Social Security as a Human Rights Issue in Europe – *Ramaer and Van Willigen* and the Development of Property Protection and Non-Discrimination under the ECHR

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Abstract

The case of *Ramaer and Van Willigen v. the Netherlands* provides for an interesting starting point for illuminating the development of social security as a human rights issue in Europe. By broadening the scope of the protection of property (Art. 1 P 1 to the ECHR), and because of the "socialization" of the Convention through the prohibition of discrimination (Art. 14 ECHR), the European Court of Human Rights has significantly increased

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its power to review social security cases. This article provides an overview of this development thus far, but also identifies several shortcomings in regard to the Court's property rights protection as well as non-discrimination review. In the field of social security, the Court's interpretation of "possessions" lacks a principled justification and consistent application, leading to deferential review of issues that not always appear fundamental. When it comes to complaints of alleged discrimination, the Court's approach is confused and can be criticized for not always scrutinizing the heart of the matter. Also in the light of the accession of the EU to the ECHR, it is suggested that for Strasbourg review to provide true added value, applying the Convention to all social security issues is not necessarily desirable. A more principled interpretation of property rights will enable the Court to focus on substantial review of those social security issues that are of a fundamental character. At the same time, more tailor-made scrutiny of unequal treatment in social security is likely to help in achieving coherent and where necessary robust European fundamental rights protection.

I. Introduction

Social security regulation is traditionally perceived as a national prerogative par excellence. At the same time social security increasingly has become subject to international rules and coordination. This not only holds true with reference to the European Union level. Various economic and social rights treaties and other international documents deal with social security,[1] but it is the European Court of Human Rights (the ECtHR; the Court) that today regularly engages in the adjudication of national social security issues.[2] Social security and related benefits amount to "possessions" for the purposes of the right to protection of property laid down in the European Convention on Human Rights (the ECHR; the Convention).[3] This means

[1] See, e.g., Art. 22 of the Universal Declaration of Human Rights (UDHR); Art. 9 of the International Covenant on Economic Social and Cultural Rights (ICESCR); Art. 22 of the Revised European Social Charter (RESC); and materials of the International Labour Organisation (ILO). See also Art. 34 of the Charter of Fundamental Rights of the European Union (CFR).

[2] This is evidenced by the Court's "Factsheets", one of which deals with "Social welfare", to be found at <http://www.echr.coe.int>. Note that by using the term "social security" or "social security and related benefits", I refer to a broad category of social advantages, including social insurance, pensions, etc.

[3] *Stec and Others v. United Kingdom,* 6.7.2005 (dec.), Reports of Judgments and Decisions ECtHR 2005-X. See further below, in particular in Section III. 1. See, e.g., *R. C. A. White/C. Ovey*, The European Convention on Human Rights, 5th ed. 2010, 483 et seq.; *K. Kaiser*,

that these benefits nowadays form part of the "classical" fundamental rights acquis protected by the Strasbourg Court. Changes in national social security policies and individual decisions can hence be perceived as interferences with existing property rights, or legitimate expectations thereto. In order to be in compliance with the Convention these interferences need to be lawful and in the public interest, and they have to meet the requirements of proportionality. Also, or even foremost, social security systems need to be in conformity with the principle of non-discrimination.[4]

International coordination and regulation of social security is necessary,[5] but not without problems. EU regulation demands adjustments with budgetary effects that are not always welcomed by the member states. But also the reception of the developing Strasbourg social security case law has not been entirely positive.[6] Whereas economic and social human rights can generally not be the subject of individual human rights complaints,[7] the judgments of the ECtHR are binding for the parties in a case.[8] Moreover, these judgments are said to have *res judicata*.[9] Whereas economic and social rights norms expressly cover this topic,[10] the ECHR does not contain a right to social security.[11] The Convention is a civil and political rights document

in: U. Karpenstein/F. C. Mayer, EMRK Konvention zum Schutz der Menschenrechte und Grundfreiheiten Kommentar, 2012, Art. 1 ZP 1, margin number 17.

[4] *Stec and Others v. United Kingdom* (note 3), para. 55; *R. C. A. White/C. Ovey* (note 3), 555.

[5] Especially in the EU context, cross border movement requires coordination, see, generally, *F. Pennings*, Introduction to European Social Security Law, 5th ed. 2010.

[6] E.g., *M. Bossuyt*, Should the Strasbourg Court Exercise More Self-Restraint? On the extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations, HRLJ 28 (2007), 321.

[7] But see the Optional Protocol to the ICESCR, that allows for individual communications. See <http://www2.ohchr.org>.

[8] Art. 1 ECHR (Obligation to Respect Human Rights); Art. 46 ECHR (Binding Force and Execution of Judgments).

[9] Next to that, some authors speak of the *erga omnes* effect of the Strasbourg case law. Cf. *S. Besson*, The Erga Omnes Effect of Judgments of the European Court of Human Rights – What's in a Name?, in: S. Besson (ed.), The European Court of Human Rights after Protocol 14 – First Assessment and Perspectives, 2011, 125. The effect of the Strasbourg case law, however, differs according to the place and role domestic legal systems accord to the Convention. See *G. Ress*, The Effects of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order, Tex. Int'l L. J. 40 (2005), 359. See also *G. Martinico/O. Pollicino* (eds.), The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective, 2010.

[10] E.g., Art. 9 ICESCR; Art. 22 RESC.

[11] See the Factsheet on Social welfare (note 2). Also, the Court often states explicitly that the Convention does not include a right to acquire property (e.g., *Van der Mussele v. Belgium*, 23.11.1983, ECtHR appl. no. 8919/80, para. 48, and more recently *Lakicević a. O. v. Montenegro and Serbia*, 13.12.2011, ECtHR appl. nos. 27458/06, 37205/06, 37297/06 and 33604/07,

enumerating negatively formulated human rights norms. Yet, by applying the "living instrument" doctrine[12] and through the recognition of multiple positive obligations,[13] the Court has significantly increased its scope over the years.[14] Although the incorporation of social security issues can be explained by the fact that there is no "water-tight distinction" between socio-economic and civil and political rights issues, and understood and applauded in the light of the notion of "indivisible" fundamental rights,[15] applicability of the Convention remains a sensitive issue.[16] If anything, Strasbourg's involvement in questions of social benefits – and the accompanying debates concerning budgetary allocations and policy choices – requires a careful attitude.

The tension between the political character and further internationalization of social security and related issues is also visible in the reasoning of the ECtHR. An interesting example is provided by the recent admissibility decision in the case of *Ramaer and Van Willigen v. the Netherlands*[17] that will form the starting point for this contribution. This case dealt with the effects of the new Dutch health care insurance system for pensioners living abroad. It concerned complaints under the right to protection of property, as the

para. 59) or a right to a pension of a certain amount (e.g., *Kjartan Ásmundsson v. Iceland*, 12.10.2004, ECtHR appl. no. 60669/00, para. 39, and more recently *Maggio a. O. v. Italy*, 31.5.2011, ECtHR appl. nos. 46286/09, 53851/08, 53727/08, 54486/08 and 56001/08, para. 55).

12 *Tyrer v. United Kingdom*, 25.4.1978, Series A No. 26, para. 31. See on the essential commitment of the ECtHR to this doctrine *G. Letsas*, The ECHR as a Living Instrument: Its Meaning and Its Legitimacy, 2012, available at <SSRN: http://ssrn.com or http://dx.doi.org>.

13 E.g., *A. Mowbray,* The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights, 2004; *D. Xenos*, The Positive Obligations of the State under the European Convention of Human Rights, 2011; *M. Klatt*, Positive Obligations under the European Convention on Human Rights, ZaöRV 71 (2011), 691.

14 *J. H. Gerards*, Fundamental Rights and Other Interests – Should It Really Make a Difference?, in: E. Brems (ed.), Conflicts Between Fundamental Rights, 2008, 655, (659 et seq.).

15 See on the idea of indivisibility of human rights and the case law of the ECtHR *I. E. Koch*, The Justiciability of Indivisible Rights, Nord. J. Int'l L. 72 (2003), 3; *I. E. Koch*, Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective, International Journal of Human Rights 10 (2006), 405; *V. Mantouvalou*, Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation, HRLR 13 (2013); *A. E. M. Leijten*, Meergelaagdheid en ondeelbare mensenrechten: de sociaaleconomische bescherming van het EHRM en de mogelijke waarde van kernrechten, Tijdschrift voor Bestuurswetenschappen en Publiekrecht (2013), 95 (in Dutch).

16 E.g., *M. Bossuyt* (note 6). Consider also the more political debates on the ECtHR that are ongoing in various member states such as the United Kingdom and the Netherlands and often concern the far-reaching interpretation of ECHR rights.

17 *Ramaer and Van Willigen v. the Netherlands*, 23.10.2012 (dec.), ECtHR appl. no. 34880/12.

new health care system had the effect that applicants' former health care contracts expired whereby they lost their premiums based entitlements. Moreover, the applicants invoked the prohibition of discrimination, arguing that the health care insurance they could obtain under the new system was not equivalent to that available to Netherlands residents. The ECtHR held the case inadmissible on all counts. Nonetheless, the decision deserves to be looked at more closely, for it reveals some of the intricacies of social security review at the ECHR level. It can form the starting point for a discussion on how we have arrived at the point where virtually all social security benefits are covered by the Convention and it signals the need for a more principled understanding of fundamental property protection in this field.[18] In addition to that, the case shows the reticent and ambiguous approach of the Court in socio-economic matters that concern alleged discrimination. And last but not least, the case provides for an interesting link with the growing interdependence of the EU and the Court of Justice of the European Union (CJEU). In the course of the national proceedings, a preliminary ruling was requested from the CJEU[19] regarding the compliance of the new system with the former European Community Treaty[20] and in particular with European Union Council Regulation 1408/71/EEC.[21] The case thereby serves to highlight certain aspects of the relationship between the EU and the ECHR and brings up the question of the "added value" of Strasbourg review in the field of social security especially after accession of the EU to the Convention.

