

Comparative Regional Human Rights Systems: Courts and Adjudication

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Interpretive Principles 2: Positive obligations, implied / non-enumerated rights, approaches to economic and social rights

Positive obligations and protection of social rights in the European Human Rights System

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1 – Opening considerations

1.1 – On the architecture of the European system as related to our subject

At this stage of our workshop, there is no more need to introduce the European system of human rights, under which fits the protection of social rights. Suffice it to recall some features.

The first is that this system rests on three pillars: the European Social Charter, the European Convention of Human Rights and the Law of the European Union at the centre of which is found the Charter of Fundamental Rights of the European Union.

The second is that social rights occupy a variable position in the circle of rights in these systems. They are dedicated and protected as such in the Charter system, whereas, if we except the prohibition of forced labour and freedom of association, they are formally absent from the European Convention on Human Rights; and, between these two figures, there is the Charter of Fundamental Rights, which formally enshrines the economic and social rights by combining civil and political rights.

Third and last characteristic trait, the guarantee of rights known under different forms, jurisdictional here (ECHR and EU law) and non-jurisdictional there (European Social Charter). It remains, however, that, from this last point of view, the differentiation of systems is not as significant as it might appear at first glance. Whether challenges give rise to the intervention of a formal jurisdictional body or not, the control procedures are built

on the same model, which is the judiciary model, with all that this implies, in democratic States, as structural requirements – independence of the body and impartiality of its members, for example – and procedure – notably the principle of due hearing –; but also with the unifying consequence that this produces on the control itself and the act to which it leads. We especially highlight the fact that this control is implemented in law, and tends to verify the conformity of an act, an action or a given situation to a determined juridical norm and that the legal assessment undertaken on this basis will be inscribed in a decision. Being acts of international bodies, these decisions, whether they come from international court or not, are covered by nothing but the authority of the interpreted item, just as they are not supported by the mechanisms of execution – including forced execution – as those that we find in national system, and which cannot exist elsewhere.

These last factors authorize comparison, especially in the field of interpretation. It is proposed that we do this by linking a leading development method of fundamental rights in contemporary international law and the protection of a group of concrete rights.

1.2 – On the relation of positive obligations to social rights

The method is the so called « positive obligations »¹, or more precisely, the jurisprudential dynamic of positive obligations. It includes, for the European Human Rights' judge, in the name of the effectiveness of the guaranteed rights, to endow these with requirements not covered by the texts, and imposing on States a positive intervention, or in other words, the adoption of measures necessary for the full enjoyment and full protection of rights. To use the actual formula of the European Court of Human Rights, « fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and there is no room to distinguish between acts and omissions »². The activism thus required of the State can take different forms: enactment of substantial standards and/or procedural rules, adoption of practical measures. It is also, and above all, noted that the material scope of this intervention is not limited. Measures expected of the State may be socio-economic in nature and affect the rights which, by virtue of international texts, present this character.

Thus defined, the « method of positive obligations » inevitably raises the question of whether it constitutes a method of interpretation properly speaking, alongside those which are usually considered as such: literal interpreting methods ; historical, systematic,

¹ See J.-F. Akandji-Kombé, *Positive obligations under the European Convention on Human Rights, a guide to the implementation of ECHR*, Human Rights Handbook n° 7, Council of Europe, 2006 ; A. R. Mowbray, *The development of positive obligations under the European Convention of Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford, 2004 ; F. Sudre : « Les obligations positives dans la jurisprudence européenne des droits de l'homme », *Revue trimestrielle des droits de l'homme*, 1995,363 ; Klatt : « Positive obligations under the European Convention on Human Rights », in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* / Kaiser Wilhelm-Institut für Ausländisches Öffentliches Recht und Völkerrecht ; S. Pavageau : « Les obligations positives dans les jurisprudences des Cours européenne et interaméricaine des droits de l'homme », *Int. Law: Rev. Colomb. Derecho Int. Bogotá (Colombia)* N° 6: 201-246, julio-diciembre de 2005.

² *Airey vs Ireland*, 9 oct. 1979, n° 6289/73, § 25.

teleological, consensualistic methods, etc.. In our opinion, the answer to this question can only be negative. It seems more fair to consider that positive obligations are involved in the elucidation, or even the description, of the content of the commitments of States and therefore the content of the standard; they are therefore to be regarded as the given result of an interpretation process conducted on the basis of principles – such as the principle of effectiveness – as well as through methods and techniques to the world to which they are foreign. If, to reply to the invitation of the organizers of the present meeting, we took the stand of getting them close to these principles, methods and techniques, it is only as instruments for the development of Human Rights.

