



# Economic and Social Council

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## Committee on Economic, Social and Cultural Rights

### Communication No. 1/2013


#### Views adopted by the Committee at its fifty-seventh session (22 February-4 March 2016)

<i>Subject matter:</i>	Access to non-contributory disability benefits for prisoners
<i>Substantive issues:</i>	Exercise of Covenant rights without discrimination; right to social security
<i>Procedural issues:</i>	Submission of the communication within one year after the exhaustion of domestic remedies; Committee's competence <i>ratione temporis</i>
<i>Articles of the Covenant:</i>	2 and 9
<i>Articles of the Optional Protocol:</i>	3, paras. 2 (a) and 2 (b)

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## Annex

### **Views of the Committee on Economic, Social and Cultural Rights under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (fifty-seventh session)**

concerning

#### **Communication No. 1/2013\***

<i>Submitted by:</i>	Miguel Ángel López Rodríguez (represented by counsel Valentin J. Aguilar Villuendas of the Asociación Pro Derechos Humanos de Andalucía)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	6 November 2013, transmitted to the State party on 6 December 2013

*The Committee on Economic, Social and Cultural Rights*, established under resolution 1985/17 of the Economic and Social Council,

*Meeting on 4 March 2016,*

*Having concluded* its consideration of communication No. 1/2013, submitted to the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,

*Adopts* the following:

#### **Views under article 9, paragraph 1, of the Optional Protocol**

1.1 The author of the communication is Miguel Ángel López Rodríguez, a Spanish national of full age. He claims to be the victim of a violation by the State party of his rights under articles 2 and 9 of the International Covenant on Economic, Social and Cultural Rights (the Covenant).<sup>1</sup> He is represented by counsel.

1.2 On 6 December 2013, the Committee decided that the admissibility of the communication should be considered separately from its merits.

1.3 In the present Views, the Committee first summarizes the information and the arguments submitted by the parties, then considers the admissibility and merits of the communication and, lastly, states its conclusions and recommendations.

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\* Pursuant to article 5, para. (1c) of the provisional rules of procedure under the Optional Protocol, Committee member Mr. Mikel Mancisidor de la Fuente did not participate in the consideration of the communication.

<sup>1</sup> The Optional Protocol to the Covenant entered into force for the State party on 5 May 2013.

## A. Summary of the information and arguments submitted by the parties

### The facts as submitted by the author

2.1 At the time of the communication's submission, the author had been held in Seville prison since March 2003. The Cordoba Provincial Office of the Ministry for Equality and Social Welfare of the Regional Government of Andalusia (the Regional Ministry) had previously awarded him a non-contributory disability benefit/allowance of €301.55 per month. In a decision issued on 23 March 2006, the Regional Ministry reduced his allowance to €147.71 per month on the grounds that, for the purpose of calculating the amount, the cost of the author's upkeep in prison, equivalent to €2,062.25 per year, should be treated as part of his revenue or income.

2.2 On 1 October 2006, the author filed an administrative complaint challenging the reduction. That complaint was dismissed on 11 October 2006. On 27 November 2006, the author filed an appeal against the Regional Ministry's decision with Cordoba Social Court No. 4, requesting restitution of his full allowance and back payment of the amounts not paid since the reduction was applied. According to the author, the amount spent on his upkeep during his imprisonment should not have been treated as personal income for the purpose of calculating his financial means and determining the amount of his non-contributory disability allowance.

2.3 On 17 March 2008, the Social Court declared the author's appeal to be partially substantiated, revoked the Regional Ministry's decision of 23 March 2006 and ordered the restitution of the full allowance of €301.55, in addition to back payment of the sums that the author had not received up to that time. The Court stated that there was no relevant case law to be considered, since the Supreme Court had passed judgment on the matter on only two occasions and its two judgments had been contradictory. The Social Court's ruling makes reference to two Supreme Court decisions: one dated 14 December 1999, in which the Supreme Court concluded that, even if the cost of a prisoner's upkeep was taken into account, the prisoner retained the right to receive the full non-contributory allowance; and another dated 20 December 2000, in which the Supreme Court ruled to the contrary. According to the ruling, the amount corresponding to the cost of the prisoner's board and lodging during his incarceration did not constitute income from either capital or labour, as it was not derived from self-employment or outside employment. Nor was it one of the benefits recognized under any social security scheme, since the services provided by the prison authorities were not a public service but rather arose from a duty that the authorities had assumed as a consequence of the prisoner's deprivation of liberty. The Regional Ministry appealed the ruling before the High Court of Justice of Andalusia.

2.4 On 10 June 2009, the High Court of Justice of Andalusia overturned the Social Court's ruling and dismissed the author's petition. The High Court noted that the Supreme Court decision of 20 December 2000 had been confirmed by another decision dated 30 January 2008, which established that amounts corresponding to the cost of prisoners' upkeep should be treated as "sundry assets and entitlements [...] of a welfare nature", as referred to in article 144.5 of the General Social Security Act, for the purpose of calculating the beneficiary's income and revenue, so that the cost of upkeep in prison could be deducted from a non-contributory disability allowance. The author submitted an appeal in cassation to the Supreme Court for the unification of case law, invoking the conflicting decision issued by the High Court of Justice of Castilla y León on 29 November 2007.

