Core Rights and the Protection of Socio-Economic Interests
by the European Court of Human Rights

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1 Introduction

1.1 Background and Context

This book deals with the protection of socio-economic interests by the European Court of Human Rights (ECtHR; Court). The European Convention on Human Rights (ECHR; Convention)[1] does not contain norms guaranteeing economic and social rights, yet from the practice of the ECtHR it must be concluded that this Court nevertheless, and increasingly, deals with cases concerning these rights. It regularly judges on whether a given pension reduction was justified,[2] whether the authorities' efforts to provide adequate housing were sufficient,[3] or whether a state should have done more to prevent health damage resulting from environmental pollution.[4] Dealing with socio-economic issues is a difficult and sensitive endeavour, and it highlights the complexity of the task of the ECtHR as the final arbiter of fundamental rights conflicts on the basis of the Convention.[5] It illuminates the difficulties inherent in striking the right balance between providing effective, individual rights protection and deferring to the national authorities whose (democratic) decisions – especially in a field like social policy – often need to be respected. In the light of this, the ECtHR can hardly be blamed for not providing a very principled socio-economic case law characterised by transparent and consistent reasoning. Nevertheless, given the Court's important but vulnerable position and the fact that the working of the Convention system is dependent on the acceptance and implementation of its judgments by the Member States, the question of how it can enhance its reasoning in socio-economic cases is worth serious attention.[6]

The main aim of this research is to explore the possible use and added value of the notion of 'core rights' for the ECtHR in dealing with socio-economic

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1 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.

2 *E.g.*, *Valkov a. O. v. Bulgaria*, ECtHR 25 October 2011, appl. nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05.

3 *E.g.*, *Winterstein a. O. v. France*, ECtHR 17 October 2013, appl. no. 27013/07.

4 *E.g.*, *Dubetska a. O. v. Ukraine*, ECtHR 10 February 2011, appl. no. 30499/03.

5 In fact, protecting socio-economic rights is a difficult endeavour for courts in general. See, *e.g.*, King 2012, pp. 8-9, who holds that 'the best argument' against social rights adjudication, is the claim that it is a 'risky enterprise'.

6 The socio-economic practice of the Court and the (potential) shortcomings thereof, *i.e.*, the topic and problem that are central to this research, will be further explored in, *infra*, Ch. 2.

complaints. The notion of core rights, briefly stated, entails that a distinction can be made between more and less important, or 'fundamental' aspects falling within the (potential) reach of a fundamental right or fundamental rights norm.[7] Why exactly it is worthwhile to investigate the concept of core rights in relation to the ECtHR's socio-economic rights protection will be elaborated in Section 1.2. Before doing so, it is important to provide some broader context to the issue that is central to this research, by introducing the ECtHR and its relation to certain features of and developments in judicial fundamental rights protection.

The European Court of Human Rights is a supranational court tasked with the interpretation and application of the rights enshrined in the European Convention on Human Rights, a treaty signed under the auspices of the Council of Europe (CoE) in 1950 and designed 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.[8] Being the first of its kind, the ECtHR, together with the former European Commission of Human Rights (EComHR; Commission), has developed the idea of fundamental rights protection at a level beyond the state, including the power to render binding judgments on the basis of individual complaints.[9] As natural as this may seem today, in the 1950s supranational judicial enforcement of fundamental rights was a novel phenomenon, and it is to a great part because of the success of the ECtHR that since then the importance of international and supranational rights adjudication in our modern, multi-level legal orders has generally increased.

What is this success story about? Starting with ten CoE Member States, presently there are forty-seven European states that have signed and ratified the Convention and are therefore subject to the jurisdiction of the Court. Especially after the fall of the Berlin wall, in the beginning of the 1990s, the number of States Parties increased significantly and many Eastern European states entered the Convention. Although this has not been without problems as regards the quantitative increase of complaints as well as the qualitative standard the Convention could set throughout the continent,[10] the Court has managed to maintain and even consolidate its important role as a safety net for individuals confronted with interferences with their fundamental rights by the state. By now, the Court has created an immense and rich body of case law, which has provided content to the rights norms laid down in the Con-

7 It does not concern a possible hierarchy amongst rights (norms). See, further, *infra*, S. 1.3.
8 Preamble to the ECHR.
9 Art. 46 ECHR.
10 On the specific issues related to Convention protection in the former communist states, see, *e.g.*, Greer 2007, p. 105ff.; Sadurski 2012, Ch. 1.

vention and in the several protocols that have been added thereto,[11] but also has influenced the understanding and the protection of fundamental rights in national legal orders.[12] The ECtHR's decisions and judgments are broadly accepted in the Member States and widely discussed by legal academics around the world.

The ECtHR is not only known for its successful, pioneering role as a supranational fundamental rights adjudicator. In legal debate, the Court and its practice have come to be mentioned as exemplary of several European and global legal (doctrinal) trends related to fundamental rights protection. These trends and developments illuminate what are perceived as some of the hallmarks of the ECtHR's practice, which provide an important background to the topics central to this research.

First, there is the Court's emphasis on *proportionality review* and *balancing* in cases concerning interferences with fundamental rights. Where Aleinikoff speaks of an 'age of balancing',[13] and Möller of the emerged 'global model of constitutional rights',[14] both underline the current predominance of a 'proportionality paradigm' in dealing with clashes between individual and collective freedom. The proportionality test, which has been developed to an important extent by the German Federal Constitutional Court (*Bundesverfassungsgericht*), and has carefully been expounded by scholars such as Alexy[15] (and more recently by Barak[16]), consists of multiple sub-tests. These concern the questions whether an interference with fundamental rights served a legitimate aim, whether it was 'suitable', 'necessary', and finally proportional *stricto sensu*.[17] Of these different tests, especially the latter is seen as illustrative of what proportionality is about. This strict proportionality test boils down to 'weighing' and 'balancing' the rights of the individual against the general interest and/or the rights of others. It finds much expression in the Court's approach, in the sense that the reasoning of the ECtHR discloses a clear preference for proportionality review and especially balancing. Partly this can be

11 For the text of the Convention, as well as the several protocols thereto, see www.conventions.coe.int. The two most recent protocols (Protocol No. 15 and Protocol No. 16) have not yet entered into force.

12 See, for a comparative study on the implementation of the Strasbourg case law, Gerards and Fleuren 2014.

13 Aleinikoff 1987.

14 Möller 2012.

15 Alexy 1985 (Alexy 2002).

16 Barak 2012. Also Möller's 'global model of constitutional rights' can be understood as a moral theory of rights focusing in particular on proportionality (Möller 2012). See also Klatt and Meister 2012.

17 In different jurisdictions, the different aspects of the tests may differ slightly. See, for a further explanation of the proportionality test, *infra*, Ch. 3, S. 3.4.2.

explained by the wording of the various provisions of the Convention.[18] On the basis of this wording, the Court's review of interferences with Convention rights is usually guided by the question whether a fair balance has been struck between the individual and the general interests at stake.[19] For generating an answer to this question, the Court takes account of the various considerations relevant on both sides of the scale, to then reach a conclusion on whether or not the Convention has been breached.[20]

Secondly, the ECtHR's case law can be seen as prototypical of another important doctrinal development in the field of fundamental rights, namely the recognition of *positive obligations*. Just like proportionality review, positive obligations are also argued to be part of the 'global model of constitutional rights',[21] and the link between the two indeed seems obvious: besides in the context of measures taken by the state the question of whether something was proportional or not can just as well apply to situations in which a state allegedly failed to take action in breach of a fundamental right.[22] In its case law, the ECtHR has expressly created a doctrine of positive obligations, by explaining that the rights enshrined in the Convention also give rise to positive duties on the part of the state.[23] Accordingly, if states want to comply with the rights enumerated in the ECHR, they cannot simply remain passive but instead have to take deliberate action and 'interfere' with the situations of individuals. When the Court started to develop its doctrine of positive obligations, which it did already in the 1960s, some may have considered this remarkable since the ECHR rights are negatively phrased and do not on their face demand active engagement by the state.[24] However, partly also due to

18 *Cf.* Arts. 8-11 ECHR. In the second paragraphs of these articles a limitation clause can be found, which requires a limitation to be 'necessary in a democratic society'. This requirement is translated by the Court into a proportionality/balancing test. See also Art. 1 of Protocol No. 1 to the ECHR.

19 *E.g.*, *Hutten-Czapska v. Poland*, ECtHR (GC) 19 June 2006, appl. no. 35014/97, para. 167 (concerning the question whether a fair balance had been struck between the property rights of homeowners and the general interest that was served by housing legislation that set particularly low levels of rent).

20 See, for an extensive study of the Court's review of proportionality *stricto sensu*, Den Houdijker 2012. For references to the Strasbourg practice in relation to the current predominance of the proportionality paradigm, see also Barak 2012, pp. 183-184; Möller 2012, pp. 13-14, and Ch. 7.

21 Möller 2012, especially pp. 5-10 (with multiple references to the ECtHR).

22 That is, at least the question whether there has been a 'fair balance' (proportionality *stricto sensu*) can also be applied to positive claims. Arguably, this is less or not the case for the other elements of a proportionality test (*ibid.*, pp. 179-180).

23 *E.g.*, *Marckx v. Belgium*, ECtHR 13 June 1979, appl. no. 6833/74, para. 31. See, for an even earlier example, *Case relating to certain aspects of the laws on het use of languages in education in Belgium*, ECtHR 23 July 1968, appl. no. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, para. 9. See, on this doctrine generally, Mowbray 2004; Xenos 2012.

24 Indeed, the provisions taken up in the Convention generally start with the words 'No one shall …' or 'Everyone has the right to …', which mirrors a negative duty of the state to refrain from interfering with the different rights. *Cf.* Merrils 1993, pp. 102-103.

the example set by the ECtHR, the concept of positive obligations has become generally accepted in modern legal debate and practice worldwide.[25]

Finally, an interesting trend in constitutional law and fundamental rights protection in particular, is the *increased prominence of socio-economic fundamental rights*.[26] Although this may seem less obvious, also in relation to this development the practice of the Strasbourg Court is not seldom considered meaningful. Ever since economic and social rights were laid down in international documents, they have been considered to be of a second rank status.[27] The dominant philosophical account of fundamental rights today still holds that fundamental rights foremost prescribe areas of freedom related to the civil and political sphere.[28] Yet whereas the debate has long been about whether socio-economic rights are actually 'rights' properly speaking, it gradually has shifted towards a more constructive approach. This shift is visible in particular in national constitutional developments, where it can be seen that especially younger and non-Western constitutions include a reference to economic and social guarantees, sometimes merely as directive principles,[29] but frequently also as self-standing individual rights that can serve as the basis for an individual constitutional complaint.[30] Also at the international level, however, socio-economic rights catalogues have been supplemented by additional protocols and (collective) complaints mechanisms allowing for states to be held accountable for shortcomings in the provision of socio-economic rights in a more forthright manner.[31] In line with these developments, the ECtHR's case-law has supported and even strengthened the emerging perception that there is or should not be a clear distinction between '"permissible" civil and

25 As a well-known exception, the United States can be mentioned. In the case of *Deshaney v. Winnebago County Department of Social Services* (1989), 489 U.S. 189, 169, the US Supreme Court held with regard to the Fourteenth Amendment that '[i]ts purpose was to protect the people from the state, not to ensure that the state protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political process'.

26 See, for a recent overview of this trend, Wesson 2014. Also Möller 2012, p. 5, speaks of the 'growing acceptance of socio-economic rights'.

27 Fredman 2008, pp. 1-2.

28 *Cf.* Möller 2012, p. 2, who holds that the different elements of the 'dominant narrative' of the philosophy of fundamental rights have meanwhile been given up. See also Fredman 2008, p. 2.

29 *Cf.* Part IV (Directive Principles of State Policy) of the Constitution of India.

30 A famous example is the Constitution of South Africa that lists a number of justiciable economic and social rights. See, *infra*, Ch. 6.

31 See the Additional Protocol to the European Social Charter (Council of Europe, 5 May 1988, ETS 128 (entry into force 5 September 1992)), creating a collective complaints mechanism, as well as the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (UN General Assembly, 5 March 2009, A/RES/63/117, entered into force 5 May 2013), which creates a possibility for individual communications. Also the Charter of Fundamental Rights of the European Union (OJ 18 December 2000 (2000/C 364/01)), under the header of 'Solidarity', contains a number of socio-economic rights.

political rights review and "impermissible" social rights review'.[32] As will become abundantly clear throughout this book, the ECtHR has for some decades now shown that it is not possible to strictly distinguish between civil and political and economic and social protection in ensuring the rights laid down in the Convention.[33] The Convention norms are of a classic, civil and political kind, but the Court has explained these norms in an extensive fashion, thereby also expounding their socio-economic dimension.[34] It has become (increasingly) engaged in cases concerning topics like housing, health care, and social security, thereby underlining that there is no fatal tension between socio-economic rights and judicial review of individual cases in this field. Even in a supranational judicial context, in which this is arguably even more problematic than at the national, constitutional level,[35] the practice of the ECtHR has shown that it is possible for a court to decide on socio-economic measures.[36]

Altogether, the role the ECtHR plays in regard to the different developments in fundamental rights protection emphasises its prominent position and 'forerunner' character. The ECtHR not only sets an unprecedented example of supranational rights adjudication as such; also when it comes to more concrete doctrinal and other developments, its practice can be perceived of as 'avant-garde'. It often breaks ground, if not by creating new trends then at least by confirming ongoing changes in the perception of fundamental rights and the way these should be dealt with. This notwithstanding, it must not be forgotten that the Court is constantly moving on thin ice. It always needs to be mindful of its supranational position and take stock of the prevailing ideas on fundamental rights protection of the States Parties to the Convention. More precisely, it cannot do without the States Parties' support and should be careful not to overstep the boundaries of its competences. In this regard the question arises whether the success story of the Court this introduction started out with, may in some way also be endangered by the various (doctrinal) developments mentioned. The Court's task does not seem unlimited and especially when

32 O'Cinneide 2014, p. 300. Speaking of the longstanding perceived distinctions between civil and political rights, and economic and social rights, Saul et al. 2014, p. 1, note that '[t]he burgeoning scholarship in recent decades has exhaustively demonstrated how these supposed fault lines are both too simplistic and overly deterministic'.