This contribution will be structured as follows. First, attention will be given to the case of *Ramaer and Van Willigen v. the Netherlands* (II.). After dealing with the facts of the case (II. 1.), the ECtHR's decision of 23.10.2012 will be discussed with respect to both the property as well as the non-discrimination aspects (II. 2.). Thereafter, the case is taken as the starting point for discussing the broader developments related to the adjudication of social security issues as fundamental rights matters in Strasbourg (III.). Attention will be given to the concept of property under the ECHR (III. 1.), as well as to the Convention's protection against discrimination (III. 2.). Together, the discussions of these topics present an image of an evolving European fundamental rights discourse in the field of social security, with

18 Cf. also *A. E. M. Leijten*, From *Stec* to *Valkov*: Possessions and Margins in the Social Security Case Law of the European Court of Human Rights, HRLR 13 (2013).

19 ECJ Case C345-09 (*J. A. van Delft, J. C. Ramaer, J. M. Van Willigen, J. F. van der Nat, C. M. Janssen and O. Fokkens v. College voor Zorgverzekeringen*), ECR 2010, I-9879.

20 Treaty establishing the European Community (TEC), as in force until 1.12.2009.

21 Regulation (EEC) No. 1408/71 of the Council of 14.6.1971 on the application of social security schemes to employed persons and their families moving within the Community.

regard to which some suggestions for improvement are given. Finally, some remarks concerning the development of social security as a human rights issue in an EU-ECHR context will be made (III. 3.), before this article concludes with a summary of its most important findings (IV.).

II. The Case of *Ramaer and Van Willigen v. the Netherlands*

1. Facts

The applicants in the case of *Ramaer and Van Willigen v. the Netherlands* are two Dutch nationals who both enjoy pensions payable under Dutch law and live in Spain and Belgium, respectively. Before 1.1.2006 basic health care in the Netherlands was organized in two separate statutes. The Health Care Insurance Act (*Ziekenfondswet*)[22] established a public health insurance system covering employed persons and pensioners up to a certain income limit, as well as receivers of state benefits. The 1998 Health Insurance (Access) Act (*Wet op de toegang tot ziektekostenverzekeringen 1998*)[23] arranged for access to private insurance for persons not insured under the *Ziekenfondswet*. Private insurers were obliged to provide insurance to eligible persons residing in the Netherlands or elsewhere in the European Union (EU), the European Economic Area (EEA), Switzerland or another state with which the Netherlands had concluded a treaty on social security, as long as Netherlands social security legislation applied to them by virtue of European Union Council Regulation 1408/71/EEC or such a treaty.

On 1.1.2006 the Health Care Insurance Act (*Zorgverzekekeringswet*)[24] entered into force. The dual system was replaced by a single regime covering all. Under the new act, Netherlands residents pay a standard basic premium as well as an income-dependent additional sum to the health care insurer of their choice. Additional private health care insurance is possible, but optional. For retired Dutch nationals who were formerly insured under the private system, who live outside the Netherlands in other European Union Member States, and who are entitled to health care in their state of residence on the basis of European Union council Regulation 1408/71/EEC, Annex VI, heading R, paragraph I, point (a) (ii), the new system had significant consequences. These persons are now required to register with the Health Care Insurance Board (*College voor Zorgverzekeringen*) and pay a

22 Act of 15.10.1964, Stb. (official law gazette) 1964, 392.
23 Act of 1.7.1998, Stb. 1998, 438.
24 Act of 16.6.2005, Stb. 2005, 358.

contribution – which is deducted from their Dutch pensions – for basic health care in their country of residence. They must also register with the Health Care Authority in the country of residence in order for the Dutch authorities to forward their contributions to the competent health care institutions.

In *concreto*, for *Ramaer* and *Van Willigen* this meant that their former private health care insurance contracts expired on 1.1.2006. From that date on, they were entitled to health care in Belgium and Spain, respectively. Both, however, objected to the payment of contributions to the Health Care Insurance Board. They complained that they had to pay higher premiums and contributions under the new system, and that the coverage was reduced as it was now dependent on the basic health care covered by the regimes in Belgium and Spain. Both applicants had had to take out complementary insurance in order to obtain the level of coverage they had until 2006. Their former Dutch insurers had offered them complementary insurance at a significantly higher price than before, so *Ramaer* and *Van Willigen* had decided in favor of complementary insurance in their countries of residence.

Several domestic proceedings were started in order to ensure that no contributions would be levied and that prior contracts would remain in existence.[25] Once the cases of *Ramaer* and *Van Willigen* had reached the Central Appeals Tribunal (*Centrale Raad van Beroep*), this tribunal requested a preliminary ruling from the CJEU to establish whether or not the Health Care Insurance Act was compatible with the European Community Treaty, and in particular with European Union Council Regulation 1408/71/EEC.[26] The CJEU ruled that Arts. 28 and 28a of this regulation did not preclude requiring recipients of a Dutch pension resident in another country of the EU in which they were entitled to health care to pay a contribution, even when they refused to register with the competent institution in their state of residence. Neither did this requirement impede their freedom of residence or freedom of movement,[27] as the applicants had claimed. However, the CJEU held that, in order for the new system to be in compliance with Art.

[25] In total, around 40.000 pensioners found themselves in a situation comparable to that of *Ramaer* and *Van Willigen*. A non-governmental organization, the Foundation for the Protection of the Interests of Netherlands Pensioners Abroad (*Stichting Belangenbehartiging Nederlandse Gepensioneerden in het Buitenland*), represented this group and also took part in the proceedings.

[26] ECJ Case C345-09 (*J. A. van Delft, J. C. Ramaer, J. M. Van Willigen, J. F. van der Nat, C. M. Janssen and O. Fokkens v. College voor Zorgverzekeringen*), (note 19).

[27] Art. 21 (Freedom of Residence) and Art. 45 (Freedom of Movement) of the Treaty of the Functioning of the European Union (TFEU), formerly Art. 18 and Art. 39 TEC, respectively.

21 TFEU, it should – and this was up to the national court to determine – not induce or provide for "an unjustified difference of treatment between residents and non-residents as regards ensuring the continuity of the overall protection against the risk of sickness enjoyed by them under insurance contracts concluded before the entry into force of that legislation".[28] The *Centrale Raad van Beroep*, in separate final decisions on the cases of *Mr Ramaer* and *Mr Van Willigen*, held that this was not the case.[29] Transitional arrangements had been the same for residents and non-residents. Both groups, moreover, were confronted with the fact that no unconditional obligation for private insurers existed to offer insurance complementary to basic cover. That it *de facto* turned out to be harder – and more expensive – for pensioners living abroad to obtain complementary insurance, might in hindsight signal a certain measure of "administrative naiveté", but did not, according to the *Centrale Raad van Beroep*, establish discriminatory intentions.[30]

2. Admissibility Decision of the ECtHR[31]

In Strasbourg, the applicants complained under Art. 1 of Protocol No. 1 to the ECHR (Art. 1 P 1; protection of property) that their entitlements related to the insurance premiums they had paid qualified as "possessions", the peaceful enjoyment of which was interfered with. They also complained under Art. 14 ECHR (prohibition of discrimination) taken together with Art. 1 P 1, as well as under Art. 1 of Protocol No. 12 to the ECHR (Art. 1 P 12; general prohibition of discrimination) that they were the victims of discrimination if compared to Netherlands residents, and moreover that they were treated differently from one another without sufficient justification. In the following, the parts of the decision dealing with the different complaints

[28] ECJ Case C345-09 (*J. A. van Delft, J. C. Ramaer, J. M. Van Willigen, J. F. van der Nat, C. M. Janssen and O. Fokkens v. College voor Zorgverzekeringen*), (note 19), para. 131.

[29] See the separate decisions on the cases of *Ramaer* and *Van Willigen*, CRvB 13.11.2011, LJN (*Landelijk Jurisprudentienummer*, National Jurisprudence Number) BU7125 and LJN BU7135, to be found at <www.rechtspraak.nl>.

[30] The Minister for Health, Welfare and Sport in this regard argued to it was not possible to compel insurers to make an offer for complementary insurance on definite, fixed-tariff conditions, as this would run counter to EU directives on non-life insurance (Directive 73/239/EEC; Directive 88/357/EEC, and Directive 92/49/EEC, as since amended).