2.5 On 27 May 2010, the Office of the Prosecutor General of the Supreme Court found that the appeal in cassation should be admitted, on the grounds that non-contributory disability allowances were an entitlement of beneficiaries and, as such, should be treated in the same way as all other social security allowances, the only eligibility criteria being residence in Spain, insufficient resources and an established degree of disability.

Additionally, the amount spent on the upkeep of a prisoner could not be considered as a replacement for labour income or any other supplement to labour income payable from public or private funds, in accordance with article 12.2 of Royal Decree No. 357/1991, since that amount arose not from a voluntary activity performed by the recipient but instead from a duty assumed by the prison authorities as a consequence of the prisoner's deprivation of liberty, as established in article 21.2 of the General Prisons Act.

2.6 On 29 September 2010, the Supreme Court dismissed the appeal in cassation for the unification of case law, on the grounds that the relevant case law had already been unified by virtue of its rulings of 20 December 2000 and 15 July 2008. The Court considered that the purpose of non-contributory benefits was to guarantee minimum benefits for persons in need, and that, accordingly, the benefits would become unnecessary if the recipients' subsistence needs were covered by other means. It also noted that any reduction in the non-contributory disability allowance had no negative effect on the beneficiary's family obligations, as these were met by other means. Furthermore, the cost of prison inmates' upkeep could be seen as income of a welfare nature. In this regard, the Supreme Court pointed out that, although the provision of upkeep was not a social security benefit, no such requirement was established in article 144.5 of the General Social Security Act, which simply made a broad reference to "assets or entitlements ... of a welfare nature". The opposite interpretation would place prisoners in an advantageous position relative to other beneficiaries or applicants, since any income received by the latter would be taken into account for the purpose of calculating income limits.

2.7 On 9 December 2010, the author filed an application for *amparo* with the Constitutional Court, alleging a violation of his rights under article 14 (equality before the law), article 24.1 (right to effective protection) and article 25.2 (right to social security benefits due to persons deprived of their liberty) of the Constitution. In particular, the author claimed a violation of his right to equality before the law relative to other persons in the same circumstances located in other autonomous communities in Spain, relative to other Spanish citizens who were in prison but were not receiving non-contributory benefits, and relative to persons at liberty who could have their meals in similar centres, such as hospitals and community kitchens, without incurring a loss of benefits.

2.8 On 29 October 2012, the Constitutional Court dismissed the author's *amparo* application and ruled that his allegations of discriminatory treatment were general, insufficient and not supported by evidence.

### **The complaint**

3.1 The author claims that the above facts amount to a violation of his rights under articles 2 and 9 of the Covenant.

3.2 The author claims that the State party has violated his right to social security and to exercise this right without discrimination and in conditions of equality, insofar as the action taken by the Regional Ministry constitutes unequal treatment relative to other prisoners, including those with their own financial means, those with other benefits and those with neither, who do not pay for the cost of their upkeep in prison; relative to prisoners residing in other autonomous communities who are not subject to any reduction of their non-contributory disability benefits, since, as demonstrated in the judicial proceedings, at least one autonomous community had apparently changed and applied a different criterion for determining the amount of the benefit, finding that the cost of a person's upkeep in prison was not of a welfare nature; and relative to persons at liberty who use other public services, such as hospitals, shelters and community kitchens, in which they receive free meals without any reduction in their benefits under the social security system.

3.3 The author claims that the authorities did not take account of the Constitution of Spain, which stipulates that persons deprived of their liberty shall enjoy all their fundamental rights, or of article 3 of the General Prisons Act, which stipulates that steps must be taken to ensure that prisoners and members of their family retain their entitlements to social security benefits acquired before admission to prison.

3.4 The author claims that he has exhausted all domestic remedies. Although the events constituting the violation of his rights occurred prior to the entry into force of the Optional Protocol, the violation was continuing at the time the communication was submitted to the Committee.

#### **State party's observations on admissibility**

4.1 On 28 February 2014, the State party submitted its observations on admissibility and requested that the communication be declared inadmissible under article 3, paragraph 2 (a), of the Optional Protocol.

4.2 The author submitted his communication more than one year after the exhaustion of domestic remedies, since the Constitutional Court issued its decision on 29 October 2012. Decisions of the Constitutional Court concerning *amparo* applications are not only communicated to the parties concerned but are also published in the Official Gazette (*Boletín Oficial del Estado*), so that they are available for public consultation. The decision on the author's case was published on 28 November 2012. The starting point for calculating the allowable time period for initiating any international procedure should be the date on which the applicant is officially informed of the ruling and thus learns of the final decision in the proceedings, not the date of the ruling's publication in the Official Gazette.

4.3 The author's rights under articles 2 and 9 of the Covenant have not been violated by the application of Spanish social security legislation, as established by the Constitutional Court. In its ruling of 29 October 2012,<sup>2</sup> the Constitutional Court took note of the interpretation adopted by the Supreme Court, according to which the meals benefit received by prisoners is considered a State benefit and is therefore included in the calculation of income for the purpose of establishing the right to a non-contributory disability allowance.

