

The right to social security: Can it be brought to court?

The right to social security has been successfully brought before international and regional courts and bodies that are empowered to receive applications or complaints and consider alleged violations of rights categorized a priori as civil or political. This became possible when the interconnection between the right to social security and other rights and principles was demonstrated. Although this type of indirect protection has proved to be significant, there are still aspects of social security that are poorly served by it or excluded from it. The development of direct justiciability mechanisms would rectify this situation.

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1. Introduction

The right to social security² has been included in the catalogue of human rights since the adoption of the Universal Declaration of Human Rights itself in 1948 (see Article 22).³ It is also enshrined in a significant number of global and regional human rights treaties and in instruments adopted by the International Labour Organization (ILO).⁴

Nothing of what is said here is intended to deny the conceptual possibility of regarding the right to social security as an actionable right.⁵ National experiences demonstrate that the right to social security, including rights derived from social security regimes, together with employment rights, are areas in which litigation precedence is firmly established at a local level, both in developed and developing countries. However, at an international level, the scope of direct justiciability on this right has been limited, due particularly to the persistence of various restrictions that limit justiciability on economic, social and cultural rights. Nevertheless, adjudication on the right to social security falls within the judicial or quasi-judicial

brief of global and regional human rights courts and bodies that are empowered to receive applications, petitions and complaints.

This report will endeavour to present several different ways in which various aspects of the right to social security – through its interconnection with other rights – have been addressed by courts and bodies empowered to consider alleged violations of rights categorized *a priori* as civil or political.

Without pretension to being exhaustive we will consider below three principal means of indirect protection for aspects of the right to social security: a) aspects of social security as a component of interests protected under the right to property; b) procedural aspects relating to due process guarantees and effective judicial tutelage of the right to social security; and c) the prohibition of discrimination and the equality principle as applicable to the right to social security.

2. The protection of the right to social security through the right to property

One of the indirect forms of protection for the right to social security has been the inclusion of rights and expectations relating to social security benefits among the interests protected by the right to

property. We will now examine how this protection functions in two regional human rights systems, the European and the Inter-American.

2.1. European human rights system

In the European system of human rights, this form of protection has manifested through the application of Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The central issue is the scope of the terms “property” or “possessions” in the article’s text. A narrow consideration of these terms could limit the scope of the article, for example, to property understood only in the sense of physical property or property already incorporated in a person’s total assets. But a wider interpretation of interests that can be included in the terms “property” or “possessions” would allow for a looser notion of “property” that, given the fulfilment of certain conditions, incorporates the expectation of receiving a pension, or other form of money transfer, and of its maintenance, updating or adjustment, among other possibilities.

The old European Commission of Human Rights and the current European Court of Human Rights have clearly leaned towards this second possibility and have considered in many cases that social security benefits

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2 References to “the right to social security” in this article include both contributory social security and non-contributory or welfare assistance; this differentiation is omitted as jurisprudence indicates its irrelevance in the light of protection offered by rights incorporated in civil and political rights instruments.

3 See for example, Andreassen, B.A. (1999). “Article 22”, in Alfredsson, G. and Eide, A. (comps.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*. The Hague: Martinus Nijhoff Publishers, p. 453-488.

4 See Courtis, C. (2003). “El derecho a la seguridad social en el derecho internacional”, in Abramovich, V., Afión, M.J. and Courtis, C. (comps.), *Derechos sociales: instrucciones de uso*. Mexico: Fontamara, p. 257-270; Scheinin, M. (2001). “The right to social security”, in Eide, A. Krause, C. and Rosas, A. (comps.), *Economic, Social and Cultural Rights. A textbook*. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 2nd Ed., p. 213-220.

5 Our general position on this can be found in Abramovich, V. and Courtis, C. (2004). *Los derechos sociales como derechos exigibles*. Madrid: Trotta, 2nd Ed.

PETITION MECHANISMS IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS BODIES

- At an international level, there is still no mechanism for applications and petitions that facilitates the presentation of complaints about violations of rights embodied in the International Covenant of Economic, Social and Cultural Rights (ICESCR). However, Article 24 of the ILO Constitution entitles unions and employers’ organizations to present ‘claims’ in the case of inadequate compliance by the state with a convention that it is party to. This includes conventions relating to social security such as Conventions 102, 121, 128, 130, 168, 103 revised, 118 and 157, among others.
- In Europe the Additional Protocol to the European Social Charter, which establishes a system of collective complaints, allows legitimate stakeholders to present complaints alleging an unsatisfactory implementation of obligations arising from the European Social Charter of 1961, or its revised version of 1996, by a state that is party to it.
- The Inter-American human rights system allows for the presentation of individual petitions to the Inter-American Commission on Human Rights alleging violations of the right to social security as established by Article 16 of the American Declaration of the Rights and Duties of Man. Additionally, arguments have been made supporting the possibility of taking questions relating to direct violations of the right to social security to the Inter-American Court of Human Rights, but the practical application of this has thus far been disappointing.