[31] *Ramaer and Van Willigen v. the Netherlands* (note 17).

will be presented separately, before the broader developments flagged by the decision are discussed more thoroughly in Section III.[32]

a) Art. 1 of Protocol No. 1 to the ECHR

In order to apply Art. 1 P 1 to the case at hand, the ECtHR first had to take a stance on whether the contracts and premium-based entitlements of the applicants indeed amounted to "possessions".[33] For Art. 1 P 1 to apply there has to be an "existing possession",[34] or, alternatively, a "legitimate expectation" to obtaining effective enjoyment of a property right in respect of certain assets of claims.[35] The applicants likened their former contracts – which were more advantageous to them than the arrangements foisted on them by the new insurance act – to social security arrangements. Yet, although the Court had recognized as "assets" claims under civil law, it held that this case was different.[36] The applicants had paid premiums that entitled them to benefits in the event the insured situation came about. They did not, however, before or on 31.12.2005, have a concrete proprietary claim that was reduced or extinguished after that date. In the context of Art. 1 P 1, legitimate expectations must generally be grounded on legal provisions or acts.[37] In the case of *Ramaer and Van Willigen*, the Court concluded, the applicants' expectations were instead "based on the hope to see their insur-

[32] The applicants also invoked Art. 6 ECHR (fair trial). A discussion of this complaint is beyond the scope of this article.

[33] Art. 1 P 1 reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[34] See also *P. van Dijk/F. van Hoof/A. van Rijn/L. Zwaak* (eds.), Theory and Practice of the European Convention on Human Rights, 4th ed. 2006, 869; *K. Kaiser* (note 3), margin number 11. In the case of *Stran Greek Refinieries and Stratis Andeadis v. Greece*, 9.12.1994, Series A No. 301-B, the Court noted that therefore the right should be "sufficiently established to be enforceable" (para. 59).

[35] "Mere hope" is not enough. See *Prince Hans-Adam II of Liechtenstein v. Germany*, 6.6.2000, Reports of Judgments and Decisions ECtHR 2001-VIII, which concerned the expropriation of a painting of the father of the applicant, in 1946. The right had become non-exercisable and did hence not amount to a "legitimate expectation" (para. 85). See also *Van Dijk et al.* (note 34), 869; *K. Kaiser* (note 3), margin number 11.

[36] *Ramaer and Van Willigen v. the Netherlands* (note 17), para. 79 (referring to *Pressos Compania Naviera S.A. a. O. v. Belgium*, 20.11.1995, Series A No. 332, para. 31).

[37] E.g., *Gratzinger and Gratzingerova v. Czech Republic* (GC), 10.7.2002 (dec.), Reports of Judgments and Decisions ECtHR 2002-XII, para. 49.

ance contracts continued, or renewed, on terms no less favorable for them then those which they enjoyed previously".[38] This could not amount to a "possession" and it followed that the complaint was incompatible *ratione materiae* with the Convention.[39]

This conclusion at first glance suggests that there are clear limits to the ECtHR's property protection in the field of social security. In fact, however, it also shows how far the Court has stretched the concept of "possessions", without providing for a clear justification. This will be explained further in Section III. 1.

b) Art. 1 of Protocol No. 1 in Conjunction with Art. 14 ECHR

In order to argue that the (effect of the) new Act was discriminatory, *Ramaer* and *Van Willigen* first of all invoked Art. 14 ECHR. This article contains the principle of non-discrimination and has an "accessory" character.[40] This means that it only applies in relation to the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention or its Protocols.[41] The Court repeated that, for this to be the case, the facts of a case need to fall "within the ambit" of one of these provisions.[42] Because the complaint under Art. 1 P 1 was held incompatible *ratione materiae* with the Convention, the present constellation did not allow for review. The Court concluded that the Art. 14-complaint was hence *ratione materiae* incompatible with the ECHR as well.[43]

This reasoning differs from how the Court usually deals with the "ambit" of a right for the purposes of applying Art. 14. Generally, in light of the importance of the prohibition of discrimination, it is willing to interpret this ambit as encompassing more than the narrower "scope" of the right at stake.[44] Nevertheless, in this case there still was the discrimination com-

38 *Ramaer and Van Willigen v. the Netherlands* (note 17), para. 81.

39 Art. 34 para. 3 (a) and para. 4 ECHR.

40 Art. 14 reads: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

41 See, e.g., *Chassagnou and Others v. France*, 29.4.1999, Reports of Judgments and Decisions ECtHR 1999-III, para. 89.

42 *Ramaer and Van Willigen v. the Netherlands* (note 17), para. 86.

43 *Ramaer and Van Willigen v. the Netherlands* (note 17), para. 87; Art. 35 para. 3 (a) and para. 4 ECHR.

44 See, for a recent example of a case in which the Court interprets the "scope" more narrow than the "ambit" *Puricel v. United Kingdom*, 14.6.2011 (dec.), ECtHR appl. no.

plaint under Art. 1 P 12 – the Convention's "self-standing" prohibition of discrimination.

c) Art. 1 of Protocol No. 12 to the ECHR

Next to Art. 14, the applicants in *Ramaer and Van Willigen* had also invoked their rights not to be discriminated against under Art. 1 P 12. The applicability of Art. 1 P 12 is not dependent on any other substantive provision of the Convention.[45] Thereby, Protocol No. 12 aims at "broadening in a general fashion the field of application of Art. 14 …".[46] As it explained in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, however, the Court interprets "discrimination" under this article in the same way as under Art. 14 ECHR.[47] In the present case, this meant that after the ECtHR concluded that the applicants were treated differently from Dutch residents, as well as from one another, on the ground of residence,[48] it could continue to assess whether they are in a "relevantly similar position". The applicants argued that this was the case, since under the old regime they had paid the same insurance premiums as pensioners living in the Netherlands. Their premiums had hence (also) benefited Dutch residents. The Court stressed that the old contracts were terminated as of 1.1.2006; the fact that up until that date, others had benefited from the applicants' contributions, was inherent in the nature of private insurance systems, and therefore irrelevant.

Referring to the case of *Carson and Others v. United Kingdom*,[49] the ECtHR underlined the essentially territorial nature of the new Dutch health care system. Since *Ramaer* and *Van Willigen*, who had chosen not to reside on Dutch territory, were "treaty beneficiaries", they were entitled in accor-

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20511/04. Cf. *R. Wintemute*, "Within the Ambit": How Big Is the "Gap" in Art. 14 European Convention on Human Rights?, Part 1, EHRLR 9 (2004), 366 (370).

45 Art. 1 P 12 reads: "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1." See *Ramaer and Van Willigen v. the Netherlands* (note 17), para. 28.

46 Explanatory Report to Protocol No. 12, para. 10, available at <http://conventions.coe.int>.

47 *Sejdić and Finci v. Bosnia and Herzegovina*, 22.12.2009, Reports of Judgments and Decisions ECtHR 2009, para. 55.

48 *Ramaer and Van Willigen v. the Netherlands* (note 17), paras. 92-94.

49 *Carson a. O. v. United Kingdom* (GC), 15.3.2010, Reports of Judgments and Decisions ECtHR 2010, paras. 85-86.

dance with Council Regulation 1408/71/EEC to basic health care in their respective countries of residence. "[A]ccordingly", the ECtHR held, "the applicants are not in a relevantly similar situation to Netherlands residents, or to each other".[50] The upshot of this was that the complaint was manifestly ill-founded.[51]

The question arises whether the Court, by considering that Art. 14 was irrelevant and by applying Art. 1 P 12 in the way just outlined, did justice to the complaint of alleged discrimination that was central to this case (see further Section III. 2. below). This question becomes especially pertinent if one takes account of the EU context in which this case must be viewed. The relation between the EU and ECHR will become more and more intense and this might have effects for the (desired) treatment of social security and non-discrimination matters at both levels. It is hence worthwhile to ask what the Court's approach implies especially in the light of the accession of the EU to the ECHR. What can in fact be expected from the Strasbourg Court regarding complex – national and at the same time European – social security constellations? These questions are addressed in Section III. 3.

III. Moving Beyond *Ramaer and Van Willigen v. the Netherlands*

The inadmissibility of the case of *Ramaer and Van Willigen* might not have come as a surprise. The Strasbourg Court, for understandable reasons, is hesitant to intervene in complicated national social policy issues.[52] Especially the conclusion that the interest complained about did not amount to a "possession" seems to be a defendable one. After all, the applicants had no concrete monetary claims and their expectations were based on private agreements rather than legal provisions or public acts.

At the same time, it is equally unsurprising that *Ramaer and Van Willigen* took their case to Strasbourg, hoping that with the help of their right to protection of property and the ECHR articles prohibiting discrimination this would eventually bring a positive end to lengthy proceedings. Over the past years, the ECtHR has allowed considerable room for the "socialization" of the Convention through the non-discrimination principle.[53] With

[50] *Ramaer and Van Willigen v. the Netherlands* (note 17), para. 101.
[51] Art. 35 para. 3 (a) and para. 4 ECHR.
[52] Cf. *A. E. M. Leijten* (note 18).
[53] *P. van Dijk et al.* (note 34), 1051; *O. Mjöll Arnardóttir*, Discrimination as a Magnifying Lens: Scope and Ambit under Art. 14 and Protocol No. 12, in: E. Brems/J. H. Gerards (eds.),

the help of a broad interpretation of "possessions", social security issues have gained significant Strasbourg attention.[54]

It is interesting to see what developments lie behind the case of *Ramaer and Van Willigen*. In the following, therefore, a broader view will be taken on the development of property protection and non-discrimination under the ECHR in the realm of social security. In presenting this development, moreover, some weaknesses in the Court's practice will become visible. It will be shown that the Court's social security case law is predicated on an unprincipled approach to property protection and that it is confused when it comes to addressing instances of alleged discrimination. Particularly also in the context of the developing relation between the ECtHR and the EU, it is worth bringing these issues to light to allow for future improvements.