4.4 The author was not in a position of inequality relative to other recipients of benefits of the same kind who are convicted prisoners. The same regulations apply equally to all prisoners throughout the territory of the State party who are concurrently receiving non-contributory social security allowances.

#### **Author's comments on the State party's observations on admissibility**

5.1 On 20 March 2014, the author responded to the State party's observations on admissibility.

5.2 In relation to the requirement established in article 3, paragraph 2 (a), of the Optional Protocol, the author asserts that, according to article 164.1 of the Constitution of Spain: "The judgements of the Constitutional Court shall be published in the Official Gazette (*Boletín Oficial del Estado*), with dissenting opinions, if any. They have the validity of *res judicata* from the day following their publication ...". Until this essential procedure has been completed, the decision remains without legal effect and could not therefore be subject to appeal.

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<sup>2</sup> The State party refers to ruling 189/2012.

5.3 Furthermore, the decision was communicated to the author on 6 November 2012 and not on 29 October 2012, as asserted by the State party.<sup>3</sup> The author adds that, in accordance with domestic legislation, monthly and annual time limits are calculated as of the day following the date of notification. In any event, given that the case involves a person deprived of his liberty, a flexible interpretation that takes account of the exceptional circumstances of the case would be appropriate.

#### **State party's observations on the merits**

6.1 On 22 May 2015, the State party submitted its observations on the merits of the communication. It maintains that there has been neither a violation of the author's right to social security nor a discriminatory application of the law.

6.2 Article 41 of the State party's Constitution establishes that the authorities are to maintain a public social security system for all citizens that guarantees sufficient social benefits and assistance in situations of need, particularly in cases of unemployment. Within this framework, the General Social Security Act establishes insufficient income as one of the requirements for eligibility for a non-contributory benefit. Article 145.2 of the Act provides that the amounts of the non-contributory benefit "are compatible with the annual revenue or income of each beneficiary, provided the latter does not exceed 35 per cent of the amount, calculated on an annual basis", of the non-contributory benefit. Moreover, article 144.5 of the Act stipulates that "any assets and entitlements derived from labour or capital, as well as those of a welfare nature, shall be considered to be eligible income or revenue". In addition, Royal Decree No. 3765/1991 specifies that any other income that is supplemental to labour income payable from public or private funds shall be considered as a replacement for labour income, and that revenue or income of any nature that the applicant is entitled to receive shall be counted.

6.3 The limit established in article 145.2 of the General Social Security Act is at the discretion of the legislature, after the various economic interests and protected legal rights at stake have been weighed up. The purpose of this provision is to establish a reasonable and logical ineligibility for receipt of a State benefit and its actual amount in relation to the beneficiary's annual revenue or income — especially when the benefit is funded from the public purse with no need for the beneficiary to have paid any prior contributions.

6.4 The non-contributory disability benefit was granted to the author on a basis of equality and without any discrimination relative to anyone else in the same situation, that is, other beneficiaries of the same type of benefit who have been convicted of an offence, deprived of their liberty and subjected to a prison regime. The Supreme Court, in its ruling of 29 September 2010, concluded that the administrative authorities had correctly applied articles 144 and 145 of the General Social Security Act to the author's case and that he had not been treated any differently from any other person in the same situation. Subsequently, the Constitutional Court found, in its judgment on the author's *amparo* application, that the author's fundamental rights under the Constitution were not being denied and that he was not being deprived of the relevant social security benefits, notably the non-contributory disability benefit. The Constitutional Court also concluded that the author had not demonstrated during the proceedings that in other cases where the cost of the daily necessities of a recipient of a non-contributory benefit was met from public funds, this situation was not taken into account when calculating the amount of the non-contributory allowance to be granted.

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<sup>3</sup> The author attaches a certificate from the Constitutional Court, dated 12 March 2014, in which it is stated that the Court's decision in relation to the *amparo* proceedings initiated by the author was issued on 29 October 2012 and communicated to the author's legal representatives on 6 November 2012.

6.5 The State party contends that any person serving a prison sentence is receiving their upkeep free of charge at the State's expense, as a subjective public right enshrined in the State party's legislation. Under articles 3 and 21 of Organic Act No. 1/1979 of 26 September (the General Prisons Act), the State administration is under an obligation to safeguard the life, integrity and health of inmates, including by providing for their upkeep. This is a right of prisoners, regardless of their personal or financial situation. However, these provisions do not mean that, from a social security perspective, the cost of a person's upkeep cannot be considered as deductible from some other kind of State benefit, such as the non-contributory disability benefit. Consequently, if the limit set for annual revenue or income is exceeded, a reasonable proportion of the excess is deducted, taking account of the type of social security benefit concerned.

6.6 Eligibility for a non-contributory social security benefit is determined by the identification of a real and objective situation of need and want on the part of the beneficiary. It is based solely on the individual's personal situation, and does not depend on the beneficiary's prior contributions, savings or levels of premium paid in to the social security system. As a State benefit funded from the public purse — i.e. from the country's economy as a whole — it is logical that article 144 et seq. of the General Social Security Act should regulate the system of exclusions and deductions regarding eligibility. Accordingly, if the beneficiary is receiving some other type of State benefit at the same time, funded from the public purse and requiring no prior contributions or premiums, one benefit should be deducted from the other.

