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Barentsen, B.

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Europees Hof voor de Rechten van de Mens
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(Costa (president), Bratza, Lorenzen, Tulkens, Casadevall, Bîrsan, Kovler, Steiner, Gyulumyan, Spielmann, Jebens, Popović, Malinverni, Nicolaou, Power, Pardalos, De Gaetano)
Noot B. Barentsen

Ouderdomspensioen. Recht op eigendom. Verbod van dwangarbeid. Werk in gevangenschap. Grote Kamer.

[EVRM art. 4, 14; EVRM Eerste Protocol art. 1]

Aan Stummer wordt een (vervroegd) ouderdomspensioen geweigerd, omdat hij onvoldoende jaren verzekerd is geweest. Hij heeft 28 jaar in de gevangenis doorgebracht en heeft daar ook gewerkt, maar deze jaren tellen niet mee als verzekerde tijdvakken.
Volgens het Hof valt de claim van Stummer onder art. 14 EVRM jo. art. 1 Eerste Protocol EVRM. Hoewel uit die laatste bepaling geen recht op socialezekerheidsuitkeringen voortvloeit, moet een overheidsstelsel waarin bepaalde socialezekerheidsrechten worden toegekend in overeenstemming zijn met art. 14 EVRM.
Het Hof is van oordeel dat het wel of niet opnemen van werkende gevangenen in een systeem van ouderdomspensioen nauw samenhangt met penitentiair beleid, waaronder de algemene doelen die met gevangenisstraf worden nagestreefd, het stelsel van werk in gevangenschap en de beloning daarvan en de besteding van de opbrengsten ervan, maar ook met sociaal beleid. Kortom, er zijn vragen over en keuzes in sociaal beleid aan de orde, waarin staten een ruime 'margin of appreciation' genieten. Met betrekking tot de sociale bescherming van gevangenen, overweegt het Hof bovendien dat, wanneer de omvang van de 'margin of appreciation' moet worden vastgesteld, ook een relevante factor kan zijn of er tussen de verdragsstaten wel of geen consensus bestaat. Het Hof constateert dat er weliswaar geen consensus bestaat over sociale verzekering van gedetineerden, maar dat er wel sprake is van een trend tot normalisatie van werk in gevangenschap. Hoewel een meerderheid van de lidstaten van de Raad van Europa voorziet in bepaalde vormen van sociale zekerheid, is er slechts een kleine meerderheid die ouderdomspensioenen voor gedetineerden openstelt; in sommige lidstaten (zoals Oostenrijk) zijn gedetineerden niet verplicht verzekerd, maar kunnen zij zich wel vrijwillig aansluiten bij de pensioenverzekering. Het Hof acht daarnaast van belang dat de onverzekerde tijdvakken van betrokkene zijn gelegen tussen de jaren '60 en '90, toen er geen consensus bestond ten aanzien van verzekering van gedetineerden.
Op grond van de omstandigheden van het voorliggende geval en gelet op de ruime margin of appreciation is het Hof van oordeel dat het stelsel van werk in gevangenschap en de sociale bescherming die daarbij wordt geboden als een geheel beschouwd niet "manifestly without reasonable foundation" zijn.
Het Hof ziet geen grond voor het oordeel dat er sprake is van strijd met art. 4 EVRM, nu een grote meerderheid van de lidstaten enigerlei vorm van sociale verzekering biedt aan gedetineerden, maar slechts een kleine meerderheid hen heeft opgenomen in het systeem van ouderdomspensioen. Er bestaat onvoldoende consensus over verzekering van gevangenen voor ouderdomspensioen. Werk in gevangenschap, zonder verzekering voor ouderdomspensioen, moet worden beschouwd als 'elk werk dat gewoonlijk wordt vereist van iemand die gedetineerd is' als bedoeld in art. 4 lid 3 onder a EVRM.

Stummer
tegen
Oostenrijk

The Law

I. Alleged violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1

61. The applicant complained that the exemption of those engaged in prison work from affiliation to the old-age pension system was discriminatory. He relied in substance on Article 14, taken in conjunction with Article 1 of Protocol No. 1.

62. Article 14 provides:

"The enjoyment of the rights and freedoms set forth in [the] 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."

63. Article 1 of Protocol No. 1 provides:

"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."

A. The parties' submissions

1. The applicant

64. The applicant referred to the principle that deprivation of liberty was a punishment in itself and that measures concerning a prisoner should not aggravate the suffering inherent in imprisonment. He argued that the exclusion of working prisoners from affiliation to the old-age pension system was contrary to that principle as it produced long-term effects going beyond the serving of the prison term.

65. Furthermore, he asserted that working prisoners were in the same situation as other employees as regards the need to provide for their old age through social insurance. The domestic courts' interpretation of section 4(2) of the General Social Security Act, namely that a distinction had to be drawn between voluntary work on the basis of a regular employment contract and prisoners' work performed in fulfilment of their statutory obligation to work, was not a convincing reason for their exclusion from affiliation to the old-age pension system.

66. The two situations were not fundamentally different in the applicant's submission. In reality, the vast majority of people at liberty were also obliged to work, if not by law, by the necessity of earning a livelihood. Work, whether performed in or outside the prison context, always served a variety of purposes going beyond the financial aspect of remuneration. The types of work performed by prisoners were not fundamentally different from the types of work performed by other persons. In sum, the exclusion of working prisoners from affiliation to the old-age pension system was not based on any factual difference and therefore required justification.

67. In the applicant's view, no such justification existed. Firstly, the exclusion of working prisoners from affiliation to the old-age pension system did not serve any legitimate aim. In so far as the Government had referred to the strained financial situation of the social security system, mere budgetary considerations could not suffice to exclude a vulnerable group from social protection.

68. Secondly, the applicant maintained that the Government had not shown objective and reasonable grounds for the difference in treatment. In particular, he contested the Government's argument that working prisoners could not pay meaningful contributions and that counting periods of prison work as insurance periods would therefore grant prisoners an unjustified privilege as compared to regular employees who had to pay full social security contributions. Since, pursuant to section 51 of the Execution of Sentences Act, the State received the proceeds from the work of prisoners, it could reasonably be expected to pay social security contributions. The Government's further argument as to whether or not periods of detention could justifiably be regarded as substitute periods was therefore of no relevance.

69. In respect of the possibility for prisoners to make voluntary contributions to the pension scheme under section 17 of the General Social Security Act, the applicant argued that many prisoners did not fulfil the requirement of having

accumulated a sufficient number of insurance months in previous periods. Moreover, the costs of voluntary insurance normally exceeded the limited financial resources of prisoners, as 75% of their modest remuneration for work was used as a contribution to the costs of serving their sentence, pursuant to section 32 of the Execution of Sentences Act.

2. The Government

70. The Government argued first and foremost that the non-affiliation of working prisoners to the old-age pension system was not discriminatory within the meaning of Article 14 of the Convention, as working prisoners were not in an analogous situation to regular employees.

71. They gave a detailed description of the organisation of prison work in Austria, underlining that prison work served the primary purpose of reintegration and resocialisation. They noted that the relevant Council of Europe standards, as well as the latest report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in respect of Austria, acknowledged the importance of work for providing prisoners with an opportunity to preserve or improve their professional qualifications, giving them a purposeful activity and a structured daily routine to make their prison term more bearable and preparing them to take up regular employment after release.

72. Prisoners were obliged to work pursuant to section 44(1) of the Execution of Sentences Act and prison authorities were under an obligation to provide them with suitable work in accordance with section 45(1) of that Act. On account of prison conditions, prisoners worked an average of five to six hours per day. Although this was not required by any provision of the Convention, prisoners received remuneration. The amounts were fixed by law and varied between EUR 5.00 and EUR 7.50 per hour according to the type of work performed. Periods spent by prisoners undergoing therapeutic or social treatment were regarded as working hours up to a maximum of five hours per week. This was clearly a beneficial form of treatment, underlining that resocialisation was the aim of prison work. The fact that part of the remuneration was used as a maintenance contribution was not at variance with the Convention.

73. In sum, regarding its nature and aim, prison work differed considerably from regular employment. The former, corresponding to a statutory obligation, was geared to resocialisation and reintegration, while the latter was based on an employment contract and served the purpose of securing a person's subsistence and professional advancement. Consequently, treating periods of prison work differently for the purpose of old-age pension insurance was not only justified but was required by the different factual situation. Counting periods for which no contributions were made as insurance periods would give working prisoners an unjustified advantage over regular employees.