1. Property Protection in Social Security and Related Fields

a) A Broad Interpretation of "Possessions" in Cases of Alleged Discrimination

From an early date on, the Committee and the Court were confronted with social security-related matters.[55] In various cases, they had recognized that when contributions had been paid that were directly related to concrete benefits, a proprietary interest could be established.[56] For a long time, however, there was no clear indication that Art. 1 P 1 also applied to non-contributory benefits.[57] In the 2005 admissibility decision in the case of *Stec and Others v. United Kingdom*, the Court "examined the question

Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights, 2013 (forthcoming); *V. Mantouvalou*, Work and Private Life: Sidabras and Dziautas v. Lithuania, E.L.Rev. 30 (2005), 573 (581 et seq.); *A. E. M. Leijten* (note 15), 98 et seq.

[54] See, generally, *A. E. M. Leijten* (note 18).

[55] See, generally, *M. Cousins*, The European Convention on Human Rights and Social Security Law, 2008.

[56] *X v. the Netherlands*, 20.7.1971 (dec.), EComHR appl. no. 4130/69; *Mrs. X v. the Netherlands*, 18.12.1973 (dec.), EComHR appl. no. 5763/72; *Müller v. Austria*, 16.12.1974 (dec.), EComHR appl. no. 5849/72; *Van Raalte v. the Netherlands*, 21.2.1997, Reports of Judgments and Decisions ECtHR 1997-I.

[57] This question especially came up in and after the case of *Gaygusuz v. Austria* (16.9.1996, Reports of Judgments and Decisions ECtHR 1996-IV). There, it was unclear whether the payment of contributions to an employment insurance scheme, or rather the fact that the case concerned an "emergency benefit", was crucial for concluding that the case was admissible.

afresh".[58] The case concerned the UK reduced earnings allowance (REA) and retirement allowance (RA), both funded by general taxation rather than by the National Insurance Scheme. The Court held that:

> In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognize that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right.[59]

The ECtHR stressed that Art. 1 P 1 does not create a right to acquire property, and that the freedom of the state to decide on whether and what kind of social security system it creates is not in any way restricted. But if a state creates a benefits scheme, and regardless of whether this scheme is a contributory or a non-contributory one, "it must do so in a manner which is compatible with Art. 14".[60] This, in the words of the Court, was "[t]he approach to be applied henceforth".

The complaint in *Stec* involved alleged discrimination. *Mrs Stec* was worse off than men in her position who, due to a higher pensionable age for men at that time, would receive the more favorable benefit (REA) until they were 65, rather than 60. Hence, *Stec* was not a "pure" property case. For that reason, it would seem that the application of Art. 1 P 1 was merely instrumental to holding that review under the ECtHR's non-discrimination clause could take place. Generally, in non-discrimination cases the Court is willing to provide a somewhat wider interpretation of the relevant Convention provision than it usually accepts – it is sufficient if the case comes within the wider "ambit" of the relevant Convention right. For Art. 1 P 1 this means that even when strictly speaking there would be no possession, the case can nevertheless fall within the broader "ambit" of the protection of property. Indeed, the Court stressed that the prohibition of discrimination extends "beyond the enjoyment of the rights and freedoms which the Convention and its Protocols require each State to guarantee". Consequently, benefits the state "voluntarily" provides for must at least be non-discriminatory.[61]

This line of reasoning is interesting for two reasons. First, looking at *Ramaer and Van Willigen*, the Court there appeared to be stricter than it

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[58] *Stec and Others v. United Kingdom,* 6.7.2005 (dec.), appl. nos. 65731/01 and 5900/01, Reports of Judgments and Decisions 2005-X, para. 47.

[59] *Stec and Others v. United Kingdom* (note 58), para. 51.

[60] *Stec and Others v. United Kingdom* (note 58), paras. 54-55.

[61] An effect of this rule is the so-called "socialization" of the Convention through the non-discrimination principle (see note 53).

normally is, reasoning that *because* Art. 1 P 1 alone was held not to apply, Art. 14 could also not be tested against. There are various examples of cases in which the first conclusion does not automatically lead to the second.[62] For *Ramaer and van Willigen* it can be argued that the facts at stake fell even outside the "broader ambit" of Art. 1 P 1, or that the Court sidestepped Art. 14 as it preferred reviewing the case under Art. 1 P 12. Nevertheless, it is questionable for the Court to signal an understanding of Art. 14 that does not move beyond Art. 1 P 1 strictly speaking at all, suggesting that the scope of the relevant article always equals its ambit.[63] Secondly, regarding the bigger development of social security protection the non-discrimination character of the case of *Stec* might have implied that the Court's far-reaching interpretation there solely applied to alleged violations of Art. 1 P 1 *combined with* Art. 14.[64] This, as several post-*Stec* cases have shown, turned out not to be the case.

b) Property Protection in "Pure" Property Cases in the Field of Social Security

After *Stec*, both contributory and non-contributory benefits have received fundamental protection by the right to property regardless of whether they were of an allegedly discriminatory nature. This has led to the rapid development of the "Strasbourg social security case law". The issues the Court has dealt with concern for example access to particular social security systems as well as the height of a pension.[65] An interesting example of the applicability of Art. 1 P 1 in "pure" property cases, is the case of *Moskal v. Poland*,[66] which dealt with an erroneously granted early retire-

[62] E.g., *Carson and Others v. United Kingdom*, 4.11.2008, ECtHR appl. no. 42184/05, paras. 70-71; *Puricel v. Romania*, 14.6.2011, ECtHR appl. no. 20551/04, paras. 23, 25.

[63] See further below, in Section III. 2. a).

[64] See, for some interesting examples of the application of *Stec* to cases of alleged discrimination, *Luczak v. Poland*, 27.3.2007 (dec.), ECtHR appl. no. 77782/01; *Luczak v. Poland*, 27.11.2007, ECtHR 77782/01; *Andrejeva v. Latvia*, 11.6.2006 (dec.), ECtHR appl. no. 55707/00; *Andrejeva v. Latvia* (GC), 18.2.2009, Reports of Judgments and Decisions ECtHR 2009; *Carson and Others v. United Kingdom* (note 62); *Carson and Others v. United Kingdom* (GC), 16.3.2010, Reports of Judgments and Decisions ECtHR 2010; *Andrle v. the Czech Republic*, 17.2.2011, ECtHR appl. no. 6268/08; *Stummer v. Austria*, 11.10.2007 (dec.), ECtHR appl. no. 37452/02; *Stummer v. Austria*, 7.7.2011, Reports of Judgments and Decisions ECtHR 2011.

[65] See, e.g., *Luczak v. Poland*, 27.3.2007 (note 64), and *Carson and Others v. United Kingdom* (note 62), respectively.

[66] *Moskal v. Poland*, 15.9.2009, ECtHR appl. no. 10373/05.

ment pension. *Ms Moskal* was granted the pension to take care of her son who was suffering from various diseases. She quit her job and received the pension for ten consecutive months, until the Social Security Board quashed its decision because her son's health condition turned out not to be sufficiently serious to make her eligible for the pension. Poland contested that Art. 1 P 1 extended to erroneously granted benefits, but he ECtHR held that

> [w]here an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Art. 1 of Protocol No. 1 to be applicable.[67]

The Court considered it irrelevant that the benefit was subject to lawful revocation and that *Ms Moskal* was not required to pay back the pension thus far received. According to the Court, a property right had been generated the moment the applicant's dossier was evaluated in a favorable way.[68]

Thus, the scope of the right to property has been seriously extended to cover social security issues, both in combination with the right to non-discrimination and taken on its own. Mostly, however, applicability of the Convention to their case does not bring applicants much. Due to the wide margin of appreciation the Court habitually leaves the states in this area a violation is mostly not found.[69] *Moskal*, however, shows the extent to which the Court can nevertheless intervene. Even though the application of the broad *Stec*-rule was controversial in this case, the Court applied a rather stringent test. It emphasized the "principle of good governance" and eventually held that the revocation of the pension had amounted to a disproportional interference with the applicant's property rights.[70]

Perhaps the *Moskal* case can be understood as an instance of individual hardship that required international human rights protection.[71] The "rule" that follows from *Moskal*, however, is a broad one: whenever states grant any kind of benefit, the termination thereof requires justification in terms of the Convention, and will not easily be acceptable if it causes individual

67 Para. 39.
68 Para. 45.
69 Cf. *M. Cousins*, The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?, Journal of Social Security Law 16 (2009), 118; *A. E. M. Leijten* (note 18). See more generally *K. Kaiser* (note 3), margin number 3. For some examples, see below (note 126).
70 Paras. 68-76.
71 Moreover, the issue at stake seems to concern a structural problem in Poland: recently, the Court has dealt with multiple *Moskal*-like cases, finding several violations. See, e.g., *Czaja v. Poland*, 2.10.2012, ECtHR appl. no. 5744/05, as well as nine other cases from that date and twelve cases from 4.12.2012 (all violations).

hardship. Moreover, even when consequences are not severe and no disproportionate relation between the general and the individual interest is expected to be found, the fact still remains that the Court has obtained the power to review any legislative or administrative interference with benefits once they are granted.[72]

c) The Need for a More Principled Interpretation of the Scope of Art. 1 P 1

The recognition of a proprietary interest in *Ramaer and Van Willigen* would have meant that the Court takes yet another big step in the field of social security-related protection. The applicants based their property complaint not on the fact that they had a concrete monetary claim that existed before the new system came into being. Instead, they complained of potential private claims, or expectations thereto. Should their case have nevertheless been admissible because the state was responsible for the new Act that consequently led to their losses? Holding so might have the result that all legislative action affecting undefined future social security claims stemming from private contracts must be justified by the state under Art. 1 P 1 of the Convention. This would undoubtedly bring to Strasbourg cases the Court is not really equipped for dealing with.[73]

At the same time, the complaint of *Ramaer* and *Van Willigen* would likely have been successful in terms of applicability if they had taken their pensions, rather than their contracts, as the basis of their proprietary claims. Even though they refused to register, the new system implied that a contribution was deducted from their pensions and in various cases the Court allowed interferences with pensions to be reviewed under the Convention.[74]

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[72] Cf. *Iwaszkiewicz v. Poland*, 26.7.2011, ECtHR appl. no. 30614/06 (an issue that was somewhat comparable to that in *Moskal*, albeit the circumstances of the applicant were less severe).