6.7 In the case of a person in receipt of a non-contributory benefit who has been deprived of liberty, the cost of the person's upkeep in prison is met and the amount of the benefit is reduced, as in the present case. This is a legitimate choice by the State party's legislature for the sake of the economic interests of the State, as the provider of scarce social goods.

6.8 In fact, the author was not discriminated against in relation to other individuals deprived of liberty who are in the same circumstances as him in that they receive a non-contributory social security benefit for disability. The author has failed to demonstrate that others, in the same circumstances and in the same prison, have not had their non-contributory benefit cut by an amount equivalent to the cost of their upkeep, to which they are entitled while in prison. Nor has he produced evidence of the alleged difference in his treatment as compared with inmates of prisons in other autonomous communities, or of any other type of detention facility.<sup>4</sup> Moreover, the State party maintains that the author has also failed to demonstrate that there has been any difference in his treatment as compared with people in other publicly funded facilities such as hospitals, orphanages, nursing homes or military establishments. Even had there been a difference, the comparison would not be valid, since the occupants of such facilities, by their very nature, are not objectively in the same personal situation as a person deprived of liberty after being convicted of a crime.

#### **Author's comments on the State party's observations on the merits**

7.1 In a letter of 10 July 2015, the author submitted his comments on the State party's observations on the merits of the communication. He says that he was subjected to unequal treatment both by the authorities responsible for administering non-contributory allowances and by the prison administration. The legislation governing non-contributory benefits, and

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<sup>4</sup> The Constitutional Court added that "in any case, the legal interpretation of arts. 144 and 145 of the General Social Security Act having been established by the Supreme Court, acting within its sphere of exclusive jurisdiction, the right to equality before the law may never require that decisions adopted by those autonomous communities that have applied the said criterion be invalidated by the fact, even if proven, that other autonomous communities do not apply it".

in particular article 144 et seq. of the General Social Security Act, does not expressly stipulate that the estimated cost of a prisoner's upkeep should be deducted from any non-contributory benefits received by the prisoner. The reduction of benefits in such cases is the result of a decision by the central Government, or by the regional government where competence in this area has been transferred to it, based on its interpretation of the applicable legislation, as in the case of the regional government of Andalusia. Owing to the lack of clarity on the applicable legislation, the authorities have applied different criteria and the courts have handed down contradictory rulings.

7.2 On the one hand, the State party states that every person deprived of liberty is entitled to free board at the State's expense. In practice, however, the persons affected by the measure in question pay for their board through the reduction in their non-contributory benefits. The author adds that, under article 3 of the General Prisons Act, steps must be taken to ensure that prisoners and members of their family retain their entitlements to social security benefits acquired before admission to prison, since the benefits also benefit members of the recipient's family.<sup>5</sup>

7.3 As regards the State party's observation that no valid comparison can be drawn between the treatment of a person held in prison and people in other publicly funded facilities such as hospitals, orphanages or nursing homes, the author says that he will refrain from commenting as the observation itself has discriminatory connotations. He adds that, in the State party, an additional penalty is imposed on persons deprived of their liberty who are the recipients of non-contributory benefits inasmuch as they have to pay for their upkeep, unlike people from other population groups such as those admitted to a hospital or a drug rehabilitation centre. In practice, therefore, article 144 et seq. of the General Social Security Act is applied and interpreted differently for beneficiaries who have been deprived of their liberty.

7.4 The author claims that, notwithstanding the Supreme Court's ruling that the cost of a person's upkeep in a public hospital is a health benefit, it is also a right established in the list of basic services provided under the National Health System, which includes meals for inpatients. Therefore, despite the similarities in the situation and circumstances of beneficiaries, in practice, persons who are not deprived of their liberty are entitled to receive free meals from public or private sources without this affecting their welfare benefits.

## **B. Committee's consideration of admissibility and the merits**

### **Consideration of admissibility**

8.1 The Committee examined the admissibility of the communication during its fifty-third session, at a meeting held on 26 November 2014.

8.2 In the light of all the documentation made available to it by the parties under article 8, paragraph 1, of the Optional Protocol, the Committee notes that the same matter has not been and is not being examined under any other international investigation or settlement procedure. Consequently, the Committee finds that there is no obstacle to the admissibility of the communication under article 3, paragraph 2 (c), of the Optional Protocol.

8.3 The Committee has taken note of the State party's argument that the communication is inadmissible because it was not submitted within the time limit, i.e. within one year of

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<sup>5</sup> The author refers to a Supreme Court ruling of 14 October 2014, which establishes that "maintenance payments may never be suspended simply because the father of the beneficiary of the payment has gone to prison, thereby imposing on the children's mother the obligation of supporting them on her own".



the exhaustion of domestic remedies, as established in article 3, paragraph 2 (a), of the Optional Protocol. However, the Committee notes that, according to the certificate issued by the Constitutional Court on 12 March 2014, the decision of the Constitutional Court marking the exhaustion of domestic remedies was issued on 29 October 2012 and communicated to the author's legal representative on 6 November 2012. In this respect, the Committee considers that the starting point for calculating the time period established in article 3, paragraph 2 (a), of the Optional Protocol is the date on which the author or his legal representative have sufficient knowledge of the final ruling to be able to prepare a communication for submission to the Committee and provide proof of the exhaustion of domestic remedies. When the author of a communication has the right to be notified, or is notified, by means of a copy of the final decision of a national court that marks the exhaustion of domestic remedies, the starting point for calculating the time period established in article 3, paragraph 2 (a), of the Optional Protocol must be considered to be the day following the date of notification. Consequently, the Committee considers that article 3, paragraph 2 (a), of the Optional Protocol does not bar it from examining the author's complaints relating to article 2 and article 9 of the Covenant.