74. The legislature's decision not to count periods during which a prisoner worked as qualifying or substitute periods was likewise based on objective reasons in the Government's submission. Under the relevant provisions of the General Social Security Act, periods spent in prison were, *inter alia*, treated as qualifying periods if the person concerned had been granted compensation in respect of the detention under the Compensation (Criminal Proceedings) Act. In that case the State had to pay the social security contributions in order to compensate the person concerned for disadvantages suffered under social security law as a result of the detention. To treat persons who were lawfully imprisoned in the same way would lead to equal treatment of unequal facts. To treat periods spent in detention as substitute periods, without payment of contributions, would also create imbalances in the social security system. Generally, the legislature considered that substitute periods were periods during which persons were prevented from making contributions on socially accepted grounds, such as school education, childbirth, unemployment, illness, military or alternative military service.

75. Moreover, it was open to prisoners to make voluntary contributions to the old-age pension system under section 17 of the General Social Security Act. That Act also provided for the possibility of reducing the amount to be paid to a lower level than that of normal contributions. However, the Government stated that, for data protection reasons, they were unable to provide statistical data on the number and proportion of prisoners making use of this possibility.

76. In the alternative, the Government argued that even assuming that working prisoners were in an analogous situation to regular employees, the

difference in treatment was justified. In practice, even if prisoners were not excluded from affiliation to the old-age pension system, they would not be able to make meaningful contributions, as very often their remuneration, after deduction of the maintenance contribution, would not reach the threshold of EUR 366.33 of so-called marginal earnings, below which employees were in any case not covered by compulsory insurance under the General Social Security Act. Given the strained financial situation of the social security institutions, only persons who were able to make meaningful contributions could be included in the old-age pension system.

77. Moreover, Contracting States enjoyed a wide margin of appreciation in the organisation of their social security systems. Even the 2006 European Prison Rules only recommended that "as far as possible, prisoners who work shall be included in national social security systems".

78. The Government explained that since the 1993 amendment of the Unemployment Insurance Act, working prisoners had been affiliated to the unemployment insurance scheme. This amendment, which was part of a broader reform of the system of execution of sentences, had been preceded by years of intensive discussion. The decision to integrate prisoners into the unemployment insurance scheme but not the old-age pension scheme was motivated by the consideration that unemployment insurance, which encompassed not only financial benefits but access to training courses and job-finding services, was the most effective instrument for furthering prisoners' reintegration after release. It had been seen as a first step towards including them into the social security system at large. However, as insurance under the General Social Security Act encompassed health and accident insurance plus affiliation to the old-age pension system, and prisoners' health care and accident insurance were provided for by the prison authorities under the Execution of Sentences Act, their affiliation to the old-age pension scheme would have necessitated more complex amendments. Moreover, according to studies carried out at the time, it was considered to be the most cost-intensive factor.

79. In addition, the Government pointed out that cases such as the present one with very lengthy prison terms were extremely rare. The majority of prisoners were in a position to accumulate a sufficient number of insurance months on account of the periods worked outside prison. In the present case the applicant had received unemployment benefits and, since their expiry, had continued to receive emergency relief payments.

80. Finally, the Austrian legislature's decision thus far not to affiliate prisoners to the old-age pension scheme provided for in the General Social Security Act did not mean that they did not enjoy any social cover. Firstly, as stated above, they were covered by the unemployment insurance scheme. Consequently, they received unemployment benefits and, upon their expiry, emergency relief payments. As a last resort, the system of social assistance provided a means-tested minimum income for persons who could not cover their basic needs by any other means. In sum, the Austrian legal system provided for a differentiated and well-balanced solution taking into account the interests of society at large on the one hand and the interests of prisoners on the other hand.

B. The Court's assessment

1. Applicability of Article 14 taken in conjunction with Article 1 of Protocol No. 1

81. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the provisions in question. The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and its Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 39-40, ECHR 2005 X; *Andrejeva v. Latvia* [GC], no. 55707/00, § 74, ECHR 2009 ...; and, most recently, *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 63, ECHR 2010 ...).

82. According to the Court's established case-law, the principles which apply generally in cases under Article 1 of Protocol No. 1 are equally relevant when it comes to welfare benefits. In particular, this Article does not create a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (see *Stec and Others* (dec.), cited above, § 54; *Andrejeva*, cited above, § 77; and *Carson*, cited above, § 64).
83. Moreover, in cases such as the present one, concerning a complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question (see *Gaygusuz v. Austria*, 16 September 1996, § 40, *Reports of Judgments and Decisions* 1996 IV, and *Willis v. United Kingdom*, no. 36042/97, § 34, ECHR 2002 IV). Although Article 1 of Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14 (see *Stec and Others* (dec.), cited above, § 55, and *Andrejeva*, cited above, § 79).
84. In the present case the applicant, having reached pensionable age, claimed an old-age pension which is due as of right on condition that a minimum number of insurance months have been accumulated. The Court considers that the social security legislation at issue creates a proprietary interest falling within the scope of Article 1 of Protocol No. 1. Applying the test whether the applicant would have had an enforceable right to receive a pension had it not been for the condition of entitlement he alleges to be discriminatory, the Court notes that it is undisputed that the applicant had worked for some twenty-eight years in prison without being affiliated to the old-age pension system. His request for an old-age pension was refused on the ground that he lacked the required minimum number of insurance months. It follows that, had he been affiliated to the old-age pension system for work performed in prison, he would have accumulated the necessary number of insurance months and would consequently have been entitled to a pension.
85. The Government did not contest the applicability of Article 14 of the Convention taken together with Article 1 of Protocol No. 1. Nevertheless, they argued that the applicant's income as a prisoner was insufficient for him to pay contributions to the old-age pension system: following deduction of the maintenance contribution, his remuneration did not exceed the marginal earnings threshold below which any employee was exempted from compulsory insurance under the General Social Security Act. The Court considers that this argument, which is itself intrinsically linked to the applicant's position as a prisoner, cannot invalidate the conclusion reached above.
86. In conclusion, the Court finds that the applicant's claims fall within the scope of Article 1 of Protocol No. 1 and the right to peaceful enjoyment of possessions which it safeguards. This is sufficient to render Article 14 applicable.

2. Compliance with Article 14 taken in conjunction with Article 1 of Protocol No. 1

(a) General principles
87. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (see *Carson and Others*, cited above, § 61). Discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. "No objective and reasonable justification" means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (ibid.; see also *Andrejeva*, cited above, § 81; and *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 51, ECHR 2006 VI).
88. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations

justify a different treatment. The scope of this margin will vary according to the circumstances, the subject-matter and its background. Thus, for example, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, in the absence of an objective and reasonable justification, give rise to a breach of Article 14 (see *Andrejeva*, cited above, § 82; *Stec and Others*, cited above, § 51; and *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000 IV).

89. Similarly, a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see *Andrejeva*, cited above, § 83; and *Stec and Others*, cited above, § 52; *Carson and Others*, cited above, § 61; in the specific context of prisoners' rights, see also *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007 XIII).

(b) Application of these principles to the present case

90. The applicant complains of discrimination on account of his position as a prisoner. Although being a prisoner is not one of the grounds explicitly mentioned in Article 14, the list set out in this Article is not exhaustive and includes "any other status" (or "*toute autre situation*" in the French text) by which persons or groups of persons are distinguishable from each other. It has not been disputed in the present case that being a prisoner is an aspect of personal status for the purposes of Article 14.

(i) Whether the applicant as a working prisoner was in a relevantly similar situation to regular employees

91. The Court will first examine whether, in respect of affiliation to the old-age pension system under the General Social Security Act, the applicant as a working prisoner was in a relevantly similar situation to regular employees.

92. The Government laid much emphasis on the differences in aim and nature between prison work and regular employment. They underlined that prison work served the primary aim of rehabilitation and pointed to its obligatory nature, arguing that these features set the applicant's situation apart from that of ordinary employees. For his part the applicant asserted that the obligatory nature of prison work was not decisive in the present context and that the type of work performed by prisoners did not differ in any way from the work performed by ordinary employees.

