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Setting up an active network of
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*The protection and promotion
by national human rights structures
of the rights of the elderly*

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WORKSHOP DEBRIEFING PAPER

University of Padua
Interdepartmental Centre on
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Università di Padova
Centre Interdépartemental pour
les Droits de la Personne et les Droits des Peuples

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¹ *The electronic version of this publication is also available at www.centrodirittiumani.unipd.it*

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INTRODUCTION

The workshop was the fourth to be organised in 2009 by the National Human Rights Structures (NHRSS) Unit of the Directorate General of Human Rights and Legal Affairs of the Council of Europe (CoE), under the Joint EU-Council of Europe “Peer-to-Peer Project” for the attention of heads and staff of ombudsman offices and national human rights institutions. The event was attended by a total of 40 participants, including 32 NHRSS Representatives.

The discussions were structured following the three parts of Article 23 of the Revised European Social Charter (ESC), a provision accepted by 21 of the 47 member States of the Council of Europe².

It was acknowledged that the ideal definition of who is considered an “*elderly person*” would be a functional one that would take into account a person’s individual needs. However, for reasons of feasibility authorities often resort to the simplifying criterion of age, most often retirement age, which varies from country to country and is not the same for both genders or different professions.

The discussion among NHRSS focussed on the recent trend, by a number of welfare policies and legislations, towards a widespread institutionalisation of elderly people. This warring trend, which ignores fundamental principles of dignity, autonomy and eventually human rights, was considered inappropriate. It was also deemed contrary to the right to private life in combination with the right not be discriminated against.

² As of June 2010, including four States, which have accepted the identical provision contained in Article 4 of the Additional Protocol to the ESC.

NHRs shared information about relevant national legislation and practices affecting the rights of elderly. It was evident from the discussion that especially Ombudsmen deal with a great number of complaints from, or on behalf of, elderly people. Many complaints simply concern delays in the payment of pension by the administration or the inadequacy of the amount of social pensions to cover basic needs of elderly people. Some NHRs denounced the growing gap between the standards set by social care legislation and their implementation: a gap due to financial constraints affecting the social services' efficiency. In some instances, NHRs had to intervene because the relevant authorities were not giving due regard to elderly persons' frailty, medical condition or general incapacity when assessing the claimant's entitlement to a benefit.

In light of this situation, a cross-cutting theme of the workshop was the right to respect of one's dignity as defined by the different international instruments and the positive obligations that it imposes on the authorities. The existence of limits of those positive obligations, in terms of resources at the disposal of the authorities, was acknowledged, but could not lead to exempting States totally of their responsibilities.

As a follow-up to this event, it was decided to produce this workshop debriefing paper, which is sketched out around the three sessions of the workshop. The publication aims at summarizing the findings of the workshop and at providing practical information on the protection of the rights of elderly by the NHRs, as well as references to documents concerning the topic.

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CHAPTER 1

The main international legal instruments for the definition and the defence of the rights of elderly people

Participants were briefed in depth about the monitoring system of the revised ESC by Prof. CSILLA KOLLONAY LEHOCZKY, Member of the European Committee of Social Rights (ECSR) and RAMON PRIETO SUAREZ, Member of ECSR's Secretariat. In addition, they explained both the substantive content of Article 23 of the ESC and the possibilities for NHRs to contribute to the related monitoring mechanisms. STEFANO VALENTI, of the Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua, briefed participants about the relevant provisions of the European Convention on Human Rights (ECHR) as interpreted by the case law of the European Court of Human Rights (ECtHR).

A. The Revised European Social Charter³

The European Social Charter (ESC) revised of 1996 embodies in one instrument all rights guaranteed by the Charter of 1961, its additional Protocol of 1988 and adds new rights and amendments adopted by the States Party⁴.

³ Based on the information provided on the ESC website at www.coe.int/socialcharter

⁴ As of June 2010, a total of 43 States have ratified the Charter (either the 1961 Charter or revised version) and are listed as follows: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Serbia, Sweden, «the former Yugoslav Republic of Macedonia», Turkey and the United Kingdom have signed and ratified the Social Charter. The following 4 states have signed but not yet ratified the Charter: Liechtenstein, Monaco, San Marino and Switzerland.

It is gradually replacing the initial ESC of 1961, which meant to translate economic, social and cultural rights into reality. The revised ESC takes account of the evolution, which has occurred in Europe since the Charter was adopted in 1961, and includes the following novelties:

New rights: right to protection against poverty and social exclusion; right to housing; right to protection in cases of termination of employment; right to protection against sexual harassment in the workplace and other forms of harassment; rights of workers with family responsibilities to equal opportunities and equal treatment; rights of workers' representatives in undertakings.

Amendments: reinforcement of principle of non-discrimination; improvement of gender equality in all fields covered by the treaty; better protection of maternity and social protection of mothers; better social, legal and economic protection of employed children; better protection of persons with disabilities.

Enforcement mechanisms: the new ESC is submitted to the same monitoring system as the Charter of 1961, developed by the Amending Protocol of 1991 and by the Additional Protocol of 1995 providing a collective complaints' mechanism.

a. Reporting system (compulsory mechanism):

- Every year before October, States Party have to report on the implementation of their ESC obligations, (not on all provisions, but only on a selected number of provisions of the ESC);
- Reports are drafted by the national governments, but should be prepared in collaboration with relevant institutions, such as trade unions, NGOs, etc. Such reports are made public together with the conclusions of the European Committee of Social Rights (ECSR)⁵ the body responsible for monitoring compliance in States Party;

⁵ See the country fact sheets, which provide a summary presentation of the implementation of the Social Charter in its States Party, at www.coe.int/t/dghl/monitoring/socialcharter/CountryFactsheets/CountryTable_en.asp

- The Committee of Ministers of the COE adopts decisions on the conformity of the State's practice with the ESC.