33 *Airey v. Ireland*, ECtHR 9 October 1979, appl. no. 6289/73, para. 26.

34 In the words of Möller 2012, p. 9: 'The ECtHR, while regularly stressing that the ECHR "does not, as such, guarantee socio-economic rights", has accepted some socio-economic entitlements mainly through the use of its doctrine of positive obligations … as flowing from several Convention articles … '.

35 An interesting example of the possibility of socio-economic rights protection at the national level is the German *Bundesverfassungsgericht*'s recognition of an individual right to a subsistence minimum (BVerfGE 125, 175, 1 BvL 1/09 of 9 February 2010 (*Hartz IV*)). This right is based on the guarantee of human dignity (Art. 1(1) of the German *Grundgesetz*) in conjunction with the 'social state principle' (Art. 20(1) GG). See, *infra*, Ch. 4, S. 4.4.2.

36 For an extensive overview, see Koch 2009.

adding the different trends it appears that there is a risk that the Court obtains a greater role than it can legitimately claim. The recognition of positive obligations in combination with that of Convention requirements related to economic and social rights can lead to all-encompassing rights review in the sense that the Court's jurisdiction – and thereby its involvement in national (social) policy and democratic decisions – can become almost limitless. Moreover, the question may arise whether proportionality review and especially balancing exercises are the appropriate means for a (supranational) judicial body to decide on all kinds of issues while trying to stay away from political decisions on the distribution of rights and goods throughout society. At least in theory, it can be argued, the various developments of which the ECtHR's practice is considered a powerful example together may have the result that the ECtHR becomes the final 'decision-maker' in virtually all conflicts concerning individual interests. Especially in a Europe characterised by diversity this does not seem desirable.

In addition, there is a practical downside to the success of the Convention system in relation to the developments mentioned. A first problem the Court has been confronted with is the 'docket crisis' of the past years. The immense and growing number of applications that reach the Strasbourg Court has influenced its work almost to the point of collapse.[37] Serious institutional measures had to be taken to subdue the immediate danger stemming from the case-overload,[38] and even though the danger of actual collapse seems to have decreased by now, the question remains whether the issue has been tackled in a lasting manner. The problem the Court has been and is still facing cannot be seen apart from its expansive interpretation of the Convention rights including the socio-economic aspects thereof. That is, its case law might give the impression that it is possible to phrase almost every thinkable interest in terms of the ECHR, thereby qualifying for Convention protection.[39]

A second, related issue is the criticism that is voiced concerning the practice of the ECtHR by both academics and lawyers, but even more prominently by politicians who in some Member States even suggest leaving the Convention.[40]

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37 For statistical information on the number of applications, judgments, by state, etc., see www.echr.coe.int (under 'Statistics').

38 Protocol No. 14 to the ECHR, for example, has amended the Convention so that it now creates the possibility for single judges to reject manifestly inadmissible applications – committees of three judges may now declare an application inadmissible and decide on the merits of a case where the matter at hand is determined by well-established case law of the Court (see Arts. 27-28 ECHR).

39 *Cf.* Gerards 2012, on the 'prism of fundamental rights' and the fact that on the basis of 'human opportunism', in combination with the Court's analogical reasoning, new aspects of rights may constantly be recognised (pp. 179-180).

40 Especially the Conservatives in the United Kingdom and the Swiss People's Party have been critical as regards their respective countries' membership. Further criticism has been visible in for example the Netherlands and Belgium. See, generally, Gerards 2014a, pp. 86-88.

Although this criticism is not specifically related to the positive, socio-economic protection the Court has offered,[41] it does explicitly concern the too far-reaching impact of the Convention and the allegedly activist role of the Court in this regard.[42] It is considered problematic that the ECtHR assumes the final say on a broad variety of topics that not always seem to concern what were originally thought to be the fundamental rights protected by the Convention. Also the way in which, *i.e.*, by means of a balancing of interests and hence in a very *ad hoc* manner, the Court reaches its conclusions does not seem convincing to some critical observers, which adds to the doubts as to the broad influence of the Convention.[43]

Thus, the Court's engagement in the socio-economic sphere, combined with the increasing role of positive obligations and the idea that the Court – or (supranational) courts in general – is not very well placed for dealing with 'polycentric'[44] issues of this kind, may constitute a risk for the successful functioning of the Convention system. Even without having regard to the actual criticism, moreover, there is the fundamental issue of how a supranational court like the ECtHR should approach cases concerning economic and social rights that cannot literally be found in the Convention. It is in this context that it is worth asking whether and what improvements can be made to the Court's practice.

41 See, however, for criticism of the Court's protection in the field of social security, Bossuyt 2007 (*cf.* also Bossuyt 2012).

42 *Cf.* the critical speech of Lord Hoffmann concerning the ECtHR of 2009, in which he stated that '[the Court] has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States … laying down a federal law of Europe' (Lord Hoffmann 2009, para. 27). Moreover, he holds that '[t]he proposition that the Convention is a "living instrument" is the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by "European public order"' (para. 36).

43 *Cf.* Von Bersntorff 2011; Von Bernstorff 2014 (who aims at suggesting more 'categorical' alternatives to the balancing-dominated practice (also) of the ECtHR). See also, *infra*, Ch. 3, S. 3.4.2.

44 *E.g.*, King 2012, pp. 5-6, who explains 'polycentricity' by stating that '[s]ome issues require the comprehension of a vast number of interconnected variables in order for one to understand the likely consequences of any change of policy'. A polycentric problem is characterised by the fact that 'the soundness of some proposals is dependent on the comparative merits of others, the complete comprehension of which is extremely difficult and which involves considerable guesswork. Resource allocation at the nationwide level is a polycentric activity par excellence'.

1.2 Research Topic and Central Research Questions

1.2.1 Socio-Economic Protection under the ECHR

Although many aspects of the ECtHR's case law and practice lend themselves for intensive research, this book zooms in on the Court's socio-economic protection. It engages with the issue of how the ECtHR can provide effective fundamental rights protection while not overstepping the boundaries of its legitimate task. In this regard it is interesting to take the socio-economic protection of the ECHR as the starting point, for especially when this particular area is concerned the tension between these two aims becomes readily apparent. Issues concerning socio-economic rights can be fundamental, yet at the same time the scope of the Convention and its limited role prevent the Court from assuming law-making capacities in this regard. Moreover, although the topic of socio-economic protection under the Convention is discussed in the literature, it is not granted the attention 'classic' rights topics related to the ECtHR generally obtain. Several articles and book chapters, most of which were written some years ago, address the socio-economic dimension of the Convention.[45] Generally these highlight important cases and point out welcome developments, whereas in some also the shortcomings in the Court's decisions and judgments are noted.[46] However, only few authors have addressed in a more fundamental way the question of how the Court should deal with the sensitive issue of socio-economic rights. In her articles on the socio-economic protection by the ECtHR – and especially of work-related rights –, Mantouvalou has provided for a normative account of how the Court should handle complaints concerning socio-economic rights, namely in an 'indivisible' manner based on a positive account of freedom.[47] In addition, Koch has developed a 'hermeneutical' perspective to fundamental rights protection under the Convention that includes civil and political as well as socio-economic rights.[48] In this work, Koch also pays attention to the case law of the Court in different socio-economic fields like health, education, and housing.[49] The current study aims to add to these important works by, first of all, providing a more up-to-date account of the socio-economic protection by the Court, paying particular attention to decisions taken and judgements rendered in recent years. More importantly, more than most of the existing literature on the topic, the current research aims at explicitly placing the socio-

45 See Koch 2002; Koch 2003; Mantouvalou 2005; Koch 2006; Brems 2007; Warbrick 2007; O'Cinneide 2008; Palmer 2009; Palmer 2010; Mantouvalou 2013. In addition, Koch has written a monograph on the topic (*Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention on Human Rights*; Koch 2009).

46 See, *infra*, Ch. 2, S. 2.6.2.

47 Mantouvalou 2013. See also Mantouvalou 2005.

48 Koch 2006 (see also Koch 2002; Koch 2003; Koch 2009).

49 Koch 2009, Ch. 5-9.

economic dimension of the ECHR in the broader context of questions surrounding the legitimate role of a (supranational) court like the ECtHR, of developments in fundamental rights adjudication and legal reasoning, and of the criticism that has been directed at the Strasbourg Court. Indeed, although the argument that there is no place at all for economic and social rights protection under the Convention will not even be considered,[50] a cautious stance is taken in that it is assumed that, at some point, the Court may overstretch its powers. The current study takes on board the shortcomings identified in the literature, while placing them in context and endeavouring to come up with a constructive response that is in line with the position and competences of the Court.

1.2.2 The Notion of 'Core Rights'

In addressing the precarious protection of socio-economic rights under the ECHR, this research contemplates the notion of core rights protection. Why is this seen as a notion worth exploring, and why is it assumed that it has potential added value in this regard? The concept of core rights, *i.e.*, the idea that one can differentiate between the various aspects of a fundamental right in the sense that some of these aspects are more essential and hence deserve more protection than others, is often considered redundant. This has to do with the idea that balancing rights and interests is the appropriate means for dealing with rights conflicts and that this leaves no room for explicit core rights protection.[51] Moreover, it is generally considered that determining the core of a right is very difficult, if not impossible. How can it be known what belongs to the inherent essence of a right and – when there is no objective answer to this question – who is to decide on this matter?[52] Nevertheless, regardless of these sceptical outlooks, the notion of core rights simply fails to fade into oblivion. It is in fact regularly taken up in new constitutions,[53] and also the Charter of Fundamental Rights of the European Union (CFR) that

50 See, for an altogether critical stance on the ECtHR's engagement in the socio-economic sphere, and social security in particular, Bossuyt 2007 (*cf.* also Bossuyt 2012).

51 In Germany, for example, it is often considered that proportionality analysis will automatically secure the protection of the essence of a fundamental right, albeit in an implicit manner. See, *infra*, Ch. 4.

52 *Cf.* Young 2008, who shows how different approaches to determining the core of a right 'provide it with paradoxical grounding', which has to do with 'the inevitability of disagreement in the ordering of both values and needs', as well as with the limits of a 'consensus approach' (p. 175).

53 A few examples are the Constitution of Colombia of 1991, Art. 334 ('In no case shall the essential core of a right be affected.'), the Constitution of Kenya of 2010, Art. 24(2)(c) ('[A] provision in legislation limiting a right or fundamental freedom … shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.'), and the Constitution of Angola of 2011, Art. 236(b) ('Alterations to the Constitution must respect … [e]ssential core rights, freedoms, and guarantees.').

entered into force in 2009 contains a reference to this idea where it states that 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must … respect the essence of those rights and freedoms'.[54] Important to note is moreover that the notion of core rights is brought up in particular also in the field of economic and social fundamental rights, which provides an additional reason for researching its potential in relation to the development of the ECHR's socio-economic dimension.[55] In the end, the idea that fundamental rights catalogues are there to protect first and foremost, or in any case, the 'core' of the rights they enumerate, as such seems hard to contradict. When rights are not conceived of as 'trumps',[56] but can be limited in the light of the general interest or the rights of others, it is generally agreed that at least their essential aspects should be protected.

Hence, given the reality that core rights notions do play a role at least in legal thinking, what this research aims to do is to see what practical, rather than merely symbolical function the concept of core rights can have in the context of the protection of socio-economic interests by the ECtHR. It will be examined in what ways it can help the Court in fulfilling its important task of protecting the rights enshrined in the Convention, while being mindful of its supranational, subsidiary position and the challenges that relate to this.

Thus, the question central to this research is: what could be the use and potential added value of the notion of core rights for the reasoning of the Court in cases concerning socio-economic interests? As mentioned, this question must be viewed in the light of the specific role and position of the Court and its aim of providing effective individual protection while leaving the necessary room for States Parties' decisions and policies. Especially given this background, in order to answer the main research question, several sub-questions need to be addressed. First, it is important to obtain a clear picture of the Court's position, the task(s) it is required to fulfil, and the options a court has – by means of different forms of reasoning – of approaching these. Secondly, it is necessary to determine what the notion of core rights really can be about, and more precisely, how it can be used in legal reasoning. And thirdly, the ECtHR's current practice with regard to the protection of socio-economic interests needs to be investigated in order to identify the room for improvement by means of core rights protection. The final section of this introductory chapter (Section 1.4) outlines how these various questions will be approached.

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54 Art. 52(1) CFR.

55 See, in particular, *infra*, Ch. 5 and 6, which discuss the notion of core rights, or 'minimum core(s) (obligations)', in the context of the ICESCR and the South African Constitution, respectively.

56 For the idea that fundamental rights 'trump' other rights and interests, see Dworkin 1984. See however Möller 2012, whose reconstructive theory (based on the practice of constitutional rights law around the world) explicitly abandons the idea of rights as trumps or side constraints.