– including both contributory and non-contributory benefits – constitute “property” or “possessions”, as referred to in Article 1 quoted above, and that they therefore deserve protection against state actions that prejudice their peaceful enjoyment.

So, for example, even in 1971 the now in-existent European Commission of Human Rights held that “while it is clear that no right to a pension is as such included in the Convention (European Convention on Human Rights), the making of compulsory contributions to a pension fund may, in certain circumstances, create a property right in a portion of such fund and that such right may be affected by the manner in which the fund is distributed.”⁶ The European Court of Human Rights has upheld this interpretation in many cases. The Court has also held that rights deriving from the payment of contributions to social security systems are pecuniary rights as defined in Article 1 of Protocol No. 1 to the European Convention.⁷ For example in the case of *Willis v. United Kingdom*, the European Court considered that the right to receive a widow’s payment and a widowed mother’s allowance from a contributory regime constituted a pecuniary right as defined in Article 1 of Protocol No. 1 to the European Convention.⁸ The Court has repeated this criterion in many other cases.⁹

Once the protection of social security benefit rights through the right to property is established, it is necessary to examine the criteria used by European human rights system bodies to determine the existence of a violation of such right in relation to pensions and other social security benefits.

It should be remembered that in regard to economic and social policy, the European Court has developed the notion of “margin of appreciation”, which implies a certain deference in court deliberations towards state decisions on questions of public policy, both in regard to its ends and the means cho-

sen to achieve them. In social security, with its need for complex system management, this notion has been reflected in the opinion of the Commission, subsequently adopted by the European Court, that the acknowledgement of the possible extension of property right protection to social security benefits does not imply the guaranteeing of the right to a particular amount. Neither does it signify the right to the establishment of specific types of benefit, given that the state has a wide discretionary margin to create and design social security schemes and their mode of finance. And even in the case of public policy objectives that need to be prioritized, the state has a certain margin to choose the means and timetable for their accomplishment. Finally, in order to establish the existence of a pecuniary right, the Court requires that the person alleging a violation meets the conditions prescribed by the relevant national law for obtaining the claimed benefit.

Having said that, however, it is necessary to emphasize that the state’s margin of appreciation is not unlimited, and that, in several cases, the European Court determined that measures adopted by the state in question constituted an unjustified interference in the applicant’s enjoyment of the right to property. We will therefore examine which criteria have been employed by European system bodies to determine an infringement of the duty of respect for the right to property in relation to social security.

Reductions that affect the substance of a right

In its final report on the *Müller v. Austria* case,¹⁰ the European Commission held that “a substantial reduction of the amount of the pension could be regarded as affecting the very substance of the right to retain the benefit of the old age insurance.” It could then be asked what degree of reduction would affect the very substance of the right. Although European jurisprudence does not provide mathematical formulas, it does at least provide some useful guidelines to categorize the degree of effect. In this case, the European Commission decided that a reduction of approximately 3% in the pension – the difference claimed by the applicant in this case – did not affect the substance of the right. At the opposite extreme, in the case of *Kjartan Asmundsson v. Iceland*, the European Court held that the cessation of a social security disability benefit resulting from a work-related injury represents an unjustified interference in the right to property of the victim.¹¹ And in the case of *Wessels-Bergervoet v. The Netherlands*, which is not directly related to a reduction in the amount of a social security benefit, the Court provides a guideline that, by analogy, can be significant in determining the

effect on the substance of the right. In this case, the Court considered that a difference of 38% between the pension received by the woman applicant and the one she would have received in the same conditions had she been a man, constituted an unjustified and discriminatory difference in treatment.¹² It could be argued that this percentage represents at least a guideline for what constitutes an intolerable difference in the area of social security.

Discrimination and violations of the equality principle

In a series of cases, the European Court has considered allegations of discrimination or violations of the equality principle in relation to protection derived from the right to property as applied to social security rights. These cases will be examined in section 4, which is exclusively devoted to the issues of discrimination and violation of the equality principle in relation to this matter.

Res judicata violation and non-compliance with judgments

Another criterion used to determine an unjustified effect on the right to property is the lack of respect by a state for final judgments that fix the amount of the benefits. So, for example, in the case of *Pravednaya v. Russia*, the European Court determined that the retroactive application of a regulation and the reopening of a case in order to modify a final judgment constituted unjustified interference with the applicant’s right to property.¹³ In another series of cases relating to compensation for work-related sickness and accident,¹⁴ pension readjustment¹⁵ and maternity benefits,¹⁶ the Court held that the state’s non-compliance with judgments that required it to pay such benefits also constituted violations of the right to property.