8.4 The Committee takes note of the author's claim that, although the decisions that gave rise to the violations of his rights were taken prior to the entry into force of the Optional Protocol for the State party, they were still applicable at the time of submission of the communication and that, for this reason, the Committee should be considered to have the competence to examine his complaints. The Committee also notes that the State party has not submitted objections under article 3, paragraph 2 (b), of the Optional Protocol. In this connection, the Committee observes that the communication contains allegations of violations of the Covenant in relation to the decisions of the Spanish authorities to reduce the author's non-contributory allowance and on the reduced allowance itself. Although these decisions, including all the judicial decisions of the Spanish authorities, were taken prior to 5 May 2013, the date of entry into force of the Optional Protocol for Spain, the author has continued to date to receive a reduced allowance. Consequently, in light of the particular circumstances in this case, the Committee considers that article 3, paragraph 2 (b), of the Optional Protocol does not bar it from examining the present communication.

8.5 The Committee considers that the author's complaints under article 2 and article 9 of the Covenant have been sufficiently substantiated for the purposes of admissibility. Consequently, the Committee considers the communication to be admissible insofar as it raises issues with respect to article 2 and article 9 of the Covenant.

### **Consideration of the merits**

#### *Facts and legal issues*

9.1 The Committee has considered the present communication in the light of all the information received, in accordance with article 8 of the Optional Protocol.

9.2 The author claims that the State party has violated his right to social security in that the Ministry for Equality and Social Welfare of the Regional Government of Andalusia (the Regional Ministry) reduced the amount of his non-contributory disability benefit on the grounds that this was necessary to cover the cost of the author's upkeep in the prison where he was deprived of his liberty. The author claims that persons deprived of their liberty should enjoy all their rights, and so the authorities must take steps to ensure that prisoners and members of their family retain their entitlements to social security benefits acquired before admission to prison. The author also claims that the decision to reduce his benefit constitutes discriminatory treatment vis-à-vis: (a) other persons deprived of their liberty, who do not have to pay the cost of their upkeep in prison; (b) prisoners living in other autonomous communities whose non-contributory disability benefits are not reduced; and

(c) persons at liberty who are temporarily housed in publicly funded facilities or who use public services such as hospitals, shelters, community kitchens or drug rehabilitation centres, where they receive free meals without any reduction in the benefits granted to them under the social security system.

9.3 The State party contends that the author's non-contributory disability benefit was reduced in accordance with the law, notably article 144 et seq. of the General Social Security Act. It also contends that the reduction was justified, since the benefit in question is non-contributory and is granted on the basis of the beneficiary's needs, not prior contributions to the scheme. According to the State party, as all persons deprived of liberty are entitled to free board, regardless of their personal situation or assets, it is logical to deduct the cost of board from the non-contributory benefit in order to protect the public purse, since the beneficiary's needs have already been met. The State party further contends that there is no discrimination, as the reduction is applied on an equal basis to anyone in the same situation as the author. And as the benefit is non-contributory, the relevant comparison is with other beneficiaries of the same type of benefit serving a prison sentence, in the same prison as the author or in any other prison. However, according to the State party, the author has failed to demonstrate, before either the Spanish courts or the Committee, that he has been treated any differently from such persons. Moreover, according to the State party, the author has also failed to demonstrate any difference in treatment as compared with people in other publicly funded facilities such as hospitals, orphanages, nursing homes or military establishments. The State party contends that, even if there had been a difference, the comparison would not be valid, since the occupants of such facilities are, by their very nature, not objectively in the same personal situation as a person deprived of liberty after being convicted of a crime.

9.4 The Committee notes that neither party disputes the fact that the Regional Ministry awarded the author a non-contributory disability benefit of €301.55 per month; that in March 2003 the author was incarcerated in Seville prison; and that on 26 March 2006 the Regional Ministry reduced his allowance to €147.71 per month on the grounds that, for the purpose of calculating that amount, the sum spent to cover the cost of the author's upkeep while in prison, equivalent to €2,062.25 per year, should be treated as part of his revenue or income.

9.5 In light of the Committee's conclusion on the relevant facts and the claims made by the author and the State party, this communication raises two separate but related questions: (a) whether the reduction in the author's non-contributory disability benefit, by an amount equivalent to the cost of his upkeep in prison, in itself constitutes a direct violation of the right to social security under article 9 of the Covenant; (b) whether this reduction represents discriminatory treatment and a violation of article 2 of the Covenant, read in conjunction with article 9. To answer these questions, the Committee will begin by recalling certain elements of the right to social security, particularly as regards non-contributory benefits, persons with disabilities and persons deprived of liberty, before moving on to analyse each question separately.

