court stated that (§ 151): "Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual".
[73] Equality and Human Rights Commission. How fair is Britain? An assessment of how well public authorities protect human rights. Human Rights review 2012, p. 29. Access through: http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/ehrc_hrr_full_v1.pdf (accessed on 5th April 2016).

3) A procedural obligation to make official investigation when the State fails to protect right to life or death occurs as a result of the use of the force.

In a case of *Anguelova v. Bulgaria*, the Court found a violation in respect of the authorities' failure to provide timely medical care[74]. As in this case person died while being in custody, it is important to emphasize the Court's approach. While examining an issue of lack of medical care, the Court did not address obligations to provide medical care as such. Rather than that, the Court examined government's explanation of a person's death and thus, made conclusions on the scope of civil and political rights. A quite similar approach the Court used in a case of *Česnulevičius v. Lithuania*[75], where the person concerned died due to beating in prison and lack of medical care. Particular attention was drawn to the fact that person was treated by the doctor with no medical license. However, Court's interpretation was limited only to a civil and political aspect of the right as a question on the right to health care was not addressed. Arguing that prison authorities failed to respond properly and in time, the Court did not address to what extend authorities were under obligation to provide proper health care. It was admitted, that prison violence requires access to medical and mental health services[76], but further requirements were explained clearly. Moreover, it may be understood that the Court did not argue for obligation to provide health services to certain extending itself, as the Court considered that the authorities failed to respond to the danger and there was a lack of coordination in prison facilities[77]. Looking systematically, the Court tended to look into both cases of the scope of civil and political rights, leaving social and economic elements aside. Undeniably, both cases involved questions relating right to health care, which were set aside. While states are under obligation to protect human lives and lack of health care may raise issues under article 2, tendency to avoid social and economic elements of the right may be seen as a contribution towards non-precision.

Another element of Article 2 is the protection against environmental hazards. In a case of *Oneryilidiz v. Turkey*, the applicants submitted that the national authorities were responsible for the deaths of their close relatives and for the destruction of their property as a result of a methane explosion at the municipal rubbish tip. Grand Chamber, addressing to the Article 2, concluded, that:" <…> in the present case the right to life was inadequately protected by the proceedings brought by the public authorities under the criminal law[78]". While the whole case may suggest that one of the

[74] *Anguelova v. Bulgaria*, no. 38361/97, ECHR 2002-IV.
[75] *Česnulevičius v. Lithuania*, no. 13462/06, 10 January 2012.
[76] *Ibid.* § 89.
[77] *Česnulevičius v. Lithuania*, *supra* note 77.
[78] *Öneryıldız v. Turkey*, no. 48939/99, § 150, 18 June 2002.

issues is related protection against environmental hazards, the Court approached the case, making the typical notion of civil and political right of Article 2 and thus making potentially article applies to the event of environmental hazards.

Another important element of Article 2 is extension of public health or welfare. For example, in a case of *Cyprus v. Turkey*, the Grand Chamber addressed, that: "<…> in this connection that Article 2 § 1 of the Convention enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction[79]. However, only in a small number of cases has the protection of Article 2 p. 1 has been extended to the public health or welfare arena[80]. As speaking about health care, in the admissibility decision *Valentina Pentiacova and others v. Moldova*, the Court rejected to approach an issue of access to medical care and examined positive obligations in relation to Article 8 of the ECHR[81].

Article 3 of the Convention states, that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The Court in a number of cases keeps emphasizing, that Article 3 contains "absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe[82]". Just like in a case of right to life, Article 3 contains three different types of obligations:[83]

1) A negative obligation to refrain from torture, inhumane or degrading treatment or punishment;
2) A positive obligation to protect persons from torture, inhumane or degrading treatment or punishment;
3) A procedural obligation to carry out investigation once reliable information on ill-treatment occurs.

As it concerns social economic rights, Article 3 of the ECHR may be relevant firstly in cases, where social cash benefits are small or inadequate. However, it must be considered pointless to claim that one has the right to a certain benefit or that the amount or a certain benefit which is already provided for is inadequate[84]. In this connection, in a case of *Budina v. Russia,* the Court stated, that:

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[79] *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV.
[80] Ellie Palmer, Protecting Socio-Economic Rights Through The European Convention on Human Rights: Trends and Developments in the European Court of Human Rights, University of Essex, 2009.
[81] *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005-I.
[82] *Soering v. the United Kingdom*, 7 July 1989, § 88, Series A no. 161.
[83] Human Rights review 2012, *supra* note 242, p. 75-76.
[84] Ida Elisabeth Koch, Human Rights as Indivisible Rights: The protection of socio-economic demands under the European Convention of Human Rights, Koninklijke Brill NV Leiden, Netherlands, 2009.

“Court’s case-law refers to “ill-treatment” that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. 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 characterized as degrading and also fall within the prohibition of Article 3[85]”. However, this case shows, that Court rejected the applicant’s claim and poor living conditions so far have not attained a high threshold of Article 3. On the other hand, it should be noticed that possibility to invoke Article 3 to a case where social and economic conditions rather than area of civil rights are at stake is not ruled out[86]. It should be observed that developed jurisprudence on Article 3 could constitute the bridge between the areas traditionally covered by the Convention, <…> that of civil and political rights - and the broad field of social and economic rights[87]. However, cutting off electricity during cold periods, for example, did not amount to inhuman and degrading treatment[88]. Thus, while generally Article 3 may be understood as having certain requirements for social and economic conditions, a more precise approach is lacking. Even though Article 3 is described as setting out a high threshold and “ill treatment” is described as physical or mental suffering, the application of this principle may raise certain doubts. Complex issues relating practical matters of social and daily life conditions are not addressed and the exact level for a high threshold for Article 3 is not clear-cut. Thus, such cases raise doubts to a legal predictability as requirements for a minimum level of severity in order to be met, are not established.

The jurisprudence of the Court shows, that states have a higher level of responsibility for situations, where a person is in custody and under full control of authorities. The Court, from the beginning, has made it clear that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3[89]. Thus, whether ill-treatment occurred, depends on the particular circumstances of the case. Such circumstances may be duration of the treatment, its physical and mental effects on the applicant, the sex (in some cases), age and state of health of the victim[90].

In the case of *M.S.S v. Belgium and Greece* the Court found a violation in respect of Article 3 of the ECHR. In this case the Court stated that: “<…> the applicant has been the victim of

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[85] *Budina v Russia* (dec.), no. 45603/05, 18 June 2009.
[86] Cassese A. Can the Notion of Inhuman and Degrading Treatments be Applied to Socio-Economic Conditions? European Journal of International Law. 1991, 2: 141−145, p. 143−144.
[87] Ibid.
[88] *Van Volsem v. Belgium*, no. 1464/89, unreported.
[89] Aisling Reidy, A guide to the implementation of Article 3 of the European Convention on Human Rights Handbook No. 6: The prohibition of torture, Council of Europe, 2002, p. 10.
[90] For example *Valašinas v. Lithuania*, no. 44558/98, § 101, ECHR 2001-VIII.

humiliating treatment showing a lack of respect for his dignity <…>. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention[91]". In this case the Court underlined the specific circumstances of the applicant – the vulnerability as an asylum seeker[92]. Despite the fact that, access to food and shelter falls within the scope of economic and social rights, and thus outside the ambit of the ECHR, the Court paid attention to the status of the applicant and pointed out that obligation to provide accommodation and decent material conditions to impoverished asylum seekers had now entered into positive law with the Greek legislation[93]. To sum up, the Court's decision on *M.SS v. Belgium and Greece* was influenced by two major factors – the applicant status as an asylum seeker and obligations under the EU Reception Conditions directive[94].

In a case of *D v. United Kingdom*, the Court analyzed social and economic rights elements of Article 3[95]. In this case the Court held that removal person to St. Kitts with advanced stage of AIDS virus would be a violation of Article 3. The Court noted that:" in the very exceptional circumstances of this case <…> it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3 (art. 3)[96]". In the case of *Dougoz v. Greece*, where a person complained about the poor conditions of detention center, where there were no beds and the detainees were not given any mattresses, sheets or blankets and there was no natural daylight and no yard in which to exercise, the Court found a violation of Article 3 of the Convention[97]. As cases of *M.S.S v. Greece and Belgium, D v. United Kingdom* and *Dougoz v. Greece* show Article 3 of the Convention is developed within three different areas[98]:

1) The cases where the issue related to a certain minimum standard of living;
2) The cases where right to medical treatment is inherent;
3) The cases where issues relate to detention conditions.

While these case studies may show that there are definitely certain aspects of socio-economic rights, it must be highlighted, that the Court does not use any principles or doctrines which

[91] *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 263, ECHR 2011.
[92] Ibid.
[93] Gina Clayton, Asylum Seekers in Europe: M.S.S. v Belgium and Greece, Human Rights Law Review 11:4(2011), 758-773.
[94] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *OJ L 31, 6.2.2003, p. 18–25.*
[95] *D. v. the United Kingdom*, 2 May 1997, Reports of Judgments and Decisions 1997-III.
[96] Ibid. §54.
[97] *Dougoz v. Greece*, no. 40907/98, ECHR 2001-II.
[98] Liam Thornton, Seasca Bliain Faoi Bhl*áth. Socio-Economic Rights and the European Convention on Human Rights. The ECHR and Ireland: 60 Years and Beyond Dublin, 29 June 2013 p. 1-43.*

would relate to socio-economic rights. The area of socio-economic rights within Article 3 is definitely within a reach as those cases may show, and general obligation to grant at least minimum social support are invoked, lack of any explanations of why and what of socio-economic rights may fall within the scope of Article 3 remains problematic.

Article 8 of the Convention states that: “Everyone has the right to respect for his private and family life, his home and his correspondence”. Obligations, arising out of Article 8 may be twofold. Firstly, Article 8 protects from arbitrary public interference. Secondly, the Court has found that in addition to this primary negative undertaking, there may be positive obligations[99]. The Court tends to construe and interprets this article broadly - over the years the notion of private life has been applied to a variety of situations[100].

The Court in order to determine whether there have been a violation typically uses a two stage test[101]: firstly the Court assess whether issue falls within scope of Article 8 p. 1 and only then examines whether interference is made by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others as it is required by Article 8 p. 2. The Court shows some awareness as it comes to certain elements of social and economic rights within Article 8. In the case of *Ostra v. Spain* the Court stated that: “naturally, severe environmental pollution may affecting individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. Whether the question is analyzed in terms of a positive duty on the State - to take reasonable and appropriate measures to secure the applicant’s rights <…>[102]”.

In the case of *Marzari v. Italy*, the Court held that: “although Article 8 does not guarantee the right to have one’s housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8” <…>. The Court recalled in this respect that, while the

[99] *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91.
[100] Notion of private life includes : bearing a name; the protection of one’s image or reputation; awareness of family origins; physical and moral integrity; sexual and social identity; sexual life and orientation; a healthy environment; self-determination and personal autonomy; protection from search and seizure; and privacy of telephone conversations. Ivana Roagna, Protecting the right to respect for private and family life under the European Convention on Human Rights, Council of Europe, Human Rights Handbooks, Strasbourg, 2012.
[101] Ibid. p. 10-12.
[102] *Lopez Nostra v. Spain*, no. 16798/90, § 51, Series A no. 139.

essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life[103].

Another case to mention is case of *Sentges v. Netherlands*[104]. In this case, the person was unable to stand, walk or lift his arms and requested a robotic arm in order to be able live his life more autonomously. While the Court once again confirmed that there are certain positive obligations to the Article 8, the application was founded inadmissible due to the fact that the applicant had access to the standard of health care offered to all persons insured.

As the cases of *Ostra v. Spain, Marzari v. Italy* and *Sentges v. Netherlands* may show, the social and economic aspects of article 8 appear in 3 directions: In an area of health protection; environmental protection and right to housing.

Article 6 of the Convention guarantees a right to the fair trial. As it can be seen from p. 4, Article 6 speaks of the right to a fair and public hearing in the determination of an individual's civil rights and obligations or of any criminal charge against him[105]. As to a social and economic dimension of this right, claims under Article 6 firstly appear in the area of social security. In the case of *Feldbrugge v. Netherlands* the Court found that health insurance payments fall within the meaning of civil rights under Article 6[106].