In summary, in all these cases the Court considered that the validity and amount of a social security benefit determined in a final judgment formed part of the beneficiary’s assets.

2.2. Inter-American human rights system

Although the experience of the inter-American system of human rights in this area is less, there are precedents for such cases. In this system, protection of the right to property is based on Article 21 of the American Convention on Human Rights.

6 See European Commission of Human Rights, case *X v. The Netherlands*, Application No. 4130/69, Decision of 20 July 1971, Collection 38, p. 9. On the same subject, case *Mrs. X v. The Netherlands*, Application No. 5763/72, Decision on admissibility of 18 December 1973, Collection 45 p. 76.

7 See European Court of Human Rights, case *Gaygusuz v. Austria*, Application No. 17371/90, Judgment of 16 September 1996, paras. 39-41. See also case *Skorkiewicz v. Poland*, Application No. 39860/98, Decision on admissibility of 1 June 1999, para. 1; case *Domalewski v. Poland*, Application No. 34610/97, Decision on admissibility of 15 June 1999, para. 2.

8 See European Court of Human Rights, case *Willis v. United Kingdom*, Application No. 36042/97, Judgment of 11 June 2002, paras. 32-36.

9 See for example European Court of Human Rights, cases *Aunola v. Finland*, Application No. 30517/96, Decision on admissibility of 15 March 2001, para. 2; *Buchen v. Czech Republic*, Application No. 36541/97, Judgment of 26 November 2002, para. 46; *Van den Bouwhuisen and Schuring v. The Netherlands*, Application No. 44658/98, Decision on admissibility of 16 December 2003; *Kjartan Asmundsson v. Iceland*, Application No. 60669/00, Judgment of 12 October 2004, para. 39; *Pravednaya v. Russia*, Application No. 69529/01, Judgment of 18 November 2004, para. 38; *Macovei and others v. Moldova*, Application No. 19253/03, 17667/03, 31960/03, 19263/03, 17695/03 and 31761/03, Judgment of 25 April 2006, para. 49; *Pearson v. United Kingdom*, Application No. 8374/03, Judgment of 22 August 2006, para. 21.

10 See European Commission of Human Rights, case *Müller v. Austria*, Application No. 5849/72, Final Report of 1 October 1975, DR 1, para. 32.

11 See European Court of Human Rights, case *Kjartan Asmundsson v. Iceland*, Application No. 60669/00, Judgment of 12 October 2004, para. 45. See also case *Azinas v. Cyprus*, Application No. 56679/00, Judgment of 20 June 2002, paras. 44 and 45, in which the Court held that complete denial of a contributory pension as a form of punishment for committing a crime is a disproportionate measure that violates Article 1 of Protocol No. 1 to the European Convention.

12 See European Court of Human Rights, case *Wessels-Bergervoet v. The Netherlands*, Application No. 34462/97, Judgment of 4 June 2002, para. 52.

13 See European Court of Human Rights, case *Pravednaya v. Russia*, Application No. 69529/01, Judgment of 18 November 2004, paras. 39-41.

14 See European Court of Human Rights, case *Burdov v. Russia*, Application No. 59498/00, Judgment of 7 May 2002, paras. 40-41.

15 See European Court of Human Rights, case *Makarova and others v. Russia*, Application No. 7023/03, Judgment of 24 February 2005, paras. 31-33; case *Plotnikov v. Russia*, Application No. 43883/02, Judgment of 24 February 2005, paras. 27-29.

16 See European Court of Human Rights, case *Poznakhirina v. Russia*, Application No. 25964/02, Judgment of 24 February 2005, paras. 27-29.

In an early case the Inter-American Commission on Human Rights erred but fortunately this was corrected in later proceedings. In its Final Report on the *Marzioni* case, the Inter-American Commission adopted a very narrow notion of property, rejecting the possible inclusion in such a concept of work-related injury compensation¹⁷ – which, incidentally, is included among the social security “branches” stipulated in ILO Convention No. 102.¹⁸

However, the Commission reviewed its position on this in the case of *Five Pensioners v. Peru*, which was finally submitted for consideration by the Inter-American Court of Human Rights. The case involved the modification of pension amounts established by law, and the non-compliance by the Peruvian state with court judgments that held the reduction of the petitioners’ pensions to be illicit and determined the amount to be paid. The Inter-American Court considered that, once the conditions established by law were fulfilled, the pension constituted an acquired right of the victims and in consequence had been incorporated in their total assets and was thus subject to protection through the right to property.¹⁹ Consequently, the Court determined that the arbitrary modification of the pensions’ amount (as high as 78%) constituted a violation of the right to property.²⁰ The Court, in a similar conclusion to that of European Court jurisprudence, also determined that the refusal of the state to fully pay pensions, the amount of which was determined by final judgment, constituted a violation of the right to property enshrined in Article 21 of the American Convention.²¹

3. Protection of the right to social security through the right to fair trial guarantees and effective judicial recourse

Both the European Court of Human Rights and the Inter-American Court of Human Rights have considered cases of social security benefits being affected by violations of due process and the obligation to provide effective judicial tutelage in the event of violations of fundamental rights.