*Right to social security and the right to access non-contributory benefits without discrimination*

10.1 The Committee recalls that the right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights. This right plays an important role in preventing social exclusion and promoting social inclusion. The right to

social security encompasses the right to access and maintain social welfare benefits, whether in cash or in kind, without discrimination.<sup>6</sup>

10.2 Benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care. States parties must also pay full respect to the principle of human dignity contained in the preamble of the Covenant, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.<sup>7</sup>

10.3 The Committee recalls that while the realization of the right to social security carries significant financial implications for States parties, the latter have an obligation to ensure the satisfaction of, at the very least, minimum essential levels of this right enunciated in the Covenant.<sup>8</sup> Among other things, they are required to ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.<sup>9</sup>

10.4 States parties are also obliged to provide the right to social security when individuals or a group are unable, on grounds reasonably considered to be beyond their control, to realize that right themselves, within the existing social security system with the means at their disposal. To this end, they must establish non-contributory schemes or other social assistance measures to provide support to those individuals and groups who are unable to make sufficient contributions for their own protection.<sup>10</sup>

10.5 In the case of persons with disabilities who, owing to disability or disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities or have a permanent disability, social security and income-maintenance schemes are of particular importance<sup>11</sup> and should enable such persons to have an adequate standard of living, to live independently and to be included in the community in a dignified manner.<sup>12</sup> The support provided should cover family members and other individuals who undertake the care of a person with disabilities.<sup>13</sup>

10.6 The Committee also recalls that the Covenant prohibits any discrimination, whether in law or in fact, whether direct or indirect, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.<sup>14</sup> In accordance with article 2, paragraph 1, of the Covenant, States parties must take effective measures, and periodically revise them when necessary, within their maximum available resources, to fully realize the right of all persons, without any discrimination, to social security.<sup>15</sup>

<sup>6</sup> General comment No. 19 (2008) on the right to social security (art. 9 of the Covenant), paras. 1-3.

<sup>7</sup> *Ibid.*, para. 22.

<sup>8</sup> *Ibid.*, para. 41. See also the statement by the Committee on “An evaluation of the obligation to take steps to the ‘maximum of available resources’ under an optional protocol to the Covenant” (E/C.12/2007/1, 21 September 2007, para. 4).

<sup>9</sup> General comment No. 19, para. 59. See also statement by the Committee on “Social protection floors: an essential element of the right to social security and of the sustainable development goals” (E/C.12/2015/1, 15 April 2015, paras. 7-8).

<sup>10</sup> General comment No. 19, para. 50.

<sup>11</sup> General comment No. 5 (1994) on persons with disabilities, para. 28.

<sup>12</sup> *Ibid.*, para. 16. See also the Convention on the Rights of Persons with Disabilities, which entered into force for the State party on 3 May 2008, particularly art. 28.

<sup>13</sup> General comments No. 5, para. 28, and No. 19, para. 20.

<sup>14</sup> General comment No. 19, para. 29.

<sup>15</sup> *Ibid.*, para. 4.

*Social security and persons deprived of their liberty in prisons*

11.1 Persons deprived of their liberty in prisons enjoy without discrimination the economic, social and cultural rights set forth in the Covenant, except for the limitations inherent in the actual deprivation of liberty as such.<sup>16</sup> The Committee recalls that, whereas everyone has the right to social security, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, such as prisoners and detainees.<sup>17</sup>

11.2 The Committee also recalls that the right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies.<sup>18</sup> Qualifying conditions for benefits must be reasonable, proportionate and transparent. The withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, and provided for in national law.<sup>19</sup>

11.3 In view of the above, a non-contributory benefit cannot, in principle, be withdrawn, reduced or suspended as a consequence of the deprivation of liberty of the beneficiary, unless the measure is provided for by law, is reasonable and proportionate, and guarantees at least a minimum level of benefits (see para. 10.3 above). The reasonableness and proportionality of the measure should be evaluated on a case-by-case basis, taking account of the beneficiary's personal situation. Consequently, in the case of persons deprived of their liberty, the reduction of the amount of a non-contributory benefit could be compatible with the Covenant if it is provided for by law and the same level of care is afforded under the services provided to persons deprived of their liberty in prison.

*Analysis of the case*

12. The Committee recalls that its task in considering a communication is confined to assessing whether the facts as described in the communication reveal a violation by the State party of the economic, social and cultural rights set forth in the Covenant. The Committee considers that it is in the first place for the courts of States parties to evaluate the facts and evidence in each particular case and the application of the relevant law, and that the Committee is called upon to express its views only as to whether the evaluation of the evidence or the application of domestic law was clearly arbitrary or amounted to a denial of justice that entailed the violation of a right recognized in the Covenant.<sup>20</sup>

*Analysis of the claims of violation of the right to social security*

13.1 The Committee will first consider whether reducing the amount of the author's non-contributory disability benefit by the cost of his upkeep in prison, from €301.55 to €147.71 per month, constitutes in itself a violation of article 9 of the Covenant. The Committee takes note of the State party's arguments that, as it is a non-contributory benefit paid from the public purse, when it is received concurrently with State benefits that are also paid from the public purse, one benefit should be deducted from the other; and that the reduction in the author's benefit was carried out in accordance with the law.