[73] E.g., *J. H. Gerards*, The Scope of ECHR Rights and Institutional Concerns – The Relationship between Proliferation of Rights and the Caseload of the ECtHR, in: E. Brems/J. H. Gerards (note 53); *A. E. M. Leijten* (note 18). This goes with regard to the workload such an interpretation would bring along, as well as the impossibility of a supranational human rights court to engage in certain political or complex issues because it lacks the necessary insight and overview.

[74] See, e.g., *Lakićević and Others v. Montenegro and Serbia*, 23.12.2011, ECtHR appl. nos. 27458/06, 33604/07, 37205/06 and 37207/06 (dealing with the suspension of pensions); *Valkov and Others v. Bulgaria*, 25.10.2011, ECtHR appl. nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05 (on the capping of pensions).

However, looking at these precedents, this would presumably not have led to a finding of a violation.[75]

At any rate, due to the very broad understanding of property rights in the field of social security it could be expected that the applicants would frame their complaint in terms of Art. 1 P 1. There was all the more reason for doing so since the Court occasionally ignores the question of the scope in the case at hand. Now and then, it refrains from deciding whether a social security case involves "property" and simply "assumes" that Art. 1 P 1 is applicable.[76] The conclusion is then often that "in any case" the interference – with what exactly remains unclear – was not disproportionate.[77] Hence, what we are confronted with is a body of property rights case law that has expanded significantly into the field of social security, the outer borders of which however remain undetermined. An unclear definition of the scope of Convention guarantees is undesirable.[78] Moreover, the relative opaqueness of the precise reach of Art. 1 P 1 might signal the want of a principled justification underlying the extension of this article into the field of social security.

Obviously, the connection between "property" and social security benefits is not a natural one. Perhaps it can be held that the first is an indispensible means for self-development, and the latter a modern instrument for achieving this goal.[79] The difference is however that social security often

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75 In *Valkov and Others v. Bulgaria* (note 74), the Court stressed "the fact that the applicants were obliged to endure a reasonable and commensurate reduction rather than a total loss of their pension entitlements" (para. 97).

76 See, *Sali v. Sweden*, 10.1.2006 (dec.), ECtHR appl. no. 67071/01; *Maggio a. O. v. Italy* (note 11), para. 59; *Valkov and Others v. Bulgaria* (note 74), paras. 87 and 113; *Stürmer v. Germany and other applications*, 6.11.2012 (dec.), ECtHR appl. no. 49372/10, para. 28.

77 E.g., *Valkov and Others v. Bulgaria* (note 74), paras. 87 and 113.

78 It can be argued that a very broad interpretation of "possessions" for purposes of the Convention – or even avoiding the possessions question – "does not hurt", as the Court only finds a violation when something is, even taking into account an often wide margin of appreciation, disproportionate. This does not hold true as individuals as well as states need to know how far fundamental rights reach, if only to ensure that at the national level, the utmost can be done to prevent cases from ending up in Strasbourg. See, generally on the importance of a clear definition of the scope of Convention rights, *J. H. Gerards/H. C. K. Senden*, The Structure of Fundamental Rights and the European Court of Human Rights, International Journal of Constitutional Law 7 (2009), 619; on the need for a more "constitutional" interpretation see *S. Greer/L. Wildhaber*, Revisiting the Debate about "constitutionalising" the European Court of Human Rights, HRLR 12 (2012), 655 (cf. also *L. Wildhaber*, A constitutional future for the European Court of Human Rights?, HRLJ 23 (2002), 161).

79 Historically, it was *Locke* who posited "property" next to "life" and "liberty"; it thereafter was taken up in the *Déclaration des droits de l'homme et du citoyen* of 1789, considered of major importance by the founding fathers of the United States Constitution of 1787, and gained importance in legal philosophy as an indispensible means for self-development. Cf. *J.*

does not require the performance of contributions and creates public law based positions that are at the same time a burden for the public purse and subject to continuous political debate and alteration.

In the landmark case of *Stec*, the Court sought to give reasons for abolishing the distinction between contributory and non-contributory benefits.[80] An unequivocal and legitimate aim of the extension was first of all the applicability of Art. 14. The Court in this regard emphasized that it wanted to avoid "inequalities of treatment based on distinctions which, at the present day, appear illogical or unsustainable". Another reason given in *Stec* was the importance of interpreting Art. 1 P 1 in line with Art. 6 (fair trial; covering "the determination of civil rights and obligations"), which was held to apply to non-contributory benefits as well. Also, limiting the interpretation of "possessions" to contributory benefits would appear increasingly artificial given that in different states benefits are organized and funded in very different ways.

Notably, none of these reasons really deals with the question what we can and cannot call "possessions". This while the Court's task here is interpreting what is meant by the "peaceful enjoyment of" the value-laden term "property". Whether this can be done on the basis of the interpretation of the Convention's fair trial requirement must be doubted. Except for a short reference to the fact that non-contributory benefits are often tax-funded,[81] it remains unclear what exactly constitutes their proprietary character.

Certainly, the Court has always held that it interprets "property" in an "autonomous" manner.[82] It does explicitly not look to what this notion implies in terms of national civil rights positions. But what then is the Court's

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Locke, Two Treatise of Government, P. Laslett (ed.), 1988, 138. *R. Çoban* puts it as follows: "Both use and exchange values of property constitute opportunities for individuals to plan and shape their lives (autonomy argument). A system of private property also promotes individuality and self-representation (personality argument)", Protection of Property Rights within the European Convention on Human Rights, 2004, 255.

[80] *Stec and Others v. United Kingdom* (note 58), para. 47 et seq. See also *A. Peters/T. Altwicker*, Europäische Menschenrechtskonvention: Mit rechtsvergleichenden Bezügen zum deutschen Grundgesetz, 2nd ed. 2012, 231 et seq.

[81] *Stec and Others v. United Kingdom* (note 58), para. 50: "Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter [non-contributory, IL] type of system also contribute to its financing, through the payment of tax." It would however be unconvincing to say that anything paid for through tax-money, amounts to individual possessions.

[82] *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23.2.1995, Series A No. 306-B, para. 53; *R. C. A. White/C. Ovey* (note 3), 481 et seq. See, on the pros and cons of autonomous interpretation, *J. H. Gerards*, Judicial Minimalism and "Dependency": Interpretation of the European Convention In a Pluralist Europe, in: M. van Roosmalen et al. (eds.), Fundamental Rights and Principles, 2013, 73, Section 2.

point of reference when it determines the scope of Art. 1 P 1? On the one hand, the Court's autonomous approach might indeed be based on its particular supranational task. The Court is dealing with 47 member states with different social security systems. Distinguishing between contributory and non-contributory benefits, for example, could then mean that individuals in different states obtain different degrees of fundamental rights protection, according to the way their state arranged the funding of certain benefits.[83]

A different rationale could be that social security benefits amount to possessions because they are deemed to form important sources of income on which numerous individuals are dependent. In both *Stec* and *Moskal* the Court underlined that many individuals depend "for survival" on social benefits,[84] and that recipients should hence be provided with some security concerning the assistance granted by the state.[85] This seems to suggest that the Court's autonomous interpretation is based on the function of social benefits to meet individuals' most pressing needs.[86] Interference with such benefits, according to this reasoning, could then lead to serious human rights violations. The question is however whether *all* social security benefits indeed serve this fundamental aim.

It seems fair to hold that the Court is interpreting property in an instrumental way. This means that we need not wait for the Court to present a distinct theory of what is "property". At the same time, it does not justify the unwillingness of the Court to determine the "possessions question" in certain cases, if only because this makes the application of the Convention unpredictable and appear arbitrary.

Given the current lack of clarity and in line with the autonomous path the Court has been taking so far, it seems that two more principled – or at least consistent – approaches towards understanding social security as possessions are possible. First, the Court could stick to the "state benefit equals property" rule, expressly applying Art. 1 P 1 also to those cases concerning democratically legitimate and minor interferences and/or benefits that at most have an "accessory" character. Whatever the state grants is then con-

83 At the same time, the "socialization" of the Convention (see note 53) is dependent on what a given state provides and hence provides for a measure of differentiation.

84 *Stec and Others v. United Kingdom* (note 58), para. 51.

85 *Moskal v. Poland* (note 66), para. 39.