3.1. European human rights system

The European Court has an extensive jurisprudence covering the application of Article 6.1 of the European Convention on Human Rights, with a series of cases referring to rights related to social security, including welfare assistance. Part of the initial discussion on this subject related to the need to interpret the scope of the text of Article 6.1 on the “determination of his civil rights and obligations.”

In the case of *Feldbrugge*, the Court discussed the applicability of Article 6.1 to a payment continuity dispute in regard to an unemployment sickness

17 See Inter-American Commission of Human Rights, case *Marzioni v. Argentina*, case 11673, Report 39/96, 11 October 1996, particularly para. 29.

18 See ILO Convention 102, part 6, articles 31-38.

19 See Inter-American Court of Human Rights, case *Five Pensioners v. Peru*, Judgment of 28 February 2003, paras. 102 and 103.

20 *Ibid.*, paras. 109, 111, 112, 116-118 and 121.

21 *Ibid.*, paras. 113-115, 117, 118 and 121.

FAIR TRIAL GUARANTEES ENSHRINED IN REGIONAL HUMAN RIGHTS INSTRUMENTS

• European Convention on Human Rights and Fundamental Freedoms

Article 6: Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

• American Convention on Human Rights

Article 25: Judicial protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake: a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b) to develop the possibilities of judicial remedy, and c) to ensure that the competent authorities shall enforce such remedies when granted.

Article 8: Right to a fair trial

The text of Article 8.1 of the American Convention on Human Rights avoids the discussions that arose in the European Court of Human Rights about the “civil nature” of a dispute, as it explicitly acknowledges its application to the “determination of [...] rights and obligations of a civil, labor, fiscal, or any other nature.”

In relation to this, and looking only at social rights issues, the Court has applied Article 8.1 to employment-related cases (*Baena and others v. Panama*, *Acevedo Jaramillo v. Peru* and *Dismissed Congressional Employees v. Peru*), and to proceedings for independent legal status acknowledgement and the award of collectively owned land titles for indigenous communities (in the cases *Awastingni v. Nicaragua*, *Yakye Axa v. Paraguay* and *Sawhoyamaya v. Paraguay*).

allowance derived from public health insurance. The Court, taking into account a series of factors – among them the economic and personal nature of the right, its link with the work contract and its affinity with private insurance schemes – determined that, under Article 6.1, it could be considered a civil dispute.²² In the case of *Deumeland*, the applicant was claiming the payment of a supplementary widow’s pension, as her husband had died in a work accident. Based on the criteria employed in the previous case, the Court concluded that the dispute could be considered civil and thus Article 6.1 was applicable to the case.²³

In the case of *Salesi*, the Court had to consider the applicability of Article 6.1 to determination of legitimacy proceedings for a monthly disability benefit. Unlike the *Feldbrugge* and *Deumeland* cases, in which the type of benefit was directly or indirectly linked to an employment relationship and to a contributory scheme, here the benefit was entirely fi-

nanced by public funds and therefore the case did not strictly speaking fall within the sphere of “social security” but rather in the sphere of “welfare assistance”.²⁴ The Court held that:

Certainly there are differences between the two [welfare assistance and social security], but they cannot be regarded as fundamental at the present stage of development of social security law. This justifies following, in relation to the entitlement to welfare allowances, the opinion which emerges from the aforementioned judgments as regards the classification of the right to social insurance benefits, namely that State intervention is not sufficient to establish that Article 6 para. 1 is inapplicable.

As in the two cases previously referred to, other considerations argue in favour of the applicability of Article 6 para. 1 in the instant case. The most important of these lies in the fact that despite the public law features pointed out by the

22 See European Court of Human Rights, case *Feldbrugge v. The Netherlands*, Application No. 8562/79, Judgment of 29 May 1986, paras. 26-40, particularly paras. 36-40.

23 See European Court of Human Rights, case *Deumeland v. Germany*, Application No. 9384/81, Judgment of 29 May 1986, paras. 60-74, particularly paras. 71-74.

24 See European Court of Human Rights, case *Salesi v. Italy*, Application No. 13023/87, Judgment of 26 February 1993, paras. 17-19.