1.3 Scope and Terminology

Before embarking on the actual research, it is important to say something on the scope of this project as well as on the terminology used. It is clear by now that this research deals with the protection offered by the ECtHR in the field of socio-economic rights and the potential role of the concept of core rights therein. In this regard it is worth stressing that the investigation in this book and the arguments presented do not relate to the protection of socio-economic fundamental rights more generally speaking. The development of economic and social rights protection and the growing importance of these rights as norms that can form the basis for judicial review is reason for a lively, ongoing debate in which scholars and practitioners alike present their different views on these important issues.[57] Although inspiration is definitely drawn from this debate, the study presented in this book cannot contribute to the broader discussion on socio-economic rights because the various findings do not apply to other (judicial) actors and norms outside the Convention that somehow deal with safeguarding economic and social rights. Indeed, the argument that is developed is concerned with the protection of socio-economic rights and interests under classic, civil and political rights norms, and more specifically with the ECtHR's unique position and context. Of course, lessons may be drawn from this and comparisons may be made with other legal contexts, yet this study does not aim at suggesting what core rights and/or socio-economic protection in general should be about.[58] In turn, this means that although the particular role and position of the ECtHR are taken as the point of departure, this research and the eventual conclusions cannot be transposed one-to-one to the protection of civil and political rights under the Convention. The options presented and conclusions drawn with regard to the potential use of core rights are specifically tailored to the subject-matter of socio-economic rights, and can hence not automatically be applied to the Strasbourg adjudicative process in general.

It must also be noted that in addressing the question of how the Court can strike a right balance between the effective protection of individual rights and a careful approach to Member States' decisions in cases socio-economic cases, the focus of this study lies on the reasoning of the Court. That is, the scope of the research is limited to the interpretation of the Convention and the review of cases that fall within its scope, as is further elaborated in Chap-

57 For some important, recent contributions to this debate, see, Bilchitz 2007; Fredman 2008; Langford 2008; Liebenberg 2010; Gearty and Mantouvalou 2011; King 2012; O'Connell 2012; Young 2012.

58 Regardless of the limited scope of this project and the fact that it does not provide for a comprehensive theory, however, it will become clear that this research supports certain normative claims concerning (the development of) the adjudication of fundamental rights norms, especially at the supranational level. See, for some remarks in this regard, the concluding Chapter of this book (*infra*, Ch. 11, S. 11.2).

ter 3. Consequently, although interesting questions also may arise, for example, as to the remedies provided in socio-economic rights cases, these will not be addressed in this thesis.

With regard to the terminology used in this book it is important to clarify that, generally, the term 'fundamental rights' is used, rather than the also commonly used 'human rights'. Although the latter term certainly may seem appropriate in the context of the protection by the ECtHR, a conscious choice has been made to refrain from using it in most instances. This has to do with the broader meaning that can be given to the notion of 'fundamental rights'. Contrary to 'human rights', this notion encompasses both fundamental rights protected at the international or supranational level and 'constitutional rights' that generally can be found in national constitutions. It is appropriate to rely on this broader notion since in different parts of the research inspiration is drawn from constitutional doctrine. Employing the notion of 'fundamental rights' enhances the comparability of issues and doctrinal insights from both the supranational and the national level. The term 'human rights', moreover, might wrongly suggest that what is concerned is some kind of 'meta-notion' that is relevant foremost in the political and theoretical rather than in the legal sphere. This would misrecognise the fact that the ECtHR is a distinctly legal actor, and that the rights it protects are of concrete relevance at the national level and in the practice of national courts.[59]

A second remark on terminology relates to the use of the term 'socio-economic rights', or 'economic and social rights'. Both terms are used interchangeably and refer to fundamental rights concerning a broad array of topics like welfare benefits, education, the provision of health care and housing, but also work-related rights, etc. Occasionally, the term 'social rights' is used as well, which has to do with the primarily 'social' – rather than 'economic' – character of the issues that receive particular attention in this book (housing, health and health care, and social security).[60] The use of these terms demonstrates, moreover, that this book is not concerned with cultural rights. Especially in the context of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which forms the central focus of Chapter 5 of this book, cultural rights seem to form a natural extension of the category of economic and social ones. However, cultural rights and particularly claims for recognition are of a different nature than issues concerning social measures

59 According to Art. 46 ECHR the judgments of the ECtHR are binding for the parties to the case. Moreover, due to their *erga omnes* and *res interpretata* effects, the judgments and interpretations of the Court are of general relevance throughout the Member States (*cf.* Gerards 2014a, pp. 21-27).

60 See, in particular, *infra*, Ch. 8, 9, and 10.

and redistribution, and for that reason they are expressly left out of consideration.[61]

Lastly, it is worth remarking that 'core rights' should not be understood as a label that is attached to rights or rights norms that are more important than others. Phrased differently, it is not meant to create or emphasise a hierarchy amongst rights, in the sense that the right to life would for example be a core right whereas the right to property would not. Instead, what this term – admittedly somewhat confusingly – refers to, is that *within* rights some aspects can be distinguished that are more important or more fundamental than others. The term 'cores of rights' also could have been adopted to express this, yet for reasons of legibility and because it is the term customarily used in the literature as well as in practice, 'core rights' is preferred here.

1.4 Methods and Outline

This introductory chapter would not be complete without some words on the methods used. The legal scientific endeavour, or jurisprudence, is generally hard to capture in terms of truly 'scientific' methods.[62] Keeping this in mind, however, in presenting an outline of the remainder of this book some remarks are made as to how the different research questions have been approached.[63]

Part I of this book ('Setting the Stage') aims at providing the necessary background information for expounding the possible uses of the notion of core rights for the ECtHR's socio-economic protection. Chapter 2 builds on this introduction by further exploring the problem that is central to this research and setting the parameters for addressing it. For this chapter, research has been done into the Convention and the various ECHR provisions, including the case law generated on the basis thereof. This was combined with an investigation of 'doctrine' more generally, including a broad variety of academic contributions of a theoretical as well as of a more practical kind. More precisely, for assessing the role and position of the Court, as well as the tasks it has to fulfil and the context in which it has to operate, use was made primarily of academic work on this topic, combined with primary sources as well as information on the (early) development of the Convention system. After introducing the 'civil and political' Convention and the multi-dimensional task of the Strasbourg Court, the chapter offers a preliminary image of the Court's socio-economic case law. It then tries to make sense of the protection of socio-economic interests under the Convention by presenting two different, yet

61 See, on the differences between socio-economic and cultural rights and possible clashes between them, *e.g.*, Young 2008, pp. 119-120 (see also, *infra*, Ch. 5).

62 On the methods of legal research, see, *e.g.*, McCrudden 2006.

63 This research was completed by the end of 2014. This means that later (case law) developments and literature (with some minor exceptions) have not been taken into account.

complementary rationales underlying such protection: the theses of 'effectiveness' and 'indivisibility'. Although both theses provide an explanation as well as a justification for granting economic and social rights protection under the Convention, it is concluded that they do not provide a sufficient starting point for the Court for dealing with issues of this kind. Chapter 3 presents the framework within which potential solutions to the problems identified in Chapter 2 may be found. It takes a step back from the specific Strasbourg context and illuminates the different stages and accompanying tasks related to judicial fundamental rights protection. For this chapter, (theoretical) academic work on the practice of rights adjudication and legal reasoning has been studied. On the basis thereof, an important distinction is made between the stages of interpretation (*i.e.*, determining the scope of a right) and application (*i.e.*, determining whether a limitation of a right was justified), while also the task of determining the intensity of review is highlighted. A discussion of these stages and tasks shows the argumentative options available to a court like the ECtHR when dealing with conflicts between fundamental rights and other interests.

Part II investigates the ideas of 'core rights' and 'core rights protection'. It does do so by means of a comparative study of three 'core rights doctrines', which is conducted with the aim of exploring the potential as well as the pitfalls inherent in these notions. More precisely, by researching legal texts, case law, and academic discussions concerning this topic, comparative insights have been gained on the understanding and use of core rights in different legal contexts, focusing on those aspects that could potentially be interesting for the Strasbourg context and the ECtHR's reasoning in particular.[64] The studies presented in Part II could hence be labelled as primarily inspirational in kind. Chapter 4 looks at a classic example of a core rights doctrine, namely the German *Wesensgehaltsgarantie*. This guarantee is taken up in Article 19(2) of the German *Grundgesetz* and provides for a limit to limitations of the funda-

64 On the possible goals and pitfalls of comparative (constitutional) law, see, *e.g.*, Jackson 2010; Jackson 2012. The comparative investigation in this book may be most adequately described by what Jackson calls the 'identification of best practices' or the 'search for just or good principles' (rather than 'developing a better understanding of other systems', 'developing a better understanding of one's own system', or 'responding to doctrinal or textual questions'). However, it must be noted that what is sought after here is not so much 'the best' way of dealing with socio-economic protection under the Convention, but rather the comparative insights that can be gained from core rights protection in legal systems that would 'best' fit the practice of the ECtHR, in order to see whether this would also lead to a 'good' approach – or at least one that meets the different demands developed especially in, *infra*, Ch. 2 of this book – to the protection of socio-economic interests under the Convention. To achieve this aim, due account was had to the 'challenges' of (constitutional) comparison, by placing the different uses of core rights in their respective contexts and having regard to normative claims, while only 'translating' them to the Strasbourg practice in the light of the specific role and position of the Court and the tasks it is required to fulfil (*infra*, Ch. 2; Ch. 7).

mental rights enshrined in this Constitution. The chapter highlights the different understandings of this provision, thereby illustrating the richness and possible added value of the very idea of core rights. The chapter also briefly discusses the right to an *Existenzminimum*, or subsistence minimum, because also the interpretation of this right can provide inspiration for (socio-economic) core rights protection under the Convention. Chapter 5 moves to an example of core rights protection specifically related to the field of international socio-economic fundamental rights. It discusses the core obligations that have been recognised under the ICESCR, thereby showing how the concept of core rights can be of practical use as well as illuminating how minimum socio-economic cores can be recognised. The final chapter of Part II, Chapter 6, discusses the debate on the use of core rights for the protection of the economic and social rights enumerated in the South African Constitution. This chapter explicitly engages with the way courts can utilise the notion of core rights – instead of, or in combination with, reasonableness review – in adjudicating individual fundamental rights complaints. It addresses the question of whether it is a good idea for them to do so, also in the light of concerns related to judicial capacities and separation of powers.

Part III of this book consists of only one chapter, Chapter 7, which brings together Parts I and II by confronting the shortcomings of the Strasbourg socio-economic case law with the insights on core rights gained from the different core rights doctrines. The chapter first aims to dispel a number of persistent misconceptions of core rights, which helps to arrive at a broader, more promising understanding of this notion. Starting from the different and seemingly incompatible roles of the Court as outlined in Chapter 2, a 'core rights perspective' is then outlined tailored to the protection of socio-economic interests in Strasbourg. This perspective is adjusted to the different stages of rights adjudication discussed in Chapter 3 and includes strategic as well as more substantive suggestions for how core rights could be used to strike a balance between effective socio-economic protection and showing deference towards the Member States.

Part IV turns to the case law of the Court in relation to socio-economic rights in order to show the room for improvement with the help of a core rights perspective. The overview presented by no means is exhaustive, and a conscious choice has been made to include especially those cases that are either of a recent date – thereby illuminating the status quo in a particular area of the case law – or very well illustrate particular features and/or shortcomings of the Court's practice. The cases have been selected by searching the HUDOC database,[65] though not before having had a look at the Court's Factsheets and its recent press releases,[66] as well as the literature, in order to obtain a first image of the cases that deserve closer examination. Helpful

65 See the website of the Court www.echr.coe.int (under 'Case-Law'; 'HUDOC').
66 *Ibid.* (under 'Factsheets').

for identifying important developments were also the cases that have received particular attention in legal scholarship, in the form of a case-comment in for example *European Human Rights Cases*, on legal blogs,[67] or elsewhere. First, Chapter 8 discusses the Court's reasoning in cases concerning housing interests. It illustrates the way the ECtHR deals with complaints relating to Roma accommodation as well as with other (social) housing issues. Chapter 9 deals with health and health care issues featuring in the case law of the Court. These concern the provision of medication or health care, but also, for example, environmental pollution. The final case law chapter, Chapter 10, covers the issue of social security and presents a number of cases concerning the reduction or revocation of pensions and other social benefits. Also in regard to this topic it becomes apparent that, although seemingly aiming at effective and indivisible protection, the ECtHR does not always manage to provide for a transparent and consistent interpretation and application of the relevant Convention rights.

Chapter 11, finally, presents the final conclusions. Besides drawing together the findings of the different parts of this study, it explores several possibilities for improving the Court's reasoning in cases concerning the various socio-economic areas on the basis of a core rights perspective. Coming back to what was said in this introduction on the current developments in judicial fundamental rights protection, the concluding chapter ends with some (potential) implications of this study for 'rights reasoning' more broadly speaking.

67 See, *e.g.*, www.strasbourgobservers.com; www.echrblog.blogspot.nl; www.echrnews.wordpress.com; www.ukhumanrightsblog.com.

PART I

Setting the Stage

2 The ECHR and Economic and Social Rights Protection

2.1 INTRODUCTION

The European Convention on Human Rights is foremost a civil and political rights document. The rights norms it enumerates are 'classic' ones. They guarantee civil and political liberties, *i.e.*, the existence of a personal sphere in which the state is not allowed to interfere. Aiming at the protection of ECHR rights, however, the European Court of Human Rights is also confronted with complaints of a more economic or social kind. These concern for example housing, health and health care, and social security.[1] 'Socio-economic complaints' bring up the question, first, whether, *prima facie*, they deserve the protection of the ECHR. If this is the case, the issue becomes whether in the individual case at hand protection should be granted.[2] Over the past decades it has become clear that the Court does not categorically exclude economic and social interests from protection under the Convention. It has held that diverse issues ranging from pension cuts to environmental pollution and the lack of medication can be covered by the ECHR. In a significant number of cases concerning economic and social issues, moreover, the ECtHR has found a violation of one or more Convention rights.