86 This, according to the Court, is also the reason why social security benefits do attract Convention protection, whereas claims relating to "compensation schemes" categorically do not. See, e.g., *Epstein a. O. v. Belgium*, 8.1.2008 (dec.), ECtHR appl. no. 9717/05; *Associazione Nazionale Reduci Dalla Prigionia Dall'Internamento e Dalla Guerra di Liberazione and 275 Others v. Germany*, 4.9.2007 (dec.), ECtHR appl. no. 45563/04; *Ernewein a. O. v. Germany*, 12.5.2009 (dec.), ECtHR appl. no. 14849/08; *Sfountouris a. O. v. Germany*, 31.5.2011 (dec.), ECtHR appl. no. 24120/06.

sidered to fall within the reach of the Strasbourg concept of "property", which is relatively easy to determine and means that in no case the scope question has to be left unanswered.[87]

The second possible option is that the Court acknowledges that reviewing every issue concerning state benefits is not the proper task of an overburdened human rights court,[88] and that it recognizes that this is not what property rights – even as autonomously interpreted human rights guarantees – are meant to protect. Rather than including all benefits, the starting point could then be that property protection in the field of social security is only provided when "core" benefits are at stake that are related to imminent needs or basic means of subsistence and a disproportionate interference with which would in fact lead to violation of someone's most fundamental, human rights. The latter option requires developing a nuanced body of case law on the scope of property protection that is aided, at least, by a principled starting point.

It might be held that delineating the scope of property in this way will have the effect that severe individual circumstances do not obtain the international protection they deserve. This view is not supported here. It is of the utmost importance that the Court defines the rights it protects in a principled way.[89] Moreover, cases falling outside a narrower interpretation of "possessions" in the field of social security, but that are nevertheless very serious, will likely obtain protection via other Convention rights.[90]

2. Non-Discrimination and Protocol No. 12

a) The Aim of Art. 1 of Protocol No. 12 and Its Significance Thus Far

Besides the property issue, also the Court's dealing with the discrimination complaints in *Ramaer and Van Willigen* attracted attention. Moving from the difficult issue of the scope of "property" to the Court's approach

87 Indeed, this approach implies that also benefits stemming from compensation schemes (cf. note 86) trigger Convention review.

88 The ECtHR is a supranational court, and not a "court of fourth instance". It is not an administrative court, capable of reviewing any social security decision, but a court that provides a safety net when, in human rights matters, the state is not fulfilling its duties. As is well-known, moreover, the Court is struggling with an enormous backlog; on 31.1.2013, 126,850 cases were pending, see <http://www.echr.coe.int>.

89 See, generally, *J. H. Gerards/H. C. K. Senden* (note 78), and *S. Greer/L. Wildhaber* (note 78).

90 *A. E. M. Leijten* (note 18), Section 4.

to non-discrimination, it must first be stressed that also when in social security issues Art. 1 P 1 is interpreted in a narrower way, this does not necessarily imply that the protection against discrimination is or should be limited as well. This first holds true for Art. 14, that after all looks at the "ambit" of the other substantive rights and can thereby take as the starting point that all "property-*related* issues", i.e., issues concerning any kind of state-granted benefit, allow for review under the Convention. Such an interpretation moreover is strengthened by the rationale underlying Art. 1 P 12. This article was explicitly created in order to broaden the scope of the guarantee of equality under the Convention. Ultimately, this can make a broad interpretation of Art. 14 in social security cases superfluous. So long as Art. 1 P 12 is only ratified by few member states, however, it would be unwise to limit the potential application of Art. 14 – as was done in *Ramaer and Van Willigen* – rather than utilize it for reviewing a wide range of instances of alleged discrimination.[91]

Secondly, especially as regards Art. 1 P 12 a limited understanding of "pure" property protection does not imply that the Court has only limited powers to review unequal treatment in relation to social security. Already since the 60s there has been discussion on the incorporation of extra non-discrimination guarantees into the Convention. After being initiated in 1998, in 2005 – following the tenth ratification – Protocol No. 12 entered into force, containing an independent non-discrimination provision.[92] Today, 37 out of 47 member states have signed P 12, out of which only 18 have ratified it as well.[93] This reluctance can be explained by the concern that the

[91] Moreover, P 12 will not apply to the EU once it accedes to the Convention. Also for that reason it is important to stress the potential of Art. 14. See further on the effects of accession below, Section III. 3.

[92] On Art. 1 P 12 generally, see *O. Mjöll Arnardóttir*, Equality and Non-Discrimination under the European Convention on Human Rights, 2003, 33 et seq.; *U. Khaliq*, Protocol 12 to the European Convention on Human Rights: A Step Forward or a Step Too Far?, Public Law (2001), 457; *L. Clardige*, Protocol 12 and Sejdić and Finci v. Bosnia and Herzegovina: A Missed Opportunity?, EHRLR 16 (2011), 82; *S. Trechsel*, Überlegungen zum Verhältnis zwischen Art. 14 EMRK und dem 12. Zusatzprotokoll, in: R. Wolfrum (ed.), Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz, 2003, 119; *R. Wintemute*, Filling the Art. 14 "Gap": Government Ratification and Judicial Control of Protocol No. 12 ECHR, EHRLR 9 (2004), 484; *S. Besson*, Evolutions in Non-Discrimination Law within the ECHR and ESC Systems: It Takes Two to Tango in the Council of Europe, Am. J. Comp. L. 60 (2012), 147; *R. C. A. White/C. Ovey* (note 3), 567 et seq.; *P. Van Dijk et al.* (note 34), 989 et seq.; *H. Sauer*, in: U. Karpenstein/F. C. Mayer (note 3), Art. 1 ZP XIII.

[93] See <http://conventions.coe.int>.

Protocol increases to a large extent the power of the ECtHR to intervene with member state policies in different areas.[94]

From the Explanatory Report it follows that the "additional" scope of Art. 1 P 12 concerns cases where a person is discriminated against

> i. in the enjoyment of any right specifically granted to an individual under national law;
>
> ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
>
> iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
>
> iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).[95]

Yet, regardless of this generous scope of application, "[t]he meaning of the term 'discrimination' in Art. 1 is intended to be identical to that in Art. 14 of the Convention".[96] This was confirmed in *Sejdić and Finci v. Bosnia and Herzegovina*[97] and means, first of all, that not every instance of differential treatment amounts to discrimination. Only when a distinction or classification concerns sufficiently analogous situations and has no "objective and reasonable justification", it will be held to violate Art. 14 (and Art. 1 P 12). As was established as early as in 1968, this will be the case when the distinction does not pursue a "legitimate aim", or lacks a "reasonable relationship of proportionality between the means employed and the aim sought to be realized".[98]

Next to *Sejdić and Finci v. Bosnia and Herzegovina*, only few cases concerning Art. 1 P 12 have thus far led to a judgment of the Court.[99] In these cases, moreover, the ECtHR found it not necessary to examine the Art. 1 P 12 complaint separately as it had already concluded on a violation of Art. 14.[100] Also the fact that a lot of complaints under Art. 1 P 12 have been declared inadmissible, indicates that the fear for a significant increase in Stras-

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94 Another explanation is the possible horizontal effect of P 12. See the Explanatory Report to Protocol No. 12, para. 24 et seq., available at <http://conventions.coe.int>.

95 Explanatory Report to Protocol No. 12, para. 22.

96 Explanatory Report to Protocol No. 12, para. 18.

97 *Sejdić and Finci v. Bosnia and Herzegovina* (note 47), para. 55.

98 See, e.g., *Chassagnou and Others v. France* (GC), (note 41), para. 91; *Serife Yigit v. Turkey* (GC), 2.11.2010, ECtHR appl. no. 3976/05, para. 67.

99 *Savez Crkava "Riječ Života" a. O. v. Croatia*, 9.2.2010, ECtHR appl. no. 7798/08; *Vučković a.O. v. Serbia*, 28.9.2012, ECtHR appl. no. 17153/11 (and 29 others).

100 *Savez Crkava "Riječ Života" a. O. v. Croatia* (note 99), para. 115; *Vučković a. O. v. Serbia* (note 99), para. 89.

bourg intervention has not yet materialized. From the point of view of the protection of discrimination, however, the picture thus far is less assuring.

b) The Need for a More Sound Non-Discrimination Approach

It must be appreciated that the Court attaches value to a coherent interpretation of discrimination under both Art. 14 and Art. 1 P 12. At the same time, this means that difficulties that have become apparent in the (social security) case law concerning Art. 14 are likely to show up in the Court's reasoning regarding Art. 1 P 12 as well. Over the years, several aspects of the Court's non-discrimination approach have been criticized.[101] In particular, the comparability ("relevantly similar position") test has been subject to critique.[102] Again, the case of *Ramaer and Van Willigen* serves as an illustrative example.

The question of whether relevantly similar positions were at stake proved fatal for the applicants in *Ramaer and Van Willigen*. The ECtHR held that as they were "treaty beneficiaries", they were not in a comparable position to Netherlands residents, or to each other. Indeed, it is clear that the situations of the applicants were not entirely similar. Why exactly they were not *relevantly* similar for the purposes of this specific non-discrimination complaint nevertheless remains unclear.[103] It can be said that the level of abstraction chosen has a great impact on the comparability test. Stressing the comparability test moreover makes that the standard of measure is even likely to determine the outcome of a case. To the contrary

> little or varying emphasis on the comparability test as something the applicant must establish before objective justification scrutiny takes place leads to the situation that the treatment complained of can be reviewed for objective justification scrutiny irrespective of the existence or non-existence of a clear reference group.[104]

Such "objective justification scrutiny" seemed to be requested by the CJEU – and carried out by the Dutch Central Appeals Tribunal – in the

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101 See, generally, e.g., *O. Mjöll Arnardóttir* (note 92), 15; *M. Cartabia*, The European Court of Human Rights: Judging Nondiscrimination, ICON 9 (2011), 808. Particularly with regard to the grounds of discrimination, *J. H. Gerards*, The Discrimination Grounds of Art. 14 of the European Convention on Human Rights, HRLR 13 (2013), 99 et seq.