The right to social security may also be an issue under Article 1 of Protocol No. 1. The entitlement to the peaceful enjoyment of possessions may raise certain questions on the right to social security. Interpreting possessions in a very wide manner, the Court manages to reach social and economic aspect of the article. Thus, when questions on Article 1 of the Protocol No. 1 appear, firstly it must be decided whether social security benefits may fall within the term of "possessions". Secondly, if benefit falls within the meaning of "possessions", deprivation of such benefit must meet specific requirements. However, this article does not entail to require property as such and accordingly, does not entail right to receive social benefits. Moreover, the text of the ECHR itself does not speak about social security explicitly and certain judicial principles with connection to social security are a creation of the Court and its case law. In addition, the Courts approach to such

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103 *Natale Marzari v. Italy* [dec.], no. 36448/97, 4 May 1999, unreported.
104 *Sentges v. the Netherlands* [dec.], no. 27677/02, 8 July 2003, unreported.
105 Nuala Mole and Catharina Harby, A guide to the implementation of Article 6 of the European Convention of Human Rights, Human Rights handbooks No.3, 2nd edition, Council of Europe 2006.
106 Case of *Feldbrugge v. The Netherlands*, application no. 8562/79, 29 May 1986, Judgment, Strasbourg.

cases may be understood as quite strict, as it must be checked whether applicant had "possessions" to begin with and whether deprivation of possessions was made in a proper manner.

A separate attention should be paid to the Article 1 of the Protocol 12[107]. General prohibition against discrimination in the enjoyment of any right set forth by law may have high influence over the enjoyment of the social and economic rights. Contrary to Article 14, which prohibits discrimination in the enjoyment of the rights and freedoms set forth in the Convention, Article 1 of the Protocol 12 stands for a wider and stronger position. In particular, Article 1 of the Protocol 12 does not require having connection to any other right or freedom set out in the ECHR and may be invoked on a separate ground. This article broadens the jurisdiction of the Court as discrimination becomes prohibited also for social and economic rights. Thus, it is a step closer to a greater recognition of rights, which are not covered by the ECHR. However, so far only a few cases are resolved by the 12 Protocol and the potential impact for social and economic rights is to be fulfilled[108]

To sum up, the Court definitely is moving towards protection of social and economic rights. Such protection, however, is often complex to due to a large amount of different articles and a number of social and economic elements. Due to the lack of clear legal basis and based on judicial principles established by the Court, social and economic rights are somehow met with caution in the Court's jurisprudence. While certain general notions, concerning social and economic rights, provide great opportunity for possible protection, a more precise approach is currently lacking. For example, when it comes to Article 3, it is not crystal clear when the high threshold requirement is met, neither is clear why certain hurdles relating practical matters of social and economic right are not addressed. Accordingly, this may be caused by lack of direct establishment of the ECHR and lack of proper justification and explanation of social and economic rights.

[107] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 September 2000, ETS 177.

[108] Up to 2016, the Court had dealt with issue concerning elections to the presidency (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009) and sentencing in war crime trials (*Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, ECHR 2013 (extracts)).

2. RIGHT TO WORK IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Work may be understood not only as a source of income, but also as an act of self-expression and self-fulfillment, also as a place for socialization. The two dimensions of work are related yet separate: the value of work as means for obtaining income to satisfy other needs is different from its value as a need in itself[109]. There are two important things to notice: the close connection between labour conditions, social justice and universal peace and labour as a human value and a way for a self-realization[110].

In the international context, the right to work is protected in Article 6 of the ICESCR. As the Committee on Economic, Social and Cultural Rights have noted: "the right to work, as guaranteed in the ICESCR, affirms the obligation of states parties to assure individuals, their right to freely chose or accepted work, including the right not to be deprived of work unfairly[111]". While the ECHR has no explicit article recognizing the right to work or obligation to take appropriate steps to safeguard this right, contrary to the ICESCR, the Court still managed to develop the notion of safeguarding right to work. As cases above have shown, the access to employment has been protected as far as civil and political rights interpretation could reach.

The right to work could not be described merely as participation in just any type of economic activity. In fact, it includes "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts[112]". Article 6 of the ICESCR, for example, is not so much concerned with what is provided by work, or conditions of work, but rather with the value of employment itself, recognizing the idea that work is an integral part of the dignity and self-respect. Right to work, as guaranteed in the ICESCR, affirms the obligation to states parties to assure individuals their right to freely choose or accept work, including the right not to be deprived of work unfairly. This definition underlines the fact that a respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the

[109] Daphne Barak- Erez and Aeyal M Gross, Exploring Social Rights Between Theory and Practice. Hart Publishing, .USA, 2007, p. 343.
[110] Asbjorn Eide Catarina Krause and Allan Rosas, Economic, Social and Cultural Rights. Second Revised Edition. Kluwer Law International, The Hague. The Netherlands, 2001. Krzysztof Drzewicki. 1.3 The Right to work and rights in work. P. 223.
[111] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, para 4. Available at: http://www.refworld.org/docid/4415453b4.html [accessed 25 February 2016]
[112] International Covenant on Economic, Social and Cultural Rights.16 December 1966, U.N.T.S., vol. 993, art. 6.

importance of work for personal development as well as for social and economic inclusion[113]. However, such factors as access to resources, education and training plays an important role on the type of work a person does.

Rights at work are those rights that relate specifically to the status of a worker[114]. Differentiation should be made between the rights which person has at work and the right to work as such. The right to work may be described as an opportunity to gain his or her living by work which he or she freely chooses or accepts. The rights at work may be described as enjoyment of just and favorable conditions of work and to form and join trade unions. The Convention speaks of two rights at work: the prohibition of slavery, servitude, forced and compulsory labour[115] and the right to form and join a trade union[116]. The right to work is not even explicitly mentioned in the Convention as such, but practice shows that the Court is able to recognize social and economic rights through the broad interpretation of civil and political rights. Once it comes to a right to work, The Court has shown awareness while interpreting for example, Article 10 (freedom of expression)[117], Article 8 (right to respect for private and family life)[118], Article 14 (prohibition of discrimination) taken in conjunction with Article 9 (freedom of thought, conscience and religion)[119], Article 6 (right to a fair trial)[120].

Different entitlements may arise once it comes to an employment context, some of these rights can only be exercised individually and others collectively[121]. Such rights as to choose a job freely, right to fair working conditions, right to a just wage and the protection of privacy may belong to individual rights, while a right to belong and be represented by a trade union and a right to strike, may belong to the collective rights.

Right to work might not only be described from collective or individual experiences. Rather than that, right to work may be described as a concept with increased focus on socio-economic rights

[113] Committee on Economic, Social and Cultural Rights, General Comment 18, Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006), § 4.
[114] Virginia Mantouvalou, Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation. Human Rights Law Review (2013), Published by Oxford University Press.
[115] Art 4 of the ECHR.
[116] Art 11. P. 1. of the ECHR.
[117] *Kosiek v. Germany,* no. 9704/82, 28 August 1986, unreported.
[118] *Leander v. Sweden,* application no. 9248/81, 26 March 1987, unreported.
[119] *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV.
[120]*Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II.
[121] Ibid. § 3.

and with inspiration of civil and political rights. The concept of work-related rights may be grouped[122]:

1) Set of rights and freedoms linked in different ways with employment, (for example, *Borgese v. Italy*, right to fair trial within a reasonable time) such as: a freedom of association, right to organize, right to collective bargaining, right to strike, etc.;

2) Freedoms and rights which are consequential to labour relationship (combination of different right to work elements). Rights such as: right to just conditions of work, right to safe conditions, right to vocational guidance and training, right of protection of women and children at work, right to social security, etc.;

3) Work related rights from the angle of non-discrimination and equality[123].

To sum up, the right to work is a complex issue involving many differentiations and different elements. Ability to earn for his living and conditions of where this living is earned, rights which can be enjoyed in a group of other workers and rights which may be enjoyed individually, draws a complex picture of the right. Taking into account possible correlations, a defined description of the right to work would bring even more controversy. Even though, the right to work could not be described as a no-go phenomenon in the Court's jurisprudence.

2.1. Right to Work

As the right to work may be understood not only as a way to earn money, but also as an act of self-expression and self-fulfillment and socialization, one should make a distinction between right to work as such and rights which person have at work, or labour rights. As the Convention has no direct provision which would mention the right to work as such, it may seem this right, as being one of socio-economic rights, may not be protected by the Court. However, one should be careful while analyzing particular situation, as the Court may protect right to work while giving broad interpretation of protection for freedom of expression, respect for private and family life, freedom of thought, conscience and religion or other civil and political rights which directly may not be qualified as socio-economic rights. For example, in a case of *Glasenapp v. Germany*[124], a secondary-school

[122] Asbjorn Eide, Catarina Krause and Allan Rosas, Economic, Social and Cultural Rights. Second Revised Edition. Kluwer Law International, The Hague, The Netherlands, 2001. Krzysztof Drzewicki. 1.3 The Right to work and rights in work. P. 223.
[123] Ibid. p. 227.
[124] *Glasenapp v. Germany*, application no. 9228/80, 28 August 1986, unreported.

teacher in Germany who expressed extremist political opinions and was employed in a temporary position, had been denied a permanent post because of his extremist political beliefs. The Court did not declare application inadmissible due to fact that case related to access to work. Rather than that, the Court found that such complaints do not fall clearly outside the provisions of the Convention[125]. According to the Court, it was necessary to "inquire whether the disputed revocation of appointment amounted to an "interference" with the exercise in the applicant's freedom of expression as protected by Article 10[126]". It may be seen, that the right to work in this case had been camouflaged under freedom of expression and had been recognized indirectly. In other words, this case is an example of the protection for the right to work as such, taking into account the fact that protection for social and economic rights arises as soon as the question may turn into connection to civil and political rights.

Another case, where the issue of access to work arose, was case of *Thlimmenos v. Greece*[127]. This time, the issue turned into whether the chartered accountant was refused to be appointed to a job position due to his past convictions. Once again, while the Convention has no express provisions for access to work as such, the Court's approach to this case was expressed through Article 14 (prohibition of discrimination), taken in conjunction with Article 9 (freedom of thought, conscience and religion). Rather than turning the question on whether the applicant could exercise his right to be appointed to chartered accountant, the Court paid special attention to the fact, that applicant's past convictions were connected to his refusal to wear the military uniform on religious or philosophical grounds. In other words, access to work as such, was granted to the point of civil and political rights, in particular, the protection against religious discrimination[128]. The Court argued, that the State breached the Convention by "failing to introduce appropriate exceptions to the rule for persons convicted of a serious crime from the profession of chartered accountants[129]".

The jurisprudence of the Court shows, that the right to work has been also interpreted through Article 8 (right to respect for private and family life) taken in conjunction with Article 14 (prohibition of discrimination). In a case of *Naidin v. Romania*, the applicant complained of the refusal of his application for employment in the reserve corps of deputy prefects – because of his collaboration with the political police under the communist regime. The Court considered that applicant was not barred from occupying a position in other areas of the public sector, which did not

[125] Ibid. § 41.
[126] Ibid.
[127] *Thlimmenos v. Greece, supra* note 119.
[128] Art. 9 in conjunction with Article 14. IT should be noted, that article 14 have no sole ground, it have to be connected with others to be found as discrimination.
[129] *Thlimmenos v. Greece, supra* note 119, § 48.

involve the exercise of public authority[130] and thus, found no violation of this case. However, the Court's approach to this case was through Article 8 (right to respect for private and family life) taken in conjunction with Article 14 (prohibition of discrimination) while not giving any particular weight on the fact, that case involved access to employment in the public service. Once again, this case is an illustration for protection of a right to work, in particular, access to employment in the reserve corps of deputy prefects, through the ambit of civil and political rights.

Access to work also appeared in a case of *Sidabras and Džiautas v. Lithuania*[131]. In this case, the applicants complained about being banned from finding employment in a private sector on the ground that they had been former KGB officers. Again, the applicant's right to seek employment in a private sector was protected from Article 14 taken in conjunction with Article 8. The Court noted, that "person's opportunity to find employment with a private company for reasons for lack of loyalty to the State cannot be justified from the Convention perspective on the same manner as restrictions on access to their employment in the public service[132]". Taking into account case of *Naidin v. Romania*, mentioned above, the Court's approach to issue with access to employment was developed through rules of non-discrimination and respect for private life[133]. While making a distinction between access to employment in private and public sectors, the Court in both cases did not fail to recognize the issue of access to employment itself. While the Court's position is to make Convention rights "practical and effective[134]", the approach of the Court may be seen as a way for a protection for the right to work. On the other hand, it does not mean that all access to employment cases will fall with the scope of Article 8 in conjunction with Article 14.