- b. Collective complaints system (optional mechanism):
 - Complaints of violations of the ESC may be lodged with the ECSR;
 - Certain organisations are entitled to lodge complaints with the ECSR (a special list of NGOs has been established, made up of NGOs enjoying participatory status with the Council of Europe);
 - If the complaint has been declared admissible by the ECSR, a written procedure is set in motion, with an exchange of memorials between the parties. The ECSR may decide to hold a public hearing;
 - The ECSR then takes a decision on the merits of the complaint, which it forwards to the parties concerned and the Committee of Ministers in a report;
 - Finally, the Committee of Ministers adopts a resolution. If appropriate, it may recommend that the State concerned takes specific measures to bring the situation into line with the ESC.

- c. In both systems:
 - Identifying the violations is the role of the ECSR;
 - Inviting States to remedy the violations is the role of the Committee of Ministers upon the proposal of the Governmental Committee⁶.

⁶ *The Governmental Committee is a body composed of representatives of the States Parties to the ESC and assisted by representatives of the European social partners participating as observers, which considers decisions of non-compliance in the months following their publication. In the event that the Governmental Committee considers that it is not envisaged to remedy a violation and take action on a decision of non-compliance, it may propose that the Committee of Ministers addresses a recommendation to the State concerned.*

B. Article 23 of the Revised European Social Charter⁷

ARTICLE 23 – THE RIGHT OF ELDERLY PERSONS TO SOCIAL PROTECTION

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

- *to enable elderly persons to remain full members of society for as long as possible, by means of:*
 - *adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;*
 - *provision of information about services and facilities available for elderly persons and their opportunities to make use of them;*
- *to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:*
 - *provision of housing suited to their needs and their state of health or of adequate support for adapting their housing; the health care and the services necessitated by their state;*
- *to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.*

Article 23 of the ESC is the first human rights treaty provision to specifically protect the rights of the elderly. The measures envisaged by this provision, by their objectives as much as by the means of implementing them, point towards a new and progressive notion of what life should be for elderly persons, obliging the states parties to devise and carry out coherent actions in the different areas covered. It is a dynamic provision in the sense that “*the appropriate measures it calls for may change over time in line with a new and progressive notion of what life should be for elderly persons*”.

⁷ Article 23 of the Revised ESC is identical to Article 4 of the Additional Protocol to the ESC.

Article 23 overlaps with other provisions of the ESC, which protect elderly persons as members of the general population, such as Article 11 (Right to protection of health), Article 13 (Right to social and medical assistance) and Article 12 (Right to social security). Article 23 requires states to make focused and planned provision in accordance with the specific needs of elderly persons. One of the primary objectives of Article 23 is to enable elderly persons to remain full members of society. The expression “*full members*” means that elderly persons must suffer no ostracism on account of their age. The right to take part in society’s various fields of activity should be granted to everyone active or retired, living in an institution or not. The effects of restrictions to the legal capacity should be limited to the purpose of the measure.

On a general level, the ECSR has examined national policies for the elderly and the level and development of national expenditure for social protection and services for the elderly, as well as measures to allow/encourage elderly persons to remain in the labour force. Non-discrimination legislation (or similar legislation) should exist at least in certain domains protecting persons against discrimination on grounds of age. Elderly persons at times may have reduced capacity making powers or no such powers or capacity at all. Therefore, there should exist a procedure for assisted decision making for the elderly.

Article 23 distinguishes between three different phases of ageing and formulates elderly persons’ rights accordingly:

- The right to remain a full member of society as long as possible by means of adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life; provision of information about services and facilities available for elderly persons and their opportunities to make use of them; right to adequate resources and to information;
- The right to choose one’s life-style freely and to lead an independent life in one’s familiar surroundings for as long as one wishes and is able to by means of provision of housing suited to their needs and their state of health or of adequate support for adapting their housing; the health care and the services necessitated by their state;

- The rights for elderly living in an institution, while respecting their privacy, to participate in decisions concerning living conditions in the institution.

A. ADEQUATE RESOURCES ENABLING THEM TO LEAD A DECENT LIFE AND PLAY AN ACTIVE PART IN PUBLIC, SOCIAL AND CULTURAL LIFE

The primary focus of the right to adequate resources is on pensions. Pensions and other State benefits must be sufficient in order to allow elderly persons to lead a 'decent life' and play an active part in public, social and cultural life. The ECSR compares pensions with the average wage levels and the overall cost of living. Pensions must be index-linked. The ECSR also takes into consideration the cost of transport as well as the cost of medical care and medicine, as well as the existence of a carer's allowance for family members looking after an elderly relative.

B. PROVISION OF INFORMATION ABOUT SERVICES AND FACILITIES AVAILABLE FOR ELDERLY PERSONS AND THEIR OPPORTUNITIES TO MAKE USE OF THEM

Although Article 23 para.1b only refers to the provision of information about services and facilities, the ECSR considers that para.1 b of Article 23, presupposes the existence of services and facilities and that elderly persons have the right to certain services and facilities. Therefore, the Committee examines not only information relating to the provision of information about these services and facilities but also these services and facilities themselves. In particular, information is required on the existence, extent and cost of home help services, community based services, specialised day care provision for persons with dementia and related illnesses and services such as information, training and respite care for families caring for elderly persons, in particular, highly dependent persons, as well as cultural leisure and educational facilities available to elderly persons.