In the European system of human rights, the human development methodology based on positive obligations is implemented primarily by the European Court of Human Rights³, and from a twofold perspective. The first is to enrich the substance of rights provided under the European Convention on Human Rights, and the second is, through the affirmation at the expense of the State of an obligation demanding the protection of interpersonal relationships, to achieve full respect of conventional rights in relations between private individuals. This method however is not confined to the European Convention on Human Rights. The European Committee of Social Rights, working within the frame of the collective complaints' procedure⁴, has likewise made it its own. It follows that positive obligations do not merely make up an instrument of the socio-economic rights.

It is, finally, but a breakdown of the European system of human rights where the technique of positive obligations does not seem to have penetrated: it is in the law of the European Union. In our opinion that is for two cardinal reasons. The first is without doubt due to the great caution that prevails with regard to social rights. This caution is that of the judge first of all. This is evidenced by the fact that these rights have never been admitted into the category of general principles of law of the European Union which is, as we know, a praetorian construction. We witness also a certain jurisprudence that gives precedence to economic freedoms (of the internal market) over social rights⁵. But the

³ See F. Sudre : « La perméabilité de la Convention européenne des droits de l'homme aux droits sociaux », in *Mélanges J. Mourgeon*, Bruylant, 1998, p. 467. Also, from the same author: « La protection des droits sociaux par la Cour européenne des droits de l'homme : un exercice de « jurisprudence-fiction » », *Revue trimestrielle des droits de l'homme*, 2003.755.

⁴ This procedure has been established by a special protocol to the European Social Charter, adopted in 1995 entered in force in 1998. About this procedure, see F. Sudre : « Le protocole additionnel à la Charte sociale européenne prévoyant un système de réclamations collectives », *R.G.D.I.P.*, 1996-3, p. 715 ; J.-F. Akandji-Kombé : « L'application de la Charte sociale européenne, la mise en œuvre de la procédure de réclamations collectives », *Droit social*, n° 9/10, sept.-oct. 2000, p. 888 ; R. Brillat : « A new protocol to the European social charter providing for collective complaint », *European Human Rights Review*, 1996-1, p. 52 ; et R. Birk : « The collective complaint : a new procedure in the European social Charter », in *Labour law in industrial relations at the turn of the century, Liber amicorum in honour of Prof. Roger Blanpain*, Kluwer 1998, p. 261. For later developments of this procedure, see our regular columns in the *Revue trimestrielle des droits de l'homme*, the *Journal de Droit européen* (columns on the procedure of collective complaint) and, since 2013, in the *European Journal of Human Rights* (international and européen columns « Labour and Social Security »).

⁵ In this sense, v. par exemple C.J., 11 dec. 2007, *Viking*, C-438/05 ; and 18 dec. 2007, *Laval*, C-341/05, commented by P. Rodière, « Les arrêts Viking et Laval, le droit de grève et le droit de négociation

reservation regarding these rights also comes, as we know, from the States, which have always shown themselves reluctant in regard to an enlargement of European Union competence in social matters. So much so that the Charter of Fundamental Rights of the European Union, even while consecrating social rights for the first time as an integral part of the European catalogue of fundamental rights, forbids that their protection entails an enlargement of the powers of the Union in the considered fields⁶. The second reason for the indifference in E.U. law with regard to the method of positive obligations appears to us to be of a structural order. Since the elements of the law are intended to produce by themselves effects in the legal orders of the Member States, and that most of the provisions contained in it, especially those relating to fundamental rights, have a direct effect suitable to impose on individuals to respect it, it is hardly necessary to go through the theory of positive obligations to achieve their horizontal application in private relationships.

It is in light of these observations that it is now appropriate to account for how the method of positive obligations involve the assertion of economic and social rights, on the one hand, and how it contributes to a better guarantee of the latter, on the other hand.

2 – Positive obligations and consecration of economic and social rights

In European jurisprudence positive obligations are put at the service of a movement for the development of human rights which takes on a double dimension: on the one hand, the realization of civil and political rights and, on the other, the deepening of social rights.