93. The Court observes that prison work differs from the work performed by ordinary employees in many aspects. It serves the primary aim of rehabilitation and resocialisation. Working hours, remuneration and the use of part of that remuneration as a maintenance contribution reflect the particular prison context. Moreover, in the Austrian system prisoners' obligation to work is matched by the prison authorities' obligation to provide them with appropriate work. Indeed, that situation is far removed from a regular employer-employee relationship. It could be argued that consequently, the applicant as a working prisoner was not in a relevantly similar situation to ordinary employees.

94. However, in the Court's view neither the fact that prison work is aimed at reintegration and resocialisation, nor the obligatory nature of prison work is decisive in the present case. Furthermore, the Court considers that it is not decisive whether work is performed for the prison authorities, as in the applicant's case, or for a private employer, although in the latter case there appears to be a stronger resemblance to a regular employment relationship.

95. What is at issue in the present case is not so much the nature and aim of prison work itself but the need to provide for old age. The Court finds that in respect of this the applicant as a working prisoner was in a relevantly similar situation to ordinary employees. It therefore has to examine whether the difference in treatment in respect of affiliation to the old-age pension system under the General Social Security Act was justified. In respect of affiliation to the health and accident insurance scheme under the General Social Security Act, however, the Court would agree that the applicant as a working prisoner was in a different situation from ordinary employees since prisoners' health and accident care is provided by the

State pursuant to the Execution of Sentences Act. Equally, the Court would accept that, as regards the payment of his pension, a prisoner who has already reached pensionable age is in a different situation from a pensioner who is not imprisoned, as a prisoner's livelihood is provided for by the prison authorities.

(ii) Whether the difference in treatment pursued a legitimate aim

96. Regarding the aim of the difference in treatment, the Government argued that working prisoners often did not have the financial means to pay social security contributions. Counting periods for which no, or at least no meaningful, contributions had been made as insurance periods giving rise to pension entitlements would create an imbalance between working prisoners and persons outside the prison context and would undermine the economic efficiency of the social security institutions, which were already facing a strained financial situation.

97. In addition, a further aim, namely that of preserving the overall consistency within the social security system, appeared to be implied in the Government's submissions. They argued that periods worked in prison could not be counted as qualifying or substitute periods, as according to the principles of Austrian social security law, such periods could only serve to compensate for periods during which no contributions were made by reason of a limited number of socially accepted activities or situations (for example, school education, childbirth, unemployment, illness, military or alternative military service).

98. The Court accepts that the aims relied on by the Government, namely preserving the economic efficiency and overall consistency of the old-age pension system by excluding from benefits persons who have not made meaningful contributions, are legitimate ones.

(iii) Whether the difference in treatment was proportionate

99. The Court reiterates its well-established case-law that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. It is inconceivable that a prisoner should forfeit his Convention rights merely because of his status as a person detained following conviction (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, §§ 69-70, ECHR 2005 IX, and Dickson, cited above, § 67). Accordingly, a person retains his or her Convention rights on imprisonment, so that any restriction on those rights must be justified in each individual case. This justification can flow, *inter alia*, from the necessary and inevitable consequences of imprisonment or from an adequate link between the restriction and the circumstances of the prisoner in question (ibid., § 68).

100. It is against this background that the Court will examine whether there was a reasonable relationship of proportionality between the non-affiliation of working prisoners to the old-age pension system and the legitimate aims set out above. The core of the applicant's argument was that the Government had failed to provide a justification for the difference in treatment. He asserted that the main reason for prisoners' inability to pay social security contributions under the General Social Security Act was the State's own policy choice to withhold the major part of a prisoner's remuneration as a maintenance contribution.

101. The Court observes that the issue of working prisoners' affiliation to the old-age pension system is closely linked to issues of penal policy, such as the perception of the general aims of imprisonment, the system of prison work, its remuneration and the priorities in using the proceeds from it, but also to issues of social policy reflected in the social security system as a whole. In short, it raises complex issues and choices of social strategy, which is an area in which States enjoy a wide margin of appreciation, whereas the Court will only intervene when it considers the legislature's policy choice to be "manifestly without reasonable foundation" (see the case-law cited in paragraph 89 above).

102. Given the complexity of the issue, the Court finds that it cannot look at the question of prisoners' affiliation to the old-age pension system in isolation but has to see it as one feature in the overall system of prison work and prisoners' social cover.

103. As has been observed above, in the Austrian system prisoners are under an obligation to work, while the prison authorities are obliged to provide prisoners with appropriate work. The Court notes as a positive feature of that system that more than 70% of the prison population are currently work-

ing. Working hours are adapted to the prison context, including certain favourable measures such as counting time spent in therapeutic or social treatment as working time up to five hours per week. Moreover, prisoners receive remuneration for their work, of which 75% is, however, deducted as a maintenance contribution. The Court notes in the first place that collecting such a contribution is not in itself at variance with the Convention (see *Puzinas v. Lithuania* (dec.), no. 63767/00, 13 December 2005, concerning a complaint under Article 1 of Protocol No. 1 about the deduction of a 25% contribution from a prisoner's salary). While the percentage in the present case appears rather high, it can nevertheless not be regarded as unreasonable taking into account the general costs of maintaining prisons and the fact that a prisoner's entire livelihood, including health and accident insurance, is provided for by the State.

104. Turning to prisoners' social cover, the Court reiterates that when defining the breadth of the margin of appreciation, a relevant factor may be the existence or non-existence of common ground between the laws of the Contracting States (see *Petrovic v. Austria*, 27 March 1998, § 38, *Reports* 1998 II).

105. The Court observes that although there is no European consensus on the matter, there is an evolving trend: in contrast to the 1987 European Prison Rules, the 2006 European Prison Rules not only contain the principle of normalisation of prison work but also explicitly recommend in Rule 26.17 that "as far as possible prisoners who work shall be included in national social security systems" (see paragraph 56 above). However, the Court notes that the wording used in Rule 26.17 is cautious ("as far as possible") and refers to inclusion in national social security systems in general terms. Moreover, while an absolute majority of Council of Europe member States provide prisoners with some kind of social security, only a small majority affiliate prisoners to their old-age pension system, some of them, like Austria, only by giving them the possibility of making voluntary contributions. A minority do not include prisoners in the old-age pension system at all (see paragraph 60 above).

106. It is thus only gradually that societies are moving towards the affiliation of prisoners to their social security systems in general and to their old-age pension systems in particular. Austrian law reflects this trend in that all prisoners are to be provided with health and accident care. In addition, working prisoners have been affiliated to the unemployment insurance scheme since 1 January 1994, following the 1993 amendment of the Unemployment Insurance Act which formed part of a broader reform of the system of execution of sentences. As the Government explained, the reason for that decision was that the legislature considered unemployment insurance to be the most efficient instrument for assisting prisoners' reintegration upon release as, in addition to payment of unemployment benefits, it granted access to a whole range of training and job-search facilities. At the time of the 1993 reform, affiliation to the old-age pension system had been envisaged, but it has so far not been put in place as a result of the strained financial situation of the social security institutions.

107. Turning to the applicant's situation, the Court observes that he worked for lengthy periods in prison (see paragraph 10 above). It follows from the domestic authorities' decisions in the present case that his periods without insurance cover occurred between the 1960s and the 1990s. The Court attaches weight to the fact that at the material time there was no common ground regarding the affiliation of working prisoners to domestic social security systems. This lack of common ground was reflected in the 1987 European Prison Rules, which did not contain any provision in this regard.

108. The Government argued that very lengthy prison terms were rare and that, consequently, the majority of prisoners had the possibility of accumulating a sufficient number of insurance months for work performed outside prison and were therefore not deprived of an old-age pension. The Court does not consider it necessary to examine this argument in detail. It would rather attach weight to the fact that the applicant, although not entitled to an old-age pension, was not left without social cover. Following his release from prison he received unemployment benefits and subsequently emergency relief payments, to which he was entitled on account of having been covered by the Unemployment Insurance Act as a working prisoner. According to his own submissions, the applicant currently still receives emergency relief payments complemented by social assistance in the form of a housing allowance. His monthly income currently amounts to approximately EUR

720 and thus almost reaches the level of a minimum pension, which is currently fixed at approximately EUR 780 for a single person.
109. On the basis of the facts of the present case and all the information before it, the Court finds that the system of prison work and the social cover associated with it taken as whole is not "manifestly without reasonable foundation". In a context of changing standards, a Contracting State cannot be reproached for having given priority to the insurance scheme, namely unemployment insurance, which it considered to be the most relevant for the reintegration of prisoners upon their release.
110. While the respondent State is required to keep the issue raised by the present case under review, the Court finds that by not having affiliated working prisoners to the old-age pension system to date, it has not exceeded the margin of appreciation afforded to it in that matter.
111. It follows that there has been no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 of the Convention.