C. ENABLING ELDERLY PERSONS TO CHOOSE THEIR LIFESTYLE FREELY AND TO LEAD INDEPENDENT LIVES IN THEIR FAMILIAR SURROUNDINGS FOR AS LONG AS THEY WISH AND ARE ABLE; PROVIDING HOUSING SUITED TO THEIR NEEDS AND THEIR STATE OF HEALTH OR OF ADEQUATE SUPPORT FOR ADAPTING THEIR HOUSING

The needs of elderly persons must be taken into account in national or local housing policies. The supply of adequate of appropriate housing for elderly person must be sufficient. Housing law and policy must take account of the special needs of this group. Policies should help elderly persons to remain in their own homes for as long as possible through the provision of sheltered/ supported housing and assistance for the adaptation of homes.

D. ENSURING THE HEALTH CARE AND THE SERVICES NECESSITATED BY THEIR STATE

In the context of a right to adequate health care for elderly persons Article 23 requires that health care programmes and services (in particular primary health care services including domiciliary nursing/health care services) specifically aimed at the elderly must exist together with guidelines on healthcare for elderly persons. In addition, there should be mental health programmes for any psychological problems in respect of the elderly, and adequate palliative care services.

E. GUARANTYING ELDERLY PERSONS LIVING IN INSTITUTIONS APPROPRIATE SUPPORT, WHILE RESPECTING THEIR PRIVACY, AND PARTICIPATION IN DECISIONS CONCERNING LIVING CONDITIONS IN THEIR INSTITUTION.

The final part of Article 23 deals with the rights of elderly persons living in institutions. In this context, it provides that the following rights must be guaranteed; the right to appropriate care and adequate services, the right to privacy, the right to personal dignity, the right to participate in decisions concerning the living conditions in the institution, the protection of property, the right to maintain personal contact with persons close to the elderly person and the right to complain about treatment and care in institutions.

There should be a sufficient supply of institutional facilities for elderly persons (public or private), care in such institutions should be affordable and assistance must be available to cover the cost. All institutions should be licensed, subject to a declaration regime, to inspection or to any other mechanism, which ensures, in particular, that the quality of care delivered is adequate. Issues such as the requirements of staff qualifications, staff training and the wage levels of staff, compulsory placement, social and cultural amenities and the use of physical restraints are also examined under this provision.

C. The European Convention on Human Rights

1. MAIN CONCEPTS RELEVANT FOR THE PROTECTION OF THE RIGHTS OF ELDERLY

I. Indivisibility of Human Rights

The interpretation of the ECHR may extend into the sphere of social and economic rights: *“There is no water-tight division separating that sphere from the field of civil and political rights covered by the Convention”*⁸.

II. The protection provided by the ECHR should not be theoretical and illusory, but practical and effective

The ECHR does not specifically refer to the rights of elderly people. However, the ECHR *“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 are with which it deals”*⁹

III. Positive obligations by the States to protect ECHR rights

Article 1 of the ECHR obliges States *“to secure everyone within their jurisdiction the rights and freedoms defined in the Convention”*. This implies not

⁸ *Airey v. Ireland*, judgment of 9 October 1979. More recently in the case of *Budina v. Russia*, decision of 18 June 2009, the ECtHR has repeated the same concept.

⁹ *Marckx v. Belgium*, judgment of 13 June 1979.

only a negative obligation not to do or to abstain to interfere, but also to take measures designed to ensure the protection of the ECHR rights. States duties to take positive steps to guarantee respect of ECHR rights may in practice require among other means, to direct resources in a way to ensure those rights. “*State budgets reveal whether governments are committed to human rights*”¹⁰.

IV. States’ margin of appreciation and availability of financial means

The rights of elderly people at issue concern a broad range of social relations. In this context fulfilment by States of their domestic or international legislative or administrative obligations depends on a number of factors, in particular financial ones. States have given by the ECtHR a wide margin of appreciation regarding the choice of means to be employed to discharge their positive obligations. However, wide margin of appreciation especially referred to available financial means “*should not be taken to mean that arbitrary action by the State*” is “*justified or that it*” is “*legitimate to plead economic difficulties*”¹¹. Therefore, once the ECtHR admits its competence *ratione materiae* the case is in the realm of the ECHR even if it has social rights implication.

2. INTERPRETATION OF PROVISIONS OF THE ECHR RELEVANT TO THE PROTECTION OF THE RIGHTS OF ELDERLY PEOPLE

I. Articles 3, Freedom from ill-treatment, and Article 1

The Court has repeatedly affirmed in its judgements that there is a positive obligation on the State to take steps to protect everyone from degrading treatment. This is relevant to the rights of elderly people living in institutions.

¹⁰ *Viewpoint of the Commissioner for Human Rights (2009)*.

¹¹ *Botta v. Italy (1988)*

II. Article 8, Right to private and family life, and Article 14

There is a recent trend towards the inappropriate institutionalisation of elderly people, which ignores fundamental principles of dignity, autonomy and eventually human rights. This trend may be contrary to the right to private life in combination with the right not to be discriminated against.

III. Article 6, Right to fair trial

Another relevant argument raised by the ECtHR that is related to the effective protection of elderly people's rights, is the concept of effective access to a court. "*For many mentally disabled people*", for example elderly suffering of dementia, "*the access to effective remedy to the violation of their rights is not so much frustrated by the imposition of an unwanted representative, but rather by the absence of any support or assistance*". Such a state of affairs is contrary to the Article 6 of the ECHR and therefore contrary to the domestic law of the 47 European states party to the ECHR

3. RELEVANT CASE-LAW OF THE ECtHR¹²

Budina v. Russia (2009)

Regarding State responsibility due to social pension not sufficient for basic human needs.

Solodyuk v. Russia (2005)

Regarding State responsibility due to the delay in payment of old-age pension constituting the sole or main income.