As we speak about protection for the right to work, Article 14 deserves special attention in the Court's jurisprudence. As we can see from the Convention text, under Article 14 discrimination is prohibited only in relation to the exercise of another right guaranteed by the treaty[135]. This means that a non-discrimination clause may be invoked only together with another article in the Convention and thus, only Convention rights may be enjoyed by non-discrimination[136]. The jurisprudence of the

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[130] *Naidin v. Romania*, no. 38162/07, § …, 21 October 2014.
[131] *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII.
[132] *Sidabras and Džiautas v. Lithuania*, *supra* note 127, § 58.
[133] ECHR, Art. 8 and 14.
[134] For example, *Levages Prestations Services v. France*, 23 October 1996, § 44-48, Reports of Judgments and Decisions 1996-V.
[135] Art 14. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground <…> or other status. See also Handbook on European non-discrimination law. European Union Agency for Fundamental Rights, 2010. Council of Europe, 2010. p. 17.
[136] The requirement that Article 14 can only be invoked if a situation is within the ambit of a Convention right is often called "ambit" requirement. Rory O'Connell, 'Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR' (2009) 29 (2) Legal Studies: The Journal of the Society of Legal Scholars 211-229.

Court, however, stresses that a non-discrimination clause is an “autonomous” provision, and it can be violated even where the substantive article relied upon to invoke Article 14 have not been violated[137]. Such approach extends non-discrimination requirements in many areas which should not fall within the scope of the Convention right. In the instant case, this would include the right to work. However, as the Court has extended the ambit of Convention rights, it has not done away with the ambit requirement[138].

The right to work may be triggered not only through a combination of Articles 14 and 8, but also with Article 8 alone. As early as 1992, the Court in a case of *Niemietz v. Germany*[139] stated that “there is no reason in principle why <…> understanding of the notion of “private life” should be taken to exclude activities of a professional or business nature[140]”. In this case, law enforcement authorities searched the law office premises of the applicant as it related to criminal proceedings for insulting behavior. The approach of the Court was important as the professional and business activities since this case is falling within Article 8.

Further development may be seen in a case of *Turek v. Slovakia*. In this case, Slovak national refused for national security clearance in order to retain his position in State administration of school systems. The Court found that facts constituted an interference with the applicant’s right to respect for his private life. While the Court admitted that there may be legitimate grounds to limit access to certain documents, limiting access to the requested information was found as unnecessary. In general terms, the issue in this case was whether deprivation of right to work was fair.

A quite similar issue appeared in a case of *Leander v. Sweden*[141]. The applicant was refused access to secret police files as he applied for a high-level position in the Swedish national policy. The Court admitted that interference adversely affected Mr. Leander’s interests, but the interference did not constitute an obstacle to his leading a private life of his own choosing[142]. The Court found that supervision system contained in Sweden law met the requirements of paragraph 2 of Article 8. As the similar issue appeared in *Turek v. Slovakia,* the Court’s approach led to the analysis of whether deprivation of right to work was fair.

To sum up, right to work is definitely protected in the jurisprudence of the Court. As right to work is not explicitly mentioned in the ECHR itself, protection may be provided through the scope of

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[137] *Belgian Linguistic* case (1968) 1 EHRR 252, 283.
[138] Rory O'Connell, 'Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR' (2009) 29 (2) Legal Studies: The Journal of the Society of Legal Scholars 211-229.
[139] *Niemietz v. Germany*, application no. 13710/88, 16 December 1992, unreported.
[140] Ibid. § 29.
[141] *Leander v. Sweden*, 26 March 1987, 9 EHRR 433, § 74.
[142] Ibid. § 59.

different articles. Yet, a general approach towards the right work is rather unclear as the Court never discussed what position right to work has in the ECHR in general and doubts may be raised whether such approach is justified enough. On the other hand, a rising number of developments, for example in cases concerning private life and inclusion of social and economic elements, is not to be regarded as a negative step.

2.2. Rights at Work

The ICESCR requires not only access to work in a general sense, but also right of everyone to the enjoyment of just and favourable conditions of work, in particular the right to safe working conditions, the right of everyone to form trade unions and join the trade union of his/her choice as well as the right of trade unions to function freely[143]. In this regard, the ICESCR sets out requirements that have a pretty wide scope. However, in short terms, such regulation establishes a right to work (Art. 6 of ICESCR) and also specific rights at work (Art. 7, 8 of ICESCR).

The Convention does not speak of to enjoyment of just and favourable conditions of work. Only Article 4, which prohibits slavery, contains such words as “work” and “labour”. However, the question turns, how far reaching interpretation of the prohibition against slavery and forced labour can be? Traditionally, slavery may be defined as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised[144]. In such case, the favorable conditions of work may not be viewed as far reaching, because there would be no violation of the ECHR as long as there are no ownership of the person. Such an issue was subject to examination in a case of *Siliadin v. France*, where Togolese national, was made to work as a domestic servant fifteen hours a day without a day off or pay for several years. The Court found, that the applicant was “clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense”.[145] Another important element of this judgment was the Court’s linkage to materials of the International Labour Organization (ILO). While “interpreting Article 4 of the European Convention, the Court has in a previous case already take into account the ILO conventions, which are binding on almost all of the Council of Europe's member States[146]”. As the

[143] CESCR, *supra* note 139, § 2.
[144] League of Nations, Convention to Suppress the Slave Trade and Slavery, 25 September 1926, 60 LNTS 253, Registered No. 1414, art. 1. p. 1.
[145] *Siliadin v. France*, no. 73316/01, § 122, ECHR 2005-VII.
[146] Ibid. § 115.

issue in this case related to the harsh conditions at work, this case shows not only close relationship between Article 4 and certain conditions at work, but also an issue with relying on other international instruments rather than the Convention.

The right to work was subject to reliance on international documents, rather than development of autonomous concepts within the Convention[147]. Once it comes to rights at work, the Court has developed the important method of referring to international standards when interpreting the Convention rights. In a case of *Demir and Baykara v. Turkey,* the Court recognized the right to collective bargaining with Article 11. In this case, the Court took "into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States, reflecting their common values"[148].The Court also noted, that it never distinguishes between documents that the Respondent State has signed and ratified and those that it has not[149]. This case shows not only close connection to the international standards other those of ECHR, but also is an example of "integrated approach". This approach means that socio-economic rights are integrated into civil and political rights document[150]. The outcome of this case may be questioned due to fact that the Court relied on international documents even though Turkey had not signed and ratified some of them[151].

Reliance on international instruments, however, is subject to controversy. First of all, in a case *Demir and Baykara v. Turkey*, the Court relied on external sources other those than the ECHR. Second of all, the rules of the international law may be different and thus, reliance on different international instruments may lead to different outcomes in a case before the Court. An example of such situation may be case of *Sørensen & Rasmussen v. Denmark.* In this case, provisions of Denmark legislation forced union membership and maintaining one on employees, as a condition of being hired and to avoid being fired from their jobs. While making observations on the ESC, the Community Charter of the Fundamental Social Rights of Workers and the ESCR's conclusions[152],

[147] The Court and the former Commission have so far characterized as autonomous a significant number of concepts that figure in the Convention: criminal charge, civil rights and obligations, possessions, association, victim, civil servant, lawful detention, home. George Letsas, The Truth in Autonomous Concepts: How to interpret ECHR. EJIL (2004), Vol. 15 No. 2, 279-305.

[148] *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 84, ECHR 2008.

[149] Ibid. § 78.

[150] Virginia Mantouvalou, Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation. Human Rights Law Review (2013), Published by Oxford University Press. P. 8 of 27.

[151] In particular, the Court relied on arts 5 and 6 of the (Revised) European Social Charter (Strasbourg, 3 May 1996, entered into force on 1 July 1999) as interpreted by the relevant monitoring body (the European Committee on Social Rights), which was not binding on respondent state.

[152] *Sørensen & Rasmussen v. Denmark*, application no. 8777/79, § *72-74*, 28 November 1984, unreported.

the Court found a violation of Article 11. As it comes to the ILO, the issue is left for regulation at national level[153]. As the Court relied on the ESC and the Community Charter, which established that mandatory membership in union is a violation[154] , rather than discretion of the states, as guaranteed in instruments of the ILO. Thus the issue, to which instrument to rely on upon a case of disagreements between experts, remains.

Another interesting development within the Court's jurisprudence is the access to information enabling employees to assess occupational risks of their health and safety. This development may be found in a case of *Vilnes and Others v. Norway*. As a result of the oil exploration in North Sea, the companies hired divers who, as a result of diving in the North Sea, become disabled. The Court found a violation of Article 8 due "to a failure to provide access to information regarding risks involved in the use of rapid decompression tables[155]". The assessment through Article 2 was rejected as applicants had not personally been exposed to life-threatening experiences[156] and limited knowledge about the long-term effects of decompression sickness did not allow to find a violation of Article 3[157]. Even if there is no particular information about concrete risks in disposal, the government is under obligation to provide essential information that they needed to be able to assess the risk to their health and to give informed consent to the risks involved[158]. However, a point should be made to the fact, that sickness appeared in long-term perspective and a case did not reveal the exact time when, the government had positive obligation to provide such information about health risks.

Protection for employment within the ECHR faced severe issues in its origin due to the Court's restrictive approach. The justiciability of social and economic rights was blurred due to the European Social Charter. In a case of *National Union of Belgian Police v. Belgium*[159], which came in 1975, the Court found that the Article (art. 11) does not guarantee any particular treatment of trade unions, or their members, by the State, such as the right to be consulted by it[160]. In a case of *Swedish Engine Driver's Union v. Sweden*, dating back to 1976, the Court repeated restrictive approach and stated that "the Article (art. 11) does not secure any particular treatment of trade unions, or their members, by the State, such as the right that the State should conclude any given collective

[153] Ibid. § 38.
[154]Ibid. § 72-73.
[155] *Vilnes and Others v. Norway*, nos. 52806/09 and 22703/10, § 253, 5 December 2013.
[156] Ibid. § 234.
[157] Ibid. § 253.
[158] Ibid § 244.
[159] *National Union of Belgian Police v. Belgium*, no. 4464/70, 27 October 1975, unreported.
[160] Ibid § 38.

agreement with them[161]". The right to strike was recognized, as such, in a case of *Schmidt and Dahlstrom v. Sweden*. However, as it was not expressly enshrined in Article 11 as the Court stated that the right to strike "may be subject to national law to regulation of a kind that limits its exercise in certain instances[162]". In 1987 in a case of *Council of Civil Service Unions v. the United Kingdom* the Court found that membership in a trade union may be restricted due to security reasons[163]. The restrictive approach to all these cases may be justified and explained due to an existence of the original European Social Charter.

Recent jurisprudence shows a greater willingness for protection for social and economic rights at the workplace as it comes for Article 11. Case of *Demir and Baykara v. Turkey* could serve as an example of extension of scope of protection from Article 11. According to the Court "the right to enter into a collective agreement might represent one of the principal means <…> for trade unionists to protect their interests[164]". This development is as important as the previous case of *Swedish Engine Driver's Union v. Sweden* the Court found that Article 11 did not provide right to enter into collective agreements. Different interpretation of Article 11 in both cases may be explained as the Court is willing to expand the protection for social and economic rights within the ECHR.

One should notice that right to strike was recognized as early as in case of *Schmidt and Dahlstrom v. Sweden*. The main issue is, however, the lack of provision of the Convention, which would provide such right. Despite this**,** in a case *Enerji Yapi-Yol Sen v. Turkey*[165], the Court emphasized that right to strike was not absolute and could be subject to certain conditions and restrictions. The Court found, that there is no violation as soon as the ban did not extend to all public servants or to employees of State-run commercial or industrial concerns.

As it comes to rights at work, the issues may concern not only social and economic elements of the Convention, but protection may appear from the civil and political rights. The issue of privacy at work, for example, arose in a case of *Barbulescu v. Romania***.** The applicant complained that his employer's decision to terminate his contract had been based on a breach of his right to respect for his private life[166]. The question turned into, whether an employer could monitor his employee communication. The Court found that the employee had a reasonable expectation of privacy also

[161] *Swedish Engine Driver's Union v. Sweden* no. 5614/72 [1976] ECHR 2 (6 February 1976) § 39.
[162] *Schmidt and Dahlstrom v. Sweden* Eur. Ct. HR, Series A, No. 21 (1976) § 36.
[163] *Council of Civil Service Unions v the United Kingdom* 10 EHRR CD269, [1987] ECHR 34, (1988) 10 EHRR CD 269. Important impact of this case was the permission for judicial review despite the fact that issue concerned national security, e.x. prerogative power of the government.
[164] *Supra* note 134, § *129*.
[165] *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, 21 April 2009.
[166] *Bărbulescu v. Romania*, no. 61496/08, § 23, 12 January 2016.

when communicating with his workplace messenger account, but in the Court's view "that it is not unreasonable for an employer to want to verify that the employees are completing their professional tasks during working hours[167]". However, one should bear in mind, that the monitoring measure is not in breach of Article 8 of the Convention does not automatically mean that such measure is indeed permitted at the end of the day[168].