Government, Mrs Salehi was not affected in her relations with the administrative authorities as such, acting in the exercise of discretionary powers; she suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the Constitution.²⁵

The Court therefore determined that there were no reasons for a conclusion different to those in the cases of *Feldbrugge* and *Deumeland*, and considered that Article 6.1 was applicable to the circumstances under examination.

Given these and other precedents, in subsequent cases disputes over the applicability of Article 6.1 to social security issues became practically inexistent. The Court applied Article 6.1 to proceedings for work-related injury and sickness compensation,²⁶ pension readjustment,²⁷ maternity benefits²⁸ and income for life from a retirement fund.²⁹

Having dealt with the question of the applicability of Article 6.1 to proceedings relating to social security benefits and contributions, we will now examine which components of the right to a fair trial and to due process guarantees were applied by the European Court to cases of interest here, without prejudice to the applicability of other component elements of such guarantees developed in the Court's jurisprudence.³⁰

Equality of arms³¹ and the public and oral nature of proceedings

Some of the cases referred to involved disputes about respect for the principle of equality of arms that is inherent to the notion of due process, particularly during the administrative process that commonly takes place in many social security systems before recourse to judicial proceedings.

In the previously cited *Feldbrugge* case, the Court held that the process that determined the discontinuation of an unemployment sickness allowance failed to guarantee the petitioner's rights to be heard, to present written arguments or to consult and object to evidence in the case file.³² The Court

also considered that the process seriously limited the applicant's right to question the decision of the medical board that decided her case.³³ In consequence the Court ruled that the state had violated Article 6.1 of the European Convention.

Reasonable timescale

One of the components of the notion of a fair trial and due process invoked in the context of proceedings relating to social security is the right of the applicant to obtain a ruling that ends the dispute in a reasonable time. This principle is particularly important in the area of social security, given the life-sustaining nature of its benefits.

In the case of *Deumeland*, for example, the Court ruled that the duration of the determination process for the claimed benefit (ten years, seven months and three weeks) violated the principle of reasonable timescale enshrined in Article 6.1 of the European Convention.³⁴ The Court emphasized that social security cases require "particular diligence."³⁵

Respect for *res judicata* and judgment compliance

The Court has also applied the requirement of respect for *res judicata*, as an obligation of the state, to cases relating to social security benefits, and has held in a significant number of cases that the state violated Article 6.1 through non-compliance with judgments obliging it to pay benefits of an amount judicially determined, or through an absence of respect for final judgments as in the establishment of means to reopen and examine cases that had already been decided.

In several cases the European Court has expressly emphasized that a state's claim to having insufficient resources does not constitute a valid excuse for non-payment of a judicially established debt.³⁶

3.2. Inter-American human rights system

The Inter-American Court has in turn applied American Convention on Human Rights Article 25 (the right to judicial protection) in proceedings on a claim for pension readjustment by the petitioners in the case of *Five Pensioners v. Peru*.³⁷ Although the representatives of the victims invoked Article 8.1 of the American Convention (equivalent to Article 6.1 of the European Convention), the Court refused to consider this due to insufficient evidence in the case file. In this case, the Court considered the state's non-compliance with a judgment that obliged it to

pay pensions in accordance with the petitioners' claim. Similarly to its European equivalent, but on the basis of a different juridical categorization, the Inter-American Court determined that the Peruvian state's non-compliance, over a period of eight years, with judgments requiring it to pay pensions in accordance with the petitioners' claim constituted a violation of the right to effective judicial tutelage.³⁸

4. Protection of the right to social security through the principle of equality and the prohibition of discrimination

A third way of protecting the right to social security through human rights instruments that allow the presentation of applications or petitions, is its articulation with arguments based on the violation of the principle of equality and the prohibition of discrimination. The strategy in such cases is to denounce the existence of unjustified or discriminatory distinctions relating to social security, for example in terms of the conditions of access to certain benefits or the amount of the benefits. This strategy has also been accepted in national courts of different jurisdictions around the world.³⁹

In some international human rights instruments – such as the International Covenant on Civil and Political Rights (ICCPR)⁴⁰ and the American Convention on Human Rights⁴¹ – the clauses enshrining the right to equal protection from the law and the prohibition of discrimination are general and therefore are also applicable to rights and regulations that are not included in the list of rights established in the instruments themselves. Consequently, these provisions can be directly invoked where social security legislation, or the practice of entities in charge of applying it, violates the principle of equality and the prohibition of discrimination.

Other instruments, such as the European Convention on Human Rights, limit the application of the provision that enshrines the principle of equality and the prohibition of discrimination to rights established in the instrument itself.⁴² Here, therefore, in bringing actions relating to social security it is necessary to relate the clause with the alleged violation of a

25 *Ibid.*, para. 19.