2.1 – Economic and social rights in the service of the realization of civil and political rights

In the context of the European Convention on Human Rights, the principle of integration of economic and social rights not covered by this text in its scope, and the extent to which this integration can be considered, were clearly laid out in the *Airey vs. Ireland* case of 1979⁷. We may remember that in that judgement, the European Court, drawing the consequences that « The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective », held that the right to juridical assistance could be considered as a requirement of the right to a judge guaranteed by Article 6, § 1 ECHR. The words are worth recalling: « The Court is aware that the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the

collective », *RTD eur.*, 2008/47 ; C.J., *Commission vs Germany*, 15 jul. 2010, C-271/08, commented by J.-F. Akandji-Kombé : « Négociation collective et droits fondamentaux : la Cour de justice franchit-elle un cap ? », *La Semaine Sociale Lamy*, n° 1463, 2010, p. 5 ; or, more recently, concerning right to strike : C.J., 4 oct. 2012, *Finnair Oyj*, C-22/11, commented by J.-F. Akandji-Kombé, Columns in *European Journal of Human Rights*, 2013/3, p. 518.

⁶ Article 51, § 2 of the Charter : « The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties ».

⁷ *Op. cit.*, § 24-26.

Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention »⁸.

The formula, now famous, attests to the evidence of the voluntarism of the Court. But it is also, and this should be equally emphasized, imbued with a certain reserve. This can be expressed as follows: the method of positive obligations and techniques associated with it did not aim to extend the material scope of the Convention, to commit to protect them inasmuch as new rights, especially when it comes to social rights which are the subject of a specific instrument of the Council of Europe, namely the European Social Charter; it is rather an interpretative tool, allowing to dynamically release the content of protected rights. In other words, the economic and social rights are not protected as « rights »⁹, but unlikely to be taken into account unless they reattach themselves to an expressly *Airey* ruling.

That having been said, it is clear that because of its generality, the proposal of the *Airey* ruling is applicable to any substantive provision of the Convention and its protocols. All civil and political rights set forth by them may therefore be subject to certain economic and social requirements. The case law also provides numerous illustrations. Thus, for example, that with a view of protecting the right to life guaranteed by Article 2 of the Convention, the Court was led to demand certain requirements relating to the protection of health that led it to the conclusion of the protection of the right to health by the Convention. The Court has held that, in a general manner « an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally. [The Court] notes 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 »¹⁰. The positive obligation of protection of health is also at the heart of a particular case provided by the Court concerning the conditions of

⁸ § 26 of *Airey Case*.

⁹ See also the position of the European Court in the case *Johnston and others vs Ireland* (18 dec. 1986, n° 9697/82, § 53) : « It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions. However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset ». The socio-economic rights are fully concerned by this principle of interpretation.

¹⁰ ECHR, 10 may 2001, *Cyprus vs Turkey*, n° 25781/94, § 219. See, in the same sense, *Nitecki vs Poland*, 21 march 2002, n° 65653/01, § 1 : « with respect to the scope of the State's positive obligations in the provision of health care, the Court has stated that an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally ».

detention, to the conduction of hazardous activities, such as nuclear tests¹¹, by States or public authorities, etc. The Court has even held that the protection of life in certain circumstances could involve the protection of individuals' housing, if it be insalubrious¹², or even a duty to proper police training¹³. Similarly, we have seen growing in the shadow of Article 8 of the Convention, which protects the right to private and family life, to a home and to correspondence, a set of requirements for the protection of the environment and of health¹⁴. We have even witnessed, in the most recent case, the birth of what some authors do not hesitate to consider as a right to employment¹⁵. It is true that we are not far from the consecration of such a law, the Court judging that « restrictions on an individual's professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others », and that prohibition to be employed, or even just a refusal to renew an employment contract are considered by it as affecting « chances of carrying on a professional activity and entailed consequences for the enjoyment of the right to respect for "private life" within the meaning of Article 8 »¹⁶.