Botta v. Italy (1998) and *Price v. The United Kingdom* (2001)

Regarding the right to independent living, in particular duty of the State to take "compensatory measures" to ensure that disabled people (and by analogy "institutionalised" elderly) have access to essential economic, social, cultural and recreational activities so that their lives are not so isolated as to be deprived of the possibility of developing their personality.

¹² www.echr.coe.int

A. v. The United Kingdom (1998) and *Z. & Others v The United Kingdom* (2001)

Regarding duty to protect from abuse, e.g. the obligation on states to have specific ‘vulnerable adult’ protection procedures.

X and Y v. The Netherlands (1985) and *Sandra Jankovic v Croatia* (2009)

Regarding duty to prosecute people who do abuse vulnerable adults.

Shtukurov v. Russia (2008)

Regarding guardianship and other overly wide ‘mental incapacity’ adjudications.

Papon v. France (decision on inadmissibility - 2001)

Regarding elderly prisoners, in particular whether there is an emerging European consensus against very old people being imprisoned.

Golder v. United Kingdom (1975) and *Airey v. Ireland* (1979)

Regarding positive obligation by the State to guarantee the right to “fair hearing” including effective “access to court”.

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CHAPTER 2

The right of elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able

RACHEL BUCHANAN from AGE, the European Older People's Platform, gave the list of concerns, which specialized NGOs in Europe voice in the EU bodies as regards elderly persons' rights in EU member States.

ABOUT AGE¹³

AGE, the European Older People's Platform, aims to voice and promote the interests of older people in the European Union and to raise awareness of the issues that concern them most. Everyone in the European Union is increasingly affected by decisions taken by its institutions : the Council of Ministers, the Commission, the European Parliament and the Court of Justice. Decisions affect the daily lives of all its inhabitants - including older people.

AGE is involved in a range of policy and information activities to put older people's issues on the EU agenda and to support networking among older people's groups. Among our guiding principles is that a change of attitudes is needed to achieve a society for all ages, seeking solidarity between generations in a way that recognizes older people's contributions to society. AGE is committed to combating all forms of age discrimination in all areas of life and aims to monitor and influence the implementation of the various EU initiatives in this area.

AGE was set up in January 2001 following a process of discussion on how to improve and strengthen cooperation between older people's organizations at EU level. Membership of AGE is open to European, national and regional organizations, and to both organizations of older people and organizations for older people. Organizations of older people will have the majority of votes in AGE's decision-making bodies. Membership is open only to non-profit-making organizations. AGE is co-financed by its members and by the European Commission.

¹³ www.age-platform.eu

A. European Policies and Practices in Europe

1. ADAPTING THE BUILT ENVIRONMENT

The home environment affects the ability of older people to stay active, to participate and to contribute to society. Today, it is clear that improvements in the built environment have a direct impact on the quality of life of an older person and their caregiver. However, more research must be carried out on this area. Relational studies between transport mobility, planning and housing on the one hand and health and social care sectors are rare. Clinicians, practitioners, and government departments engaged in policy developments must be more proactive about carrying out evaluations studies of health outcomes of the built environment. Better evidence can improve the lives of the general population and in particular of older people.

Recommendations to EU level:

- The EU should ensure the full implementation of regulations and Directives in Member States in areas such as universal accessibility in the indoor and outdoor environment such as urban pavements transports (and their stops) and housing that can meet the needs of older people;
- Develop EU housing standards in a “*design for all*” approach;
- Support research Programs that proved evidence for Member States of relationships between good environment improvements and healthy old age.

2. SOCIAL INTEGRATION FOR OLDER PEOPLE LIVING HOME

Older people living at home can become socially isolated , vulnerable and excluded from society. Integrating them in community must be a priority. Dispelling myths and stereotypes about id people by showing their continued enthusiasm for life should help change attitudes towards older people. The development of care services for older people that preserve their integration in the community is essential.

Recommendations to EU level:

- The social integration and inclusion of older people living at home or in residential setting in the community and society as a whole must be a priority at EU level in all policy areas.
- Finance of sustainable EU programmes that include, integrate, and empower older people just after retirement or upcoming to retirement, living at home or in residential setting is important to keep people actively engaged in society;
- The EU should facilitate the exchange of good practices between Member States of social integration of older people after retirement or upcoming to retirement; good examples (adapted to each country's culture) can be replicated;
- The EU institutions must make EU member states aware of the need to inform people about their value in their own country as well as the need for them to have an active European citizenship.

3. USE OF ICT AND NEW TECHNOLOGIES IN THE HOME

The use of ICT (Information and Communication Technologies) to help elderly and people with disabilities to continue to live at home is commonly known as Ambient Assisted Living (AAL). Technology can help older people carry out daily activities as well as monitor health, create social networks and increase participation in society and augment safety. The use of technology can also facilitate social inclusion, improve their professional participation and quality of life and ultimately enhance independent living.

Recommendations to EU level:

- The EU institutions must promote the usage of ICT to empower older people, to live independently, to increase sociability and to help them to play an active role in society.
- Implement the common EU guidelines of (e)Accessibility already established at EU level where Member States can use and adapt according to the characteristics of older people in their country.

- Continue to support and promote AAL initiatives that have a positive impact on older people's lives: ICT enabled services for integrated health and social care, involving users and measuring its social and economic impacts.
- Create training programmes and support initiatives to improve older people/user motivation towards ICT before and after retirement and increase the levels of digital literacy
- Ensure that the needs of older people are taken into account and have an active role when Member States develop ICT services and devices or training programmes.
- Launch multidisciplinary research and monitor the social and economic implications of ICT for older people.