102 *O. Mjöll Arnardóttir* (note 92), 126 et seq.; *J. H. Gerards*, Judicial Review in Equal Treatment Cases, 2005, 127 et seq.

103 Cf. *J. H. Gerards* (note 102), 128 et seq.

104 *O. Mjöll Arnardóttir* (note 92), 127.

cases of *Ramaer* and *Van Willigen*. The ECtHR, however, did not get to that point but barred itself from further investigating the issue by holding that the respective situations are not relevantly similar. This might not only have been disappointing for the applicants, but also more generally brings up the question of what exactly is added by supranational attention for issues like these.[105] Although reviewing the merits of a complex non-discrimination complaint is not an easy task, it seems to be exactly that what a human rights court aiming at the furtherance of more general non-discrimination goals needs to do.

Another aspect that briefly deserves attention is the Court's use of the margin of appreciation in non-discrimination cases. The doctrine of the margin of appreciation is as much inherently part of the Strasbourg supranational take on fundamental rights protection, as it is criticized for being vague and uncontrolled.[106] A specific problem with regard to cases of alleged discrimination is that the suspect character of a distinction often contradicts the margin that is nevertheless granted. The Court stresses that "a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy",[107] while it at the same time considers that distinctions on suspect grounds (e.g., sex, nationality, or sexual orientation[108]) require "very weighty reasons" as justification.[109] How can both be reconciled? It is often unclear why in a given case the very weighty reasons-requirement or instead the wide margin prevails.

All in all, several aspects of the Court's non-discrimination approach, not least for purposes of the smooth and effective development of Art. 1 P 12,

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105 See further below, in Section III. 3.

106 See, on the margin of appreciation doctrine, e.g., *Y. Arai-Takahashi*, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, 2001; *E. Brems*, The Margin of Appreciation Doctrine in the Case-Law of the European court of Human Rights, ZaöRV 56 (1996), 240. For critique on (the use of) the margin of appreciation, see *G. Letsas*, A Theory of Interpretation of the European Convention on Human Rights, 2007, 80 et seq.; *J. H. Gerards*, Pluralism, Deference and the Margin of Appreciation Doctrine, ELJ 17 (2011), 80; *J. Kratochvíl*, The Inflation of the Margin of Appreciation by the European Court of Human Rights, NQHR 29 (2011), 324; *M. Cousins* (note 69), 131 et seq.

107 E.g., *Stec a. O. v. United Kingdom* (GC), 12.4.2006, Reports of Judgments and Decisions ECtHR 2006-VI, para. 52; *Andrle v. the Czech Republic* (note 64), para. 50.

108 See, for a more exhaustive list, *D. J. Harris/M. O'Boyle/E. P. Bates/C. M. Buckley*, Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights, 2nd ed. 2009, 590 et seq. Differential treatment for these "suspect categories" will result in stringent review and hence some evidence of alternatives will easily lead to a condemnation of the way the State acted. See also *J. H. Gerards* (note 102), 201 et seq.

109 E.g., *Stec a.O. v. United Kingdom* (GC) (note 107), para. 52; *Andrle v. the Czech Republic* (note 64), para. 49.

demand improvement. It is true that the Court's task in the field of social security is a limited one that will have to remain characterized by considerable deference towards states. This should not, however, result in the Court's hiding behind the question of comparability or "general" margins of appreciation. In the field of social security, the aim of the Court's non-discrimination instruments, and especially Art. 1 P 12, will only be achieved when it starts working on a more robust, and perhaps also better tailored approach.

3. The Relation EU-ECHR and Social Security Related Issues

a) Accession of the EU to the ECHR and Potential Consequences

Having discussed the development of property protection and non-discrimination under the ECHR in the field of social security, this final Section is devoted to the nexus between the EU and the ECHR. As the relation between the CJEU and the ECtHR intensifies, different challenges appear. This goes in particular also for the sphere of social security. The ECtHR is – compared to the CJEU – a relative newcomer in the field of social security, whereas the EU already for decades (indirectly) engages in coordination and regulation in this area.[110] The EU, on the other hand, is setting the first substantive steps on the path towards becoming an important human rights player, thereby looking up to the "human rights expert" Strasbourg and its well-developed case law. Part of the ECtHR's task is hence the guidance of the EU on matters of fundamental rights protection.[111] Especially, moreover, when the EU becomes subject to Strasbourg procedures due to its accession to the Convention, the ECtHR is expected to provide added value for victims of alleged human rights violations. But to what extent can the ECtHR perform this role in the context of complicated social security issues?

The Treaty of Lisbon and Protocol No. 14 to the ECHR lay the legal basis for the accession of the EU to the ECHR.[112] Since 2010, negotiations

[110] Generally, *F. Pennings* (note 5).

[111] Cf. Art. 53, para. 3 CFR: "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

[112] Art. 6 para. 2 TEU; Art. 17 P 14, amending Art. 59 of the ECHR (the new para. 2 now reads: "The European Union may accede to this Convention"). See, for some recent articles

have been on-going between the European Commission and the Council of Europe's Steering Committee for Human Rights (CDDH).[113] Last year it was decided that these should be rounded up "without delay"[114]; this April the Draft Agreement was finally finalized.[115] Several procedural aspects – concerning for example the co-respondent mechanism[116] – continue to pose intricate questions and ratification might still take a while.[117] Important here, however, is to ask what the material effects will be of accession of the EU to the ECHR in the field of social security.

In a recent article, *Pennings* discussed what accession would mean in particular for "non-discrimination on the ground of nationality in the area of social advantages".[118] In the context of the EU, non-discrimination provisions generally only apply to non-EU nationals if these are legally resident on the territory of an EU member state and the situation is not confined to a single member state. The ECtHR does not distinguish between EU and non-EU citizens. As was indicated above, distinctions in social security made on the suspect ground of nationality, in principle demand "very weighty reasons", regardless of whether the disadvantaged person is a citizen or a non-citizen (e.g., a third-country national holding a residence permit).[119] According to *Pennings* this could have the effect that the Strasbourg Court "decides that EU law, e.g. the exclusion of non-EU nationals from

on the accession, e.g., *T. Lock*, Walking on a Tightrope: the Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order, CML Rev. 48 (2011), 1025.; *M. Kuijer*, The accession of the European Union to the ECHR, Amsterdam Law Forum 3 (2011), 17; *J. Jacque*, The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms, CML Rev. 48 (2011), 995; *A. Ciucă*, On the Charter of Fundamental Rights of the European Union and the EU accession to the European Convention on Human Rights, Eastern Journal of European Studies 2 (2011), 57; *A. Weiss*, EU Accession to the European Convention on Human Process: The State of Play and the Added Value for Victims of Human Rights Violations in Europe, EHRLR 17 (2012), 391; *C. Eckes*, EU Accession to the ECHR: Between Autonomy and Adaption, M.L.R. 76 (2013), 254; *M. Konstantinos*, The Framework for Fundamental Rights Protection in Europe under the Prospect of EU Accession to the ECHR, Journal of Politics and Law 6 (2013), 64.

113 See, e.g., <http://www.coe.int>.

114 Steering Committee for Human Rights (CDDH), Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights (CM/Del/Dec(2011)1126/4.1, CM(2011)149).

115 See <http://www.coe.int>.

116 See Art. 3 of the Draft Agreement.

117 Before ratification by the parties to the ECHR, the CJEU will be asked to give its opinion, and the Council of the EU will unanimously have to agree.

118 *F. Pennings*, Non-Discrimination on the Ground of Nationality in Social Security: What Are the Consequences of the Accession of the EU to the ECHR?, Utrecht Law Review 9 (2013), 118.

119 Cf. *Luczak v. Poland*, 27.11.2007, ECtHR 77782/01, para. 48; *Andrejeva v. Latvia* (GC), 18.2.2009, (note 64), para. 87.

the coordination regulation, from Regulation 492/11 or from the application of Art. 18 TFEU, has to be well reasoned".[120] He considers that when this is the case, economic reasons used within the EU context might not satisfy the Strasbourg human rights court.

The issue highlighted by *Pennings* forms an interesting example of where EU accession to the ECHR can bring to light divergent approaches and demands adjustment in the sphere of social security regulation.[121] That such examples are indeed on hand is a direct consequence of the broader "scope" of the protection of discrimination under the ECHR. The Convention has one – and with Art. 1 P 12, two – *general* prohibitions of discrimination. In the EU context multiple, often narrowly defined equality guarantees are available in primary as well as secondary EU law.[122] Some of these are of a general character, but others only relate to specific grounds of discrimination and apply to specific policy contexts. Think for example of Art. 45 TFEU, ensuring the free movement of workers and non-discrimination in the area of working conditions. In the field of social security Regulation 883/2004/EC prohibits discrimination on the ground of nationality.[123] That the broader scope of the Convention's non-discrimination guarantees automatically means that Strasbourg adjudication has a clear added value is however not a given. Also on the basis of what this article has discussed so far, two related reasons can be brought up that argue against this conclusion.