Thus, the economic and social rights dimension of the ECHR cannot be ignored. As the Court itself has underlined, a clear distinction between the civil and political and the economic and social sphere cannot be made.[3] Regardless of the Convention's classical starting point, the protection of socio-economic interests is therefore merely inevitable. Yet this does not mean that review of economic or social issues does not bring up any legitimate concerns. As is evidenced by the literature on the topic, the socio-economic dimension of the Convention sits uneasily with notions such as (democratic) legitimacy, subsidiarity, and expertise.[4] Therefore, even though it is impossible to exclude

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1 See, for an analysis of the case law on these topics, *infra*, Ch. 8, 9, and 10, respectively.

2 See, on the different stages of fundamental rights adjudication, *infra*, Ch. 3.

3 *Airey v. Ireland*, ECtHR 9 October 1979, appl. no. 6289/73, para. 26 (*infra*, S. 2.4.1).

4 These concerns are mirrored in the debate on (the desirability of) the adjudication of constitutional or treaty-based economic and social rights. See, *e.g.*, Gearty, in Gearty and Mantouvalou 2011, pp. 57-64; O'Connell 2012, pp. 8-17; King 2012, pp. 3-8. In regard to positive (socio-economic) obligations under the ECHR in particular, see Krieger 2014. Many of the authors discussing the socio-economic protection offered by the Convention, however,

the socio-economic sphere from the protected area covered by the Convention, the scope and depth of the ECHR's economic and social dimension may be a point of debate, even more so because of the ECtHR's intricate role in a 'multi-level' system of fundamental rights protection. It can be asked whether the role of the Court in treating complaints of a particularly socio-economic kind is in some way limited. In line with this, an important question is whether the practice of the ECtHR in the socio-economic field is based on a particular theoretical approach to economic and social rights protection. And if not, whether it would nevertheless be desirable that a principled starting point be present.

It is the purpose of the present chapter to introduce the socio-economic dimension of the Strasbourg practice as well to further elaborate on these questions. The chapter presents the Convention articles that have proven most relevant in developing the socio-economic protection under the ECHR, while also 'making sense' of this phenomenon by answering the question how the Court's engagement in this field can be understood. Finally, coming to the problem that is central to the investigation in this book, this chapter addresses the chances and (potential) pitfalls of the Court's socio-economic approach. In this way, it forms the backdrop against which, later on, the idea and use of core rights protection can be investigated as a means of addressing the different concerns.

The chapter is set up as follows. In Section 2.2, some background information is given on the ECHR as a civil and political rights document. This is followed by a brief outline of the position and the role of the ECtHR as a fundamental rights adjudicator in a multi-level legal system (Section 2.3). Section 2.4 introduces the socio-economic case law of the Court. It gives an overview of the relevant Convention articles, by means of which a preliminary image is created of the kinds of socio-economic issues addressed by the ECtHR.[5] Section 2.5 presents two different possible understandings of the development of the socio-economic dimension of the Convention, namely the 'effectiveness thesis' and the 'indivisibility thesis'. Both of these theses can explain the socio-economic protection that has been offered thus far, but they also bring up questions regarding the direction in which this development could possibly be heading. In Section 2.6 the criticisms that have been directed at the Court's socio-economic case law are mapped out, and it is concluded that it is worth investigating the notion of core rights for its potential use in addressing these.

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generally assess this development in a positive manner. See, *e.g.*, Koch 2002; Brems 2007; O'Cinneide 2008; Palmer 2009; Koch 2009. See also Leijten 2013; Leijten 2014; Leijten 2015.

5 For a more detailed case law analysis in the light of the objective of this study, see, *infra*, Ch. 8, 9, and 10.

2.2 THE ECHR AS A CIVIL AND POLITICAL RIGHTS TREATY

The European Convention on Human Rights embodies an agreement between states striving for the protection of human rights. Its inception can be understood against the background of the human rights movement that evolved in response to the atrocities that had occurred in the first half of the twentieth century. More particularly, the origins of the ECHR can be viewed in the light of the coming into being of the Universal Declaration of Human Rights (UDHR; Declaration).[6] In 1948 the UDHR was adopted by the General Assembly of the United Nations.[7] The creation of this 'international bill of rights' formed a major step in the development of fundamental rights protection beyond the state and 'has retained its place of honor in the human rights movement' ever since.[8] It contains an extensive set of fundamental rights that is not limited to what are generally termed 'classic' or 'civil and political' rights.[9] Next to, *e.g.*, the right to life, the prohibition of torture and the right to take part in the government of his country,[10] the UDHR also enumerates economic and social guarantees. Examples are the rights to work,[11] to education,[12] as well as

> 'to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'[13]

There is no indication in the UDHR of a hierarchy amongst the different norms taken up in this comprehensive list. This suggests that civil and political and socio-economic rights were considered of equal importance.[14] However, against the backdrop of the Cold War and because of the prominent role of the United States in the universal human rights movement, the equal status of these rights had become more contentious over the drafting period.[15] Importantly, the Declaration did not obtain the character of a legally binding

6 Bates 2010, p. 40.
7 United Nations General Assembly Resolution 217A(III) of 10 December 1948.
8 Steiner 1998, p. 45.
9 See, on the different 'generations' of rights, generally, Tomuschat 2008, p. 25ff.
10 Arts. 3, 5, and 21 UDHR, respectively.
11 Art. 23 UDHR.
12 Art. 26 UDHR.
13 Art. 25(1) UDHR. Art. 25(2) guarantees special care and assistance to motherhood and childhood. The remaining economic and social rights laid down in the UDHR concern the right to social security (Art. 22) and the right to rest and leisure (Art. 24).
14 However, Craven 1995, p. 17, fn. 87, notes that it has been argued that the UDHR signals a preference for civil and political rights, if only because these are listed first.
15 Steiner et al. 2007, p. 136.

instrument. Rather, it was meant to function as a springboard for treaties that would have more than merely political significance. This made the differences between the two sorts of rights less immediately relevant; after all these mainly become apparent once rights bring along legal obligations states have to comply with. When eventually binding legal norms were drafted, it was hence not very surprising that the contents of the UDHR were divided over two separate covenants.[16] The first came to include only civil and political rights, while the economic, social and cultural ones obtained a separate covenant.

It is well known that the two treaties concerned here, namely the International Covenant on Civil and Political Rigths (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), are quite different.[17] Whereas the ICCPR rights are phrased as individual and subjective rights, the ICESCR merely requires states to take steps towards the fulfilment of socio-economic guarantees, subject to the requirement of progressive realisation and in the light of the available resources.[18] Partly because of the latter's less individualised and less concrete character economic and social rights protection has come to be understood as second-rank. Nowadays still, these rights are famously labelled the 'Cinderella of the human rights corpus'.[19]

In line with the international human rights movement, at the European level, too, efforts were made after the Second World War to create a 'Charter of Fundamental Rights'.[20] In May 1948, a preliminary draft of the European Convention on Human Rights prepared by the legal committee of the European Movement was adopted.[21] Article 1 of this draft held that 'every State a party to this Convention shall guarantee to all persons within its territory' a list of no less than eleven rights. These included several freedoms (of speech, religion, association, and from arbitrary arrest, detention and exile, and slavery) as well

16 See the analysis, prepared by the United Nations, of the drafting process: Annotations on the Text of the Draft International Covenants on Human rights, UN Doc. A/2929, 10th Session (1955), p. 7.

17 United Nations General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 U.N.T.S. 171 (entry into force 23 March 1976); United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, 993 U.N.T.S. 3 (entry into force 23 March 1976).

18 See, for more information on (the differences between) the ICCPR and the ICESCR, *infra*, Ch. 5, and especially S. 5.2.1.

19 Fredman 2008, p. 2 (cited by many human rights scholars and other legal writers). Economic, social, and cultural rights have also been called the 'poor cousins' of civil and political ones, see Saul et al. 2014, p. 1. According to Koch 2002, p. 30, '[d]espite the end of the cold war, economic social and cultural rights enjoy a much weaker protection than civil and political rights, and we are actually witnessing two concurrent discussions – one concerning the indivisibility of human rights and another questioning the legal nature of half of the rights, namely the economic, social and cultural rights' (see, on the indivisibility of fundamental rights, *infra*, S. 2.5.3).

20 Teitgen 1993, p. 5; Bates 2011, p. 18ff.

21 Teitgen 1993, p. 5; Bates 2010, pp. 20-21.

as equality and freedom from discrimination. Also taken up was the 'freedom from arbitrary deprivation of property'.

In 1949 the Consultative Assembly of the Council of Europe set up a Legal Committee that was thereafter tasked to proceed with the project.[22] Taking the European Movement's draft as the starting point, this committee had to decide on which rights would eventually deserve a place in the Convention. According to the legal committee's rapporteur at the time, Pierre-Henri Teitgen, in doing so

> 'the committee agreed without difficulty that the collective enforcement should extend solely to rights and freedoms: (a) which imposed on the States only obligations 'not to do things,' which would thus be susceptible to immediate sanction by a court; and (b) which were so fundamental that human dignity and democracy were inconceivable if they were not respected; it followed that so-called economic and social rights should be excluded, at least to begin with.'[23]

On the basis of this it was decided that from the previous list, the 'borderline right' to the protection of property was not to be included.[24] Together with the right to education this right only became part of Protocol No. 1 to the Convention.[25]

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms eventually entered into force on 3 September 1953.[26] According to the Preamble, the aim was to 'to take the first steps for the *collective enforcement* of *certain* of the rights stated in the Universal Declaration'.[27] The eventual document merely enumerates the guarantees that within the UN system would later become part of the ICCPR, and can thus be termed

22 This had to lead to a draft recommendation that had to be adopted by a two-thirds majority of the Assembly, to then be submitted to the Council of Ministers that had to unanimously agree upon it, as well as to the governments involved. See Teitgen 1993, pp. 9-10. See also Van Dijk et al. 2006, pp. 3-4.

23 Teitgen 1993, p. 10.

24 Gerards 2008, p. 659, fn. 15. That the right to protection of property was not included can also be explained as follows: '[I]n the limited time available it simply proved impossible to draft a provision that outlawed the practice of arbitrary confiscation by totalitarian regimes but which clearly could not be used as a means to question the nationalization policies of socialist governments such as that of the UK' (Bates 2011, p. 24).

25 *Cf.* Bates 2011, p. 24: 'The disagreement on the rights to education and property proved heated and intractable. For practical reasons, therefore, the two rights in question were left out of Recommendation 38. After pressure from the Assembly at a later stage, they were included in the First Protocol to the Convention.'

26 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.

27 Preamble to the ECHR [emphasis added].

'civil and political' rights.[28] Indeed, one reason for this was that the rights included had to be suitable for adjudication by a court.[29] Also important in the European context was the rise of communism.[30] As follows from the report of the Consultative Assembly,

> '[the committee] considered that, for the moment, it is preferable to limit the collective guarantee to those rights and essential freedoms which are practiced, after long usage and experience, in all the democratic countries. While they are the first triumph of democratic regimes they are also the necessary condition under which they operate. Certainly, professional freedoms and social rights, which have themselves an intrinsic value, must also, in the future, be defined and protected. Everyone will, however, understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union and then to coordinate our economies, before undertaking the generalization of social democracy.'[31]

It is noticeable from this, as well as from the earlier quote from Teitgen, that the inherent value of economic and social rights was not questioned as such. Rather, the time was not yet considered ripe for these rights to be included in a document containing binding human rights norms subject to collective enforcement.

The civil and political rights norms that obtained a place in the Convention can be placed under different headers. First of all the ECHR includes classic freedoms: the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery and forced labour (Article 4), the right to freedom and security (Article 5), no punishment without law (Article 7), the right to respect

28 Not all of the UDHR's 'civil and political rights' were taken up in the Convention. Exceptions are the right to equality before the law, freedom of movement and residence, the right to a nationality, etc. (Arts. 7, 13, and 15 UDHR, respectively). See Van Dijk et al. 2006, p. 5.

29 One of the most outstanding features of the European human rights system was and still is that it allows for supranational adjudication of these rights on the basis of individual complaints. See, *infra*, S. 2.3.

30 According to Harris et al. 2014, p. 1, the Convention 'stemmed from the wish to provide a bulwark against communism, which had spread from the Soviet Union into European states behind the Iron Curtain after the Second World War. The Convention provided both a symbolic statement of the principles for which West European States stood and a remedy that might protect those states from communist subversion'. See also Bates 2011, pp. 18-19.

31 Council of Europe, Consultative Assembly, First Session, Reports, 1949, p. 1144. See also Krieger 2014, p. 194. In the words of Harris et al. 2014, p. 5: 'The European Convention protects predominantly civil and political rights. This was a matter of priorities and tactics. While it was not disputed that economic, social, and cultural rights required protection too, the immediate need was for a short, non-controversial text which governments could accept at once, while the tide for human rights was strong. Given the values dominant within Western Europe, this meant limiting the Convention for the most part to the civil and political rights that were essential for a democratic way of life; economic social and cultural rights were too problematic and were left for separate and later treatment.'

for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), and the right to marry (Article 12). These freedoms protect an individual sphere that does not allow for state interference. However, in particular for those rights contained in Articles 8-11, the prohibition is non-absolute or relative in the sense that in certain circumstances interferences can be justified.[32] Secondly, there are the 'procedural' safeguards: the right to a fair trial (Article 6) and the right to an effective remedy (Article 13). Rather than protecting substantive rights, these provisions ensure the entitlement 'to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' as well as 'an effective remedy before a national authority' in case of a violation of the Convention. Finally, there is the prohibition of discrimination (Article 14), which prohibits unjustified unequal treatment in the enjoyment of Convention rights.