B. Right to independent living/personal autonomy through social and family relations: positive obligation by the State¹⁴

Regarding the right to independent living, it can be said that there is in particular a duty of the State to take “*compensatory measures*” to ensure that disabled people (and by analogy elderly seen as vulnerable group) have access to essential economic, social, cultural and recreational activities so *that their lives are not so isolated as to be deprived of the possibility of developing their personality*.

A powerful argument made by some lawyers is that the inappropriate institutionalisation of elderly and disabled people is contrary to ECHR requirements (Article 8 or even Article 3 in conjunction with Article 14).

States duties to take positive steps to guarantee respect of ECHR rights may in practice require to direct resources in a way to ensure that an individual has access to such facilities as are necessary for the development of social relation and of an individual's personality: such facilities may include not

¹⁴ Based on a paper by Professor LUKE CLEMENTS “*The need for new legislations*” briefing paper - 2 May 2007.

only essential economic and social activities, but also an appropriate range of recreational and cultural activities. In the case of *Botta v. Italy* this may mean that in extreme circumstances, which were not considered as such in the case of the applicant, actions must be taken by the state to facilitate the inclusion of disadvantaged people). The then Commissioner Bratza of the European Commission of Human Rights in the Commission's Report on the above mentioned case wrote that "*the crucial factor is the extent to which an individual is so circumscribed and so isolated as to be deprived to develop his/her own personality*".

Judge Greve in her separate opinion in the case of *Price v. UK* wrote about "*compensatory measures*" necessary to improve and compensate for the disabilities faced by a person. These measures came to form the disabled person's physical integrity.

Important factor is to show how this notion of positive action can be developed to cover not only cases of persons having special needs because of personal factors such as disability but also such as age of even social factors such as extreme poverty or other factors which renders that category a vulnerable group.

However, one will have to think also about the limits of the positive obligations in terms of resource allocation. Financial resources of the State are relevant factors in determining their social policies, and it is clear that in some cases independence through community based care clashes with cost effectiveness if compared with institutionalisation.

In the case of *Botta v. Italy* the Italian Government agreed with the Commission's warning that "*interpreting Article 8 so broadly as to include in States' positive obligations the obligation to ensure the satisfactory development of each individual's recreational activities would amount to altering the meaning of the provision in question to such an extent that it would be unrecognisable to those who had drafted it. Once the door was open for a development of that type, it would be extremely difficult to set limits. It would be necessary, for example, to take into consideration obstacles resulting from the insufficient means of those who wished to take part in such activities. That approach was likely to transform the Convention institutions into arbiters of the social poli-*

cies of the States party to the Convention, a role which did not form part of either the object or the purpose of the Convention". However, the Court in the same case does seem to consider that a State has obligations to adopt measures to secure respect for private life even in the sphere of the relations of individuals between themselves where it has found a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life.

Independence of elderly v. institutionalisation should not be decided only on the basis of cost effectiveness criteria. For example, in the case of *Olmstead v. L.C.*, the view of the majority of judges of the Supreme Court of the United States was that "*confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment*".

These considerations should be taken into account when NHRs deal with the right of elderly to carry an independent living. The ECtHR has tried to define what is required by the complex and multi-meaning obligation of the State to show respect for person's private life. Using language such as dignity could grip the quintessence of the ECHR, "*which is to guarantee the respect for human dignity and freedom*"¹⁵.

¹⁵ *Pretty v. United Kingdom* (2002)

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CHAPTER 3

The rights of elderly people living in institutions

A. Article 23 of the Revised European Social Charter

The rights of elderly people living in institutions is not an “*happy topic*” per se because it is often related to the worst stage of ageing, the one which goes from 75 years onwards. Until now there was no negative conclusion by the ECSR on the respect of Article 23. This is probably because it is a very wide issue where it is difficult to pin point precise failures by the States. However, recently a collective complaint, International Federation of Human Rights Leagues (IFHR) v. Ireland (Complaint No. 42/2007)¹⁶ relates to Article 23 read in conjunction with Article E (non-discrimination) and to Article 12 para. 4 (the right to social security) of the Revised ESC¹⁷.

ESC ARTICLE 23, PARA 3.

“to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution”.

Notwithstanding the absence of negative conclusions, so far, the ECSR considers the following important issues in relation to Article 23 when examining the national reports:

¹⁶ www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp

¹⁷ *It is alleged that the situation of this elderly in Ireland constitutes a discrimination against persons in receipt of Irish Contributory Old Age Pensions who do not reside permanently in Ireland in that they do not have access to the Free Travel scheme when they return to Ireland.*

1. The nature of institutional care;
2. What happens to the financial resources of the pensioners that are paid into the institution;
3. Accurate statistics indicating for example the exact number of institutions and how many people are institutionalised. However, a low level of institutions can be an indicator of good level of home care;
4. Legal standards for these residential institutions. Whether physical space and physical conditions are guaranteed (a minimum of 6 m² per person). Whether entering an institution is based on informed decision, whether there is the possibility of moving in with spouse, etc;
5. Regarding staff, the ideal would be one staff (including cleaning staff, cooks, nurses etc.) for each person institutionalised. However there are no minimum standards. Also the level of training and salary of the staff are often inappropriate and affects elderly in these institutions.
6. Regarding the right to privacy, the ECSR examines how privacy is guaranteed (like toilets, regular contact with family, access to pocket money, etc.);
7. Quality of life: ECSR requests States to report about the level of participation of elderly in the decisions concerning their living condition;
8. Control: there has to be an independent body controlling the quality of these institutions. ECSR requests information on what kind of sanctions are applied in case of wrongdoing;
9. Careful consideration should be given to the number of complaints received by these monitoring bodies: when elderly feel threatened, they are less likely to file a complaint than those who feel comfortable in an institution.