This last case is particularly revealing of the penetration of considerations connected to economic and social rights within the scope of the European Convention. But one can draw another important lesson. It is that the method of positive obligations is not the only factor explaining the penetration. It in fact constitutes but a single element of an interpretative approach that distinguishes between positive obligations, the game of the principle of non-discrimination¹⁷, and the technique of autonomous concepts. It must be noted that if it is indeed an obligation to take the necessary measures to protect the right of every person to live a private social life through work, this positive obligation owes its original existence to the implementation of the principle of non-discrimination. The social protection rights, namely the right to social security and the right to social assistance, are examples in this regard. They owe their inclusion in the scope of Article 1 of Protocol n° 1 to the Convention, at the same time to the implementation of the obligation of non-

¹¹ See, for example, ECHR, June 9, 1998, *L.C.B. vs United Kingdom*, n° 14/1997/798/1001.

¹² See, for example, ECHR, 6 juil. 2005, *Öneryildiz vs Turkey*, n° 48939/99, commented by P. De Fontbressin : « De l'effectivité du droit à l'environnement sain à l'effectivité du droit à un logement décent ? », *Revue trimestrielle des droits de l'homme*, 2006/65, p. 87 et s. For general overview, see F. Tulkens & S. Van Drooghenbroek : « Le droit au logement dans la convention européenne des droits de l'homme, bilan et perspectives », in N. Bernard, C. Mertens (dir.), *Le logement dans sa multidimensionnalité. Une grande cause régionale*, Ministère de la Région Wallonne, Études et Documents, Namur, 2005, p. 311 ; and, in a largest perspective that include European Convention of Human Rights and European Social Charter, J.-F. Akandji-Kombé : « Logement, droits fondamentaux et droit européen », in Conseil d'Etat (français), *Rapport public 2009 : Droit au logement, droit du logement*, La Documentation française, p. 397.

¹³ See, for example, ECHR, 20 dec. 2004, *Makaratzis vs Greece*, n° 50385/99.

¹⁴ D. Garcia San José, *Environmental protection and the European Convention on Human Rights*, Human Rights File n° 21, Council of Europe, 2005.

¹⁵ See, ECHR, 27 jul. 2004, *Sidabras & Dziautas vs Lithuania*, n° 55480/00 and 59330/00 ; and in recent case-law, *Martinez Fernandez vs Spain*, 15 may 2012, n° 56030/07. See, for comment and overview, my columns in the EJHR, and article : « Un nouvel horizon pour le droit à l'emploi : le droit à la vie privée », in *Mélanges à la mémoire du Professeur François Gaudu*, forthcoming.

¹⁶ *Martinez Fernandez* case, op. cit.

¹⁷ See, *Sidabras and Dziautas* case, op. cit.

discrimination under Article 14, to autonomous interpretation of the concept of « possession » and to the implementation of positive obligation's doctrine¹⁸. It is even possible to argue that the first two elements had a greater influence than the latter one.

In total, we must remember that if it is true that we see a growing attraction of economic and social rights in the field of the European Convention on Human Rights, the interpretative constructions that make this dynamic possible are complex. The result itself is not unequivocal. We readily admit that the situation in which the introduction into the issue of an economic and social element is done via the assessment of the applicability of the alleged conventional provision is fundamentally different from that in which this element occurs only in assessing the proportionality of the interference committed by the State. Here there are different degrees of recognition, and a variable intensity of the presence of rights thereby accommodated.

2.2 – Positive obligations in the service of deepening of guaranteed social rights

But the method of positive obligations is not implemented solely to ensure the effectiveness of civil and political rights. It is also for the benefit of economic and social rights expressly guaranteed by European texts, especially those of the Council of Europe. It follows that the theory of “extensions of an economic and social order” applies to them also, as indeed may economic and social rights be granted civil and political components.

This dynamic can first be seen in the European Convention on Human Rights. We know that it devotes several provisions to economic and social rights: Article 4, which prohibits slavery, servitude and forced labour; Article 11, which recognizes freedom of association; and the Article 1 of Protocol n° 1, which enshrines the right to property – right to possessions –; Article 2 of the same Protocol dedicated to the right to education. The discovery of positive obligations within the scope of these provisions has enabled the Court to strengthen the position of the rights involved in the conventional device.