The issue of privacy at work arose also in a case of *Copland v. United Kingdom*. In this case, person's telephone and internet usage was monitored by the employer. However, in this case "interference in this case was not "in accordance with the law" as required by Article 8 p. 2 of the Convention[169]". Together with a case of *Niemietz v. Germany*, where the Court extended a notion of "private life" to the professional and business activities, cases relating privacy at work shows great willingness to the protection of rights at work through the extended scope of civil and political rights. Wide interpretation of private life allowed the Court to ensure that protection of the rights of person at work would actually reach the person, as jurisprudence requires "practical and effective[170]" protection of rights.

To sum up, practical and effective protection of rights provides a real life possibility to enjoy the rights set out by the ECHR and not to be just a pure aspirational dream. Once it comes to developments concerning rights at work, ECHR is not isolated from other international instruments. Such cases as *Sørensen & Rasmussen v. Denmark* show that requirements for rights at work under ECHR may not be isolated from other developments in international law. On the other hand, *Siliadin v. France* suggests that at least the very minimum could be provided with the prohibition on slavery. Possible developments become even more unpredictable, taking into account cases such as *Barbulescu v. Romania*, where more emphasis is given to the civil and political elements of the right and protection is not dulled only because the case involves questions relating workplace.

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[167] Ibid. § 59.

[168] Christoph Zieger, European Court of Human Rights: Private messages at work may be read by employers. Access through: (accessed 2016-03-20) http://www.dataprotectionreport.com/2016/01/european-court-of-human-rights-private-messages-at-work-may-be-read-by-employers/

[169] *Copland v. the United Kingdom*, no. 62617/00, § 48, ECHR 2007-I.

[170] *Levages Prestations Services v. France, supra* note 130.

3. RIGHT TO SOCIAL SECURITY IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

For individuals social security rights may be essential means of safeguarding their standards of living[171]. When social security requirements under national law changes, rights of individuals may be endangered, and thus their sources of income may be denied. This may be done in various ways: it may be done by benefit reduction, by changing conditions for benefit, increasing a level of contributions or the termination of right to benefit.

While the right to social security is not explicitly protected by the Convention, the Court had enlarged the scope of protection for the property right and managed to include social security as well[172]. Within the ECHR, protection for property is provided with Article 1 of Protocol No. 1[173]. The Court has found that this Article comprises three distinct rules[174]:

1) The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property;
2) The second rule covers deprivation of possessions and subjects it to certain conditions;
3) The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose.

However, the article speaks about entitlement to the peaceful enjoyment of his possessions, rather than the right to property itself. This may be understood as peaceful enjoyment of possessions is a narrow concept of right to property, as it guarantees that acquired property rights are protected from arbitrary interferences[175], rather than the right to property as such. It should be noted, that concept of "possessions", is very broadly interpreted in the Court's jurisprudence, as it covers wide scope economic interests. Movable or immovable property, tangible or intangible interests such as shares or patents, an arbitration award, the entitlement to a pension, a landlord's entitlement to rent, the economic interests connected with the running of a business, the right to exercise a profession, a

[171] Anna Tsetoura, Property Protection as a limit to deteriorating social security protection. European Journal of Social Security, Volume 15 (2013), No. 1, p. 55.
[172] Monica Carss-Frisk, A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights, Human Rights Handbooks, No. 4, Council of Europe, 2001.p. 57.
[173] COHRE, *supra* note 38.
[174] *Sporrong and Lonnroth v. Sweden*, Judgment of 23 September 1982. Publications of the European n Court on Human Rights, Series A, No. 52, § 61.
[175] Anna Tsetoura, *op. cit*.

legitimate expectation that a certain state of affairs will apply, a legal claim and the clientele of a cinema have been held to fall within the protection of Article 1[176].

In the case of *Andrejeva v. Latvia*, the Court found that all principles which apply generally in cases concerning Article 1 of Protocol No. 1 are equally relevant when it comes to welfare benefits[177]. However, the ECHR does not protect social welfare benefits of the extent as it would guarantee a particular amount of benefit, for example, in the case of *Müller v. Austria*, the Court found that the Convention does not give a right to a pension of a particular amount[178]. Moreover, the Article 1 of Protocol No.1 applies only to existing possessions as the text is limited to enshrining the right of everyone to the peaceful enjoyment of "his" possessions[179]. In other words, right to property established in the Convention does not guarantee the right to acquire property. But if the State has in force legislation providing for the payment as of right of a pension – whether or not conditional on the prior payment of contributions – that legislation has to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements[180].

The interference with a person's right to property under Article 1 of Protocol No. 1 is deemed to be compatible under certain conditions. According to the Court, interference should be lawful, it should serve a legitimate public (or general) interest and any interference was reasonably proportionate to the aim sought to be realized[181].

When deciding whether interference was lawful, the Court analyses the principle of legal certainty. The Court had found that in a democratic society, subscribing to the rule of law, no determination that is arbitrary can ever be regarded as lawful[182]. The principle of legal certainty applies to the Convention as a whole, and thus applies in relation to Article 1 of Protocol No. 1. In the Court's view, the principle of legal certainty requires in the first place the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions[183]. For example, in the case of *Iatridis v. Greece*, the Court found that interference was manifestly in breach

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[176] Monica Carss-Frisk, *supra* note 172.

[177] *Council of Civil Service Unions v the United Kingdom*, *supra* note 160, § 77.

[178] *Müller v. Austria*, no. 5849/72, Commission's report of 1 October 1975, § 25, Decisions and Reports (DR) 3.

[179] *Van der Mussele v. Belgium*, 23 November 1983, para. 48, Series A No. 70.

[180] *Carson and Others v. the United Kingdom* [GC], no. 42184/05, para 64.

[181] *Wieczorek v. Poland*, no. 18176/05, § 58-60, 8 December 2009.

[182] *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33.

[183] *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 110, Series A no. 102.

of Greek law and accordingly incompatible with the applicant's right to the peaceful enjoyment of his possessions[184].

Analysis, whether interference serves a legitimate public or general interest, allows for the state parties to enjoy a wide margin of appreciation. Once it comes to the implementation of social or economic policies, the Court will respect the legislature's choice what is in the public interest, unless the judgment founds it manifestly ill-founded without reasonable foundation[185].

In order for an interference with property to be permissible, it must not only serve a legitimate aim at the public interest, but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized[186].

In conclusion, right to social security serves as a way to protect a person's standard of living. Under ECHR, this is done with jurisprudential developments of Article 1 of Protocol 1. Relevant questions to be answered are whether any type of social benefit could be regarded as possessions and whether deprivation of such benefit was done in accordance with the law, serving a legitimate aim and was proportional. Special attention should be paid to the wording of the article, as literal interpretation does not give right to acquire property as such and as a consequence, does not give right to receive social security benefit as such.

3.1. Right to Social Security and Right to Work

There is no right to social security benefits contained in the Convention *per se*. However, where an employee has contractual entitlements to a pension and has complied with making the requisite contributions, he or she may have a proprietary interest in either a state or private pension[187]. On the other hand, it is much more difficult to claim that the withholding of a state pension gives rise to an interference with property rights due to the connection with social policy[188].

[184] *Iatridis v. Greece* [GC], no. 31107/96, § 62, ECHR 1999-II.
[185] Monica Carss-Frisk, *supra* note 191, p. 27.
[186] *James v. the United Kingdom*, no. *8793/79*, § 50, A98 (1986); and *Lithgow and Others v. the United Kingdom,* 8 July 1986, § 120, Series A no. 102.
[187] *X v Sweden* (1986) 8 EHRR 252.
[188] Robin Allen QC and Rachel Crasnow, Employment Law and Human Rights. Oxford University Press, 2002 p. 187.

Once it comes to social security benefits, the Court found that: "all principles which apply generally in cases concerning Article 1 of the Protocol No. 1 are equally relevant when it comes to welfare benefits[189]". The question, however, turns what kind of benefits does the Court recognize?

In the case of *Deumeland v. Germany*[190] the Court recognized a right to a widow's pension and death benefit. The applicant was an heir to his mother, who applied for supplementary widow's pension claiming that her husband died as a consequence of industrial accident. Relying on Article 6 p.1, the applicant was successful in his claim. The Court emphasized, that right in question was a personal, economic and individual right, a factor that brought it close to the civil sphere[191]. In the case of *Carlin v. the United Kingdom*[192] the Court analyzed disability benefit due to the industrial accident. As an applicant was arrested and denied of disability benefit, the Court found that the suspension of the applicant's entitlement in conformity with applicable regulations does not constitute an interference with possessions within the meaning of Article 1 of the Protocol No.1 of the Convention[193]. The Court considered that the person concerned should have satisfied domestic legal requirements governing the right to disability benefit.

Jurisprudence also shows that Court is willing to recognize unemployment benefits, as it happened in the case of *Gaygusuz v. Austria*[194]. Such unemployment benefits, however, cannot be subject to nationality requirement[195]. The decision whether a person should be awarded unemployment benefits is also subject to fair hearing requirement within the meaning of Article 6 p. 1 of the Convention[196]. It is for the applicant to assess whether the government bodies require his comments on the entitlement to an unemployment allowance[197]. The requirements of Article 6 p.1 were also an issue in a case of *Feldebrugge v. Netherlands*[198]. From the foregoing, it is clear, that the Court is willing to recognize such benefits as: sickness, disability, widow pension and death benefit, unemployment benefit or payments under social schemes. However, it is to believe that this list is not finite, as the Court never paid special attention to the type of benefit itself. The Court instead used

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[189] *Andrejeva v. Latvia* [GC], no. 55707/00, ECHR 2009.
[190] *Deumeland v. Germany*, 29 May 1986, Series A no. 100.
[191] Ibid. § 71.
[192] *Carlin v the United Kingdom*, no. 27537/95, 3 December 1995, unreported.
[193] Ibid.
[194] *Gaygusuz v Austria*, no. 17371/90, 16 September 1996, unreported.
[195] The Court found that difference in treatment between Austrians and non-Austrians as regards entitlement to emergency assistance, of which Mr. Gaygusuz was a victim, is not based on any "objective and reasonable justification". Ibid, § 50.
[196] *K.S. v. Finland*, no. 29346/95, 31 May 2001.
[197] Ibid. § 23.
[198] *Feldbrugge v. The Netherlands*, no. 8562/79, 29 May 1986, unreported.

general formula, stating that claims to a social benefit funded at least in part by contributions is a "pecuniary right" for the purposes of Article 1 of the Protocol No. 1[199].

While the Court recognizes a great range of security benefits, the issue may appear to be a specific amount of benefit. Sadly, the Court has found, that even where Article 1 guarantees the right to derive benefit of benefits system, it does not guarantee a specific amount of payment[200]. Therefore, there is no proportionality check between contributions made and a specific benefit received.

As the right to work is concerned, it is important to notice, that legal relationship relates an employer and an employee. Thus, in a case of accident at work, the government may appear not to be responsible as legal relationship may relate exclusively employer and employee. One may argue that an individual in such case cannot rely on the ECHR, as the private actor is not bound by the Convention. This is called the theory of "drittwirkung", which supposes that an individual may rely upon a national bill of rights to bring a claim on private person that has violated his rights under that instrument[201]. However, this thinking may not be adapted to the context of the Convention, as it imposes obligations on the states[202]. However, where private actions fall within the area of a right of the Convention or actions is delegated to a private actor, the state cannot absolve itself from responsibility to secure the Convention right by delegating its obligations to private bodies or individuals[203].

Jurisprudence shows, that the Court is not excluding the right to social security benefits of a mere fact, that it concerns social economical rights. As it comes to the right to protection against unemployment, on the international level, it is protected by the Universal Declaration of Human Rights Art. 23 p. 1 as it states that: "everyone has the right <…> to protection against unemployment". This obligation, albeit with diversified variations, is translated into the provisions of the ICESCR (Article 6 p. 2) and ESC (Article 1 p. 1)[204]. However, it is often argued that these obligations lack significance and precision, as a mere adoption and enforcement of certain policy are in conformity with the international obligations. The Court's case-law shows that with certain limitations, protection of unemployment, disability, sickness and other benefits may be tangible

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[199] Christoph Zieger, *supra* note 165.
[200] *Nahon v the United Kingdom*, application no. 34190/96, 23 October 1997, unreported.
[201] Harus, Oboyle and Warbrick, Law of the European Convention on Human Rights. Oxford University Press. Second Edition, 2009 p.20.
[202] Art 1 of ECHR.
[203] *Costello-Roberts v. the United Kingdom,* application no. 13134/87, § 27. 25 March 1993, unreported.
[204] Asbjorn Eide Catarina Krause and Allan Rosas, Economic, Social and Cultural Rights. Second Revised Edition. Kluwer Law International, The Hague, the Netherlands, 2001. Krzysztof Drzewicki. 1.3 The Right to work and rights in work. P. 238.

reality. First of all, the Court develops "fair hearing" requirements within the meaning of Article 6 p. 1 of the Convention. This may be viewed as ability for judicial review of the decision of the authority whether to award particular benefit. While the "fair hearing" requirement makes social benefits enforceable before judicial authorities, the issue for the exact amount of benefits remains.