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<sup>16</sup> See also principle 5 of the Basic Principles for the Treatment of Prisoners, General Assembly resolution 45/111 of 14 December 1990.

<sup>17</sup> General comment No. 19, para. 31.

<sup>18</sup> *Ibid.*, para. 9.

<sup>19</sup> *Ibid.*, para. 24.

<sup>20</sup> See communication No. 2/2014, *I.D.G. v. Spain*, Views adopted on 17 June 2015, para. 13.1.

13.2 As pointed out earlier, a decrease in the amount of a non-contributory benefit is compatible with the obligations set out in the Covenant, provided that the measure is provided for by law and is reasonable and proportionate (see paras. 11.2-11.3 above). In the author's case, under article 144 et seq. of the General Social Security Act, the amount of his non-contributory disability benefit was reduced because the essentials — board and lodging — that the original benefit was meant to cover are provided directly and free of charge by the prison, so that the reduction is considered to be authorized by the above-mentioned articles, in accordance with the interpretation of the Spanish Supreme Court. The reduction is therefore authorized by law.

13.3 The reduction is, moreover, a reasonable means of achieving a purpose that is compatible with the Covenant, namely, the protection of public resources, which are necessary for the realization of individuals' rights. In the particular case of non-contributory benefits which draw exclusively on public funds and do not depend on prior contributions by the beneficiary, States parties have a certain amount of discretion to make the most appropriate use of tax revenue with a view to guaranteeing the full realization of the rights recognized in the Covenant and ensuring, among other things, that the social security system provides a minimum essential level of benefits to all individuals and families (see para. 10.3 above). The Committee therefore finds it reasonable, for the purposes of a more effective allocation of State resources, to consider reducing a non-contributory benefit if there is a change in the needs of the beneficiary that were the basis for determining the amount of the non-contributory benefit. In this case, the author's needs have changed owing to the fact that his upkeep in prison is provided by the State party.

13.4 Finally, the Committee notes that, since the measure in question was taken, the author has continued to receive a non-contributory allowance of €147.71, as well as his upkeep in the prison where he is incarcerated. The State party has thus replaced the cash benefit that was being paid to the author when he was at liberty with in-kind support, namely his upkeep while he is deprived of liberty. In this regard, the Committee considers that a State party does not have absolute discretion to replace a cash benefit with another form of support. In some circumstances, the replacement itself or the amount by which the cash benefit is reduced might constitute a violation of the right to social security if such a measure has a disproportionate effect on the person. The compatibility of such a measure with the obligations under the Covenant must be assessed on a case-by-case basis. In this particular case, there is no evidence that replacing part of the non-contributory benefit paid in cash with the upkeep provided in prison has had serious negative effects on the author. In fact, the author has submitted no information or documentation that would indicate that the measure in question was disproportionate in that it impaired the satisfaction of his own or his family's basic needs that the non-contributory benefit was intended to cover (see para. 10.3 above), or that this measure affects him particularly because of his disability. Consequently, in the particular circumstances of the present case, the Committee considers that the author's claim and the information provided by him do not allow it to conclude that the reduction in the amount of the author's non-contributory benefit constitutes in itself a violation of article 9 of the Covenant.

*Analysis of the claims of discrimination and the enjoyment of the right to social security*

14.1 The Committee will now consider whether the decrease in the amount of the author's non-contributory benefit constitutes discriminatory treatment with respect to his right to social security. The Committee recalls that not every instance of differential treatment constitutes discrimination, if the criteria for such differential treatment are reasonable and objective and if the aim is to achieve a purpose which is legitimate under

the Covenant.<sup>21</sup> The Committee notes that the author is a person with a disability and that he is also deprived of his liberty, and that he is therefore at greater risk of discrimination than the population at large (see paras. 10.5 and 11.1 above). This means that stricter scrutiny is required in considering the question of possible discrimination against the author.

14.2 The Committee will start by analysing the author's claim that he was treated differently from prison inmates whose non-contributory benefits had not been reduced. On this point, the Committee finds that the comparison proposed by the author seems appropriate, as it refers to persons who are broadly speaking in the same situation as the author in respect of the issue under consideration. It is true that the court rulings and documentation provided by the author appear to refer to a period in which there may have been contradictory judicial decisions in relation to the interpretation and application of article 144 et seq. of the General Social Security Act as regards the criteria for calculating the amount of the non-contributory benefit for persons deprived of their liberty. However, the author has not demonstrated, for example by citing legal rules or their application, that there is in practice any difference in the manner in which the non-contributory benefit of persons deprived of liberty in prisons in other autonomous communities is calculated. Furthermore, the Supreme Court ruling of 29 September 2010 established that the interpretation of the law in that respect had been unified by its rulings of 20 December 2000 and 15 July 2008, authorizing an amount for upkeep to be deducted from the prisoner's benefits. The author has failed to show that subsequent to the Supreme Court's rulings a difference in treatment has occurred in practice in the various autonomous communities. That being the case, the Committee does not consider it necessary to examine whether in a given case alleged unequal treatment between different autonomous communities might constitute a violation of the Covenant. The Committee therefore concludes that there is no evidence that the decision of the Regional Ministry to cut the author's benefit amounted to unequal treatment relative to other persons deprived of liberty in prisons located in other autonomous communities.