The case of freedom of association in relation to the right to collective bargaining and the right to collective action, including the right to strike, is exemplary in this regard. It is recalled that in the initial state of the case law, the Court found that only the right to form trade unions was protected by Article 11 of the Convention. Besides the negative freedom of association, which it considers as not within the scope of this provision, the right to collective bargaining and the right to strike being likewise excluded, the Court did not hesitate at that point to argue that these rights belong to the proper domain of the European Social Charter¹⁹. But what is interesting to note here is that the refusal to admit the evidence as implications of freedom of association within the meaning of Article 11 appears, in the first judgements of the Court, as the refusal to impose demanding positive obligations upon States in this matter. Indeed, the rationale of these cases is the belief of

¹⁸ A. Grgiæ, Z. Mataga, M. Longar & A. Vilfan, *The right to property under the European Convention on Human Rights, a guide to the implementation of the ECHR*, Human rights handbooks, n° 10, Council of Europe, 2007.

¹⁹ See the two cases referred above.

European judges that « article 11, § 1 does not guarantee any particular treatment of trade unions, or their members, by the State, such as the right to be consulted by it », and if « the members of a trade union have a right, in order to protect their interests, that the trade union should be heard, [this article] certainly leaves each State a free choice of the means to be used towards this end »²⁰. Under these conditions, the change of practice that intervened with the *Demir and Baykara vs. Turkey*²¹ case cannot fail to be credited with the theory of positive obligations. This change can indeed be interpreted as meaning that the European Court finally resolved to impose such obligations to States, seeing that the elements that were hitherto excluded are hence considered as essential components of the freedom of association. Of course, positive obligations are not the only lever of this evolution. One need only read the *Demir and Baykara* case to notice that the interpretation termed consensual, which is based on the convergence of legal systems of the involved States and elements of international law, has played a leading role in the discovery of these new obligations.

Still, as applied in combination with other interpretive resources, to an originally social right or freedom, the method of positive obligations inevitably leads to its deepening, in the manner of freedom of association given here as an example, which includes henceforth not only the right to form trade unions and to join them, but also as successive conquests, that of the right to not join a union, the right to collective bargaining and collective action as right to strike, and maybe tomorrow the freedom of expression of trade unions²².

Such a dynamic is also implemented within the framework of the European Social Charter. Initiated in the context of the original control procedure on State reports, it has fully opened, since 1998, in the favour of the collective complaints procedure. It is interesting to note, though, that the European Committee of Social Rights builds its own approach on the same basis that the European Court of Human Rights. The guiding principle, openly borrowed from the *Airey* judgement, is that the Charter, just as the European Convention on Human Rights, aims to protect rights that are not theoretical,

²⁰ ECHR, 27 oct. 1975, *National union of belgian police vs Belgium*, n° 4464/70, § 38-39 ; and 6 feb. 1976, *Swedish engin drivers' union vs Sweeden*, n° 5614/72, § 39-40. The European Court's judgement is the clearest in another case, called *Wilson, National Union of Journalists and others vs United Kingdom* (2 jul. 2002, n° 30668-30671-30678/96, § 44) : « the Court has consistently held that although collective bargaining may be one of the ways by which trade unions may be enabled to protect their members' interests, it is not indispensable for the effective enjoyment of trade union freedom. Compulsory collective bargaining would impose on employers an obligation to conduct negotiations with trade unions. *The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union.* The union and its members must however be free, in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and the wide degree of divergence between the domestic systems in this field, *the Contracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured* ».

²¹ ECHR, 12 nov. 2008, n° 34503/97.

²² See J.-F. Akandji-Kombé : « Pour un renouvellement de la jurisprudence de la Cour européenne des droits de l'homme relative à la liberté d'expression syndicale – ou la liberté d'expression syndicale, fille de la liberté syndicale », *Droit ouvrier*, may 2013, n° 778, p. 299.

but effective ones²³. It follows, according to the Committee, that « it is necessary to seek the interpretation of the treaty that is most appropriate in order to realise the aim and achieve the object of this treaty, not that which would restrict the Parties' obligations to the greatest possible degree »²⁴. The interpretive dynamics induced by this principle is further accentuated by the orientation which consists, for this European body, in interpreting the provisions of the Charter in light of current conditions²⁵, which brings it to pay particular attention to legal developments in the involved States, to the consensus being developed within the Council of Europe, as well as to the jurisprudence of bodies of other treaties of protection of human rights.