26 See European Court of Human Rights, case *Burdov v. Russia*, Application No. 59498/00, Judgement of 7 May 2002, paras. 34-38.

27 See European Court of Human Rights, case *Pravednaya v. Russia*, Application No. 69529/01, Judgment of 18 November 2004, paras. 24-34; case *Makarova and others v. Russia*, Application No. 7023/03, Judgment of 24 February 2005, paras. 26-30; case *Plotnikov v. Russia*, Application No. 43883/02, 24 February 2005, paras. 22-26.

28 See European Court of Human Rights, case *Poznakhirina v. Russia*, Application No. 25964/02, Judgment of 24 February 2005, paras. 22-26

29 See European Court of Human Rights, case *Macovei and others v. Moldova*, Applications No. 19253/03, 17667/03, 31960/03, 19263/03, 17695/03 and 31761/03, Judgment of 25 April 2006, paras. 39-46.

30 See Abramovich and Courtis, *op. cit.*, p. 184-192.

31 The equality of arms principle requires that all parties to a process receive the same treatment from judicial bodies.

32 See European Court of Human Rights, case *Feldbrugge v. The Netherlands*, Application No. 8562/79, Judgment of 29 May 1986, para. 44.

33 *Ibid.*, para. 45-46.

34 See European Court of Human Rights, case *Deumeland v. Germany*, Application No. 9384/81, Judgement of 29 May 1986, paras. 76-90.

35 *Ibid.*, para. 90.

36 See European Court of Human Rights, case *Burdov v. Russia*, Application No. 59498/00, Judgement of 7 May 2002, para. 35; case *Makarova and others v. Russia*, Application No. 7023/03, Judgement of 24 February 2005, para. 27; case *Poznakhirina v. Russia*, Application No. 25964/02, Judgement of 24 February 2005, para. 23; case *Plotnikov v. Russia*, Application No. 43883/02, 24 February 2005, para. 23.

37 See Inter-American Court of Human Rights, case *Five Pensioners v. Peru*, Judgment of 28 February 2003, paras. 127-141.

38 *Ibid.*, particularly paras. 133-138 and 141.

39 See for example, Constitutional Court of South Africa, case *Khosa and others v. Minister of Social Development and others*, 2004 (6) SA 505 (CC), 4 March 2004 (discrimination in access to social security benefits due to national origin); Spanish Constitutional Tribunal, Judgments 103/83, of 22 November 1983 (discrimination against men in relation to women in widower/widow pensions) and 116/87 of 9 July 1987 (unjustified distinctions between categories of workers for social security purposes); Italian Constitutional Court, Judgment No. 184 of 1983 (unjustified distinctions between beneficiaries of disability pensions and old age pensions in regard to health expenditure exemptions).

40 See International Covenant on Civil and Political Rights, art. 26.

41 See American Convention on Human Rights, art. 24.

42 See European Convention on Human Rights and Fundamental Freedoms, Art. 14. It has to be specified that Protocol No. 12 to the European Convention on Human Rights extends the application of the prohibition of discrimination to all rights established by law (see Art. 1, Protocol No. 12 to the European Convention of Human Rights). However, by August 2007 there had been only 15 ratifications of this Protocol.

right protected by the European Convention or by its additional Protocols.

We will now examine how the principle of equality and the prohibition of discrimination are dealt with in different human rights protection systems in relation to social security.

4.1. Universal system of human rights

Within the framework of the universal system for the protection of human rights, the Human Rights Committee – a body that monitors compliance with the ICCPR – has had several opportunities to consider alleged violations of the principle of equality and the prohibition of discrimination.

In two already classic cases in its jurisprudence, *Zwaan de Vries v. The Netherlands*⁴³ and *Broeks v. The Netherlands*,⁴⁴ the Committee determined that Dutch unemployment compensation legislation discriminated against married women by imposing access conditions on them that were not required in the case of married men in the same situation. The Committee held that this different treatment on the basis of gender constituted a violation of ICCPR Article 26.

In a recent case the Committee reached a similar conclusion, this time with regard to distinctions established by Colombian legislation in relation to pension transfer. The Committee considered that the distinction made on the basis of the sexual orientation of the petitioner – the partner of the dead beneficiary – was discriminatory, because the law provided protection to common law partners of different gender but not to partners of the same gender.⁴⁵

4.2. European human rights system

The European Court of Human Rights has considered a series of cases involving alleged discrimination, or violation of the principle of equality, in terms of the protection derived from the right to property as applied to social security rights. The Court held that the protection of the right to property established in Article 1 of Additional Protocol No. 1 to the European Convention on Human Rights does not imply a right to acquire property, nor does it prescribe any restriction on the state's freedom to establish any type of social security scheme or to set the type and amount of the benefits in such a scheme. However, if the state creates a benefits or pensions system, it should do so in a way that is compatible with Article 14 of the European Convention, that is, in a way that respects the principle of equality and the prohibition of discrimination.⁴⁶