To sum up, the ECHR does not guarantee the right to work as such not to mention certain social guarantees for workers. Yet, a broad interpretation of Article 1 of the Protocol 1 and lack of any special attention to the type of social benefit, suggests that certain social guarantees for workers within the ECHR is not an illusion. Jurisprudence concerning one of the questions of crucial importance, that is the amount of benefit received, in a *Nahon v. the United Kingdom* was answered in a negative way. While claiming for a social benefit of a worker is rather possible option, successful claim for a specific amount of benefit is hardly possible.

3.2. Relationship between Right to Social Security and Right to Property

A right to social security payments to Article 1 of Protocol No. 1 arises as soon as a person concerned satisfies the conditions set by domestic law. In the case of *Burdov v. Russia*, for example, failure to comply with the national Court's decision prevented the applicant from receiving the money he could reasonably have expected to receive[205].

Unlike as it is suggested, it would be too difficult to say that the Court's approach to cases of contributory benefits is different [206]. In the case of *Gaygusuz v. Austria*, the Court found that it is not necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay "taxes or other contributions[207]". The same approach appeared in the case of *Koua Poirrez v. France*[208], where it was established, that that a non-contributory benefits also gives rise to a pecuniary right for the purposes of Article 1 of Protocol No. 1. Moreover, in the case of *Willis v. the United Kingdom*, the Court did not consider significant whether contributory payments have been made in order to receive a widow's pension[209]. Furthermore, the right to a pension that derives from employment can also be considered a property right when no special contributions were made by either the employee or employer, but the employer has made a more general undertaking to pay a

[205] *Burdov v. Russia* (dec.), no. 59498/00, § 41, ECHR 2001-VI.
[206] Ana Gomez Heredero, *supra* note 203, p. 25.
[207] *Gaygusuz v Austria, supra* note 175.
[208] *Koua Poirrez v. France*, no. 40892/98, § 37, ECHR 2003-X.
[209] *Willis v. the United Kingdom*, no. 36042/97, § 35, ECHR 2002-IV.

pension at conditions that can be considered to be part of the employment contract[210]. However, it should be held in mind, that all these cases related to the issue of discrimination, as Article 14 was applicable.

Controversy over contributory and non-contributory benefits was settled in the case of *Stec and Others v. United Kingdom*. In this case, the applicants complained about reducing earning-related benefits which related to injuries at work. The Court found, that a right to a non-contributory benefit falls within the scope of Article 1 of Protocol No. 1 <…>; the same conclusion in respect of a contributory benefit[211]. While cases dating back may have brought differentiation for contributory and non-contributory benefits, case of *Stec and Others v. United Kingdom* made a clear answer as a there is no ground to justify the continued drawing of such a distinction of the purposes of the applicability of Article 1 of Protocol No. 1[212]. While differentiation of benefits had been dissolved, another issue appeared in the case. In the Grand Chamber Judgment, the Court argued that very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex, but a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy[213]. As it comes to question whether the margin of appreciation or weighty reasons requirement should prevail, it often becomes unclear. Most probably, the Court's task in the field of social security is a limited one that will have to remain characterized by considerable deference to the states[214].

After developments in *Stec* case, rapid development of the "Strasbourg social security case law" appeared[215]. Developments were in two different areas: access to particular social security systems and amount of social security benefits. In the case of *Luczak v. Poland*, for example, the applicant complained that he had been refused admission to the farmers' social security schemes for the ground of his nationality and thus could not receive benefits from that scheme. The Court found, that very weighty reasons would have to be put forward by the respondent Government in order to justify a difference in treatment[216]. Going further, the Court explained that even where weighty reasons have been advanced for excluding an individual from the scheme, such exclusion must not leave him in a situation in which he is denied any social insurance cover, whether under a general or

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[210] *Azinas v. Cyprus*, no. 56679/00, § …, 20 June 2002.
[211] *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2005-X.
[212] Ibid. § 53.
[213] *Stec and Others v. the United Kingdom opt. cit*.
[214] Ingrid Leijten, Social Security as a Human Right issue in Europe - *Ramaer and Van Willigen* and the Development of Property Protection and Non- Discrimination under the ECHR. Leiden University, Columbia. ZaöRV 73 (2013), 177-208.
[215] Ibid. p. 191.
[216] *Luczak v. Poland*, no. 77782/01, § 52, 27 November 2007.

a specific scheme, thus posing a threat to his livelihood[217]. As a conclusion, a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 was found.

The approach of the Court suggests right to property does not create to acquire property as such. Without any restrictions, it is up to the state whether to establish social security schemes. However, if the state decides to establish particular social security schemes, this must be done in a manner, compatible with Art. 14. More than that, developments in *Stec* case suggest, that the protection of the right to social security may fall within right to property alone and may be subject to "pure Article 1 of Protocol No.1" review.

3.3. Socio-Economic Minimum Core

The Court in the case of *Pavcenko v. Latvia* ruled, that the Convention does not guarantee, as such, social and economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living[218]. It may seem, that under the ECHR, welfare functions remains under the prerogative of national policy. However, an assumption that such a rule is an absolute, would be wrong.

In the case of *Damjanac v. Croatia*, the question turned to the payment of pension to the former military officer. The Court found, that suspension of payments due to changed place of residence, the competent domestic pension authorities had interfered with the applicant's property interests in breach of the principle of lawfulness and accordingly breached the right to peaceful enjoyment of his possessions[219]. Compared to the *Pavcenko v. Latvia case,* it may seem that once it comes to the social security cases, the Court's approach is not crystal clear, as the right to claim financial assistance from a State is not protected by the ECHR, and yet interference with the peaceful enjoyment of possessions may show certain fundamental guarantees applied in the field of social arrangements.

Once it comes to the minimum guarantees for social arrangements, the Court emphasizes the negative obligation to the states to refrain from inflicting serious harm to persons within their jurisdiction. In particular, a wholly insufficient amount of pension and social benefits may raise an

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[217] *Ibid*.
[218] *Pavcenko v. Latvia* (dec.), no. 40772/98, 28 October 1999, unreported.
[219]*Damjanac v. Croatia*, no. 52943/10, § 104, 24 October 2013.

issue under Article 3 of the Convention[220]. Notably, the Court has always held that insufficient resources of a State will not normally justify failure to secure Convention rights and freedoms, notably when considering Article 3 issues[221]. In the case of *Budina v. Russia*, for example, where applicant complained about an inadequate amount of old-age pension, the Court emphasized, that under Article 1 of Protocol 1 taken in conjunction with Article 3 Contracting Parties may require to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment[222]. Although the Court found no violation in this case, the contribution to the social and economic rights should be not underestimated. In a situation, where a person is dependent on a State support, serious deprivation incompatible with human dignity may be a reason to hold a State liable for violation of Article 3. It may be understood, that certain minimum guarantees exist when it comes to Article 3 in the area of social and economic rights.

To the contrary, Article 1 of Protocol 1 does not contain any minimum guarantees, and the Court never addresses a notion of minimum core in such cases. While under Article 1 of Protocol 1 right to social security payment may be an issue to whether discontinuation of benefit was a proportionate burden which could not be justified by the legitimate community interest[223], approach to the same case may be different, if one uses Article 3 and argues from the point of view of minimum core. Thus, social security cases may be understood as having a high level of unpredictability, as under Article 3 question turns whether minimum standards were met and under Article 1 of Protocol 1 question turns whether deprivation of possession was in the general interest of the community.

On international level, in order to implement fully the right to social security provision (Article 9 of the ICESCR), states parties should, within the limits of available resources, provide non-contributory old-age benefits and other assistance for all older persons, who, when reaching the age prescribed in the national legislation, have not completed a qualifying period of contribution and are not entitled to an old-age pension or other social security benefit or assistance and have no other source of income[224]. On the account of minimum core, the Committee stated that States must ensure access to a social security scheme that provides a minimum essential level of benefits of all

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[220] *Larioshina v. Russia* (dec.), no. 56869/00, 23 April 2002, unreported.

[221] Françoise Tulkens, The European Convention on Human Rights and the Economic Crisis: The Issue of Poverty. European Journal of Human Rights (2013) 8.

[222]Cassese A, *supra* note 87.

[223] For example, *Kjartan Ásmundsson v. Iceland*, no. 60669/00, ECHR 2004-IX.

[224] General Comment No. 6. The Economic, Social and Cultural rights of older persons (Thirteeenth session, 1995), UN Doc. E/C. 12/1995-16/Rev. I (1995). Adopted at the 39th meeting of the thirteenth session, on 24 November 1995.

individuals and families[225]. A minimum core provides necessary aspects of social and economic rights making them more tangible law rather than often broadly stated principles. In particular, a minimum core makes rights more workable and perhaps even fit for adjudication[226]. As it comes to the ECHR, rather than broad interpretation of possessions and a generous margin of appreciation, minimum core approach may lead into a more solid protection of a right to social security.

In conclusion, the ECHR does not guarantee right to claim financial help from the state. This becomes especially relevant when we speak about Article 1 of Protocol 1. To the contrary, under Article 3, in order to be protected from inhuman and degrading treatment, persons are entitled to certain social and economic right minimum. Thus, Article 3 represents that a certain minimum core exists, contrary to the situations when we speak about deprivation of possessions. One explanation could be that ECHR does not give right to acquire property as such and accordingly social and economic minimum could not exist under right to peaceful enjoyment of possessions. Ironically, but such explanation becomes less convincing as same issue may be solved depending on article concerned and approach towards it. In particular, if a person claims for a specific amount of social benefit, claim may be rejected under right to property and may be considered under a notion of ill treatment. It also may be rejected under both articles, considering that ECHR does not require exact economic well-being of a person. A more transparent approach to social and economic minimum core would provide a greater level of legal certainty.

3.4. Overpaid Benefits as Possessions

Right to social security may be protected by Article 1 of Protocol 1 as long as one may possibly lay a claim to the property concerned. It is only existing property and not the right to acquire property in the future which is protected[227]. If a person no longer satisfies the conditions of domestic law, this may be described as interference with a peaceful enjoyment of his possessions. Eventually, if national law changes, the issue may concern not only to discontinue of payments, but also question

[225] General Comment No. 19: The Right to Social Security, CESCR, 39th Session (2007), § 59(a).
[226] Ingrid Leijten, The European Convention on Human Rights and Minimum Core Socio-Economic Rights Protection. World Congress of Constitutional Law 2014 Oslo, June 16-20, Workshop No. 4: Social rights and the challenges of economic crisis.
[227]Monica Carss-Frisk. A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights, Human Rights Handbooks, No. 4, Council of Europe, 2001 p. 6.

of overpaid benefits. The question arises, whether overpaid benefits eventually may be understood as possession and thus, held requirements of Article 1 of the Protocol 1.

In the case of *B v. the United Kingdom*[228] a mother with learning disability did not inform authorities that her children had been taken into care, caused an overpayment of social benefit. When issue turned whether the overpaid benefit may fall under a notion of "possessions", the Court concluded that the applicant did not have an assertable right to the overpaid benefit and did not, accept that it amounted to a possession for the purposes of Article 1 of Protocol No. 1[229]. While an answer may be clear and it may seem that overpaid benefits may not fall within a notion of "possessions", later jurisprudence shows otherwise.