First, the Convention's non-discrimination provisions might have a broad applicability, yet this does not say much in terms of protection offered. There are indeed only few differential treatment issues that automatically fall outside the scope of the ECHR. Moreover, the list of grounds of discrimination is a long, if not exhaustive one.[124] Nevertheless, the image alters from that point on: as became clear in the case of *Ramaer and Van Willigen*, the "relevantly similar position" requirement can form a hurdle that is hard to jump. Also the fact that the "wide margin" is never far away when socio-economic issues are discussed, makes that the review of instances of alleged discrimination is not always as straightforward as it might seem. If the ECtHR reaches the point of scrutinizing the merits of the case

120 *F. Pennings* (note 118), 133 et seq.

121 Important to note is, however, that after the accession P 12 will not apply to the EU, at least not as long as this Protocol is not ratified by all EU member states.

122 Cf. *S. Besson*, Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?, HRLR 8 (2008), 647 (653 et seq.).

123 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29.4.2004 on the coordination of social security systems, Art. 4 (Equality of Treatment).

124 See, e.g., *J. H. Gerards* (note 101), 104.

in the first place, the question whether the differential treatment was prohibited depends on whether there was a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".[125] Even when social security treatment is clearly different, this proportionality test often leads to the conclusion that a violation is not found.[126] Thus, a broad scope of property protection does not equal broad protection. The same goes, moreover, for the protection under Art. 1 P 1. Leaving aside the question of whether this is desirable in the first place, the inclusion of virtually all benefits as "possessions" does not imply that Strasbourg always provides substantial fundamental rights protection.[127]

Secondly, regardless of the broad scope of Art. 1 P 1, Art. 14, and Art. 1 P 12, review of property and non-discrimination cases starts from general rules that are not necessarily tailored to social security issues. At the EU level, different provisions are written for and explained by taking into account a specific policy field. One example is provided by the CJEU's case law concerning students' rights to obtain maintenance grants similarly to domestic students while studying abroad. In this context, it elaborated that states may ensure that the grant of such assistance does not become an unreasonable burden, and therefore limit it to students who have demonstrated "a certain degree of integration".[128] In this way, it allows for substantial scrutiny of unequal treatment with the help of viewpoints relevant for the issue at hand.

Especially given the broad scope of Convention guarantees, the ECtHR might also be aided by viewpoints like these. Of course, the ECtHR takes into account the circumstances of the case and sometimes seems to identify criteria informing the proportionality test, but it does for example not decide on the susceptibility of grounds or the comparability issue based on specific rules it has developed for the context of pensions or other benefits. The Strasbourg margin of appreciation is "generally wide" when matters concern economic and social policy, but this does not mean that it is tailor-made for specific material issues. While a case-by-case approach might make the Court's case law less consistent and predictable, a more sophisticated use of additional rules that apply in a distinct area might create a more

125 See above (note 98).

126 Some examples are *Stec a. O. v. United Kingdom* (GC) (note 107); *Carson a. O. v. United Kingdom* (GC), 15.3.2010, Reports of Judgments and Decisions ECtHR 2010; *Andrle v. the Czech Republic* (note 64); *Stummer v. Austria* (note 64); *Valkov and Others v. Bulgaria* (note 74).

127 Cf. *A. E. M. Leijten* (note 18).

128 ECJ Case C209-03 (*Bidar*) ECR 2005, I-2119 – *Bidar*. Cf. also ECJ Case C-158/07 (*Jacqueline Föster*) ECR 2008, I-8507.

fitted and principled approach.[129] In other words: lacking such customized rule-like tools, the ECtHR is and will remain rather hesitant to provide substantial review in the field of social security.

b) Between Deferential Review and the Demand for "Added Value"

In fact, the expectedly limited added value of Strasbourg review after EU accession in the field of social security is nothing new. After all, also when the ECtHR deals with national social security laws and decisions, it cannot but admit that it is no expert in this field and that at least some leeway must be given to the states in this respect (as well as, implicitly, to EU law). A broad interpretation of "property" or "differential treatment" does not compensate for the "narrowness" of the ECtHR's authority. This court, after all, is a human rights court, with leading expertise in that field, but it is not fully knowledgeable when it comes to the broad range of policy issues that comes before it. The EU instead, works towards clear (economic) goals in the light of which it can more easily reach conclusions on how certain issues must be dealt with or interpreted. Moreover,

> [t]he European institutions, including the Court of Justice in Luxembourg, were given a mandate to unify the laws of Europe. The Strasbourg court, on the other hand, has no mandate to unify the laws of Europe on the many subjects which may arguably touch upon human rights.[130]

Thus, it is unavoidable that the ECtHR's role remains a restricted one in a complex social policy field like social security. Rather than asking for overarching protection, the relevant question must therefore be how the ECtHR can do that what it is capable of and is meant to do, in the best possible way. For example, broadening the scope of "possessions" under Art. 1 P 1 seems to increase the scope of protection, also with regard to – after accession – EU laws and decisions. Yet, this is not entirely true if one considers that this implies reviewing complex social security issues even when their "fundamental" character is not apparent and the Strasbourg human

[129] In the light of the importance of *individual* fundamental rights protection, a case-by-case approach is often considered crucial as it pays due attention to the particularities of a case. At the same time, individual (proportionality) tests often lack transparency. In this context it can be argued that a more "categorical" approach (for example with the help of specific "core" aspects of rights, see, e.g., *J. von Bernstorff*, Kerngehaltsschutz durch den UN-Menschenrechtsausschuss und den EGMR: Vom Wert Kategorialer Argumentationsformen, Der Staat 50 (2011), 165) might be interesting for the ECtHR.

[130] *Lord Hoffman*, Judicial Studies Board Annual Lecture, London, 19.3.2009.

rights court is likely not to have much to say. On the other hand, non-discrimination *is* something the ECtHR should be an expert in. But rather than serving as an example in Luxembourg, its current approach could instead perhaps benefit from a close look at the way the EU deals with equal treatment review. The ECtHR cannot simply take over doctrines and guiding viewpoints, as the aims and tasks of the EU are considerably different. Nevertheless, aiming for a more tailor-made review of complaints of discrimination, might be the best route towards coherent, and where necessary robust, fundamental European social security protection.

IV. Conclusion

This article started with a discussion of the admissibility decision of the Court in the case of *Ramaer and Van Willigen v. the Netherlands.* The case was held inadmissible on all counts, but nevertheless served as an interesting starting point for discussing the development of the Strasbourg social security case law with respect to property protection and non-discrimination. That it did not lead to a judgment by the ECtHR is likely to have been disappointing for the applicants. Moreover, holding the case inadmissible might appear questionable given that the CJEU in a preliminary proceeding stressed the possible discrimination issue at stake, an issue that was now left unanswered by the Strasbourg Court. The conclusion of this article must be that the role of the ECtHR in social security cases remains indeed a limited one. That does not mean, however, that its approach cannot be improved in order to allow for more principled and – where necessary – more robust fundamental rights protection.

Section III. 1. discussed the role of Art. 1 P 1 in the development of fundamental social security protection in Strasbourg. It illuminated the broad interpretation the ECtHR has given to "possessions" in cases concerning non-discrimination, but also when Art. 1 P 1 is invoked on its own. This interpretation however has resulted in a great emphasis on the margin of appreciation and is not always consistently applied. It was suggested that a narrower and more principled interpretation of Art. 1 P 1 might improve the way in which the Court can fulfill its task as an ultimate protector of fundamental rights. Speaking of property rights every time a state benefit is involved requires the Court to review complex social security arrangements, also when the issue is not a fundamental one. In the case of a more narrow understanding, serious fundamental rights issues that concern benefits but

not "property" are still likely to obtain protection albeit under different Convention articles.

Whereas this can be doubted for social security review, protection against discrimination is a task for the Strasbourg human rights court. Section III. 2. however has shown that the Court's non-discrimination approach signals several shortcomings. The coming into being of Art. 1 P 12 underlines the importance attached to Strasbourg equal treatment protection. But whereas this importance seemingly requires substantive scrutiny, in practice the Court is often hesitant to review the core of the discrimination issue at stake. It can be criticized for applying the comparability test in a manner that is not transparent and also the role and width of the margin of appreciation often remain unclear. It is time that the Court starts to reflect critically on its non-discrimination approach and the aims it thereby wants to achieve. Even though, particularly in a field like social security, margins remain unavoidable, perhaps more tailor-made scrutiny would be beneficial.

Finally, this article reflected on the nexus between the EU and the ECHR. It might be expected, and it also appears from the broad scope of the Convention articles discussed, that once the EU accedes to the Convention, Strasbourg review would provide much added value in the field of social security. It was stressed, however, that especially in a field like social security, the fact that the Court in the end "only" is a human rights court, means that what it can provide for is limited. Contrary to what is happening at the EU level, the ECtHR does not strive for harmonization and cannot proceed on the basis of clear economic goals. What it is nevertheless required to do is providing for substantial review of social security issues once these indeed concern fundamental, human rights. Also in the context of the intensifying relationship between the CJEU and the ECtHR, therefore, providing for principled property protection and improved non-discrimination review might be the best way in which the Strasbourg Court can play a valuable role.