One result of this interpretative approach is precisely to submit the States who are party to the Charter to new positive obligations, corresponding to unprecedented requirements of the rights guaranteed by this text. Thus, for example, the Committee was able to deduce of the right to health, subject of Article 11 of this text, the obligation of States to promote sexual and reproductive health education for children and adolescents, understood « as a process aimed at developing the capacity of children and young people to understand their sexuality in its biological, psychological, socio-cultural and reproductive dimensions which will enable them to make responsible decisions with regard to sexual and reproductive health behaviour »²⁶. It is thus that, from the same right to health was extracted the right to a healthy environment together with a number of highly specific obligations, such as to²⁷:

- develop and regularly update a legislative and regulatory framework on sufficiently developed environmental issues;
- anticipate special provisions (adaptation of equipment, setting emission limits, measurement of air quality, etc.) as much to prevent air pollution at the local level as to contribute to the reduction of atmospheric pollution on a planetary scale;
- ensure effective implementation of environmental standards by appropriate control mechanisms;
- inform, sensitize and educate the public, including in schools, about environmental issues in general and on a local level;
- assess health risks through epidemiological surveillance of populations in question.

Thus also that from the right to housing, families on the one hand (Article 16 of the Charter) and children and adolescents on the other hand (Article 17), the Committee will infer, based on the purpose of economic, social and legal protection of beneficiaries, the

²³ European Committee of Social Rights, 10 sept. 1999, *International commission of jurists vs Portugal*, complaint n° 1/1999.

²⁴ European Committee of Social Rights, 7 dec. 2004, *World organization against torture vs Ireland*, complaint n° 18/2003. See also, in recent case-law the decision *Defence for children international vs Belgium*, 23 oct. 2012, complaint n° 69/2011, § 30.

²⁵ See for example, European Committee of Social Rights, 6 dec. 2006, *Marangopoulos foundation for human rights vs Greece*, complaint n° 30/2005.

²⁶ European Committee of Social Rights, 30 march 2009, *Interrights vs Croatie*, complaint n° 45/2007, § 46.

²⁷ Décision in *Marangopoulos foundation's case*, op. cit., § 203.

obligation for States to ensure, to the benefit of foreign children in an irregular situation, immediate and comprehensive care, covering the needs of both accommodation and means of subsistence, as well as health and education²⁸.

It is also to be observed that this movement of consolidation of social rights guaranteed by the Charter does not happen only through the discovery of new extensions in economic and social matters. This is also accompanied by an attraction of civil rights into the field of social rights as elements inherent to them. The recent case law of the European Committee of Social Rights provides outstanding examples regarding the right to life, the right to a protection of physical integrity and the right to a normal private life. These examples are far from being isolated instances²⁹, especially if we count among civil rights the rights of procedure, through which is organized the guarantee of human rights.

3 – Positive obligations and guarantee of economic and social rights

The contribution of positive obligations to the development of the rights of the European Convention on Human Rights is as much in the field of the guarantee of rights as in terms of their recognition. This is known, even if we have to come back here. We will later wonder about the position of the European Committee of Social Rights in this field.

3.1 – The approach of the European Court of Human Rights

Because it essentially boils down to the formulation of a general obligation for the protection of the rights of the European Convention on Human Rights, and because it aims at the effectiveness of these rights, the jurisprudence of the Strasbourg Court in relation to positive obligations necessarily leads to the subjection of States to certain procedural duties³⁰.

The general spirit of this case-law is to ensure that any violation of the Convention may be punished in the legal systems of member States.

This requires first of all that national law expressly provides for the punishment of acts contrary to the rights guaranteed by the Convention. The Court has recently recalled it in connection to Article 4 of the Convention: States must establish a legislative and administrative framework prohibiting and penalizing forced or compulsory labour, servitude and slavery³¹. It seems that, given the distinctiveness of behaviour prohibited by this Article, the European judge requires States to implement a specific repressive

²⁸ European Committee of Social Rights, *Defence for children international vs Belgium*, 23 oct. 2012, complaint n° 69/2011. See J.-F. Akandji-Kombé : « Travail et protection sociale / Labor and social security (chronique / column) », *Journal européen des droits de l'homme / European Journal of Human Rights*, 2013/3.

²⁹ For more details, see J.-F. Akandji-Kombé : « The material impact of the jurisprudence of the European Committee of social rights », in G. De BURCA & B. De WITTE, *Social rights in Europe*, Oxford University Press, 2005, p. 89.

³⁰ See E. Dubout : « La procéduralisation des obligations relatives aux droits fondamentaux substantiels par la Cour européenne des droits de l'homme », *Revue trimestrielle des droits de l'homme*, 2007/70, p. 397.