II. Alleged violation of Article 4 of the Convention

112. The applicant alleged that since he was not affiliated to the old-age pension system for work performed as a prisoner, such work could not be regarded as falling under the terms of Article 4 § 3 (a) and therefore violated Article 4 § 2 of the Convention.
Article 4, in so far as relevant, reads as follows:
"1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term 'forced or compulsory labour' shall not include:
(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention;
..."

A. The parties' submissions

113. The applicant asserted that the prison work performed by him clearly amounted to "forced or compulsory labour" within the meaning of Article 4 § 2 of the Convention. He referred to ILO Convention No. 29, according to which "forced or compulsory labour" meant all "work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". In that connection, he pointed out that prisoners in Austria were obliged to work pursuant to section 44 of the Execution of Sentences Act and that it was a punishable offence under sections 107(1) and 109 of that Act if a prisoner refused to work.
114. While conceding that the obligation to work as a prisoner could be justified by Article 4 § 3 (a), he submitted that, by today's standards, prison work without affiliation to the old-age pension system could not be regarded as "work required to be done in the ordinary course of detention" within the meaning of that provision. Consequently, the fact that he had to work as a prisoner without being affiliated to the old-age pension system violated Article 4 of the Convention.
115. For their part, the Government argued that prison work fell outside the scope of Article 4 as it was covered by the exception to the prohibition of forced or compulsory labour contained in Article 4 § 3 (a). Consequently, the non-affiliation of working prisoners to the old-age pension system did not raise an issue under Article 4 of the Convention.

B. The Court's assessment

1. General principles

116. The Court reiterates that Article 4 enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 4 § 1 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Siliadin v. France*, no. 73316/01, § 112, ECHR 2005 VII, and *Rantsev v. Cyprus and Russia*, no. 25965/04, § 283, ECHR 2010 ... (extracts)).
117. Article 4 § 2 of the Convention prohibits "forced or compulsory labour". In interpreting Article 4, the Court has in previous cases taken into account the relevant ILO Conventions, which are binding on almost all of the Council of Europe's member States, including Austria, and especially the 1930 Forced Labour Convention (see *Van der Mussele v. Belgium*, 23 November 1983, § 32, Series A no. 70, and *Siliadin*, cited above, § 115).

118. The Court noted in those cases that there was in fact a striking similarity, which was not accidental, between paragraph 3 of Article 4 of the Convention and paragraph 2 of Article 2 of ILO Convention No. 29. Paragraph 1 of the last-mentioned Article provides that "for the purposes" of the latter convention, the term "forced or compulsory labour" means "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" (see *Siliadin*, cited above, § 116). The Court regarded this definition as a starting-point for the interpretation of Article 4 of the Convention but noted that sight should not be lost of the Convention's special features or of the fact that it was a living instrument to be read "in the light of the notions currently prevailing in democratic States" (see *Van der Mussele*, cited above, § 32).

119. Article 4 § 3 (a) indicates that the term "forced or compulsory" labour does not include "any work to be done in the ordinary course of detention".

120. The Court has noted the specific structure of Article 4. Paragraph 3 is not intended to "limit" the exercise of the right guaranteed by paragraph 2, but to "delimit" the very content of that right, for it forms a whole with paragraph 2 and indicates what the term "forced or compulsory labour" is not to include *("n'est pas consideré comme 'travail forcé ou obligatoire'...")*. This being so, paragraph 3 serves as an aid to the interpretation of paragraph 2. The four subparagraphs of paragraph 3, notwithstanding their diversity, are grounded on the governing ideas of general interest, social solidarity and what is normal in the ordinary course of affairs (see *Van der Mussele*, cited above, § 38; see also *Karlheinz Schmidt v. Germany*, 18 July 1994, § 22, Series A no. 291 B, and *Zarb Adami v. Malta*, no. 17209/02, § 44, ECHR 2006 VIII).

121. The Court's case-law concerning prison work is scarce. In one of its early judgments the Court had to consider work a recidivist prisoner was required to perform, his release being conditional on accumulating a certain amount of savings. While accepting that the work at issue was obligatory, the Court found no violation of Article 4 of the Convention on the ground that the requirements of Article 4 § 3 (a) were met. In the Court's view the work required "did not go beyond what is 'ordinary' in this context since it was calculated to assist him in reintegrating himself into society and had as its legal basis provisions which find an equivalent in certain other member States of the Council of Europe" (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 59, Series A no. 50, with reference to *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, §§ 89-90, Series A no. 12).

122. In respect of prisoners' remuneration and social cover, the Court refers to the decision of 6 April 1968 by the European Commission of Human Rights in the case of *Twenty-one Detained Persons v. Germany* (nos. 3134/67, 3172/67, 3188-3206/67, *Collection* 27, pp. 97-116), in which the applicants, relying on Article 4, complained that they were refused adequate remuneration for the work which they had to perform during their detention and that no contributions under the social security system were made for them by the prison authorities in respect of the work done. The Commission declared their complaint inadmissible as being manifestly ill founded. It noted that Article 4 did not contain any provision concerning the remuneration of prisoners for their work. Moreover, it referred to its consistent case-law, which had rejected as being inadmissible any applications by prisoners claiming higher payment for their work or claiming the right to be covered by social security systems.

123. The Court had to examine a similar complaint from a somewhat different angle in the case of *Puzinas* (cited above). The applicant complained under Articles 4 and 14 of the Convention and Article 1 of Protocol No. 1 that the domestic social security legislation was inadequate in that it did not permit prisoners to claim pension or any other social benefits for prison work. The Court examined the complaint in the first place under Article 1 of Protocol No. 1, noting that it was undisputed that the applicant was not entitled to any pension or social benefits under the relevant domestic legislation. Finding that the applicant therefore had no possessions within the meaning of Article 1 of Protocol No. 1 regarding his future entitlement to or the amount of a pension, the Court rejected the complaint under this provision, as well as under the other provisions relied on, as being incompatible *ratione materiae* with the provisions of the Convention.

2. Application to the present case

124. The Court has to examine whether the applicant in the present case had to perform "forced or compulsory labour" contrary to Article 4 of the Convention. The Court notes that the applicant was under an obligation to work in accordance with section 44(1) of the Execution of Sentences Act. Refusal to perform the work assigned to him constituted an offence under section 107 of that Act, punishable under section 109 by penalties ranging from a reprimand to solitary confinement.

125. Taking the definition of forced or compulsory labour contained in Article 2 § 1 of ILO Convention No. 29 as a starting-point for the interpretation of Article 4 § 2 of the Convention (see *Van der Mussele*, cited above, §§ 32-34), the Court has no doubt that the applicant was performing work "for which he had not offered himself voluntarily under the menace of a penalty".

126. While this does not appear to be in dispute between the parties, they differ in their view as to whether his work was covered by the terms of Article 4 § 3 (a) of the Convention, which exempts "work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of the Convention" from the term "forced or compulsory labour". The Government answered the question in the affirmative, concluding that the work performed by the applicant as a prisoner did not fall within the scope of Article 4. The applicant for his part asserted that prison work without affiliation to the old-age pension system was not covered by the provision in question. Therefore, it constituted "forced or compulsory labour" in violation of Article 4 § 2.

127. The Court has not yet had an opportunity to examine the question whether Article 4 requires Contracting States to include working prisoners in the social security system. It notes that the above-mentioned decision of the Commission in *Twenty-one Detained Persons v. Germany* (cited above), which answered the question in the negative, dates from 1968. The Court will therefore have to assess whether the position adopted in that decision is still valid in respect of the work performed by the applicant as a prisoner without being affiliated to the old-age pension system.

128. The wording of the Convention does not give any indication as regards the issue of working prisoners' affiliation to the national social security system. However, in establishing what is to be considered "work required to be done in the ordinary course of detention", the Court will have regard to the standards prevailing in member States (see *Van Droogenbroeck*, cited above, § 59).