Over the years, the Convention has been supplemented by various protocols, which incorporate institutional changes[33] as well as contain additional fundamental rights norms. It was already mentioned that the First Protocol to the ECHR enshrines the right to the protection of property (Article 1) as well as the right to education (Article 2). Important are for example also the right to free elections[34] (also included in Protocol No. 1), the abolishment of the death penalty in Protocol No. 13,[35] and the 'free-standing' non-discrimination clause laid down in Article 1 of Protocol No. 12. The latter provision ensures that also without a direct link with another Convention right non-discrimination complaints can be dealt with under the Convention. The protocols are optional, and not every party to the Convention has ratified every provision of every protocol. This implies that, regardless of their 'classic' character, some of the rights added are nevertheless too controversial for being agreed upon by all states that partake in the Strasbourg system of human rights protection.[36]

From the 1970s onwards, some efforts have also been made to create a protocol to the ECHR that would include socio-economic rights.[37] In 1970 and 1978, recommendations were adopted that argued in favour of such a protocol, yet the initiatives were rejected.[38] Also more recently action has been under-

32 See, on the absolute versus relative character of rights, *infra*, Ch. 3, S. 3.2.1.

33 See, in particular, Protocol No. 11 to the ECHR, 'restructuring the control machinery established thereby'.

34 Art. 3 of Protocol No. 1 to the ECHR.

35 Art. 1 of Protocol No. 13 to the ECHR.

36 Rainey et al. 2014 (Jacobs, White and Ovey), p. 7. Charts of signatures and ratifications can be found on the Court's website www.echr.coe.int (under 'Official Texts'; 'Protocols to the Convention').

37 For an overview, see Berchtold 1991, p. 355ff.

38 Council of Europe, Consultative Assembly, Recommendation 583 (1970), and Council of Europe, Parliamentary Assembly, Recommendation 838 (1978), respectively. See also Van Dijk et al. 2006, p. 7.

taken concerning the possible protection of economic and social rights within the ECHR framework.[39] In 2005, however, the Steering Committee for Human Rights (CDDH) concluded that 'it was obvious that such an activity would have no political support at the present time'.[40] Since then, attention for the topic has faded.[41]

Just like in the UN system, also under the umbrella of the Council of Europe the protection of economic and social rights has been given hand and feet with the help of a separate document. In 1961 the European Social Charter (ESC) was adopted.[42] The ESC contains an extensive list of economic as well as social rights. These rights are directed at the Member States, phrased in a positive way in the sense that they require state action to be taken, and guarantee for example the right to work and just conditions of work,[43] as well as the right to protection of health and social security.[44] Like in the UN human rights context, also at the CoE level the enforcement mechanism of the ESC is of a different kind than that offered by the ECHR. Meanwhile, the ESC has been revised and consolidated, and next to a reporting procedure a collective complaints procedure has been created.[45] This has resulted in over a hundred complaints and an illuminating body of decisions by the European Committee of Social Rights (ECSR).[46] Still, however, the mechanisms for obtaining protection under the (revised) ESC rank second in comparison to the one created in the Convention – complaints can indeed only be made collectively, the decisions of the ECSR are not binding for the parties to a case, and it is therefore harder to ensure concrete follow-up at the national level. Unsurprisingly, thus, it is particularly the European protection under the 'civil and political' ECHR, rather than (also) that of the Council of Europe's economic and social rights

39 Council of Europe, Committee of Ministers, Declaration on the occasion of the 50th anniversary of the Universal Declaration of Human Rights, 10 December 1998 (in which the protection of fundamental social and economic rights was emphasised as an 'integral part of human rights protection'); Council of Europe, Parliamentary Assembly, Recommendation 1415 (1999), Additional protocol to the European Convention on Human Rights concerning fundamental social rights.

40 Council of Europe, Report of 29 June 2005 from the Steering Committee for Human Rights, CDDH(2005)009, S. 5.4, para. 17. See also Council of Europe, Report of 18 May from the Working Group on Social Rights GT-DH-SOC(2005)007.

41 Koch 2009, p. 323.

42 Council of Europe, European Social Charter, 18 October 1961, ETS 35. A revised version of the Charter ((R)ESC) was adopted in 1996: Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.

43 Arts. 1 and 2 (R)ESC, respectively.

44 Arts. 11 and 12 (R)ESC, respectively.

45 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 9 November 1995, ETS 158.

46 For more information and case law, see www.coe.int/socialcharter.

norms, that is often considered the most effective example worldwide of supranational fundamental rights protection.[47]

2.3 The Position and the Role of the ECtHR as a Supranational Fundamental Rights Adjudicator

According to Teitgen,

> 'the Convention which was envisaged had firstly to list the *fundamental* human rights and freedoms to be respected and safeguarded in every Member State of the Council of Europe, and secondly to set up a system of collective enforcement of those rights for all those States.'[48]

Indeed, a central reason why the ECHR has come to be perceived as a 'human rights protection system of unparalleled effectiveness'[49] is that it is backed by a supranational court capable of rendering binding judgments on the basis of individual applications.[50] Unique at the time, this feature today ensures that individuals in 47 Member States can resort to the ECtHR if they feel national courts have not dealt with their fundamental interests in an adequate manner.[51]

Originally, the collective enforcement mechanism of the ECHR consisted of the European Commission of Human Rights (EComHR) and the European Court of Human Rights in collaboration with the Council of Ministers of the COE.[52] In this setup the EComHR played the most important role in dealing with fundamental rights complaints. Only in a limited number of instances cases were referred to the ECtHR.[53] This changed on 1 November 1998 with the entry into force of Protocol No. 11 to the ECHR. With this protocol a single

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47 Ryssdall 1996, p. 18, notes that the ECHR 'has developed into a regional human rights protection system of unparalleled effectiveness. Its scope, its influence and the number of states that have agreed to abide by its standards have grown far beyond the most optimistic predictions of its founders. It is, in my view, no exaggeration to say that, at least as far as the democratic protection of individuals and institutions is concerned, the Convention has become the single most important legal and political common denominator of the states of the continent of Europe in the wide geographical sense'.

48 Teitgen 1993, p. 3. See also the Preamble to the ECHR, where it is emphasised that the Convention aims at taking 'the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.

49 Ryssdall 1996, p. 18.

50 The creation of this mechanism was however controversial, see Teitgen 1993, pp. 12-14.

51 According to Art. 35(1) ECHR, '[t]he Court may only deal with the matter after all domestic remedies have been exhausted'. See also the other paragraphs of Art. 35 for the different admissibility criteria.

52 See the original Art. 19 ECHR and Art. 10 of the Statute of the Council of Europe (5 May 1949, ETS 001), respectively.

53 See the original ECHR for the competences of the EComHR and the ECtHR until 1998.

and permanent European Court of Human Rights replaced the part-time EComHR and ECtHR.[54] Next to interstate applications,[55] this court 'may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto'.[56] Under the current system, there is a possibility for internal appeal after a Chamber of the Court has rendered judgment. Within three months, the parties to the case may in exceptional circumstances request a referral to the Grand Chamber of the Court. When a panel of five judges accepts this request, the Grand Chamber delivers a final judgment.[57]

It is the Court's task to interpret the rights enshrined in the Convention and the Protocols thereto and apply them to concrete individual complaints.[58] This may sound straightforward, yet in order to elaborate on the problem that underlies the current investigation it is necessary to problematise this task to some extent. First of all, it must be kept in mind that the ECtHR is a supranational court. It is part of an international organisation, the Council of Europe, and plays a subsidiary role in a complex, multi-level legal order.[59] This implies that it only may step in when national authorities have failed to provide the necessary fundamental rights protection. At the same time the Court is a human rights court or 'fundamental rights adjudicator'. As such, it has the important task of protecting individuals' most fundamental interests, which indeed requires particular dedication. Finally, the ECtHR has also been labelled, or at least compared to, a 'constitutional court'.[60] Albeit not in the sense of a supreme court that is able to strike down laws for their incompatibility with the constitution, this means that it is understood to play a leading and decisive, or in any case guiding role.[61]

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54 Art. 19 ECHR: 'To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.'

55 Art. 33 ECHR.

56 Art. 34 ECHR.

57 Arts. 43 and 44 ECHR.

58 *Cf.* Art. 32 ECHR. See, more extensively on the more technical aspects of interpreting and applying fundamental rights, *infra*, Ch. 3.

59 On the specific 'problematic' of the Court, see, *e.g.*, Gerards 2009, p. 409ff. (with further references).

60 *E.g.*, Ryssdal 1996; Alkema 2000, pp. 59-60; Wildhaber 2002; Greer 2006, p. 173; Wildhaber 2007, p. 528; Stone-Sweet and Keller 2008, p. 7; Gerards 2009, pp. 409-412; Sadurski 2009; Hennette-Vauchez 2011; Croquet 2011, p. 308; Sadurski 2012, p. 47; Greer ad Wildhaber 2013; Harris et al. 2014, p. 4.

61 Because the ECtHR does not have the power to strike down national laws, it will never become *fully* constitutional (Sadurski 2009, p. 448). It nevertheless has many 'constitutional' characteristics: it protects *justiciable* rights that seem at least *de facto* – though this depends to some extent on the jurisdiction – *superior* to other laws (*cf.* Raz 1998, pp. 153-154).

These three different role perceptions, *i.e.*, being a supranational/subsidiary body, a human rights protector as well as a constitutional adjudicator, can explain what makes the task of the Court so particularly challenging. All three roles impose different and sometimes incompatible expectations on the ECtHR.[62] To illustrate this, the different demands the Court faces can be presented along the lines of two of the dilemmas the Court faces practically on a day-to-day basis.[63]

First, the ECtHR has to ensure *effective fundamental rights protection* while it also has to take a *deferential stance* towards the Member States. On the one hand, the Court has been set up to guarantee a certain level of fundamental rights protection throughout the Council of Europe Member States. It must aim at pursuing this task in an effective manner, *i.e.*, ensure that the ECHR guarantees are not 'rights that are theoretical or illusory but rights that are practical and effective'.[64] This means that it sometimes needs to interpret rights in a manner that was not foreseen at the time the Convention was drafted.[65] It also implies that the Court will from time to time reach a conclusion that goes against strongly held national beliefs or long-standing policies or practices. In its 'human rights protector' role, thus, the ECtHR sometimes needs to be '*rücksichtslos*' in order to provide for effective rights protection.

On the other hand, the Court is and remains a supranational court. This means that it must keep a certain distance to what is decided at the national level.[66] 'Deference' implies that respect is shown to the will or opinion of another. In the context of the Court, a deferential attitude is not only an

62 *Cf.* the tasks of the ECtHR as identified by Gerards 2012, pp. 184-186. Gerards speaks of the 'backup' role that is important for ensuring actual fundamental rights protection, the standard-setting role that allows for clarifying the level of protection that should be guaranteed under the Convention, and the agenda-setting function, by means of which the Court can place certain topics on the regulative or policy agendas of the national authorities. See also Gerards 2013, p. 468; Gerards 2014a, pp. 15-17.

63 See, further on the dilemmas the Court faces in the light of its sensitive position and in relation to the notion of 'shared responsibility', Gerards 2014a.

64 *Airey v. Ireland*, ECtHR 9 October 1979, appl. no. 6289/73, para. 24.

65 *Cf. Tyrer v. the UK*, ECtHR 25 April 1978, appl. no. 5856/72, para. 31, where the Court stated that it 'cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field', and accordingly held that corporal punishment can fall within the scope of Art. 3 of the Convention.

66 *Cf. Case relating to certain aspects of the laws on het use of languages in education in Belgium*, ECtHR 23 July 1968, appl. nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, para. I.B.10: '[T]he Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a contracting party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.'

imperative in itself, demanded by the system of the Convention,[67] it also has a pragmatic purpose. In the end, the ECtHR is dependent on the willingness of the Member States for the implementation of its judgments.[68] A deferential stance might be worthwhile in this regard. When the Court is 'going too far' by rendering far-reaching judgments that encroach to a serious extent upon national laws and democratic decision-making, this not only potentially conflicts with its supranational and subsidiary position, it can also decrease the inclination of the Member States to comply with the Strasbourg fundamental rights system in the first place.[69]

It is true that the aims of ensuring effective protection and showing deference to the national authorities need not necessarily conflict. The Member States have willingly subjected themselves to the jurisdiction of the Court and have endowed it with the power to interpret and apply the fundamental guarantees of the Convention. At the same time it is not hard to imagine that both demands in fact do regularly collide. Ensuring that fundamental rights are non-illusory for those who can invoke them can require a strict stance by the Court that has unwelcome consequences for the state involved. A famous example is the case of *Hirst v. the United Kingdom*, where the Court held that the UK had violated Article 3 of Protocol No. 1 for restricting convicted prisoners' right to vote.[70] The judgment has been very critically received and to date there is debate about whether and how to change the legal system in accordance with it.[71] Situations like these can have a chilling effect on the relation between the Court and the state, which in turn might have a negative impact on the effectiveness of the supervisory system as a whole.

The second, related dilemma can be sketched as follows. The ECtHR must offer *individual protection* while it should at the same time provide *general guidance*. As a fundamental rights guarantor it provides a safety net for individuals who need to be protected against their state or against majority decision-making that is unfavourable to minority groups.[72] In order to guarantee the ECHR's subjective rights, the Court thus needs to take individual circumstances into account. What is more, it can be argued that the individual circumstances – sometimes even regardless of the wording of the Convention

67 *Cf.* Art. 1 ECHR that requires *the Member States* to comply with the Convention. Art. 35(1) ECHR underlines this.

68 *E.g.*, Krieger 2014, p. 200. The ECtHR cannot strike down national laws, and leaves it up to the states to provide the eventual solution. There is (political) pressure to comply with the ECtHR's judgments, exercised mainly by the Council of Europe Committee of Ministers by supervising the execution of the Court's judgments and decisions.