In the case of *Moskal v. Poland* the issue concerned benefits which had been paid as a result of official error and which was subsequently terminated[230]. In this connection, the Court considered that a property right is subject to revocation in certain circumstances does not prevent it from being a "possession" within the meaning of Article 1 of Protocol No. 1[231]. Emphasizing that application was filed in good faith and making broad interpretation, the Court found a violation of Article 1 of Protocol No. 1. While case may be a positive step towards protection for social and economic rights, the position of the Court is a bit surprising as with previous cases it was founded that if person concerned does not satisfy, or ceases to satisfy, the legal conditions laid down in domestic law for the grant of such benefits, there is no interference with the rights under Article 1 of Protocol No. 1[232]. Some legal writers think that *Moskal v. Poland* case implies a rule, that where a social security authority incorrectly and through its own error awards a pension to a person in the difficult circumstances of the applicant, it cannot revoke the pension at all[233]. In any case, a point should be made, that the Court different approaches may be inspired by the applicant's good will. If an applicant fills an application for a social security benefit in a good will while pursuing a legitimate aim, even an overpaid benefit will be considered as a possession. To the contrary, if an applicant contributes to the false calculation of benefit, for example by making false declarations, the overpaid benefit does not may understood as a possession. The important question is, however, under what circumstances overpaid benefit may be taken back, because as a general principle, public authorities

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[228] *B. v. the United Kingdom*, no. 36571/06, 14 February 2012.
[229] Ibid. c 40.
[230] *Moskal v. Poland,* no. 10373/05, 15 September 2009.
[231] Ibid. § 40.
[232] *Bellet v. France*, 4 December 1995, Series A no. 333-B.
[233] Mel Cousins. Benefit Overpayments, the Common Law and Human Rights. 1 December 2010. Journal of Social Security Law, Vol. 17. 4, pp. 21-26.

should not be prevented from correcting their mistakes, even those resulting from their own negligence[234].

In order the interference to be lawful within the meaning of Article 1 of Protocol 1, a fair balance needs to be struck between the public interest and the interests of the person. Once it comes to the overpaid benefits, it is interesting how balancing needs to be made. In the case of *Wieczorek v. Poland* the question turned to whether the decision to revoke applicant's disability pension on the basis that she was no longer disabled, was proportional[235]. The Court not only determined whether the interference was "in the public interest", but additionally called upon to determine whether the interference imposed an excessive individual burden on the applicant[236]. Special attention was paid to the fact, that the applicant was not obliged to pay back any amounts which she had been receiving prior to the date when she was found to no longer meet the applicable legal requirements[237]. Having in mind the case of *Moskal v. Poland*, where recovery of overpaid benefits was prevented, the main factor to the fair balance to be struck may be the fact that in *Wieczorek* case the applicant was not obliged to repay any incorrectly paid benefits.

To sum up, the Court's position on overpaid benefits is not crystal clear. While in certain cases overpaid benefits do not count as "possessions", in other cases the Court is willing to balance overpaid benefits between public and private interest. Moreover, the balancing test applied by the Court tends to be in favour of the applicants if they acted in a good will. In such case, the State's ability to take back an overpaid benefit is close to minimum.

[234] *Moskal v. Poland*, *supra* note 230, § 73.
[235] *Wieczorek v. Poland*, *supra* note 197.
[236] *Ibid*. § 64.
[237] *Ibid*. § 72.

4. RIGHT TO HEALTH CARE IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention on Human Rights does not guarantee the right to health care or the right to be healthy[238]. Traditional view that social and economic rights are more reflection of the European Social Charter or International Covenant on Economic, Social and Cultural Rights, must be subject to the developments of the case law of the European Court of Human Rights. Health issues may arise out of civil and political rights guaranteed by the Convention even in such cases, where issues may have clear social and economic dimension.

One of the fundamental issues is that there is no universal definition of the right to health care[239]. ICESCR, for example, gave a broad definition of this regard, stating that "every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity[240]". CESCR went further, explaining that realization of the right to life may be pursued through the formulation of health policies, implementation of health programmes and adoption of specific legal instruments. With no universal definition and no reference to the health care rights, it may seem that claims on the ECHR would face strict non-justiciability. However, to the contrary, integrated approach ensured, that the health care issues were raised within the prohibition of torture (Art. 3), right to life (Art. 2.) and right to respect for private and family life (Art. 8).

Right to health care, becomes relevant, as the physical and moral integrity becomes an essential part of Article 8. Compared to Article 3, it may be suggested that if a level of severity for ill-treatment under Article 3 is not met, questions whether protection of physical integrity arises.

To sum up, realization of the right to health care is problematic as there is no universal definition of the right. However, a variety of legal obligations under ECHR may show a certain degree of protection and questions may be raised whether the ECHR has established certain obligations concerning health care.

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[238] European Court of Human Rights. Thematic Report: Health- related issues in the case law of European Court of Human Rights, Council of Europe, June 2015, p. 4.
[239] Mirjana Marochini, Council of Europe and the Right to Healthcare - Is the European Convention on Human Rights Appropriate Instrument for Protecting the Right to Healthcare. v. 34, br. 2, 729-760 (2013 p. 730.
[240] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the ICESCR), 11 August 2000, E/C.12/2000/4, available at: http://www.refworld.org/docid/4538838d0.html [accessed 8 April 2016]

4.1. Right to Health and the Right to Health Care

In the case of *L.C.B. v the United Kingdom*[241] the Court has firstly explored duty to provide medical services. In this case, the applicant's father was exposed to dangerous levels of radiation as a result of nuclear weapons tests. By not finding intentional deprivation of an applicant's right to life, the issue turned whether the United Kingdom took all preventative measures not to put life at risk. The Court found, that given the information available to the State at the relevant time it could not it had been expected to act of its own motion to notify her parents of these matters or to take any other special action in relation to her[242]. The importance of this case is that the Court recognized not only a negative obligation to refrain from taking intentional or unlawful taking of life, but also a positive obligation to safeguard lives within State's jurisdiction.

In the case of *Calvelli & Ciglio v. Italy*[243], the applicant complained about procedural delays making impossible to prosecute a doctor, responsible for their child death. The Court found, that Italy was under the obligation to adopt appropriate measures for protection for lives whether public or private hospitals. However, the Court found no violation as it came to a lack of criminal prosecution. The same approach was used by the Court in the case of *Erikson v. Italy*[244], where medical negligence was not subject to criminal liability. The Court considered that the State is under obligation to provide effective judicial system to establish a cause of the death and decide on any liability. However, in neither of cases the Court did not find a violation due to a lack of criminal liability, neither the Court mentioned an issue of providing health care.

However, an inefficiency of judicial remedies may be in a breach of Article 2 and may show a connection to the right to health care. In the case of *Šilih v. Slovenia*[245], where applicant's son died after he was injected allergic drugs, the Court considered that there had been no effective investigation into his death. Taking into account the length of the investigation and change of judges in civil proceedings, the Court pointed out, that the domestic authorities failed to deal with the applicants' claim arising out of their son's death with the level of diligence required by Article 2 of the Convention[246]. The question may arise, what standards do the Court uses to describe medical negligence. In the case of *Byrzykwski v. Poland*, where an applicant's wife fell into a coma during

[241] *L.C.B. v. the United Kingdom*, 9 June 1998, Reports of Judgments and Decisions 1998-III.
[242] Ibid. para. 41.
[243] *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, ECHR 2002-I.
[244] *Torquil Dick Erickson v. Italy* [dec.], no. 37900/97, 26 October 1999, unreported.
[245] *Šilih v. Slovenia*, no. 71463/01, 28 June 2007.
[246] Ibid. § 203-211.

caesarean section and subsequently died, the Court stated that part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient may not fall under positive obligations under Article 2 of the Convention to protect life[247]. However, the Court also emphasized obligation to securing high professional standards of health professionals and the protection for the lives of patients.

Denial of health care may be raised as an issue under Article 2, if a 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[248]. However, as it comes to Article 2, the cases mentioned above does not concerned minimum level of required health care, but rather represent certain aspects of the right to life itself.

Mehmet Sentürk and Bekir Sentürk v. Turkey[249] cas was the first time where applicants raised a question of basic health care. In this case, a pregnant woman died as a result of failure to provide her with emergency health care even when her condition was critical. The Court found, that domestic law did not have provisions <…> capable of preventing the failure <…> to provide the medical treatment required by the deceased woman's condition[250]. As a result, in this case the Court had developed a framework, which would help to look into the recognition of the right to health care. In particular, shortcomings on the part of the hospital authorities and no possibility of access to appropriate emergency treatment, reiterated that failure of a state to comply with its duty to protect a person's physical well-being amounts to breach of Article 2[251].

Right to health care may also fall under ambit of Article 2 in cases relating to the detainee's health. In the case of *Jasinskis v. Latvia*[252], a deaf and mute applicant was detained for public intoxication and hooliganism. With no way of communication, the applicant could not access the medical care and was assumed to be drunk. As a result of head injury and lack access to medical assistance, the applicant subsequently died. The Court emphasized, that persons in custody are in a vulnerable position and the authorities are under a duty to protect them[253]. Taking into account

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[247] *Byrzykowski v. Poland*, no. 11562/05, § 104, 27 June 2006.
[248] Pentiacova and Others v. Moldova (dec.), no. 14462/03, ECHR 2005-I; *Nitecki v. Poland* (dec.), no. 65653/01, 3 November 1999, unreported and *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV.
[249] *Mehmet Sentürk and Bekir Sentürk v. Turkey*, no. 13423/09, 09 April 2013, unreported.
[250] Ibid. § 96.
[251] Ibid. § 95-96.
[252] *Jasinskis v. Latvia*, no. 45744/08, 21 December 2010.
[253] Ibid. § 59.

particular circumstances of the case, it was concluded that police failed to fulfill their duty to safeguard the life of the applicant's son by providing him with adequate medical treatment[254].

In the case of *Dzieciak v. Poland*[255], the applicant was charged with participation in organized crime and international drug trafficking and held in custody. During his detention, he suffered several heart attacks and as a result, died. The Court paid special attention to the number of failures of the authorities, such as keeping applicant in the detention facility with no hospital wing, cancel of surgery and extension of a person's detention despite opposite medical opinion. Bearing in mind, that Article 2 encompasses certain positive obligations, the Court concluded that the applicant's death was caused by ineffective medical care during his four years in pre-trial detention[256].

In the case of *Salakhov and Islamyona v. Ukraine*[257], the applicant, who was HIV positive, was put in pre-trial detention and as a result died two weeks after his release. The Court took a view, that three particular elements to be considered in relation to the compatibility of an applicant's health with his continued detention: (a) the medical condition of the detainee, (b) the adequacy of the medical assistance and care provided in detention, and(c) the advisability of maintaining the detention measure in view of the state of health of the applicant[258].

On the international level, the United Nations Human Right Committee (hereinafter – HRC) has noted, that the right to life has been too often narrowly interpreted[259]. It went further, explaining that the protection for this right requires that States would adopt positive measures. While HRC here speaks about reduction of infant mortality, elimination of epidemics and malnutrition, such interpretation of the right to life is orientated to social and economic aspect of the right. Compared to the jurisprudence of the Court, it should be asserted that the Court hesitates to recognize social and economic aspect of the Article 2. As in the case of *Mehmet Sentürk and Bekir Sentürk v. Turkey* it was recognized that lack of access to health care may be read in the Article 2, the further recognition of social and economic aspect of the right may be considered as a rather ambitious possibility. As the further sections will show, while complaints to protect right to health care through Article 2, the Court rather prefers to decide cases through Articles 3 and 8.

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[254] Ibid. para. 67.
[255] *Dzieciak v. Poland*, no. 77766/01, 9 December 2008.
[256] Ibid. § 111.
[257] *Salakhov and Islyamova v. Ukraine*, no. 28005/08, 14 March 2013.
[258] Ibid. § 176.
[259] UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, available at: http://www.refworld.org/docid/45388400a.html (accessed 8 April 2016), § 5.

To sum up, developments of the right to health care under Article 2 of the ECHR continues to be raised since the year of 2013. Yet, the obligation to provide health care faces certain shortcomings. Until 2013 duty to provide health care was not breached unless health care was denied despite undertaking an obligation to provide health care to the population in general. On the other hand, right to health care faces a certain breakthrough as duty to provide health care is identified as involving adequate medical treatment (*Jasinskis v. Latvia*) and effective medical care (*Dzieciak v. Poland*). Yet, doubts may be raised for the exact content of the right to health care as cases mentioned are limited to health care of prisoners and authorities are held to be responsible for them. Also, the Court prefers to avoid dealing with health care issues through right to health (Art. 2 of ECHR).

4.2. Right to Private Life and the Right to Health Care

Article 8 of the ECHR contains 4 different aspects: private life, family life, home and correspondence[260]. If a complaint falls within Article 8, the interference in any of these four aspects is subject to further requirements[261]. Every aspect is given a broad interpretation ensuring, that wide range of situations falls within the protection for Article 8[262]. Such a broad approach ensures not only effective protection for civil and political aspect of the right, but also shows certain scrutiny towards right to health care.