129. The applicant relies in essence on the Court's doctrine that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, for instance, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 75, ECHR 2002 VI; and *Van der Mussele*, cited above, § 32). He appears to be arguing that European standards have changed to such an extent that prison work without affiliation to the old-age pension system can no longer be regarded as "work required to be done in the ordinary course of detention".

130. The Court notes that the applicant worked for lengthy periods in prison, starting in the 1960s. At that time the Commission, in its decision in *Twenty-one Detained Persons v. Germany* (cited above), held that Article 4 of the Convention did not require working prisoners to be affiliated to the social security system. The 1987 European Prison Rules remained silent on the issue of working prisoners' affiliation to the social security system. The Court acknowledges that, subsequently, significant developments have taken place in the field of penal policy. These developments are reflected in the 2006 European Prison Rules, which contain the principle of normalisation of prison work as one of the basic principles. More specifically in the present context, Rule 26.17 of the 2006 Rules provides that "as far as possible, prisoners who work shall be included in national social security systems".

131. However, having regard to the current practice of the member States, the Court does not find a basis for the interpretation of Article 4 advocated by the applicant. According to the information available to the Court, while an absolute majority of Contracting States affiliate prisoners in some way to the national social security system or provide them with some specific insurance scheme, only a small majority affiliate working prisoners to the old-age pension system. Austrian law reflects the development of European law in that all prisoners are provided with health and accident care and working prisoners are affiliated to the unemployment insurance scheme but not to the old-age pension system.

132. In sum, it appears that there is no sufficient consensus on the issue of the affiliation of working prisoners to the old-age pension system. While Rule 26.17 of the 2006 Rules reflects an evolving trend, it cannot be translated into an obligation under Article 4 of the Convention. Consequently, the obligatory work performed by the applicant as a prisoner without being affiliated to the old-age pension system has to be regarded as "work required to be done in the ordinary course of detention" within the meaning of Article 4 § 3 (a).
133. The Court concludes that the work performed by the applicant was covered by the terms of Article 4 § 3 (a) of the Convention, and did not therefore constitute "forced or compulsory labour" within the meaning of Article 4 § 2 of the Convention.
134. Consequently, there has been no violation of Article 4 of the Convention.

III. Alleged violation of Article 14 of the Convention taken together with Article 4
135. The Court notes that the applicant relied mainly on Article 4 alone, but also referred to Article 14, however without submitting any separate arguments under Article 14 taken in conjunction with Article 4.
136. The Court finds that its examination under Article 4 alone covers all aspects of the issue raised by the applicant's complaint. The Court therefore considers that there is no need to examine the applicant's complaint under Article 14 of the Convention taken together with Article 4.

For these reasons, the Court
1. *Holds*, by ten votes to seven, that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1;
2. *Holds*, by sixteen votes to one, that there has been no violation of Article 4 of the Convention;
3. *Holds*, unanimously, that there is no need to examine the complaint under Article 14 of the Convention taken in conjunction with Article 4 of the Convention.

Concurring opinion of Judge De Gaetano
1. I have voted with the majority under all three heads of the operative part of the judgment. Nevertheless I cannot share fully the reasoning embraced by the majority in connection with the first two heads.

2. The majority have found that there was no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 because the difference in treatment pursued a legitimate aim (paragraphs 96 to 98) and was proportionate (paragraphs 99 to 110). In my view the Court need not have gone so far. Contrary to what is suggested in paragraph 95, the General Social Security Act is not intended "to provide for old age" generally, but only to make provision for, *inter alia*, an old age pension for persons who are gainfully employed. By no stretch of the imagination can the applicant be considered to have been, while in prison, "gainfully employed", the notion of gainful employment implying a measure of contribution to the national economy. In my view, therefore, the applicant as a prisoner working in the prison kitchen or prison bakery, was simply *not* in a relevantly similar situation to ordinary employees (a point which is only hesitantly referred to in paragraph 93 and then discarded). The position *might* have been different if he were performing work (whether within the prison confines or without) for a private person or company; or if he were engaged in producing things which the prison authorities then sell on the open market in direct competition with other producers; but that is not the case here.
3. As for the finding of no violation of Article 4, the majority decision seems to be based on the fact that there is "no sufficient consensus on the issue of the affiliation of working prisoners to the old-age pension system" (paragraph 132, and paragraph 131 *passim*). Again I fail to follow the reasoning. Work which is excepted under Article 4 § 3 (because it is required to be done "in the ordinary course of detention") does not cease to be so excepted because it is paid or unpaid, or because the prisoner is or is not affiliated to a pension scheme. Nor do the European Prison Rules (1987 and 2006) come into the picture in the instant case. What one has to look at is the nature of the work performed by the applicant. In this case the applicant was not made to stand by the side of a public road to break stones with a sledgehammer – he worked in the kitchen and bakery, which must surely rank as an "ordinary" contribution to the work that must necessarily be carried out in any community by its members, be that community domestic, monastic or penal. In light of the above I cannot share the reasoning in paragraphs 129 to 132.

Joint partly dissenting opinion of Judges Tulkens, Kovler, Gyulumyan, Spielmann, Popović, Malinverni and Pardalos

(*Translation*)

We do not share the position of the majority that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 in the present case. Instead, we believe that the applicant, who spent twenty-eight years in prison and worked there for lengthy periods, was discriminated against in that he was not affiliated to the old-age pension system on account of his status as a prisoner.

1. First of all, we would emphasise that we fully agree with the majority that the applicant, as a working prisoner, was in a *relevantly similar* situation to ordinary employees as regards the need for old-age insurance cover (see paragraph 95 of the judgment). Here, the judgment explicitly, and rightly, rejects the Government's contention that working prisoners were not in a similar situation to other employees, notably because of the difference in the nature and aims of prison work, which was mandatory and pursued the aims of social reintegration and rehabilitation.

2. Where we depart from the majority is in the assessment of whether the difference in treatment to which the applicant was subjected in respect of affiliation to the old-age pension system under the General Social Security Act was justified in terms of the requirements of the Convention. In our view, it was not.

3. With regard, firstly, to the *legitimate aim* pursued by the difference in treatment, the judgment refers to "preserving the economic efficiency and overall consistency of the old-age pension system by excluding from benefits persons who have not made meaningful contributions" (see paragraph 98). Although it is of course reasonable to take economic realities into account, it must nevertheless be acknowledged that there has been a gradual trend in the Court's recent case-law towards attaching considerable importance to them, sometimes to the detriment of fundamental rights (see *N. v. the United Kingdom* [GC], no. 26565/05, 27 May 2008; *Burden v. the United Kingdom* [GC], no. 13378/05, ECHR 2008 ...; and *Carson and Others v. the United Kingdom* [GC], no. 42184/05, ECHR 2010 ...). Furthermore, strictly speaking, the "economic well-being of the country" found in Article 8 of the Convention does not appear as such in Article 1 of Protocol No. 1, which refers more broadly to the public interest.

4. Next, with regard to the question of *proportionality*, the judgment begins with an emphatic reminder of the Court's well-established case-law to the effect that "prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. It is inconceivable that a prisoner should forfeit his Convention rights merely because of his status as a person detained following conviction" (see paragraph 99). Nevertheless, in applying this approach to the present case, the majority head off in a different direction.

5. The judgment relies to a large extent on the *margin of appreciation* which the State must be afforded, one of the relevant factors in which may be the existence or non-existence of common ground between the legal systems of the Contracting States (see paragraph 104 of the judgment). We would observe that there is nowadays an evolving trend in the Council of Europe's member States towards the affiliation of working prisoners to national social security systems. The 2006 European Prison Rules reflect the position of all the Council of Europe member States in terms of policy.[1] On the basis of Rules 64 and 65 of the 1987 European Prison Rules, they lay down the principle of normalisation of detention conditions as the basis of policy on execution of sentences.[2] They explicitly recommend that "as far as possible, prisoners who work should be included in national social security systems" (Rule 26.17). This trend is gradually reducing the margin of

1 Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies.