14.3 The Committee will now proceed to examine the author's claim that he was treated differently from other persons deprived of their liberty who do not receive a non-contributory benefit and whose upkeep in prison is provided to them free of charge. In the author's view, there is discrimination in that he pays for his own upkeep and the other prisoners do not have to do so.

14.4 The Committee considers that on this point the author starts from a false assumption that leads him to draw an inappropriate comparison. The author assumes that the non-contributory cash benefit is his own income, to be included in his assets, so that the reduction of his income to offset the cost of his upkeep amounts to his "paying" for his upkeep. But this is not the case, as his cash benefit is non-contributory — with characteristics like those described in paragraph 13.3 above — and therefore is not income arising from the sum of contributions made by the author, as in the case of a contributory benefit; rather, the benefit was granted to him as a person with needs he could not meet from other income or benefits. The amount of the initial benefit can therefore be reduced insofar as the author receives other income or benefits that allow him to meet those needs. Hence, it is not true that the author has to pay for his upkeep in prison while the other prisoners do not have to do so because, in his case, the amount corresponding to his upkeep is taken into account, as revenue or income, in calculating the amount of his non-contributory allowance. The author's situation is different from that of persons deprived of their liberty who do not receive a non-contributory benefit. The Committee therefore considers that the alleged differences referred to by the author do not constitute a violation of articles 2 and 9 of the Covenant.

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<sup>21</sup> General comment No. 20 (2009) on non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the Covenant), para. 13.

14.5 Lastly, the Committee will consider the author's claim that his treatment was discriminatory as compared with that of persons at liberty who use publicly funded facilities where they are fed and sometimes lodged free of charge, such as hospitals, shelters and drug rehabilitation centres, without any reduction in their non-contributory social security benefits. The Committee finds that the author has failed to provide relevant information and documentation that indicate that such differential treatment does in fact occur, and that even if the author's assertion in this respect was correct, there would have been no discrimination against him.

14.6 There are indeed significant similarities between the situation of the author and that of a person at liberty who is in receipt of a non-contributory allowance and receives board or lodging free of charge in a public service facility such as a hospital. In both cases, the persons concerned receive a non-contributory cash benefit and another benefit in kind from the State, and it could thus be concluded that the State must treat both cases in the same way: either leave both individuals' cash benefits intact or reduce them proportionally. However, the Committee considers that, despite the similarities, there are also significant differences between the two situations that explain how the State can treat them differently without being guilty of discrimination. The Committee finds that the situation of a person deprived of liberty as a result of a criminal conviction is different from that of the other persons mentioned by the author (such as a sick person receiving treatment in hospital or a person who is given meals in a shelter) in at least two respects.

14.7 In the first place, a convicted person is deprived of liberty to serve a sentence imposed by a court for a fixed period of time, generally of several months or years. Such persons therefore have a specific legal status, and, furthermore, it is relatively easy to work out the cost of their upkeep and to determine whether all or some of the needs intended to be covered by the initial non-contributory benefit are adequately covered by the upkeep provided in prison, as well as to determine how long this upkeep will be provided. In contrast, the situation of persons at liberty who use the public services mentioned by the author, such as hospitals or treatment centres, is different, since, unlike a person deprived of liberty for committing a crime, in principle such persons avail themselves of these services and agree to stay in these centres voluntarily to obtain protection of their basic rights, and they do so for periods of time that are unpredictable but often short. In such cases, it is much more uncertain that it would be possible to ensure that a reduction in the amount of the benefit would not hinder the satisfaction of the needs that the non-contributory benefit is intended to cover. What is more, given the indeterminate and temporary nature of the services provided, it is quite likely that such a reduction would take effect after the beneficiary had left the hospital or treatment centre where his or her upkeep was being provided.

14.8 In the second place, even though users in such facilities receive board and lodging, this should not be seen as an additional, separate service, but as an integral, indissociable part of the services provided by the State to enable them to cope with the situation of vulnerability in which they find themselves, usually temporarily, and that are necessary to ensure the protection of their basic rights, such as the right to health and to food.

14.9 The Committee therefore considers that there are similarities between the situation of the author and that of the persons at liberty with whom a comparison is drawn. Nevertheless, in the light of the significant differences indicated above, the State party is not obliged to provide identical treatment to persons in receipt of a non-contributory allowance who are deprived of liberty and persons at liberty who receive the same allowance and are in hospitals, treatment centres or shelters. Accordingly, the author's allegations of differences, even if they were true, do not constitute discriminatory treatment that would be a violation of articles 2 and 9 of the Covenant.

### **C. Conclusion**

15. On the basis of the foregoing considerations of fact and law, the Committee, acting pursuant to article 9, paragraph 1, of the Optional Protocol to the Covenant, finds that the reduction of the author's non-contributory cash benefit for disability does not constitute a violation of his rights under articles 2 and 9 of the Covenant.

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