B. The Standards of the European Committee for the Prevention of Torture

ANDRES LEHTMETS, Member of the European Committee for the Prevention of Torture (CPT)¹⁸, gave an overview of the various dangers of ill-treat-

¹⁸ *Until 2009.*

ment of elderly persons in institutions and informed of the ways in which the CPT tries to prevent ill-treatment from happening, inviting NHRs to exert a similar sort of careful and systematic control.

Are the “resident elderly” under CPT’s mandate?

It is a frequent question that appears. The CPT has so far monitored the living conditions of elderly in closed institutions, such as psychiatric hospitals.

Safeguards

Moving persons to an institution against their will or without their consent is a measure which seriously infringes the fundamental rights of the person concerned. Therefore firstly it should be examined whether there is a legal basis for the elderly involuntary placement in these closed institutions. Placement must be made in the light of objective medical expertise, including psychiatric nature. In any case, the CPT is not engaged only in a purely legal exercise and during its visit the most important concern is to assess whether the elderly are deprived of their liberty, how they are treated and whether this treatment is in accordance with the normative framework: all of this is interrelated.

Conditions of stay

The CPT has stressed in a number of visit’s reports that the needs of elderly institutionalised should be given due consideration. This should imply *“creating a positive therapeutic environment involves, first of all, providing sufficient living space per patient as well as adequate lighting, heating and ventilation, maintaining the establishment in a satisfactory state of repair and meeting hospital hygiene requirements. Particular attention should be paid to the decoration of both patients’ rooms and recreation areas, in order to give patients visual stimulation. The provision of bedside tables and wardrobes is highly desirable, and patients should be allowed to keep certain personal belongings (photographs, books, and so on). The importance of providing patients with lockable space in which they can keep their belongings should also be underlined; the failure to provide such a facility can impinge upon a patient’s sense of security and autonomy. Sanitary facilities should be designed so as to*

*allow patients some privacy. Further, the needs of elderly and/or handicapped patients in this respect should be given due consideration; for example, lavatories which do not allow the user to sit are not suitable for such patients. Similarly, basic hospital equipment enabling staff to provide adequate care (including personal hygiene) to bedridden patients must be made available; the absence of such equipment can lead to wretched conditions*¹⁹.

Medical Care

Medical treatments should be available, including psychological and psychiatric care. Elderly should receive personalized treatment, with a treatment plan, informing the elderly of it and seeking his/her consent. Ideally elderly should not stay usually for a long period in these institutions: unjustified institutionalisation leads to a number of negative outcomes including violation of human rights due to unnecessary deprivation of liberty.

Special issues of concern

Issues such as artificial feeding, restraints and isolation, etc. are of special concern during the CPT visits in institutions where there are elderly. Clear policies concerning the use of restraints accompanied by guidelines should be into place: in any case restraint should never be used as a punishment.

C. The ECHR standards

While it does not refer specifically to the situation of elderly people in institutions, the ECHR states that no-one may be subjected to inhuman or degrading treatment. In particular, Article 1 and Article 3 of the ECHR require states to take measures designed to ensure that individuals within their jurisdiction are not subject to torture inhuman or degrading treatment or punishment, including such ill treatment administered by private individuals. This also means that there is a positive obligation on the State to take steps to protect everyone from degrading treatment or abuse.

¹⁹ 2009 Visit's report in Georgia (Abkhazia).

A. v The United Kingdom (1998) and *Z. & Others v The United Kingdom* (2001) both cases regard the duty to protect from abuse, e.g. the obligation on states to have specific ‘vulnerable adult’ protection procedures. In the case of *A. v The United Kingdom* the assessment of the minimum of the ill treatment to be within the scope of Article 3 depends on the nature and the context, its duration, its physical and mental effects and in some instances, the sex age and state of health of the victim. In particular, children and other vulnerable individuals are entitled to state protection in the form of effective deterrence against serious breaches of personal integrity (in this case chastisement of a kid by the step father). The domestic law in this case did not provide adequate protection against treatment or punishment contrary to Article 3.

In the similar case of *Z. & Others v The United Kingdom*, the ECtHR acknowledges the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life. However, the present case leaves no doubt as to the failure of the system to protect applicants children from serious long term neglect and abuse. *Mutatis mutandis*, the ECtHR findings are relevant also in cases of institutionalised elderly.

CONCLUSIONS

The role of the NHRs

As recently stated by the Commissioner for Human Rights of the Council of Europe, THOMAS HAMMARBERG, “*elderly is one of the vulnerable groups that have been deeply affected by the economic crises. In Europe especially, ageing persons in the so-called transition countries have been hit hard. The number of elderly people begging in the streets goes to prove that their human right to an adequate standard of living is not respected. The term ‘lost generation’ is sadly appropriate*”²⁰. In this grim situation the role of NHRs in protecting the rights of elderly people is pivotal. A review of their annual reports indicates that in particular Ombudsmen deal with a great number of complaints from, or on behalf of, elderly people. As already mentioned in the introduction, many complaints arise simply because an administration fails to pay due concern to the very fact that the complainants are elderly and have difficulty in understanding complex forms or detailed regulations about benefits and other schemes. Another category is related to the public bodies’ failure to examine all the circumstances of a case, therefore not giving due regard to an elderly person’s frailty, medical condition or general incapacity: assessing that person’s entitlement to a benefit would make his or her live easier and less stressful. Thus, in concrete NHRs can:

- raise awareness on the need for the effective protection of the rights of the elderly;
- makes sure that when States draft a national action plan it also concerns the rights of the elderly;
- regularly visit CoE website and in particular the Social Charter website²¹;
- press, advocate and lobby for the acceptance by the State of the ESC Article 23 provisions;

²⁰ “*Elderly across Europe live in extreme hardship and poverty*”, *The Council of Europe Commissioner’s Human Rights Comments* <http://commissioner.cws.coe.int>

²¹ www.coe.int/socialcharter

- request to be put on the mailing list of the ESC Secretariat;
- support the launching of collective complaints with the ECSR, thus helping standards setting of elderly rights;
- Send their annual and ad hoc reports to the ECSR secretariat.