69 *E.g.*, Gerards 2014a, pp. 41-46, who holds that in particular with regard to potential interpretative 'overreach', that 'this may not contribute to the willingness of national authorities to implement the Court's case law in their own legislation, policies or case-law' (p. 46).

70 *Hirst v. the UK (No. 2)*, ECtHR (GC) 6 October 2005, appl. no. 74025/01.

71 *E.g.*, Foster 2009; Bates 2014.

72 *E.g.*, Gerards 2012, pp. 184-185.

(narrowly understood) or judgments in earlier cases – from this perspective need to be decisive.[73]

Secondly, however, the Court at the same time needs to provide for more 'objective' protection, or at least for objective, general guidelines. The 'constitutional role' of the Court is more than just a modern label attached to the ECtHR's practice that nicely fits the broader badge of 'constitutionalism beyond the state'. Rather, the constitutional task of the Court is embedded in the system of the Convention. The idea is that it is first and foremost up to the Member States to ensure compliance with the ECHR.[74] Article 1 of the Convention holds that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. Because these rights and freedoms do not necessarily speak for themselves, they are in need of clarification by the ECtHR. Indeed, although in principle the judgments of the Court are only binding for the parties to the case,[75] it is widely recognised that they *de facto* work *erga omnes*.[76] This means that the effects of the Court's judgments can reach beyond the contours of a particular case. Once the Court interprets or applies the Convention in a particular manner, the example set will not only trigger individuals in a situation comparable to that of the applicant to invoke their rights under the Convention, but it is also likely to be taken as a point of reference by states, especially by national courts. Thus, to ensure that the necessary guidance is provided and an appropriate level of protection is guaranteed throughout the Council of Europe Member States, the Court is required to render principled,

73 See, for the first time that the Court underlined this, *Sunday Times v. the UK*, ECtHR 26 April 1979, appl. no. 6538/74, para. 65, where it noted that 'the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it'. See also *Young, James and Webster v. the UK*, ECtHR 13 August 1981, appl. nos. 7601/76 and 7806/77. There '[t]he Court emphasises once again that, in proceedings originating in an individual application, it has, without losing sight of the general context, to confine its attention as far as possible to the issues raised by the concrete case before it' (para. 53). *Cf.* Callewaert 1993, p. 728; Matscher 1993, p. 64.

74 According to Letsas 2007, p. 9, 'the ECHR is treated by the relevant actors (ie Member States, applicants, and judges) as enshrining rights that states have a *primary* duty to respect when deploying coercive force, as opposed to a *secondary* obligation to compensate victims should they be found to be in breach of the Convention by the European Court of Human Rights'. See also Tulkens 2012, pp. 6-10.

75 Art. 46(1) ECHR: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.'

76 Ress 2005, p. 374, speaks of an 'orientation effect': 'There are judgments that the states do not like and that are not complied with, risking of course that they will be found in violation of human rights in a new case before the Court. There are examples of a clear reluctance on the part of some states to follow the reasoning of the Court in the future, but in the long run all the states have accepted the Court's jurisprudence.' See also Gerards 2009, pp. 409-410; Gerards 2014a, p. 21ff.

comprehensively reasoned judgments that provide states with more than just information on the outcome of a single case.[77]

The demands of individual and of constitutional or 'general' justice may be seen to be in conflict with one another. As a human rights protector, the Court is likely to emphasise individual protection, whereas its important guiding role might require more general reasoning. At the same time, the Court's subsidiary function seems to demand both: on the one hand, when the Court sticks to the individual circumstances of a case, judgments that demand far-reaching (legislative) reparations can be avoided. On the other hand, however, for being able to protect ECHR rights in a sufficient manner without the ECtHR having to interfere, states are in need of clear, general guidelines and criteria determined at the Strasbourg level.

Thus, the Strasbourg Court faces an all but uncomplicated or one-dimensional task. It can hardly be blamed for the fact that in trying to meet the various demands and deal with the dilemmas mentioned it has not only been praised, but criticised as well. Especially over the past years, this criticism has intensified.[78] In the media as well as in the political arena, prominent actors have voiced their doubts about the functioning and future of the Court's fundamental rights protection.[79] The Court has been accused of interfering with Member States' laws and policies more than necessary and of overstepping its boundaries as a judicial body.

Another problem that has come to the fore more recently is the enormous caseload of the Court. Since the 1980s the number of applications has grown steadily.[80] With the inception of the new ECtHR in 1998 and not much later the accession of several Eastern European states, this growth has everything but diminished.[81] It is fair to say that since a number of years the caseload of the Court has become a real threat to the functioning of the Strasbourg fundamental rights system.[82] In order to keep the amount of applications pending before the Court manageable, over the past decade a number of

77 See, on the notion of 'judicial minimalism' in the practice of the Court, as well as the problem that this can lead to a lack of clarity, Gerards 2014a, p. 62ff.

78 *Cf.* the discussions that evolved since the end of the 2000's in for example the UK and the Netherlands. See, *e.g.*, Masterman 2014 and Gerards and Fleuren 2014a, respectively. See more generally Gerards 2014a, pp. 86-88.

79 Prominent, recent examples are the criticism by the Conservative party in the United Kingdom, and by the Swiss People's Party in Switzerland. In both countries, political actors have even suggested leaving the Convention.

80 *Cf.* Greer 2006, pp. 33-41. Statistical information on the number of applications, judgments, by state, etc. can be found via www.echr.coe.int (under 'Statistics').

81 The latter development, moreover, has also led to difficult questions regarding the appropriate level of fundamental rights protection as well as structural problems. See Letsas 2007, p. 2; Leuprecht 1998; Greer 2007, p. 105ff.; Sadurski 2012, Ch. 1.

82 As it has often been said, the Court became a 'victim of its own success'. See Dembour 2002, p. 604.

measures have been taken. Of crucial importance has been the entry into force of Protocol No. 14 to the Convention. This protocol includes some institutional amendments to enable the Court to deal with a greater number of cases in a shorter period of time.[83] At the High Level Conference on the Future of the European Court of Human Rights in 2010 in Interlaken, Switzerland, moreover, some further concrete actions were agreed upon,[84] as well as in the Izmir Declaration that was concluded in 2011 in Turkey.[85] The High Level Conference in Brighton in 2012 has shown, however, that there is still much to worry about.[86] In response to the perceived problems of the system, the government leaders in Brighton decided to devise a new protocol to the Convention. Once all the Member States Parties to the Convention have ratified this Protocol No. 15, this protocol shall add a new recital to the ECHR, reading:

> 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.'

The very fact that it was considered necessary to codify the notion of subsidiarity and the margin of appreciation doctrine may go to show that, with solving the backlog problem only, the Court will not yet be there.

Evidently, the criticism of the Court's encroaching upon national prerogatives is more than a problem in the margins that is irrelevant for legal debate. In particular it is also relevant for the purpose of this study, as the Court's task as a protector of socio-economic rights cannot be meaningfully assessed without having regard to the acceptance and effectiveness of its judgments. Indeed, the starting point taken here is that it is important for the Court to

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83 Protocol No. 14, amongst other things, has amended the Convention so that it now creates the possibility of single judges to reject manifestly inadmissible applications – committees of three judges may now declare an application inadmissible and decide on the merits of a case where the matter at hand is determined by well-established case law of the Court (see Arts. 27-28 ECHR).

84 Interlaken Declaration, 19 February 2010 (the different declarations can be found on the website of the Court).

85 Izmir Declaration, 27 April 2011. See, in particular, point 8 of the Preamble ('Considering that the provisions introduced by Protocol No. 14, while their potential remains to be fully exploited and the results so far achieved are encouraging, will not provide a lasting and comprehensive solution to the problems facing the Convention system'), and point 3 ('[The High Level Conference] [t]akes note of the fact that the provisions introduced by Protocol No. 14 will not by themselves allow for a balance between incoming cases and output so as to ensure effective treatment of the constantly growing number of applications, and consequently underlines the urgency of adopting further measures').

86 Brighton Declaration, 20 April 2012. See, in particular, under B. (Interaction between the Court and national authorities) and under G. (Longer-term future of the Convention system and the Court).

not just focus on one of its roles but instead discharge *all* of its relevant functions, *i.e.*, both its function as an individual rights guarantor and its function as a constitutional guardian of the Convention, while keeping in mind that its position is a supranational one. Firstly, its subsidiary role implies that the Court cannot provide for an all-encompassing rights order that determines every possible conflict at the national level. Secondly, the Court has to strive for effective protection as much as possible in individual cases. And finally and very importantly, in order to manage its caseload and work towards an enduring, well-functioning system of European fundamental rights protection, it should set clear, consistent and comprehensible standards with the help of criteria and guidelines that are relevant for more than one case only. Only this will allow the Member States to confidently and effectively apply ECHR standards in their own legal orders. As will become clear in the remainder of this study, especially also in the context of economic and social interests it is particularly challenging for the ECtHR to live up to all these expectations.

2.4 The Economic and Social Dimension of the ECHR

It was explained in Section 2.2 that the ECHR is a typical civil and political rights document that first and foremost protects negative freedoms, as is underlined by the wording of the rights it enumerates.[87] Article 10, for example, stipulates that '[e]veryone has the right to freedom of expression', and that '[t]his right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. When the Convention is 'taken literally' it is therefore hard to believe that it imposes more than mere duties not to interfere. Yet over the years it has become apparent from the Court's case law that the rights listed in the Convention also entail positive obligations.[88] An early example is presented by the *Marckx* judgment, in which the Court held that the fact that in Belgium no maternal affiliation could be established directly after the birth of an illegitimate child violated the right to one's family life (Article 8 ECHR).[89] A possibility to do so had thus to be created in order for Belgium to comply with the Convention.

87 This was illustrated by a Factsheet on the website of the Court concerning 'welfare rights'. This factsheet explicitly stated that '[t]he European Convention on Human Rights … guarantees *civil and political rights* (such as the right to life, the right to liberty and security and the right to a fair trial). Meanwhile, other Council of Europe instruments, notably the European Social Charter, concern *economic and social rights* (such as housing, health, education, employment legal protection and social welfare)'. There no longer is a social welfare factsheet available online (but see for the remaining factsheets www.echr.coe.int, under 'Factsheets').

88 See, generally, Mowbray 2004; Xenos 2012.

89 *Marckx v. Belgium*, ECtHR 13 June 1979, appl. no. 6833/74.

Another point is that the individual rights laid down in the Convention cannot always meaningfully be characterised as entirely civil or political in nature. Even a brief look at the case law of the Court reveals that economic and social interests are protected therein as well. Under the header of rights to private life, property, non-discrimination, etc., the ECtHR has over the years reviewed – and found violations in – numerous cases concerning social security payments, housing laws, environmental nuisances, etc. Inasmuch as the ECHR *norms* (or articles) may still be considered to be 'civil and political', this no longer holds true for all of the interests they protect.[90]

Although in legal scholarship the provision of positive guarantees and the protection of socio-economic interests are often considered to be closely related,[91] in fact two different things are concerned. The positive obligations found in the Convention do not always concern economic or social rights, while the socio-economic guarantees offered by the Court are not always of a positive kind. Nevertheless, it must be admitted that there is a great overlap between the two, since protection of economic and social interests often requires that at least some active steps be taken. Therefore, it is submitted here that it is indeed especially the combination of the two that adds to the Convention's socio-economic rights dimension.[92]

Against this background, this section provides a brief overview of the Court's case law on (positive) economic and social matters, which by no means is meant to be comprehensive. The aim is to generate a general image of what the socio-economic case law of the Court entails by presenting some illustrative examples. After introducing the Court's first explicit acknowledgment of the fact that civil and political rights and economic and social rights are not fully separable (2.4.1), these examples will be presented under two different headings. The first of these concerns the socio-economic protection that has been provided mainly under Articles 6 and 14 ECHR (2.4.2). These articles can be called 'procedural' and 'non-free-standing', respectively. As such they indirectly allow for what can be termed the 'socialisation' of the Convention. Secondly, regard is had to the (self-standing) substantive articles that allow the Court to engage in the adjudication of a broad range of economic and social interests (2.4.3). Highlighted are Articles 2, 3, and 8 ECHR, as well as Article 1 of Protocol No. 1 to the Convention.

90 On the distinction between *norms* and *protected interests* as it is used in this book, see *infra*, S. 2.5.1. See also, *infra*, S. 2.5.2 and 2.5.3 (for different explanations for this development).

91 *Cf.* Möller 2012, who in discussing his 'global model of constitutional rights' explicitly links the two (*e.g.*, p. 5ff.).

92 *Cf.* also, *infra*, S. 2.6.2 (on the potential of the ECHR's socio-economic dimension and the role of positive obligations therein).

2.4.1 No 'Water-tight Division' Between the Civil and Political and the Socio-Economic Sphere

The adjudication of economic and social matters under the classic rights norms laid down in the ECHR is not a recent phenomenon. Although the number of socio-economic judgments of the Court has increased significantly over the past years, it was recognised at a relatively early stage that the 'civil and political' character of the ECHR must necessarily be nuanced. It was in a 1979 case under Article 6(1) ECHR (the right to a fair trial) that the Court for the first time explicitly held that the Convention also protects interests one would primarily expect to be protected by other human rights treaties.[93] In the case of *Airey v. Ireland*, it had to deal with the question of whether the Article 6(1) guarantee of access to court also gives rise to positive state duties.[94] Mrs Airey wished to go to court to obtain a separation from her violent, alcoholic husband, but could not afford any legal assistance. The ECtHR held that the right to free legal aid can under circumstances also be invoked in civil law suits. It emphasised the importance of procedural protection, even when this has substantial implications for a national legal system and brings along significant costs. In the words of the Court, Article 6 'may compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court'.[95] The Government had submitted that 'the Convention should not be interpreted so as to achieve social and economic developments in a Contracting state'.[96] The Court, however, rather than circumventing this sensitive point, responded by holding as follows:

> 'Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.'[97]

In this way it made clear that a conceptual distinction between the civil and the social sphere cannot be made. The *Airey* case thereby put an end to the idea that the Convention is concerned strictly and solely with civil and political interests. It showed the ECtHR's willingness to conclude on (costly) obligations

93 *Cf.* Scheinin 2001, p. 34: 'Under the Convention, the far-reaching procedural safeguards of … [Article 6] are perhaps the clearest example of the ECHR giving additional protection to rights that are basically also covered by other human rights treaties.'
94 *Airey v. Ireland*, ECtHR 9 October 1979, appl. no. 6289/73.
95 *Ibid.*, para. 26.
96 *Ibid.*
97 *Ibid.*

for the state that can be interpreted as being primarily of a social or economic nature.