In the case of *Stec and others v. United Kingdom*, the applicants alleged that the establishment

of the retirement age as the limit for the payment of a work-related accident compensation allowance was discriminatory, as in the United Kingdom there is a different retirement age for men and women (65 for men and 60 for women).⁴⁷ The Court considered two questions separately. First, it concluded that linking the payment of the work accident compensation allowance with the normal employment period, and establishing its limit as the retirement age, had a legitimate purpose and was therefore reasonable. It then considered the gender-related difference in retirement age. On this point the Court found that a different retirement age for men and women was originally justified as a measure aimed at correcting existing inequalities between men and women and therefore could be considered reasonable, but that the difference in treatment should cease when social and economic changes remove the need for special treatment for women.

However, the Court indicated that as this social change has been gradual it is not possible to determine an exact moment in time when the differential measure becomes disproportionate. The Court also pointed out that, after a national consultation process, the state has adopted measures to correct this differentiated treatment by establishing a gradual gap reduction scheme in stages. The Court concluded that, given the original justification of the differentiated treatment and the gradual change in the social and economic position of women, the measures and timescale chosen by the state to equalize retirement ages were not so manifestly unreasonable as to exceed the wide margin of appreciation that it has in these matters. In consequence it considered that there was no violation of Article 14 of the Convention, in relation to Article 1 of Protocol 1.

In two other cases, involving access to social security benefits, the European Court considered legal distinctions based on the national origin of the victims (which, it should be remembered, is one of the bases for discrimination that is prohibited by Article 14 of the European Convention on Human Rights).

In the case of *Gaygusuz v. Austria*, the Court had the opportunity to consider the compatibility of the prohibition of discrimination with the Austrian regulation for the granting of emergency social benefits in cases of unemployment benefit cessation.⁴⁸ The applicant had met all of the benefit access conditions – among them having contributed to the unemployment insurance fund – except the one of having Austrian nationality. The Court rejected the government's arguments and ruled that the distinction based on nationality lacked objective and reasonable justification and was therefore discriminatory. In the case of *Koua Poirrez v. France*, the applicant – a disabled person originally from Côte d'Ivoire – contested the denial of a disability benefit on the grounds of nationality. Again the Court decided that the distinction on

the basis of nationality lacked objective and reasonable justification and was therefore discriminatory, violating Article 14 of the European Convention in relation to Article 1 of Protocol No. 1.⁴⁹

5. Final considerations

This outline jurisprudence survey has demonstrated that an appreciable proportion of right to social security aspects have been taken up by international courts and human rights bodies through their interconnection with other rights and principles.

It is relevant here to evaluate the degree of coverage offered by these indirect forms of protection in order to determine what would be added by direct justiciability for the right to social security at an international level.⁵⁰

The forms of indirect protection of the right to social security presented in this paper include both substantive and procedural aspects.

On the substantive side, protection through the right to property has proved useful in protecting access to social security benefits already established by law, ensuring their payment and maintaining their integrity. This type of protection functions particularly well in states with a broad-based social security regime that is sufficiently disciplined from a regulatory point of view. Here, even in the case of non-contributory benefits, the degree of tutelage will be greater the more that conditions of access to the benefit are clearly established by law and, conversely, it will be lesser to the extent that access is left to the discretion of the authorities – a state of affairs that regrettably continues to be the norm in regard to social assistance in many countries, including those of Latin America.

The protection of the integrity of benefits is not absolute but relative and leaves the state with a margin of appreciation to implement modifications provided that they have legitimate ends and the measures adopted are proportionate to them. However, this tutelage establishes some limits to the margin of appreciation, basically in the form of requiring respect for the substance of the right – in other words, the reasonability of the restriction or limitation – and respect for court judgments that end a dispute.

The substantive aspect of protection is complemented by the principle of equality and the prohibition of discrimination. The use of these principles allows some degree of control over regulations that establish benefits, particularly in those cases where the state has made distinctions based on the so-called 'suspicious categories', such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or

43 See Human Rights Committee, case *Zwaan de Vries v. The Netherlands*, Application No. 182/1984, view adopted on 9 April 1987.

44 See Human Rights Committee, case *Broeks v. The Netherlands*, Application No. 172/1984, view adopted on 9 April 1987.

45 See Human Rights Committee, case *X v. Colombia*, Application No. 1361/2005, view adopted on 14 May 2007.

46 See European Court of Human Rights, case *Stec and others v. United Kingdom*, Applications No. 65731/01 and 65900/01, decision on admissibility of 6 July 2005, paras. 54 and 55 and Judgment of 12 April 2006, para. 53.