The Social Charter can be contacted at:
Secretariat of the European Social Charter,
 Council of Europe 67075 Strasbourg cedex,
 Tel.: + 33 (0) 3 88 41 32 58 - e-mail: social.charter@coe.int

- conduct thematic investigations related to elderly;
- initiate disciplinary investigation *vis à vis* the administration;
- place complaint boxes in homes for elderly and collect them personally to make sure that elderly dare to complain (like boxes in prisons).

Concerning, the relation between the NHRSs and the ESC Secretariat, it was recalled that the RSIF²² informs the NHRSs of relevant conclusions and case-law of the ECSR. But the representatives of the NHRSs said it would be helpful if each NHRS receive from the ECSR Secretariat both the reports on implementation sent by its government with an invitation to comment thereon, and the ECSR's conclusions on their country when they become public.

In concluding with the words of the Irish Ombudsman we could say that NHRSs *“have a role in ensuring that people are treated fairly by the administration, and, when it comes to the elderly, fairly means without discrimination, with due regard to their physical or mental capacity, and above all with respect to their human dignity, to the positives of ageing, and to the role the now elderly have played in helping to secure the economic bounty that their children and grandchildren now enjoy”*²³.

²² *Regular Selective Information Flow, an electronic publication which is e-mailed biweekly to all NHRS offices of the Council of Europe Region.*

²³ *2004 Annual Report of the Ombudsman, Office of the Ombudsman of Ireland.*

APPENDIXES

List of background documents

UNITED NATIONS

- United Nations Convention on the Rights of Persons with Disabilities
www.un.org/disabilities/convention/conventionfull.shtml
- United Nations Programme on Ageing
www.un.org/esa/socdev/ageing/index.html
- Resolutions of the General Assembly
- International Year of Older Persons 1999
- Second World Assembly on Ageing “Building a Society for all Ages”
- United Nations Principles for Older Persons
www.un.org/esa/socdev/ageing/un_principles.html

EUROPEAN UNION

- Charter of Fundamental Rights of the European Union
Article 25 the rights of elderly: “The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.”
www.europarl.europa.eu/charter/pdf/text_en.pdf
- Overview of the European Union policy and documents on the right of elderly persons
www.europarl.europa.eu/comparl/libe/elsj/charter/art25/default_en.htm

COUNCIL OF EUROPE

Treaties / Conventions

- European Convention on Human Rights
www.echr.coe.int

European Social Charter

- Article 23 : The right of elderly persons to social protection
<http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>

Committee of Ministers

- Recommendation CM/Rec(1994) 9, on “elderly people” (see guiding principles annexed)
- Recommendation CM/Rec(94) 14, on coherent and integrated family policies. (especially point 10 of principles annexed)
- Recommendation CM/Rec(98) 9, on dependence.
- Challenges of social policy in Europe’s ageing societies Parliamentary Assembly (Reply adopted by the Committee of Ministers on 24 September 2003 at the 853rd meeting of the Ministers’ Deputies)
- Recommendation CM/Rec(2004)10 “Concerning the protection of the human rights and dignity of persons with mental disorder”
- Recommendation CM/Rec(2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015
- Recommendation CM/Rec(2009)6 on “ageing and disability in the 21st century: sustainable frameworks to enable greater quality of life in an inclusive society”
<https://wcd.coe.int/ViewDoc.jsp?id=1470069&Site=CM>

Parliamentary Assembly

- Recommendation 1591 (2003), Challenges of social policy in Europe’s ageing societies,
- Recommendation 1796 (2007) on the situation of elderly persons in Europe
<http://assembly.coe.int/Documents/AdoptedText/ta07/EREC1796.htm>

Selected judgments of the European Court of Human Rights

- *Botta v Italy* (1998) and *Price v. The United Kingdom* (2001)
Regarding the right to independent living, in particular duty of the state to take “compensatory measures” to ensure that disabled people (and by analogy “institutionalised” elderly) have access to essential economic, social, cultural and recreational activities so that their lives are not so isolated as to be deprived of the possibility of developing their personality.
- *A. v The United Kingdom* (1998) and *Z. & Others v The United Kingdom* (2001)
Regarding duty to protect from abuse, e.g. the obligation on states to have specific ‘vulnerable adult’ protection procedures.

- *X and Y v The Netherlands (1985) and Sandra Jankovic v Croatia (2009)*
Regarding duty to prosecute people who do abuse vulnerable adults.
- *Shtukaturv v Russia (2008)*
Regarding guardianship and other overly wide ‘mental incapacity’ adjudications.
- *Papon v France (decision on inadmissibility - 2001)*
- Regarding elderly prisoners, whether there is an emerging European consensus against very old people being imprisoned.
- *Golder v United Kingdom (1975) and Airey v Ireland (1979)*
Regarding positive obligation by the state to guarantee the right to “fair hearing” including effective “access to court”.