The paragraph just quoted has been referred to regularly in the Court's case law,[98] which means that *Airey* has proven not to be merely an exception. Quite to the contrary, the overlap between the civil and political sphere and the field of economic and social rights is visible in a still increasing number of decisions and judgments. These concern Article 6, but also several other provisions enshrined in the Convention.

2.4.2 'Socialisation' Through Article 6 and Article 14 ECHR

At first glance, the *Airey* case was not about a substantive socio-economic matter, such as the provision of housing or health care. It was brought and adjudicated under Article 6 ECHR, the right to fair trial, which can be considered to contain (classical) procedural fundamental rights guarantees.[99] More precisely, the case concerned Mrs Airey's access to court, a right developed under paragraph 1 of this article. However, it turned out that in order to obtain such access, Mrs Airey was in need of free legal aid. At a second glance, thus, the case did (also) concern social protection. The *Airey* case thereby sets a perfect example of the inseparability of 'civil' and 'social' concerns, as the Court indeed recognised in its judgment.

Next to the 'procedural' Article 6 route, there is another route that from the outset tends to interfere with the strict distinction between civil and political and socio-economic interests. Also the non-discrimination principle enshrined in Article 14 ECHR does not clearly distinguish between different kinds of guarantees. Perhaps even more obviously than Article 6, this article ensures protection that can easily trigger social effects, since, once unequal treatment is considered discriminatory, privileges or benefits provided to one group need to be distributed amongst others as well, also when they are of a social kind.[100]

Both Article 6 and Article 14 thus provide for 'derived' socio-economic rights protection in Strasbourg, in the sense that it is not because of the fact that the substantive socio-economic interests as such are protected by the

98 See, for a recent example, *N. v. the UK*, ECtHR (GC) 27 May 2008, appl. no. 26565/05, para. 44. There, however, the reference was used to underline that '[a]lthough many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights'. The dissenters in this case (Judges Tulkens, Bonello, and Spielmann) have drawn attention to this 'incomplete and thus misleading quotation', which according to them ignores 'the social dimension of the integrated approach adopted by the Court' (para. 6).

99 See, for such a 'classical' reading of the judgment, Warbrick 2007, pp. 245-246.

100 However, in order to invoke Art. 14, another substantive Convention right must be involved as well. See, *infra*, S. 2.4.2.2.

Convention that social protection under these articles is granted, but rather such protection is linked to ensuring procedural safeguards or combating discrimination. Besides the *Airey* case, some more examples may serve to illustrate this.

2.4.2.1 Article 6 ECHR

The right to fair trial enshrined in Article 6 ECHR – to the extent relevant here – reads as follows:

> '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'[101]

The right to a fair trial plays a prominent role in the Convention system. Not only does a great percentage of the applicants invoke this provision, the right itself also forms one of the cornerstones of the ECHR.[102] Article 6 explicitly deals with procedural guarantees, which implies that it is not the Court's function 'to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention'.[103] The rights guaranteed by Article 6 apply

101 Paragraphs 2 and 3 of Art. 6 read: '2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.' See, for extensive introductions to this article and the relevant case law, as well as further references, Van Dijk et al. 2006, pp. 511-650; Harris et al. 2014, pp. 370-492; Rainey et al. 2014, pp. 246-306; Meyer, in Karpenstein/Mayer 2012, pp. 133-204; Peçi et al., in Gerards et al. (eds.) 2013, pp. 195-497.

102 According to the Grand Chamber of the Court 'the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) restrictively' (*Perez v. France*, ECtHR (GC) 12 February 2004, appl. no. 47287/99, para. 64).

103 *Garcia Ruiz v. Spain*, ECtHR (GC) 21 January 1999, appl. no. 30544/96, para 28.

in the context of criminal charges[104] as well as in disputes regarding 'civil rights and obligations'. It is the Court's broad interpretation of the latter notion that is crucial for the indirect social protection the right to a fair trial can offer.

Importantly, the Court has interpreted the notion of 'civil rights and obligations' in an autonomous manner, *i.e.*, without considering the defendant state's qualification of what is at stake to be decisive.[105] Thereby, and by 'expanding its scope over time, the position has been reached in which most substantive rights that an individual may arguably claim under national law fall within Article 6 unless they quintessentially concern the exercise of the public power of the State'.[106] Whereas notably disputes concerning the entry, conditions of stay, and removal of aliens as well as issues concerning public service employment and taxes are not considered to be 'civil' in nature, Article 6 of the Convention covers a great range of other topics. Most illustrative for the socio-economic dimension of Article 6 is the application of this provision in the field of social security. Whereas the Court in several earlier cases balanced the 'private' and 'public' aspects of disputes concerning this topic in order to determine whether the applicability of Article 6 was triggered,[107] later it more generally incorporated disputes concerning social security, including social assistance.[108]

In fact, the Court's broad interpretation of 'civil rights and obligations' implies that besides social security disputes, all kinds of other social rights-related disputes are covered by the right to a fair trial as well.[109] Admittedly, the social protection that follows from this is often more indirect compared to what was granted in *Airey*, since cost-free assistance of a lawyer may be considered to be a particularly concrete social advantage. In most cases, Article 6 merely ensures an appropriate procedure without thereby guaranteeing a substantive individual interest of an economic or social nature. Nevertheless, at least this means that the various well-worked out guarantees written down in Article 6(1) of the Convention must be complied with, as well as that in

104 Excluded from criminal charge proceedings are 'ancillary' proceedings concerning legal aid, pre-trial detention, as well as extradition proceedings to face a criminal charge in another state. Harris et al. 2014, p. 373.

105 *König v. Germany*, ECtHR 28 June 1978, appl. no. 6232/73, para. 88.

106 Harris et al. 2009, p. 212. In this regard, 'more recent jurisprudence, by which more and more rights and obligations have been brought within Article 6, is not always easy to explain in terms of any distinction between private and public law that is found in European national law' (Harris et al. 2014, p. 379).

107 *Feldbrugge v. the Netherlands*, ECtHR 29 May 1986, appl. no. 8562/79, para. 40; *Deumeland v. Germany*, ECtHR 29 May 1986, appl. no. 9348/81, para. 60.

108 *Salesi v. Italy*, ECtHR 26 February 1993, appl. no. 13023/87, para. 19. Since the distinction between contributive and non-contributive benefits cannot be considered as fundamental, the right to a fair trial thus applies to all disputes in this field. *Cf.* Koch 2002, p. 36. Tax related disputes, however, continue to be excluded from the scope of Article 6. For an exception, however, see *Editions Périscope v. France*, ECtHR 26 March 1992, appl. no. 11760/92, para. 40.

109 One can for example also think of (private) work related disputes.

social rights disputes covered by Article 6 access to court must be provided.[110] As will become clear later on in this study, the importance of such 'procedural' protection for the advancement of socio-economic aims should not be underestimated.

2.4.2.2 *Article 14 ECHR*

Article 14 ECHR contains the prohibition of discrimination:

> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'[111]

As can be inferred from this wording, Article 14 guarantees the enjoyment *of other Convention rights* without discrimination. It is therefore described as 'parasitic' and as having 'no independent existence'.[112] Its application, however, 'does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles'.[113]

The 'within the ambit' formulation can be understood as pointing at something that is more inclusive than the strict scope of a particular ECHR provision.[114] Over time, the Court has come to recognise that Article 14 extends beyond the enjoyment of the Convention rights that states are required

110 *Golder v. the UK*, EComHR 21 February 1975, appl. no. 4451/70.

111 See, for extensive introductions to this article and the relevant case law, as well as further references, Van Dijk et al. 2006, pp. 1027-1051; Harris et al. 2014, pp. 783-822; Rainey et al. 2014, pp. 567-594; Sauer, in Karpenstein/Mayer 2012, pp. 341-358; Gerards, in Gerards et al. (eds.) 2013, pp. 1126-1222.

112 *Chassagnou and Others v France*, ECtHR (GC) 29 April 1999, appl. nos. 25088/94, 28331/95 and 28443/95, para. 89. As a response to the 'gap' that hence exists – in the sense that Article 14 indirectly 'permits' government discrimination when there is no sufficient connection to another Convention right – the Committee of Ministers in 2000 adopted Protocol No. 12, providing for a 'free-standing' prohibition of discrimination. However, ratification of this Protocol has turned out problematic. Continuing dependence on Article 14 has therefore led to broadening the use of that Article. Attempts to 'close the gap' can be found in, *e.g.*, Wintemute 2004 and Wintemute 2004a. See also Arnardóttir 2003, pp. 35-37; Arnardóttir 2014, p. 331.

113 See, *e.g.*, *Abdulaziz, Cabales and Balkandali v. the UK*, ECtHR 28 May 1985, appl. nos. 9214/80, 9473/81 and 9474/81, para. 71; *Karlheinz Schmidt v. Germany*, ECtHR 18 July 1994, appl. no. 13580/88, para. 22; *Petrovic v. Austria*, ECtHR 27 March 1990, appl. no. 20458/92, para. 22.

114 Wintemute 2004, p. 370; Arnardóttir 2014. For a recent example that shows that a case can be incompatible *ratione materiae* when it comes to Article 1 taken alone, while being reviewed under Art. 1 P1 in conjunction with Article 14, see *Puricel v. the UK*, ECtHR 14 June 2011 (dec.), appl. no. 20511/04.

to guarantee. It also attaches to additional rights voluntarily provided by the state, as long as they fall within the 'general scope' of any Convention article[115] and regardless of whether these rights are, or are not, of a socio-economic kind. In other words, as soon as measures or decisions taken by the state touch upon a provision of the Convention – irrespective of whether the Convention would require such (economic or social) measures or decisions – they must comply with the requirement of non-discrimination.[116]

In relation to Article 1 of Protocol No. 1 (the protection of property), for example, the accessory character of the prohibition of discrimination implies that when a social security right is created by the state, a complaint about a difference in treatment relating to that right will fall within the ambit of this Article for the purpose of applying Article 14. In the words of the Court: 'Although 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'.[117] Similarly, the Court has held that 'there is no right under Article 8 of the Convention to be provided with housing', but if a state provides benefits in this field, it must nevertheless comply with the requirements of Article 14.[118]

Because of the broad scope of application it has been given by the Court, 'Article 14 may have a socialising effect on the rights and freedoms laid down in the Convention'.[119] Indeed, economic and social rights are not explicitly taken up in the Convention, but because of the working of the non-discrimination principle they can nevertheless be protected via the (civil and political) rights listed therein. The effect of this is limited, however, because

> 'a [socio-economic] right does not arise when the preferential treatment by the authorities is intended precisely to remove an existing inequality or – according

115 See for the first time *Case relating to certain aspects of the laws on het use of languages in education in Belgium*, ECtHR 23 July 1968, appl. no. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, para. 9.

116 See *Kafkaris v. Cyprus*, ECtHR (GC) 12 February 2008, appl. no. 21906/04, para. 159, where the Court stated that '[a] measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature'. According to Van Dijk et al. 2006, p. 1051, '[i]f, for instance, … [states] proceed to subsidise a particular religious community or to promote education in a particular language, other religious communities or other linguistic communities are in principle entitled to the same treatment'.

117 *Stec a. O. v. the UK*, ECtHR 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, para. 55. Indeed, in this regard 'a negative obligation not to discriminate may have positive implications if the differential treatment concerns distribution of certain benefits' (Koch and Vedsted-Hansen 2006, p. 20).

118 *Bah v. the United Kingdom*, ECtHR 27 September 2011, appl. no. 56329/07, para. 40.

119 Van Dijk et al. 2006, p. 1051.

to the case law developed by the Commission and the Court – may be justified on other objective and reasonable grounds.'[120]

Distinctions between groups and individuals in the field of health care policy or social security legislation are omnipresent. Importantly, it cannot always be argued that persons falling in different categories – which determine whether or not they receive certain forms of assistance – find themselves in a comparable position. Even if this is the case, however, distinctions can serve a legitimate aim and be considered proportional in the light thereof. Although relevant for ECHR protection in the socio-economic sphere, thus, Article 14 does not necessarily provide an easy route for obtaining social rights protection.

2.4.3 Socio-Economic Protection Through Substantive ECHR Rights

More direct, though nevertheless called 'collateral',[121] is the protection of socio-economic interests under the (other) substantive rights laid down in the Convention. Whereas claimants under Articles 6 and 14 ECHR require what is effectively a fair trial or a non-discriminatory situation, under the other articles relevant here the economic and social nature of their requests may appear more straightforward. Article 8 of the Convention, for example, is phrased in relatively open terms. It provides a 'right to respect for private and family life', and especially the former can be understood very broadly. What is more, the Court's recognition of the possibility of positive obligations under this article[122] has opened up the possibility for admitting numerous positive and social private life-related claims about specific socio-economic measures or benefits.