47 See European Court of Human Rights, case *Stec and others v. United Kingdom*, Judgment of 12 April 2006, Applications No. 65731/01 and 65900/01, paras. 54-56.

48 See European Court of Human Rights, case *Gaygusuz v. Austria*, Application No. 17371/90, Judgment of 16 September 1996, paras. 33-51.

49 See European Court of Human Rights, case *Koua Poirrez v. France*, Application No. 40892/98, Judgment of 30 September 2003, paras. 46-49.

50 In addition to the mechanisms mentioned in section 2, negotiations are currently taking place in UN bodies for the adoption of a Facultative Protocol to the ICESCR. The ICESCR includes the right to social security in its Article 9. For more details on this process, the following websites can be consulted: <www.ohchr.org/english/issues/escr/intro.htm> and <www.opicescr-coalition.org>.



other status, to quote those expressly established in Article 2.1 of the ICCPR, in Article 3 of the ICESCR and in Article 1.1 of the American Convention on Human Rights, although it should be mentioned that this list is not exhaustive.⁵¹

Protection through the principle of equality and the prohibition of discrimination can have an 'additive effect', that is, to extend an existent benefit to a category of beneficiaries who were excluded from it. But it should be emphasized that for this type of protection to be set in motion, it is necessary that the benefit already exists to some degree. Although a more vigorous interpretation of the prohibition of discrimination could be imagined – one that demands, for example, the creation of benefits as a necessary affirmative measure to prevent or eliminate discrimination – the abovementioned jurisprudence has still not moved in that direction.

The procedural aspects of protection – which encompass different aspects of due process guarantees and the right to effective judicial tutelage, as we have seen – also involve as a prerequisite the existence of legally established benefits, or procedures oriented to their creation, that constitute the object of the dispute.

By contrast, some aspects of the right to social security can be identified that are poorly covered by, or excluded from, these types of indirect protection and that would benefit from the establishment and implementation of direct justiciability mechanisms for this right.

In brief it could be said that direct justiciability of the right to social security at an international level could provide some supplementary substantive criteria for considering actions, and particularly omissions, on the part of a state in the establishment of social security benefits. To this end, *a clear determination of the eventualities that should be covered* would provide an important parameter for the detection of non-compliance and deficiencies.

A second aspect that could be considered is the *establishment of parameters for the appropriateness or sufficiency of benefits*, a notion that is partly reflected in the concepts of "minimum content", "core content", "vital or existential minimum" and "core obligations."⁵² The challenge of this notion is to link relevant action taken by the state in this matter with measurable parameters in relation, as a minimum, to the cost of living or the meeting of basic or life-sustaining needs.

A direct justiciability of the right to social security could add a third aspect aimed at reinforcing the protection provided by the right to property, specifically in the social area, in the form of the so-called *prohibition against regressiveness* or prohibition of regression in terms of social rights.⁵³ In accordance with this principle, derived from the obligation to deliver a progressive development of social rights,⁵⁴ a state cannot diminish the content of those rights that it has already acknowledged. Although the prohibition is not absolute, it inverts the burden of justification, placing it on the state, and augments the required standard of justification for deliberately regressive measures. The prohibition against regressiveness could, for example, narrow the margin that the state has for justifying restrictions on the right to property in the case of restrictions or limitations to already existent social rights.

Having said this, and with the aim of not generating unfounded expectations, it is also necessary to remember that substantive state obligations in regard to social security are mitigated by the notion of "margin of appreciation" applicable to the state in the field of economic and social policies. Consequently, the more serious and visible the violation, the greater the impact will be of the suggested supplementary protection, particularly in the case of protection at an international level. ■

51 The enumeration in Art. 14 of the European Convention of Human Rights is similar: "...or any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property, birth," in addition to the residual formula "or other status."

52 On this notion see, in general: Eide, A. (1989). "Realization of Economic, Social and Cultural Rights. Minimum Threshold Approach", in the International Commission of Jurists Journal, No. 43, p. 46-60; Chapman, A. and Russell, S. (2002). "Introduction", in Chapman, A. and Russell, S. (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*. Amaberes: Intersentia, p. 1-19. In particular on its application to the right to social security, see Lamarche, L. (2002). "The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights", in Chapman and Russell (eds.), *ibid*, p. 87-114.

53 For more details on the prohibition against regressiveness, see works compiled in Courtis, C. (2006). *Ni un paso atrás. La prohibición de regresividad en materia de derechos sociales*. Buenos Aires: Ed. del Puerto/CEDAL-CELS.

54 Enshrined in Art.2.1 of ICESCR, in Art. 26 of the American Convention on Human Rights and in Art. 1 of the San Salvador Protocol, among other instruments.