2 The concept of normalisation is defined as bringing detention conditions closer to parity with the standards of free society, in both social and legal terms (W. LESTING, *Normalisierung im Strafvollzug. Potential und Grenzen des §3 Absatz 1 StVollzG*, Pfaffenweiler, Centaurus, 1988, and E. SHEA, "Les paradoxes de la normalisation du travail pénitentiaire en France et en Allemagne", *Déviance et société*, vol. 29, no. 3, 2005, pp. 349 et seq.).

appreciation which States may enjoy in this area. While they still retain a choice in respect of the policies to be implemented and the timing of any legislative changes (see *Petrovic v. Austria*, 27 March 1998, §§ 36-42, *Reports of Judgments and Decisions* 1998 II, and *Stec and Others v. the United Kingdom* [GC], no. 65731/01, §§ 63-65, ECHR 2006 VI), they cannot disregard such a trend altogether.

6. We are struck by the lack of flexibility in the system applied in the applicant's case. Section 4(2) of the General Social Security Act, as interpreted by the domestic courts, provides for the *automatic* exclusion of working prisoners from the compulsory old-age pension system. The applicant thus worked for twenty-eight years as a prisoner without ever having been affiliated to the system. Besides the consideration that working prisoners are in a different situation from ordinary employees in that they do not perform work on the basis of an employment contract but by virtue of a statutory obligation, the exclusion is mainly based on the premise that prisoners do not have the necessary means to pay contributions to the old-age pension system. However, this situation is a result of the State's deliberate policy choice to withhold 75% of a working prisoner's remuneration as a maintenance contribution, a percentage which is particularly high.[3] Prisoners are thus in a sense "condemned" to be unable to pay sufficient contributions.

7. While deducting a maintenance contribution from a prisoner's remuneration is not in itself at variance with the Convention (see *Puzinas v. Lithuania* (dec.), no. 63767/00, 13 December 2005), the high percentage of this contribution in the Austrian system leaves virtually no room for contributions to the social security system, apart from a small percentage for the payment of contributions to the unemployment insurance scheme. In our view, there is a lack of balance between the possible public interest in ensuring that prisoners contribute towards the costs incurred by the community as a result of their imprisonment and the individual prisoner's interest in providing for old age. Nowadays, because of the long-term sentences being imposed in many countries, the presence of an older prison population is a new sociological reality which will necessarily raise the question of old-age pensions for such prisoners at the time of their release. The applicant's case is a good example. He has spent twenty-eight years of his life in prison and was released at the age of sixty-six.

8. Admittedly, the applicant was not left without any social cover. Since the 1993 amendment of the Unemployment Insurance Act, working prisoners have been affiliated to the unemployment insurance scheme, which the legislature considered at that time to be the most effective instrument for encouraging prisoners' reintegration after release. However, as the Government acknowledged, the Austrian legislature itself regarded this amendment as only a *first* step towards full integration of working prisoners into the social security system (see paragraph 78 of the judgment). Yet despite that intention, the issue of working prisoners' affiliation to the old-age pension system has not been discussed subsequently.

9. From a judicial perspective, the applicant brought his case before the courts in 2001 and the Supreme Court gave judgment in 2002. In finding that the non-affiliation of working prisoners to the old-age pension system was not discriminatory, the domestic courts limited themselves to referring to the Supreme Court's leading case on the issue, a judgment delivered in 1990 – more than twenty years ago now. They did not consider it necessary to re-examine whether the non-affiliation of working prisoners was still proportionate to any legitimate aims pursued, nor did they make an assessment of the applicant's particular circumstances.

10. Regarding the applicant's current situation, he continues to receive emergency relief payments (to which he is entitled on account of having been covered by the Unemployment Insurance Act as a working prisoner), supplemented by social assistance for persons who are otherwise unable to provide for their basic needs. However, in our view, neither the emergency relief payments nor the social assistance can be compared to an old-age pension granted on the basis of the number of years worked and the contributions paid. The former constitute assistance, whereas the latter is a right. *The difference is significant in terms of respect for human dignity.* Social security forms an integral part of human dignity. In addition, it is

3 See A. PILGRAM, "Austria", in D. VAN ZYL SMIT and S. SNACKEN (eds.), *Prison Labour: Salvation or Slavery? International Perspectives*, Onati International Series in Law and Society, Aldershot, Ashgate, 1999, p. 21.

now acknowledged in modern penology that social rehabilitation implies the development of personal responsibility. Lastly, as regards access to social services, the European Committee of Social Rights has highlighted former prisoners as a vulnerable group.

11. In these circumstances, we consider that the non-affiliation of working prisoners to the old-age pension system creates a distinction between prisoners and ordinary employees, which risks producing – and in the applicant's case actually produces – a long-term effect going well beyond the legitimate requirements of serving a particular prison term. Some writers have had no hesitation in referring to this as *double punishment*.[4] Such a situation sits ill with the idea that prisoners should not suffer any restriction of their rights beyond the necessary and inevitable consequences of imprisonment. Moreover, it does not serve the aim of rehabilitation, on which, by the Government's own assertion, the system of prison work is based.

12. The Grand Chamber's judgment does, however, leave an opening for the future. The Grand Chamber takes note of the context of changing standards and finds that while, as matters currently stand, the respondent State has not exceeded the margin of appreciation afforded to it in this area by not affiliating working prisoners to the old-age pension system, it is called upon to keep the situation under review (see paragraph 110 of the judgment). Prisoners, it must be emphasised, have been recognised by the Court itself as persons in a vulnerable situation (see, for example, *Algür v. Turkey*, no. 32574/96, § 44, 22 October 2002; *Mikadze v. Russia*, no. 52697/99, § 109, 7 June 2007; *Renolde v. France*, no. 5608/05, § 93, 16 October 2008; and *Aliev v. Georgia*, no. 522/04, § 97, 13 January 2009). Today, the right to an old-age pension forms part of the social pact between citizens and the State.

Partly dissenting opinion of Judge Tulkens
(*Translation*)

1. I consider that in this case there were sound reasons for finding a violation of Article 4 of the Convention, which prohibits forced labour. This position is all the more compelling as the Court has found no violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention.

2. Admittedly, Article 4 § 3 (a) specifies that "forced or compulsory labour" does not include *any work required to be done in the ordinary course of detention ("tout travail requis normalement d'une personne soumise à la détention")*. However, this provision, incorporated in the Convention in 1950, must be interpreted in the light of the present-day situation. More specifically, the concepts used in the Convention are to be understood in the sense given to them by democratic societies today.

3. It has long been the Court's position that "[g]iven that [the Convention] is a law-making treaty, it is ... necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties".[5] Such an interpretation is guided by the Preamble to the Convention, which refers to the maintenance and further realisation of rights and freedoms. "Maintenance" requires the Court to ensure in particular that the rights and freedoms set out in the Convention continue to be effective in changing circumstances. "Further realisation" allows for a degree of innovation and creativity, which may extend the scope of the Convention guarantees. Moreover, in the *Golder* judgment the Court provided the following clarification regarding the teleological method: "This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 § 1 read in its context and having regard to the object and purpose of the Convention, a law-making treaty."[6] The same reasoning can be followed in relation to Article 4 § 3 (a).

4 See *Les limitations au droit à la sécurité sociale des détenus: une double peine?*, ed. V. van der Plancke and G. Van Limberghen, Brussels, La Charte, series "Les dossiers de la revue de droit pénal et de criminologie", no. 16, 2010.

5 *Wemhoff v. Germany*, 27 June 1968, p. 23, § 8, Series A no. 7.

6 *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18.

4. This approach has had natural consequences. The Court subsequently developed the idea/principle of effective protection of the rights enshrined in the Convention.[7] Since then, the effectiveness theory has become the basis for the protection of the Convention rights and freedoms. These rights must be given "their full scope" since the purpose of the Convention is to guarantee rights that are not theoretical or illusory but practical and effective.

5. In relation to Article 4 of the Convention, the judgment rightly notes that the Court's case-law concerning prison work is scarce. Indeed, in the sphere of prisoners' remuneration and social cover, the only relevant decision is that of 6 April 1968 by the European Commission of Human Rights in the case of *Twenty-one Detained Persons v. Germany* (nos. 3134/67, 3172/67, 3188-3206/67, Collection 27, pp. 97-116), in which the application was declared manifestly ill-founded.