³¹ ECHR, *C.N. and V. vs France*, 11 oct. 2012, n° 67724/09, § 105.

mechanism for each of them. Thus it held that the existence of criminal provisions against trafficking in human beings was insufficient in light of the prohibition of slavery, and it went all the way as to require of the United Kingdom the adoption of a specific law criminalizing domestic slavery as an offence³². The same obligation to criminalize obviously applies to cases of injury to life or for acts that constitute abuse.

It then assumes that, within the internal order, ways to necessary solutions should be provided in the case of infringement of rights, of the sort that they may be activated efficiently and in a timely fashion. It should be noted that this obligation enshrined the right to a judge and to an effective judicial procedure in the fields of the substantive rights of the Convention. In other words, this right is a requirement of the right to life, the prohibition of ill-treatment, the prohibition of slavery and forced labour, freedom of association, the right to welfare, etc., regardless of Articles 13 and 6 of the Convention which are known to specifically guarantee, respectively, the right to appeal and the right to a fair trial. It should be added that the sanction by the Court of the State's failure towards the positive obligation to provide a legal procedure can be direct or indirect³³. In the first case, where the Court held that failure in itself constitutes a violation of the Convention, it is often necessary to combine the relevant substantive provision with Article 6. In the second case, the issue of compliance with said positive obligation arises rather at the control stage of the proportionality of an interference with the exercise of the right in question. Thus it is, for example, that seeking the protection of the right to employment on the grounds of Article 8 of the Convention (right to a private life), the Court held that the fact for the measures for professional bans prescribed by law to not be submitted to jurisdictional control raises a presumption of lack of proportionality and thus incompatibility with Article 8³⁴.

Finally, the Court has also come to put in the charge of the States a demanding obligation to investigate, especially when at issue are the rights affecting the life of the person, their integrity and their dignity (Articles 2, 3 and 4 of the Convention). The national authorities are required to conduct in all cases, of their own initiative or in cases of an alleged breach of any of these rights, a survey that would be effective, that is to say meets conditions of independence, promptness and efficiency³⁵.

3.2 - *The approach of the European Committee of Social Rights*³⁶

The jurisprudence of the European Committee of Social Rights on the positive obligations is also underpinned by the desire to ensure the internal effectiveness of the rights protected by the Charter. This fact in itself is remarkable considering that these rights are traditionally considered non justiciable because of their way of formulation. It is true, moreover, that, if we except a few provisions that *recognize* the rights of individuals, and

³² ECHR, *C.N. vs United Kingdom*, 13 nov. 2012, n° 4239/08.

³³ J.-F. Akandji-Kombé, *Positive obligations...*, *op. cit.*, p. 16 & 21.

³⁴ ECHR, 23 march 2006, *Albanese vs Italy*, n° 77924/01.

³⁵ See J.-F. Akandji-Kombé, *Positive obligations...*, *op. cit.*, p. 34.

³⁶ For more details on these issues, see my columns referred to in note n° 4.

thus are likely to be sources of right invoked directly before the national courts, most of the provisions include obligations to do of which the only recipient in the text is the State: the obligation to adopt rules, to recognize, to promote, to encourage, to act in order to achieve an objective, etc.. In addition, many of these obligations present themselves as an obligation of means rather than of results.

In such a context, the need to organize in internal law an effective punishment of violations becomes illusory. In any event, it is insufficient, because between the obligations as set out in the Charter and their realization on the part of individuals there are links missing so that the adopted approach in the context of the European Convention on Human Rights does not allow compensation.

This in no way means that the European Committee of Social Rights is not concerned with the legal guarantee of the rights protected by the Charter. Its jurisprudence even shows just the opposite³⁷, namely that the right to a judge is inherent in most of the rights of the Charter, and that the States are positively required to implement the remedies that these involve, and to organize them with a focus on the effectiveness of the rights in question. But this case cannot be fully understood unless it is put into perspective. Indeed, it is part of an overall construction which tends to make of social rights specific rights, of which the right to a judge is the culmination. The other elements are upstream from here and consist essentially in a resolutely innovative design of obligations to be borne by the State, through a process that can be represented as the construction of missing links necessary to bring the obligations as set out in the Charter to their judicial enforcement.