In the case of *X and Y v. the Netherlands*[263] the Court found that a concept of "family life" covers physical and moral integrity of the person. In this connection, it may be understood that such judicial principle holds certain social and economic aspect of the right to health care. Also, the Court in the case of *Sentges v. the Netherlands*[264] has recognized that in addition to the negative undertaking, there may be certain positive obligations arising out of respect for family life. However, rejection for a robotic arm by health insurance authorities was held to be proportional and margin appreciation afforded to the State was not overstepped. For comparison, in the case of *Van Kück*

[260] ECHR Art. 8 (1).
[261] If there was interference with Article 8, the questions must be answered whether interference was in accordance of the law, does it follows legitimate aim and if it was necessary in democratic society? The Court nevertheless apply each stage of the test before reaching its conclusion. Ursula Kilkelly, The Right to Respect for Private and Family Life. A guide to the implementation of Article 8 of the European Convention of Human Rights. Human Right Handbooks, No. 1, p. 9.
[262] Dirk Ehlers. European Fundamental Rights and Freedoms. De Gruyter Rechtswissenschaften Verlags-GmbH 2007, Berlin p. 68-72.
[263] *X and Y v. the Netherlands*, *supra* note 246, § 22.
[264] *Sentges v. the Netherlands, Supra* note 102.

v. Germany, refusal to repay costs of gender reassignment surgery was found to be contrary to the requirements of Article 8 of the ECHR. The Court considered that the burden placed on a person to prove the medical necessity of treatment, including irreversible surgery, falls into one of the most intimate areas of private life[265]. Compared to *Sentges v. the Netherlands*, the different outcome may be explained by the fact, that the Court considers respect for the gender identity of transsexuals a crucial requirement encompassed in Article 8 and linked to the very essence of the Convention – that is, respect for human dignity and freedom[266].

Another important development within the Courts' jurisprudence through Article 8 concerning right to health care, is the right to personal autonomy. In the case of P*retty v. United Kingdom*[267], where the applicant was dying from neuro-degenerative disease, the issue turned to whether applicant may have the right to commit suicide with the help from her husband. While the Court did not find any violation of the ECHR, the Court found that under Article 8, "the notion of personal autonomy is an important principle underlying the interpretation of guarantees[268]" .One may argue, that the Court did not afford to commit suicide and it may be regarded as a negative development, decreasing the protection for Article 8, this case for the first time recognizes personal autonomy as an important underlying principle of the guaranties contained in the ECHR[269]. As to the personal autonomy, this principle is closely interlinked with the broader concepts of human dignity and personal freedom[270]. Thus, such development may be held as a method of a greater recognition of social and economic aspects of Article 8. It is clear, that specific weight to the principle of personal autonomy makes patient highly protected in the health care system. In the case of *R.R v. Poland*[271], for example, the Court made clear links with a principle of personal autonomy and the right to access to health information. According to the Court, the right to access to health information is often decisive for the possibility of exercising personal autonomy, relevant for the individual's quality of life[272]. As this judgment may be welcomed and makes a great contribution towards patient's autonomy in relation to the health professionals, general approach may seem a bit

[265] *Van Kück v. Germany*, no. 35968/97, ECHR 2003-VII.
[266] *Eva Brems*, Indirect Protection of Social Rights by the European Court of Human Rights. At Daphne Barak-Erez, and Aeyal M. Gross (eds), Exploring Social Rights: Between Theory and Practice, Oxford and Portland: Hart Publishing Ltd, 2007, p. 149.
[267] *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III.
[268] Ibid. § 61.
[269] Jonas Juškevičius, Janina Balsienė, Human Rights in Healthcare: Some Remarks on the Limits of the Right to Healthcare. Jurisprudence 2010, 4(122), p. 95–110.
[270] N.R. Koffeman LL.M. (The right to) personal autonomy in the case law of the European Court of Human Rights. Leiden University, 2010. Access through http://hdl.handle.net/1887/15890 (accessed 8 April 2016).
[271] *R.R. v. Poland*, no. 27617/04, ECHR 2011.
[272] Ibid. § 197.

problematic due to need for balancing between personal autonomy and societal interests[273]. Moreover, a principle of personal autonomy is not discussed in the broad context of health care and happens only in extreme cases, such as P*retty v. United Kingdom,* where the question is assisted suicide[274].

Georgel and Georgeta Stoicescu v. Romania[275] may also be example of recognition of the right to health care under Article 8. In this case, the applicant was injured by stray dogs near her home and as a result, became immobile. While the Court paid special attention to the State's inactivity over a problem of the stray dogs in the state, the most important founding in connection to the right to health care, is a lack of general and preventive measures for protecting the applicant's health[276]. More specifically, the right to health care may be triggered under Article 8 p. 1 in a case of excessive delay to the health service to which patient is entitled and has a serious impact on the patient's health[277].

Once it comes to a right to health care under Article 8, a special attention must be paid to the margin of appreciation granted to the States. The margin of appreciation that states enjoy under Article 8 further limits the range of health care obligations that the ECHR can beget[278]. As a right to health care may be economically sensitive issue due to the economic capacity of the State and also considering economic differences in the Council of Europe, it may seem that the European minimum standard may be too hard to find. Not surprisingly, social and economic questions are a sensitive matter within the Court. For the states, if the issue involves the application of social or economic policies, the margin of appreciation is wide[279]. If the question involves allocation of limited state resources, the margin of appreciation for such cases is even wider[280].Thus, findings in the case of *Pentiacova and others v. Moldova* may be implying the rule, that only basic health care may be covered by Article 8, and any health care system going beyond can be developed in accordance with availability of resources. However, having in mind case of *Georgel and Georgeta Stoicescu v. Romania*, the States are required to take certain positive measures for the protection of human lives. While case *Georgel and Georgeta Stoicescu* concerned stray dogs and case of *Pentiacova* involved

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[273] Elizabeth Wicks, Human Rights and Healthcare. Bloomsbury Publishing, 2007, p.63.
[274] Jonas Juškevičius, Janina Balsienė, Human Rights in Healthcare: Some Remarks on the Limits of the Right to Healthcare. Jurisprudence 2010, 4(122), p. 95–110, at p. 101.
[275] *Georgel and Georgeta Stoicescu v. Romania*, no. 9718/03, 26 July 2011.
[276] „Lack of sufficient measures taken by the authorities in addressing the issue of stray dogs combined with their failure to provide appropriate redress to the applicant as a result of the injuries sustained, amounted to a breach of the State's positive obligations under Article 8 of the Convention to secure respect for the applicant's private life" Ibid. § 62.
[277] Case of *Giuseppina Passannante v. Italy*, application No. 32647/96, 1 July 1998, Admissibility Decision.
[278] Michael Freeman et al., Law and Global Health: Current Legal Issues. OUP Oxfor, 2014, p. 152.
[279] *Connors v. the United Kingdom*, no. 66746/01, § 82, 27 May 2004.
[280] *Soering v. the United Kingdom, supra* note 84.

allocation of limited resources, both cases relate to a certain economic policy aspect. In the case of *Georgel and Georgeta Stoicescu v. Romania*, the Court found obligation to take certain positive steps, and thus the issue involved the allocation of resources, as protection against stray dogs may be subject to at least a partial population of the state.

To sum up, it may seem that starting from 2011 the Court reduced margin of appreciation granted to the States under Article 8 by including a requirement to make preventative steps for protection for persons when allocating resources (*Georgel and Georgeta Stoicescu v. Romania*). Despite the involvement in social or economic policies, where the margin of appreciation is wide, the Court tends to be more involved in targeted allocation of resources.

4.3. Prohibition of Torture and Right to Health Care

Article 3 initially prevents torture, inhuman or degrading treatment or punishment. States must refrain from damaging person's physical health[281] or mental and psychological health[282]. This is a negative obligation to Article 3 and the Court, in addition, has developed requirement to take positive measures to protect physical and mental health of individuals.

In the case of *D v. the United Kingdom*[283], the applicant, diagnosed with HIV, challenged his removal to St. Kitts arguing that the lack of medical care in St. Kitts would be contrary to Article 3. The Court considered that bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment[284]. The Court's approach to this case is important for two reasons. Firstly, this case may serve as a representation to the whole line of cases, where the expulsion of a person to be in violation of Article 3 if person is in very poor state of health. Secondly, the Court developed two important criteria, which helps to distinguish whether there is a violation of Article 3 in a case of expulsion of the person. In general, the Court admitted, that States have the right to control the entry, residence and expulsion of aliens[285]. However, person may only be expulsed only if he is not in critical medical condition or medical treatment and family support would be available in his home country. A number

[281] For example, beating by State agents – *Kaçiu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, 25 June 2013.
[282] For example, psychological torture - *Gäfgen v. Germany* [GC], no. 22978/05, ECHR 2010.
[283] *D. v. the United Kingdom*, 2 May 1997, Reports of Judgments and Decisions 1997-III].
[284] Ibid. § 53.
[285] Ibid. § 46.

of applications were manifestly ill founded once those criteria were not met[286]. To sum up, the developments in the *D .v the United Kingdom* shows that expulsion of person to the third country, which lacks necessary health care, may be in contrary to Article 3. However, this rule may not be crystal clear as it may seem.

In the case of *N v. the United Kingdom*[287], the applicant from Uganda entered the United Kingdom and was diagnosed with HIV. Soon, she was diagnosed with AIDS, but her condition stabilized after receiving health care in the United Kingdom. The applicant argued that expulsion to Uganda, where treatment of her disease was highly priced, would violate Article 3. The Court emphasized a high threshold set out in the *D v. the United Kingdom* case, but surprisingly stated, that "alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country[288]". Therefore, no violation of Article 3 was found. If such judicial principle would have been made in *D v. the United Kingdom*, it would be highly doubtful that applicant would have succeeded in his case. Surprisingly, the Court considered that the Convention is essentially directed at the protection of civil and political rights. Emphasizing the civil and political aspect of the right, the Court made clear, that free and unlimited health care to all aliens without a right to stay within its jurisdiction would place too great a burden on the Contracting States[289]. Yet, economic differences in the Council of Europe may be one of the reasons why the Court did not find a violation of this case. In joint dissenting opinion, the minority argued that the Court entered into balancing between the demands of the general interests of the community and the protection of the individual rights[290]. An observation should be made, that the Court also made incomplete reference to the case of *Airey v. Ireland*[291]. To sum up, the case of *N v. the United Kingdom* may be viewed as deprivation from the previous case law, stressing that right to the health care must be afforded to the aliens, who are being expelled from the State, only in exceptional circumstances. Moreover, as a deportation of person sick with AIDS was found not to be a violation in the case of *N v. the United Kingdom* it may seem, that the scope of protection for alien expulsion cases may be *ad hoc*.

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[286] List of cases may be found at *Eva Brems*, Indirect Protection of Social Rights by the European Court of Human Rights. At Daphne Barak-Erez, and Aeyal M. Gross. (eds), *Exploring Social Rights: Between Theory and Practice.* Oxford and Portland: Hart Publishing Ltd, 2007, p. 141, note 27.
[287] *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008
[288] Ibid. § 43.
[289] Ibid. § 44.
[290] Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann in *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008.
[291] *Airey v Ireland, supra* note 48.

Another important development within Article 3 and the right to health care is cases, which concern health of detainees. Generally, the position of detainees requires special attention as dependence on authorities and lack of access to the healthcare may damage their psychological or physical well-being. Detainees must be held in the conditions which are compatible with respect to human dignity and their health and well-being must be secured and requisite medical assistance should be provided[292].

In the case of *Poltoratskiy v. Ukraine*[293], the Court faced with a question whether conditions of detention to which the applicant was subjected on death row is compatible with Article 3. Government relied, among other things, on serious socio-economic problems and difficult economic situation of prison authorities. The Court did not accept such position, stating that "that lack of resources cannot in principle justify prison conditions which are so poor as to reaching the threshold of treatment contrary to Article 3 of the Convention[294]". Compared to the case of *N v. the United Kingdom*, it must be observed the Court had different approaches towards situations concerning expulsion of alien and requirements for prison detainees. Both of these cases have strong social and economic aspect of Article 3 and places great economic burden on the State and thus, the Court considers that it is necessary to provide health care for the prisoners, but not for the aliens. One of the explanations for such approach might be that the Court is rather afraid to grant right to health care for the population in general[295].

In the case of *Mouisel v. France*[296] the applicant was diagnosed with leukemia and underwent chemotherapy sessions. He complained being constantly kept in chains despite his physical weakness and perfect disciplinary records. The Court found a violation of Article 3 holding that applicant's condition had become increasingly incompatible as his illness progressed. The Court also made links to the recommendations of the European Committee for the Prevention of Torture and thus emphasized that conditions in which prisoners are transferred to hospital to undergo medical examinations, continue to raise problems in terms of medical ethics and respect for human dignity[297].