6. More than forty years have passed since the above-mentioned inadmissibility decision and prison law – which at the time was virtually non-existent – has developed considerably during this period. Traditionally regarded as an area outside the law, prisons have gradually opened up to fundamental rights, to the benefit not only of prisoners but also of the prison authorities and their staff. Thus, regarding the same issue of prisoners' remuneration which formed the subject of the Commission's 1968 inadmissibility decision referred to in the previous paragraph, it is interesting to note that thirty years later, in a judgment of 1 July 1998, the German Federal Constitutional Court held, on the contrary, that since the State had a constitutional duty to promote prisoners' social rehabilitation and had chosen compulsory prison work as one of the means of achieving that aim, it had to ensure appropriate remuneration for such work, which could not yield the expected results unless it was properly rewarded.[8] Although the Constitutional Court did not specify the amount that would constitute an appropriate reward, it held that it was unconstitutional to pay prisoners low wages that bore no relation to the value of the work performed or to the minimum wage in the outside world. The guiding principle is that of human dignity.[9] Similarly, Rule 26.10 of the 2006 European Prison Rules emphasises the need for equitable remuneration for prisoners.

7. In Austria, as we have seen, prisoners are obliged to work pursuant to section 44 of the Execution of Sentences Act; furthermore, refusal to work constitutes an offence under sections 107(1) and 109 of the same Act, carrying penalties ranging from a reprimand to solitary confinement. This situation thus clearly entails – as was not disputed – work under the menace of a penalty within the meaning of ILO Convention No. 29, and hence forced or compulsory labour.

8. In such a context, can it really still be maintained in 2011, in the light of current standards in the field of social security, that prison work without affiliation to the old-age pension system constitutes work that a person in detention may *normally* be required to do? I do not think so. This, in my view, is the fundamental point. Nowadays, work without adequate social cover can no longer be regarded as normal work. It follows that the exception provided for in Article 4 § 3 (a) of the Convention is not applicable in the present case. *Even a prisoner cannot be forced to do work that is abnormal.* In the examination of the case under Article 14 in conjunction with Article 1 of Protocol No. 1, moreover, the judgment notes explicitly that "the applicant as a working prisoner was in a relevantly similar situation to ordinary employees" (see paragraph 95).

9. If we are to give any meaning to the famous phrase from the 1984 *Campbell and Fell* judgment that "justice cannot stop at the prison gate",[10] it is important to take account of developments in the member States, as reflected, for example, in the 2006 European Prison Rules, which refer to normalisation of prison work as one of the basic principles in this sphere and one which has guided reforms in certain member States.[11]

7 *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, p. 32, § 5, Series A no. 6.

8 BverfG – 2 BvR 441/90, 1 July 1998.

9 D. VAN ZYL SMIT and S. SNACKEN, *Principles of European Prison Law and Policy. Penology and Human Rights*, Oxford University Press, 2009, p. 192.

10 *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 69, Series A no. 80.

11 Thus, for example, in Belgium, the Law of 12 January 2005 establishing the principles governing the prison service and the legal status of prisoners is part of the

10. In finding no violation of Article 4 of the Convention, the judgment relies to a decisive extent on the lack of a sufficient *consensus* among member States on the issue of working prisoners' affiliation to the old-age pension system (see paragraph 132 of the judgment). This argument, to my mind, raises two difficulties. The first is of a factual nature. Nowadays, with the development of long-term prison sentences, the profile of prisoners has changed and the reality is that prisons house increasing numbers of older inmates. Whereas for younger prisoners, the requirements of social rehabilitation encompass health and accident cover and affiliation to the unemployment insurance scheme, for older prisoners they also include the guarantee of an old-age pension. The second difficulty is of a legal nature. What role is there in the present case for a European consensus, the main function of which is to determine the extent of the margin of appreciation? The flexibility inherent in the margin of appreciation is admittedly an essential factor, but, as the Court has frequently repeated, it must go hand in hand with European supervision. Such supervision was lacking in the present case.

NOOT

1. Klager heeft tussen 1963 en 1994 ongeveer 28 jaar in de gevangenis gezeten. In 1999 vraagt hij een vervroegd pensioen aan ingevolge de Oostenrijkse ouderdomspensioenwetgeving. Dat pensioen wordt hem geweigerd, omdat hij onvoldoende verzekerde tijdvakken heeft opgebouwd. Tijdens het verrichten van arbeid in loondienst of het ontvangen van een arbeidsinkomensvervangende uitkering is iemand ingevolge de Oostenrijkse wet verzekerd, maar niet in perioden dat iemand in de gevangenis zit. Dat laatste geldt ook als iemand in detentie arbeid heeft verricht. Oostenrijkse gevangenen zijn tot het verrichten van arbeid overigens ook verplicht, en een groot deel van de inkomsten die ze daarmee verdienen moeten ze afstaan bij wijze van bijdrage in de kosten van hun levensonderhoud. Klager legt het Hof de vraag voor of hier sprake is van een discriminatoire inbreuk op zijn recht op eigendom (art. 14 EVRM jo. art. 1 EP) en of hier sprake is geweest van – kort gezegd – dwangarbeid (art. 4 EVRM).
2. De Grote Kamer van het Hof beantwoordt beide vragen ontkennend. Bij de 'dwangarbeidvraag' is dat met een overgrote meerderheid, over de andere vraag bestaan binnen het Hof blijkbaar meer verschillen van inzicht. De klacht wordt met een kleine meerderheid (10 tegen 7) verworpen, terwijl rechter De Gaetano in een 'concurring opinion' langs een andere weg dezelfde uitkomst bereikt als de meerderheid; de redenering van de meerderheid wordt dus door slechts 9 van de 17 rechters ondersteund. In deze noot zal ik vooral aandacht besteden aan de 'discriminatievraag'; onder 7 ga ik nog kort in op de andere vraag.
3. Het is opmerkelijk dat het Hof het eigendomsrecht in deze zaak van toepassing acht. In de in de uitspraak genoemde ontvankelijkheidsbeslissing van 13 december 2005, nr. 63767/00 (*Puzinas t. Litouwen*) had het Hof de klacht van een Litouwse gevangene dat hij niet in aanmerking kwam voor ouderdomspensioen nog niet-ontvankelijk verklaard omdat de nationale wetgeving aan gevangenen nu eenmaal geen pensioen toekende en er dus geen eigendomsrecht in het geding was. Een verschil met de onderhavige zaak is dat daarin geen beroep was gedaan op art. 14 EVRM, maar het Hof stapt wel opmerkelijk licht heen over de vraag of hier eigenlijk wel een door het verdrag gewaarborgd uitkeringsrecht in het geding is. Dat laat zich overigens best construeren, bijvoorbeeld met de redenering dat de klager in dit geval zo lang hij op vrije voeten was wel verplicht premies heeft afgedragen en daar nu niets voor terugziet omdat, op al dan niet discriminatoire gronden, een aantal jaren niet meetelt. Het was goed geweest als het Hof wat uitvoeriger op dit punt was ingegaan. (Te) letterlijk genomen, en door het ontbreken van een nadere uitleg, kan het oordeel van het Hof zo worden gelezen dat lidstaten moeten gaan rechtvaardigen waarom zij bepaalde groepen, of dat nu gevangenen, zelfstandig ondernemers of statutair bestuurders van beursgenoteerde vennootschappen zijn, niet toelaten tot een wettelijke regeling van sociale zekerheid. De verwijzing naar de uitspraak in de zaak *Stec e.a. t. Verenigd Koninkrijk* (EHRM 12 april 2006 (GK), nr. 65731/01, «EHRC» 2006/72

reform aimed at normalising prison work by making it as similar as possible to employment in the community and requiring its inclusion in the social security system.

m.nt. Pennings) overtuigt niet, omdat daar niet de situatie aan de orde was dat klager simpelweg was uitgesloten van een bepaalde socialezekerheidsregeling en er van een 'eigendomsaanspraak' dus eigenlijk geen sprake kon zijn. Dat uit onder meer *Stec* blijkt dat een socialezekerheidsaanpraak niet op premiebetaling hoeft te berusten, doet niet ter zake. In genoemde 'concurring opinion' schrijft De Gaetano ook dat de Oostenrijkse pensioenregeling is bestemd voor degenen die in 'gainful employment' werkzaam zijn, niet voor werkenden in het algemeen. Het werk van gevangenen is, zeker in het onderhavige geval, toch echt iets anders. Maar zelfs als het gaat om gevangen die redelijk productieve arbeid verrichten, dan nog is de vraag of er wel sprake is van enige inbreuk op eigendom. Gelet ook op de financieel-economische en sociale beleidsafwegingen die moeten worden gemaakt bij het vormgeven van een nationaal socialezekerheidsstelsel, en niet alleen door de overheid maar ook door vakbonden en werkgeversorganisaties, gaat het nogal ver om te verlangen dat de overheid moet gaan rechtvaardigen waarom bepaalde groepen wel of bepaalde groepen niet meeverzekerd zijn. Uiteraard dient de Staat het gelijkheidsbeginsel in acht te nemen bij de inrichting van zijn stelsel, nationale grondwetten en fundamentele regels van EU-recht dwingen daar ook toe, maar het is wel de vraag of uit het EVRM een dergelijke 'algemene' toets aan het gelijkheidsbeginsel voortvloeit.