The first element of this construction lies in the definition of the consistency of the performance obligation. Going against a ints procedure, The European Committee of Social Rights considers that when the Charter requires States to take certain actions, the mere adoption of these is not sufficient. It should be, moreover, that these measures are effectively implemented³⁸. While maintaining this case, the Committee was required to specify the deepening in various subsequent decisions. We find the most complete expression of this position in the case *International Movement ATD-Fourth World vs France*³⁹. Called upon, in this case, to decide the implications for States of the right to housing as enshrined in Article 31 of the Charter, which, it should be recalled, requires them « to take measures designed: to promote access to housing of an adequate standard, to prevent and reduce homelessness with a view to its gradual elimination, to make the price of housing accessible to those without adequate resources », the Committee had to admit that this provision imposes nothing on States but an obligation of result. But, they added immediately that, « rights recognised in the Social Charter taking a practical and effective, rather than purely theoretical, form », it is not merely to require the State to take simple legal action. It must have taken all measures to ensure that they produce the desired effects in practice. This effectively means that the State must:

- implement specific means to allow real progress towards achieving the

³⁷ J.-F. Akandji-Kombé : « The material impact... », op. cit.

³⁸ *International Commission of jurists vs Portugal*, 10 sept. 1999, op. cit.

³⁹ 5 dec. 2007, n° 33/2006, § 58 et s.

objectives assigned by the Charter, which include the adoption of legal measures, the allocation of sufficient resources and organization of procedures that allow full enjoyment of the right in question;

- maintain statistics worthy of that name allowing to tackle needs, resources and results;
- to carry out a regular review of the effectiveness of the strategies adopted;
- to define a set of steps, and not defer indefinitely the assigned deadline for achieving them;
- to pay particular attention to the impact their choices will have on all categories of persons concerned, particularly those whose vulnerability is greatest.

This version of the expected actions of the participant States as a result of any obligation imposed by the Charter which is not of the result is in itself remarkable. It should be especially noted here that it induces in-depth monitoring of compliance with this text. In fact, every element of the list above represents a special register of the assessment of national situations with regard to the Charter. This will serve primarily for the European supervision performed by the European Committee of Social Rights. But this also makes more plausible a national judicial proceeding, particularly in the field of the responsibility of public authorities, where such course of law exists.

The second element of this jurisprudential construction is designed to ensure a better guarantee of the rights contained in the European Social Charter, and which also stems from the implementation of the technique of positive obligations, is the promotion of a form of horizontal applicability of this instrument. The approach here is very special and cannot be reduced to what we are used to within the framework of the European Convention. More precisely, it does not mean to rule immediately upon the direct effect of the Charter in disputes between individuals. The prism is here rather that of the international responsibility of the State. It is considered, as is common in international law, that in ratifying an international treaty the State agrees to be bound by it and should be answerable for all acts of its agents, its bodies, territorial divisions, as well as those of individuals whose behaviour contrary to the Treaty it has not been able to prevent and/or punish. This principle was established for the first time by the Committee in a case where trade unions were accused of undermining the freedom of association protected by Article 5 of the Charter⁴⁰. It has been confirmed several times since, including in the context of an action which has sought the responsibility of the State (Greece) for pollution generated by local and State companies and affecting the health of populations⁴¹. From there it can easily be taken as an implication that the Charter must be respected not only by the State but also by other subjects of legal orders. The difference with the European Convention on Human Rights will however be that it is not possible here to infer the direct applicability of all provisions of the Charter in private relationships. Still, since the implementation of such applicability is impossible, the Committee's jurisprudence sounds like an invitation to at least ensure the applicability of the Charter in the actions aimed

⁴⁰ *Confederation of Swedish enterprise vs Sweden*, 22 may 2003, Complaint n° 12/2002.

⁴¹ *Marangopoulos foundation for human rights vs Greece*, 6 dec. 2006, Complaint n° 30/2005.

against the State, be they illegal actions against its acts or claims for compensation for adverse effects of the Charter's violation by said State or by private persons with its consent or tolerance.

We see from all points of view – consecration of rights or the internal security of these – positive obligations are an iron spear essential for the realization of the effectiveness of economic and social rights in Europe. In this, the method that refers to it is at the forefront of the safest means on the continent to ensure the indivisibility of human rights. It is only necessary to ensure never to disconnect this means from others to which it is, in theory and in practice, inextricably linked.