An interesting issue appeared in the case of *Tudor Ciorap v. Moldova*[298]. Here, the applicant went on a hunger strike due to poor conditions of his detention. The Court concluded that force-feeding, not prompted by valid medical reasons, but rather with the aim of forcing the applicant to

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[292] *Kudła v. Poland* [GC], no. 30210/96, ECHR 2000-XI.
[293] *Poltoratskiy v. Ukraine*, no. 38812/97, ECHR 2003-V.
[294] Ibid. § 148.
[295] Mirjana Marochini, *supra* note. 229.
[296] *Mouisel v. France*, no. 67263/01, ECHR 2002-IX.
[297] Ibid. § 47.
[298] *Ciorap v. Moldova*, no. 12066/02, 19 June 2007.

stop his protest, can only be considered as torture[299]. Thus, the force-feeding may be commenced only due to medical reasons and Article 3 requirements may seem to be actually reaching a high threshold. This may be explained by the fact that the Court tends to link Article 3 with Reports on the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[300] .

To sum up, the Court is not coherent towards health care cases under Article 3. While recognizing the right to health care to specific groups of persons, such as prisoners seems rather hesitant to recognize the right to health care to all persons. As the Court's approach may be explained through economic hurdles, it is not quite clear why an argument of limited resources is accepted when the case concerns aliens, but such explanation is not valid when it comes to health care of a prisoner.

[299] Ibid. § 89.
[300] *Nevmerzhitsky v. Ukraine*, no. 54825/00, ECHR 2005-II.

CONCLUSIONS

1. Although the ECHR mainly focuses on civil and political rights, but already in *Airey* case the Court noted that interpretation of the Convention may extend over the sphere of social and economic rights. However, the protection of social and economic rights in the Court's jurisprudence is chaotic and unpredictable. With no explicit text, protection is based on broad principles developed by the Court, which lacks clear explanation and a more precise approach. Practical matters are addressed in a vague and abstract way and possible limits are unclear. For example, social assistance from a state may be guaranteed if the situation attains a high threshold of Article 3, but exact level for a high threshold to be met, is not clear. Looking at other articles, no unified theory or method would explain what rights are protected and why.
2. Approach used by the Court in cases related to the right to work is not clear. The Court may use other international instruments rather than the ECHR without any reasonable explanation. Serious doubts may be raised whether the Court may rely on other international materials or findings of expert committees if the state is not bound by them in a first place (*Demir and Baykara v. Turkey*). Moreover, case of *Sørensen* & *Rasmussen v Denmark* shows that the Court does not explain why one or other international instrument was used and the outcome of the case may depend on the instrument itself. Also, lack of justification causes a serious dilemma if different international instruments provide different answers to a same issue as it happened in *Sørensen* & *Rasmussen* case. Thus, same issue may be solved in different ways with no reasonable explanation by using international instruments which would provide different rules.
3. The Court has showed a certain degree of awareness towards guarantees for workers. These guarantees, however, currently lack contextualization. The Court in certain cases is willing to decide on issues concerning conditions at work through Article 4 (*Siliadin v. France*) and tangle questions on a social benefits of workers (*Gaygusuz v. Austria)*. Unfortunately, it is rather unclear, whether conditions at work and social benefits of workers are tending to be an autonomous concept within the ECHR as it happened in *Siliadin v. France* or will be linked with future developments of other international instruments as it happened in *Sørensen* & *Rasmussen v Denmark.*

4. Overpaid benefits may be protected under the ECHR and may be qualified as a “possession” (*Stec and Others v. United Kingdom)*. As a general rule, the national authorities are not forbidden to take such benefits back (*Moskal v. Poland*), but the circumstances under which it can be done, are quite unclear. If a person acted on a good will, it is more likely that such benefits may not be taken back in any given way (*Wieczorek v. Poland*, *Moskal v. Poland*). Thus, practical application of rule that states can fix their own negligence is quite confusing.
5. Right to health care involves economic and social policies of the national authorities and thus, as it comes to questions on allocation of resources, states have a wide margin of appreciation. Despite this general rule, the Court is willing to get involved in the distribution of resources in certain cases, for example, in cases involving lack of preventative measures for protection of lives (*Georgel and Georgeta Stoicescu v. Romania*) or involving access to health care of prisoners (*Jasinskis v. Latvia*). Accordingly, the Court develops high standards as it comes to health care of prisoners (*Poltoratskiy v. Ukraine*), but in cases involving health care of illegal aliens, the Court is hesitant to develop stricter rules (*N v. the United Kingdom*). The exact requirements for proper distribution of resources are unclear, as in *N v. the United Kingdom* the Court did not get involved distribution of resources and a question of health care once it came to illegal aliens.

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ABSTRACT

This Master's thesis is designed for analysis of implicit socio-economic rights in the jurisprudence of the European Court of Human Rights. General analysis of the right to work, the right to social security and the right to health care and individual elements of these rights is necessary to clarify the relationship between these rights and their common position in the Convention. This provides insight on the possibilities to defend these rights and the developments of the jurisprudence of the Court. Thesis confirms that protection of implicit social and economic rights is chaotic and unpredictable. The right to work is guaranteed taking into account developments of the various international instruments, regardless of whether the state is bound by the latter, or not. Usage of such instruments in the cases of right to work is not clear, considering that international treaties may provide different rules. The Court is not unanimous towards overpaid benefits, as there are no clear criteria which would define whether such payments may fall within meaning of possessions. If such payments fall within the concept of possessions, it is nearly impossible to recover them. The right to health care in the jurisprudence is not guaranteed to all persons equally. Jurisprudence on health care of prisoners sets strict standards, but if the issue involves aliens, the Court does not establish strict rules.

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Reikšminiai žodžiai: Socio-ekonominės teisės, netiesioginis gynimas, Europos žmogaus teisių konvencija, Europos Žmogaus Teisių Teismas.

ANOTACIJA

Šis magistrinis darbas yra skirtas tiesiogiai neįtvirtintų socio-econominių žmogaus teisių analizei. Bendra teisės į darbą, teisės į socialinę apsaugą ir teisės į sveikatos apsaugą bei atskirų šių teisių elementų analize norima išsiaiškinti šių teisių tarpusavio ryšį, jų bendrą poziciją Europos Žmogaus Teisių Teismo ginamų teisių sistemoje bei galimybes šias teises ginti ir plėtoti teismo jurisprudencijoje. Darbas patvirtina, jog netiesioginių socialinių bei ekonominių teisių gynimas yra chaotiškas bei nenuspėjamas. Teisė į darbą yra ginama atsižvelgiant į įvairius tarptautinius dokumentus, neatsižvelgiant į tai ar valstybė yra įsipareigojusi pastarųjų atžvilgiu ar ne. Tarptautinių dokumentų naudojimas darbo bylose taip pat neaiškus tais atvejais, kuomet skirtingi tarptautiniai instrumentai numato skirtingas taisykles. Permokėtų socialinių išmokų atžvilgiu teismas nėra išreiškęs vieningos nuomonės, kadangi nėra aiškių kriterijų nusakančių ar tokios išmokos yra laikomos nuosavybe. Jei tokios išmokos patenka į nuosavybės sąvoką, valstybės galimybė jas išreikalauti yra arti minimumui. Teisė į sveikatos apsaugą jurisprudencijoje nėra užtikrinama visiems asmenims vienodai, kadangi kaliniams dažnai yra nustatomi griežti standartai, tačiau imigrantams išsiunčiamiems iš šalies tokie reikalavimai nėra nustatomi.

SUMMARY

Social and economic rights, highly depends on economical capacities of the states, are often treated as too abstract and justiciability of those rights are nearly impossible. The gradual implementation of social and economic rights in the context of the availability of resources is often treated not even as a legal obligation by the state, but only as a mere political guideline.

European Convention on Human Rights is often regarded as a civil and political rights document. However, the jurisprudence of the court, which often involves a broad interpretation of the law is moving towards protection for human rights with specific socio-economic elements. Even in those cases in which specific articles of the Convention do not literally speak about socio-economic rights, the court is not willing to give up the interpretation that would allow indirect protection of socio-economic rights. The right to work, the right to social security and the right to health care is attracting more and more attention in the jurisprudence of the Court. Through development of various concepts such as Convention as a living instrument, margin of appreciation, proportionality and others, European Court of human Rights created a progressive and effective system for the protection of human rights. With the creation of various legal principles, approach towards particular socio-economic rights elements remains problematic. Although indirect protection in a growing number of jurisprudence is to be welcomed, absence of general approach towards socio-economic rights gives some legal unpredictability. With an analysis of certain elements of these rights, this thesis clarified, that protection of social and economic rights in the Convention is disorganized and unpredictable. The Right to work is guaranteed linking to the international instruments, by which the states are not bound in the first place. Doubts may also be raised once such instruments provide different rules. The jurisprudence of the right to social security lacks legal clearance, as position of the Court towards overpaid benefits is not unanimous. The Court sets confusing rules once the state party wants to take such benefits back and whether such payment would be protected by the Convention in first place. Once it comes to questions concerning health care, states parties are given a wide margin of appreciation. Because it involves allocation of limited resources, this surely is a sensitive issue. However, the jurisprudence shows that the Court develops strict standards for health care of prisoners but does not develop requirements for health care of aliens. Thus, it is not clear why the Court provides rules for allocation of resources once issue involves prisoners, but not aliens.

SANTRAUKA LIETUVIŲ KALBA

Socialinės ir ekonominės teisės, priklausomos nuo valstybių ekonominės padėties bei socialinės politikos, dažnai yra traktuojamos kaip įtvirtinančios itin abstrakčius valstybių įsipareigojimus, kurių gynimas teisme yra itin sudėtingas. Laipsninis socialinių ir ekonominių teisių įgyvendinimas atsižvelgiant į valstybės turimus išteklius, dažnai yra traktuojamas net ne kaip teisinis valstybės įsipareigojimas, o tik kaip politinės gairės.

Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencija dažnai yra įvardijama kaip pilietinių it politinių teisių apsaugos dokumentas. Tačiau teismo jurisprudencija, kurioje dažnai pasitelkiamas plečiamasis teisės aiškinimas, dažnai gina žmogaus teises, kurioms būdingi tam tikri socio-ekonominiai elementai. Netgi tais atvejai, kuomet konkretus konvencijos straipsnis neįtvirtina tam tikros socio-ekonominės teisės, teismas nėra linkęs atsisakyti interpretacijos, kuri leistų ginti tiesiogiai neįtvirtintą socio-ekonominę teisę. Teisė į darbą, teisė į socialinę apsaugą bei teisė į sveikatos apsaugą sulaukia vis daugiau dėmesio teismo jurisprudencijoje. Pasitelkdamas plečiamąjį teisinį aiškinimą, valstybės diskrecijos, proporcingumo, konvencijos kaip gyvo dokumento bei kitus principus, Europos žmogaus teisių teismas kuria progresyvią bei efektyvią žmogaus teisių apsaugos sistemą. Tačiau teismo išplėtotų bei sukurtų principų gausa bei skirtingas požiūris į tam tikrus socio-ekonominių teisių elementus išlieka problemiškas. Nors plėtojama jurisprudencija tiesiogiai neįtvirtintų socio-ekonominių teisių srityje yra sveikintinas dalykas, bendros pozicijos tam tikrų teisių atžvilgiu nebuvimas suteikia tam tikro teisinio nenuspėjamumo. Šių teisių elementų analizė patvirtina, jog socialinių bei ekonominių teisių gynimas konvencijoje yra chaotiškas ir nenuspėjamas. Teisė į darbą yra ginama naudojantis tarptautiniais dokumentais, kurių atžvilgiu valstybė nėra įsipareigojusi. Abejonių taip pat gali sukelti tie atvejai, kuomet naudojami instrumentai nustato skirtingas taisykles. Teismo pozicija permokėtų socialinių išmokų atžvilgiu taip pat nėra vieninga, kadangi nustatytos painios taisyklės ar tokios išmokos gali būti pripažįstamos nuosavybe bei sąlygos valstybei permokėtas išmokas susigrąžinti. Teisės į sveikatos apsaugą bylose teismas garantuoja didelę diskreciją valstybėms, kadangi klausimas liečia ribotų išteklių paskirstymą. Tačiau nėra aišku, kodėl griežtos taisyklės nustatytos kuomet klausimas liečia kalinius, o imigrantų atžvilgiu reikalavimai išteklių paskirstymui nėra nustatomi.

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patvirtinu, kad šis rašto darbas / bakalauro / magistro baigiamasis darbas

„___Socio-Economic Rights in the Jurisprudence of the European Court of Human Rights

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1. Yra atliktas savarankiškai ir sąžiningai;
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______________________ _Edgaras Bartoševičius_____
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