4. De in *Puzinas* gekozen benadering (de wet kent geen eigendomsrecht toe dus kun je daarin ook niet worden gediscrimineerd) spreekt mij wel aan in zaken als deze, waarin sprake is van ongelijke behandeling op grond van 'onverdachte' criteria. Wel gaat die benadering wringen bij uitsluiting op grond van bijvoorbeeld sekse, ras, seksuele oriëntatie of geloofsovertuiging. Algehele uitsluiting van vrouwen van de AOW zou in die optiek niet verboden zijn door art. 1 EP jo. 14 EVRM. Dat deze discriminatie in ander verband wél verboden is, maakt deze uitleg dan wel minder schadelijk maar ook weer niet erg aansprekend. Aan de andere kant gaat het ook weer ver om van verdragsstaten te verlangen dat zij moeten gaan uitleggen waarom in hun socialezekerheidsstelsels bepaalde keuzes voor en tegen bepaalde groepen zijn gemaakt. Ik haal nogmaals het voorbeeld van de zelfstandig ondernemer aan, die zeker als hij een wat sukkelende ZZP'er is in sociaaleconomische positie en qua behoefte aan sociale bescherming niet dramatisch verschilt van een werknemer in loondienst. Maar moet dit nu werkelijk, ook al is het met inachtneming van een forse 'margin of appreciation', aan een EVRM-toets worden onderworpen? Opvallend is toch wel hoe intensief de meerderheid toetst of gevangen werkkrachten verschillen van vrije werknemers, om van de grote meerderheid nog maar te zwijgen. Wat mij betreft een andere kwestie is of het in alle gevallen rechtvaardig en maatschappelijk wenselijk is om (ex-)gedetineerden van socialezekerheidsaanspraken uit te sluiten. Het kan hun resocialisatie belemmeren. In die zin valt normalisatie wel toe te juichen, maar zoals de 2006 European Prison Rules ook bepalen 'voor zover mogelijk'.

5. Hoewel het Hof het eigendomsrecht van toepassing acht, en daarmee vergt dat het uitsluiten van bepaalde groepen wordt gerechtvaardigd, heeft het bij de beoordeling van die rechtvaardiging uitdrukkelijk wel oog voor de sociaaleconomische realiteit waar een nationale overheid rekening mee moet houden. Dit leidt tot een aanzienlijke beoordelingsvrijheid voor een lidstaat, mede in aanmerking genomen dat er op het punt van toegang van gedetineerden tot ouderdomspensioen geen consensus bestaat tussen de bij het EVRM aangesloten staten. Er is een (kleine) meerderheid die deze toegang kent, maar dat acht de (meerderheid van) het Hof onvoldoende. Het Hof concentreert zich in zijn beoordeling niet op het eigendomsrecht op pensioen, maar op de vraag of werkende gevangenen en verzekerde werknemers in voldoende mate van elkaar verschillen om een verschillende behandeling te rechtvaardigen. Een grote minderheid oordeelt in een 'dissenting opinion' anders. Gevangen en vrije 'werknemers' hebben een gelijke behoefte aan pensioen, zoals ook in de meerderheidsopinie is vermeld. De minderheid voegt daaraan toe dat uit verschillende regels, zoals de 2006 European Prison Rules, voortvloeit dat de positie van gevangenen zoveel mogelijk moet worden 'genormaliseerd'. De meerderheid vat die regels als minder dwingend op, maar wijst er ook op dat de normalisatie in de jaren dat klager niet verzekerd was nog niet tot ontwikkeling was gekomen. De oude Prison Rules (uit 1987) zeggen niets over socialezeker-

heidsrechten, en in een al weer wat verder verleden was de Europese Commissie voor de Rechten van de Mens van oordeel dat gevangenen aan het EVRM geen pensioenrechten konden ontlenen. De minderheid constateert hoopvol dat de meerderheid de mogelijkheid openlaat dat een andere uitkomst wordt bereikt in een zaak die in een andere periode speelt.
6. Voor de Nederlandse praktijk is overigens interessant dat het Hof aandacht besteedt aan de positie van de gepensioneerde gevangenen. Uit par. 95 lijkt te volgen dat zij anders behandeld mogen worden dan andere gepensioneerden, omdat de staat al in hun levensonderhoud voorziet. Dat is ook de in de Wet socialezekerheidsrechten gedetineerden (Wsg, Stb. 1999, 595) gekozen benadering. Gedurende detentie is het recht op uitkering ingevolge, bijvoorbeeld, de AOW, de WW en de WIA mede ter voorkoming van dubbel levensonderhoud uitgesloten. Voor de volledigheid mag niet onvermeld blijven dat de verzekering voor het Nederlandse ouderdomspensioen gekoppeld is aan het ingezetene zijn van Nederland, en niet aan het zijn van werknemer op vrije voeten. Naar Nederlands recht zou klager, wat het ouderdomspensioen betreft, alleen problemen hebben gehad als hij na zijn 65e opnieuw in het gevang zou zijn beland. In de werknemersverzekeringen WW, WAO en WIA kunnen tijdvakken van detentie wel hinderlijk zijn, omdat de duur van de daardoor geboden uitkeringen mede bepaald wordt door – kort gezegd – de omvang van de periode dat iemand als werknemer verzekerd is geweest.
7. Het Hof is meer eensgezind van oordeel dat er geen sprake is van dwangarbeid/verplichte arbeid in de zin van art. 4 EVRM. Ook hierbij wordt de 'normalisatie' meegewogen, maar het Hof oordeelt dat die (nog) niet zo ver gaat dat de arbeid onder dermate onredelijke condities moet worden verricht dat er sprake is van door art. 4 verboden verplichte arbeid. Dat klager wettelijk verplicht was, onder strafbedreiging, in de gevangenis te werken is tussen partijen niet in geschil. Uit de zaak *Van der Mussele* t. *België* (EHRM 23 november 1983, nr. 8919/80, *Series A*, Vol. 70) kan worden afgeleid dat er pas van verboden verplichte arbeid kan worden gesproken als het opleggen ervan onredelijk is, gelet op de daaraan verbonden belasting en gelet op het doel dat ermee wordt gediend. In mijn noot onder de zaak *Schuitemaker* t. *Nederland* (EHRM 4 mei 2010, nr. 15906/08, «EHRC» 2010/99) schreef ik dat in die afweging mede een rol kan spelen of die arbeid behoorlijk wordt beloond. Het Hof is van oordeel dat de gevangenisarbeid, ondanks het ontbreken van een oudedagsvoorziening, binnen de marges blijft. In wezen onderzoekt het Hof of het werk een 'excessive burden' vormt. Dit kan direct al tot de conclusie leiden dat er van dwangarbeid geen sprake is, maar het Hof acht hier art. 4 lid 3 onder a EVRM van toepassing. Het gaat om het daarin bedoelde werk dat gewoonlijk van gedetineerden wordt vereist en dat is geen dwangarbeid. In zijn 'concurring opinion' stelt De Gaetano de aard en zwaarte van de werkzaamheden – huishoudelijk werk binnen de gevangenismuren – centraal. Ook wordt van belang geacht dat het verrichten van zulk werk in woongemeenschappen (zoals ook kloosters) feitelijk niet ongebruikelijk is. Met de meerderheid lijkt mij dat andere factoren (zoals socialezekerheidsaspecten) mee mogen wegen bij de vraag of werk 'normaal' is. Dat leidt in dit geval vervolgens niet tot een andere uitkomst, omdat pensioenverzekering van gedetineerden binnen Europa geen gemeengoed is. Het zou echter anders kunnen liggen als een gedetineerde werk moet doen 'buiten de gevangenismuren' in een normaal bedrijf.

B. Barentsen