Selected decisions from the European Committee of Social Rights

- Digest of the case law of the European Committee of Social Rights (pp. 147-150 and 329-332)
www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf
- International Federation of Human Rights Leagues (IFHR) v. Ireland (Complaint No. 42/2007)
www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp

European Committee for the Prevention of Torture (CPT)

- The CPT standards “Substantive” sections of the CPT’s General Reports Chapter V. “Involuntary placement in psychiatric establishments” and “Means of restraint in psychiatric establishments for adults” (pp 51-68)
www.cpt.coe.int/en/documents/eng-standards.doc

The Commissioner for Human Rights

www.coe.int/t/commissioner

- Background paper and conclusions of the seminar on the “protection of human rights, and the special situation of elderly people in retirement homes or institutions”, Neuchâtel, 21-23 October 2001 The Commissioner - ComDH(2001)16 / 23 October 2001
- Viewpoints
- “Older people are too often ignored and denied their full human rights” (2008)
www.coe.int/t/commissioner/Viewpoints/080428_en.asp
- “State budgets reveal whether the government is committed to Human Rights” (2009)
www.coe.int/t/commissioner/Viewpoints/090803_en.asp

OTHER USEFUL LINKS AND DOCUMENTS

- The European Older's People Platform
www.age-platform.org
- Mental Disability Advocacy Centre
www.mdac.info

Workshop programme

MONDAY, 14 SEPTEMBER 2009

Arrival of the participants at the European Youth Centre

TUESDAY, 15 SEPTEMBER 2009

9.30 – 11.00 **Introductory session**

Format of the workshop and issues addressed

MARKUS JAEGER, Head of Co-operation with National Human Rights Structures Unit, Directorate General of Human Rights and Legal Affairs, Council of Europe

The main international legal instruments for the definition and the defence of the rights of elderly people: The Revised European Social Charter

RAMON PRIETO-SUAREZ, Administrator, European Social Charter Division, Directorate General of Human Rights and Legal Affairs, Council of Europe

The European Convention on Human Rights

STEFANO VALENTI, P2P Project Manager, Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua

11.00 – 11.30 Coffee break

11.30 – 12.30 Discussion

- 12.30 – 13.30 Lunch at the European Youth Center
- 13.30 – 17.30 **Thematic session 1 – The right of elderly people to remain full members of society as long as possible: Right to adequate resources and to information**
Article 23 of the Revised European Social Charter and other applicable international standards
CILLA KOLLONAY-LEHOCZKY, Member, European Committee of Social Rights
- European Policies and Practices in Europe
RACHEL BUCHANAN, Policy Officer, AGE - the European Older People's Platform
Discussion and exchange of experiences with contributions from the NHRSS
- 15.30 – 16.00 Coffee break
- 16.00 – 17.30 Discussion and exchange of experiences continued
- 20.30 Dinner

WEDNESDAY, 16 SEPTEMBER 2009

- 9.00 – 12.30 **Thematic session 2 – The right of elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able**
Article 23 of the Revised European Social Charter
RAMON PRIETO-SUAREZ, Administrator, European Social Charter Division, Directorate General of Human Rights and Legal Affairs, Council of Europe
- European Policies and Practices in Europe
RACHEL BUCHANAN, Policy Officer, AGE - the European Older People's Platform
Discussion and exchange of experiences with contributions from the NHRSS

- 10.30 – 11.00 Coffee break
- 11.00 – 12.30 Discussion and exchange of experiences continued
- 12.30 – 13.30 Lunch at the European Youth Centre
- 13.30 – 17.30 **Thematic session 3 – The rights of elderly people living in institutions**
 Article 23 of the Revised European Social Charter and other applicable international standards
 CILLA KOLLONAY-LEHOCZKY, Member, European Committee of Social Rights
- The norms enshrined in the European Convention for the Prevention of Torture and in the UN Convention Against Torture, and their monitoring
 ANDRES LEHTMETS, Member, European Committee for the Prevention of Torture (CPT)
- Practices in Europe
 RACHEL BUCHANAN, Policy Officer, AGE - the European Older People's Platform
- Discussion and exchange of experiences with contributions from the NHRSS
- 15.30 – 16.00 Coffee break
- 16.00 – 17.30 **Discussion and exchange of experiences continued**
- 17.30 – 18.00 **Winding-up of the workshop**
 STEFANO VALENTI and MARKUS JAEGER
- 20.00 Dinner

THURSDAY, 17 SEPTEMBER 2009
 Departure from European Youth Centre

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notes

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Workshop debriefing papers 2008

“Rights of persons deprived of their liberty: the role of national human rights structures which are OPCAT mechanisms and of those which are not”

9 -10 April 2008 Padua (Italy)

“Complaints against the police: their handling by the national human rights structures”

20-21 May 2008 St. Petersburg (Russian Federation)

“Protecting the human rights of irregular migrants: the role of national human rights structures”

17 -19 June 2008 Padua (Italy)

“The promotion and protection by national human rights structures of freedom of expression and information”

21-23 October 2008 Padua (Italy)

“The role of national human rights structures in promoting and protecting the rights of persons with disabilities”

2-3 December 2008 Budapest (Hungary)

Workshop debriefing papers 2009

“The protection of the rights of Roma people by the national human rights structures”
24-25 February 2009 Budapest (Hungary)

“The role of national human rights structures in case of non-execution of domestic judgments”
24 - 26 March 2009 Padua (Italy)

“The role of national human rights structures as regards anti-terrorists measures”
09 - 11 June 2009, Padua (Italy)

“The role of the ombudsman in the defence of social rights in times of economic crisis”
3-4 September 2009 St. Petersburg (Russian Federation)

“The protection and promotion by national human rights structures of the rights of the elderly”
15-16 September 2009 Budapest (Hungary)

“The protection of separated or unaccompanied minors by national human rights structures”
20 - 22 October 2009 Padua (Italy)



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This project aims at setting up an active network of independent non-judicial human rights structures in Council of Europe member States.