Next to Article 8 ECHR, several other substantive articles have been important in the development of the socio-economic dimension of the Convention, such as Article 2 (right to life), Article 3 (prohibition of torture), and Article 1 of the First Protocol to the ECHR (protection of property). Together with Article 8, these provisions form the focal points of the chapters of this book that deal with the protection the ECHR offers in the field of housing, health and health care, and social security.[123] The current section mainly aims to intro-

120 *Ibid*. As the Court has established as early as in 1968, this will be the case when the distinction does not pursue a 'legitimate aim', or lacks a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. See, *e.g.*, *Chassagnou and Others v France*, ECtHR (GC) 29 April 1999, appl. nos. 25088/94, 28331/95 and 28443/95, para. 91; *Serife Yigit v. Turkey*, ECtHR 2 November 2010, appl. no. 3976/05, para. 67.

121 *Cf*. also Warbrick 2007, p. 247, who speaks of '[c]ollateral protection of economic and social interests'.

122 *E.g.*, *Marckx v. Belgium*, ECtHR 13 June 1979, appl. no. 6833/74, para. 31.

123 See, *infra*, Ch. 8, 9, and 10.

duce the different articles, and provide a glimpse of how these civil and political rights norms ensure the protection of a broad range of economic and social guarantees.

2.4.3.1 Article 2 ECHR

Article 2 ECHR protects the right to life. It states that

> '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
> (a) in defence of any person from unlawful violence;
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'[124]

The right to life can be considered amongst the most fundamental rights of the Convention.[125] The prohibition to deprive someone of his life is directed at national authorities, agents, and individuals for which the state can be held responsible.[126] Importantly, the exceptions summed up in Article 2 must be read narrowly.[127] The use of force 'must be shown to have been "absolutely necessary" for one of the purposes in sub-paragraphs (a), (b) or (c) and, therefore, justified in spite of the risks it entailed for human lives'.[128] Although the right to life is not 'absolute' in the sense that no exceptions are allowed,[129] a successful appeal to one of these exceptions will hence be very rare.

Although Article 2 primarily contains a negative obligation for the state, it 'may, as other Convention articles … give rise to positive obligations on

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124 See, for extensive introductions to this article and the relevant case law, as well as further references, Van Dijk et al. 2006, pp. 351-403; Harris et al. 2009, pp. 203-234; Rainey et al. 2014, pp. 143-168; Schübel-Pfister, in Karpenstein/Mayer 2012, pp. 52-69; Mirgaux, in Gerards et al. (eds.) 2013, pp. 25-76.

125 See *McCann a. O. v. the UK*, ECtHR (GC) 27 September 1995, appl. no. 18984/91, para. 147. See also Schübel-Pfister, in Karpenstein/Mayer 2012, no. 1.

126 Mowbray 2012, p. 83. According to Van Dijk et al. 2006, p. 352 'Article 2 can be invoked in Strasbourg only when its violation is (also) due to a lack of protection on the part of the national authorities, because complaints can only be directed against acts and omissions for which the State bears responsibility'.

127 Van Dijk et al. 2006, p. 403. *Cf.* also Mowbray 2012, p. 83; Schübel-Pfister, in Karpenstein/Mayer 2012, no. 29.

128 *Stewart v. the UK*, EComHR 10 July 1984, appl. no. 10044/82, para. 15.

129 It can, however, be considered amongst the non-derogable rights of the Convention. See Art. 15(2) ECHR: 'No derogation from Article 2, except in respect of deaths resulting from lawful acts of war … shall be made under this provision.' See Van Dijk et al. 2006, p. 403.

the part of the State'.[130] 'Protection by law' first of all implies certain procedural duties. The Court has held that Article 2(1), read in conjunction with Article 1 of the Convention,[131] 'requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State'.[132] More generally, the first sentence of Article 2 is understood to mean that states are required to take 'appropriate steps to safeguard the lives of those within their jurisdiction',[133] *i.e.*, they have a 'primary duty' to secure this right by creating 'an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions'.[134]

The positive interpretation of the right to life has resulted in the application of this provision not only in situations of conflict or violence, but also in more 'daily' circumstances related to hospital and medical treatment, detention, or environmental matters. In the context of medical treatment the right to life has played a role in cases where a life-threatening disease was not timely diagnosed[135] or where necessary treatment was refused.[136] Also issues concerning (the provision of) medication have come up, in which context, for example, Article 2 was applied to a complaint concerning a request for a refund of the cost of drugs.[137] Moreover, the Court has also held that 'an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual at risk through the denial

130 *W. v. the UK*, EComHR 28 February 1983 (dec.), appl. no. 9348/81, para. 12.
131 Art. 1 ECHR reads: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'
132 *McCann and Others v. the UK*, ECtHR (GC) 27 September 1995, appl. no. 18984/91, para. 161.
133 *E.g.*, *L.C.B. v. the UK*, ECtHR 9 June 1998, no. 14/1997/198/1001, para. 36.
134 *Makaratzis v. Greece*, ECtHR (GC) 20 December 2004, appl. no. 50385/99, para. 57. This means that there must be (criminal) laws against the taking of life. There also need to be regulations for the use of force by agents of the state like the police as well as for other activities that involve or might involve a risk to life. These regulations must be enforced by 'an effective judicial system' (*Öneryildiz v. Turkey*, ECtHR (GC) 30 November 2004, appl. no. 48939/99, para. 92. This requirement however 'does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims'). When the laws in place are not respected, this implies that punishment must be possible.
135 *Powell v. the UK*, ECtHR 4 May 2000 (dec.), appl. no. 45305/99. The case was declared inadmissible, but the Court emphasised that it 'cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2'.
136 *Mehmet Senturk and Bekir Senturk v. Turkey*, ECtHR 9 April 2013, appl. no. 23423/09.
137 *Nitecki v. Poland*, ECtHR 21 March 2002, appl. no. 65653/01.

of health care which they have undertaken to make available to the population generally'.[138]

Also the treatment – or lack of appropriate treatment – of prisoners has raised specific issues under Article 2. In particular, the Court has dealt with various cases of suicide by prisoners, where it has held that '[i]t is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies'.[139] In other contexts in which individuals are dependent on the state and the authorities for that reason have a special responsibility, the right to life can also bring along positive obligations of a particularly socio-economic kind. When the authorities are aware of a worrisome situation possibly endangering the lives of dependent, vulnerable individuals, regardless of the economic circumstances, they are required to take the necessary protective measures including the provision of food and medication.[140] Finally, the right to life can be relevant in relation to the responsibility of the state for environmental pollution.[141] Depending on the dangerousness of the situation concerned, there can be an obligation for the state to provide information and take the necessary measures in order to avoid a violation of the Convention.[142]

The cases dealt with under the right to life as enshrined in the Convention thus concern a broad variety of topics.[143] Whereas at first glance Article 2 mainly applies to the use of force or situations of conflict, its applicability is much broader. Especially in issues concerning health – ranging from life threatening diseases to the effects of serious pollution and treatment of those under the responsibility of the state – , the social dimension of the Court's case law under Article 2 becomes apparent.

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138 *Cyprus v. Turkey*, ECtHR (GC) 10 March 2001, appl. no. 25781/94, para. 219. Also quite generally, the Court stated in *Calvelli and Ciglio* that the positive obligations under Article 2 apply in the public health sphere and 'require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible be made accountable' (*Calvelli and Ciglio v. Italy*, ECtHR (GC) 17 January 2002, appl. no. 32967/96, para. 49).

139 *Keenan v. the UK*, ECtHR 3 April 2001, appl. no. 27229/95, para. 91.

140 *Nencheva a. O. v. Bulgaria*, ECtHR 18 June 2013, appl. no. 48609/06.

141 *E.g., L.C.B. v. the UK*, ECtHR 9 June 1998, no. 14/1997/198/1001, concerning a case of leukemia resulting from exposition to radiation. In this case it was considered that Article 2 applied, but no violation was found.

142 See *Öneryildiz v. Turkey*, ECtHR (GC) 30 November 2004, appl. no. 48939/99. *Cf.* also *Budayeva a. O. v. Russia*, ECtHR 20 March 2008, appl. nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, which concerned a natural disaster, and where a violation was found.

143 Covered are moreover also issues related to abortion, euthanasia and the death penalty. These issues are not discussed here.

2.4.3.2 *Article 3 ECHR*

Article 3 ECHR (the prohibition of torture) reads:

> 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[144]

The brevity of this provision can be explained by its absolute character: no justifications can be provided for torture or for treatment or punishment that is prohibited under this article.[145] It has become clear that this absolute prohibition covers a rather broad variety of individual interests. Whereas Article 2 provides 'protection against deprivation of life only',[146] '[o]ther injuries to the physical – and mental – integrity may in many cases be brought under Article 3'.[147]

Next to ensuring that state officials do not actively expose individuals to torture or other forms of ill-treatment, Article 3 also entails positive obligations for the state. The ECtHR has held that

> '[t]he obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals.'[148]

Primarily, these positive measures must constitute effective deterrence as well as ensure an effective investigation.

In order to get an idea of what socio-economic protection is implied by Article 3, it is important to ask exactly what kind of treatment or punishment this provision forbids. How must 'torture' or 'inhuman' and 'degrading' be understood, and do the words 'treatment' and 'punishment' imply that only specific situations trigger the application of this provision? The latter question must be answered in the negative: the Court has made clear that a limited overview of the situations covered by Article 3 cannot be given. Instead, it

144 See, for extensive introductions to this article and the relevant case law, as well as further references, Van Dijk et al. 2006, pp. 405-441; Harris et al. 2014, pp. 235-278; Rainey et al. 2014, pp. 169-197; Sinner, in Karpenstein/Mayer 2012, pp. 69-80; Woltjer and Pachtenbeke, in Gerards et al. (eds.) 2013, pp. 25-76.

145 Like Art. 2, Art. 3 has been considered to belong to the most fundamental of the rights protected by the Convention, see *Soering v. the UK*, ECtHR 7 July 1989, appl. no. 14038/88, para. 88.

146 *X. v. Austria*, EComHR 13 December 1979 (dec.), appl. no. 8278/78, para. 1.

147 Van Dijk et al. 2006, p. 353.

148 *Moldovan a. O. v. Romania*, ECtHR 12 July 2005, appl. nos. 41138/98 and 64320/01, para. 98.

has held that in order for this provision to apply the situation an individual is confronted with must 'attain a minimum level of severity'.[149] It has further explained that '[t]he assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.'.[150] This means that there is no single, clear criterion that is decisive for judging whether something counts as 'ill-treatment', and that the question whether particular circumstances demand individual protection has to be decided on a case-by-case basis.

This relative way of approaching the (positive) obligations that follow from Article 3 of the Convention does not *a priori* exclude that a violation is being found due to socio-economic circumstances. For example, Article 3 has been applied in cases where houses were destroyed,[151] but also where applicants – as a consequence of such destruction – for years had no appropriate place to live.[152] In the latter case, it was not the lack of an appropriate place to live as such that was reason for holding Article 3 applicable. Instead, it was the combination of (aggravating) factors at stake that made the Court decide that in the circumstances at hand the prohibition of ill-treatment applied.[153] A similar conclusion can be distilled from cases concerning prison circumstances, which sometimes also attain the minimum level of severity required. This can be the case especially where prisoners are concerned whose health is such that they are in need of special treatment,[154] or that it requires accommodation to be made in order to prevent serious humiliation.[155]

Most prominent in terms of social protection under Article 3 are perhaps the cases concerning health and medical treatment apart from those involving prison situations. In a number of cases, the Court has had to deal with complaints of persons suffering from serious illness who were about to be deported

149 *Ireland v. the UK*, ECtHR 18 January 1978, appl. no. 5310/71, para. 162.

150 *Ibid.*

151 *E.g.*, *Selçuk and Asker v. Turkey*, ECtHR 24 April 1998, appl. nos. 23184/94 and 23185/94, para. 78.

152 *Moldovan a. O. v. Romania*, ECtHR 12 July 2005, appl. nos. 41138/98 and 64320/01.

153 These aggravating circumstances concern for example the age of the applicants or racial motives. *Cf. Selçuk and Asker v. Turkey*, ECtHR 24 April 1998, appl. nos. 23184/94 and 23185/94, para. 78. *Cf.* also the cases of *Bilgin v. Turkey*, ECtHR 16 November 2000, appl. no. 23819/94 and *Dulas v. Turkey*, ECtHR 30 January 2001, appl. no. 25801/94, both of which dealt with similar fact patters and in which the Court also concluded on violations of Art. 3. In *Orhan v. Turkey*, ECtHR (GC) 18 June 2002, appl. no. 25656/94, para. 362, the Court however did 'not find … distinctive elements concerning the age or health of the applicant or the Orhans or specific conduct of the soldiers vis-à-vis either of those persons which could lead to a conclusion that they had suffered treatment contrary to Article 3 of the Convention'.

154 *Cf. Farbtuhs v. Latvia*, ECtHR 2 December 2004, appl. no. 4672/02, para. 56; *Khudobin v. Russia*, ECtHR 26 October 2006, appl. no. 59696/00, para. 93.

155 Even when there is no intention to humiliate the individual, see *Peers v. Greece*, ECtHR 19 April 2001, appl. no. 28524/95, para. 74.

to their country of origin. According to the Court, this can amount to a violation of Article 3 ECHR,[156] if only in very exceptional circumstances.[157] In similar vein, in a case concerning an individual asylum seeker who was deprived of any means of subsistence and who was living in extreme poverty, the Court has underlined that

> 'it has not excluded "the possibility that the responsibility of the State may be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity".'[158]

In this case the Court held the state responsible and thus inferred a positive socio-economic obligation from Article 3 ECHR.[159]

Thus, Article 3 can be engaged in a variety of circumstances of a socio-economic nature: in cases related to severe housing conditions or health problems, as well as when more generally an individual's living standard is concerned. What matters is whether the high 'minimum level of severity' threshold has been transgressed. This seems most likely when that individual is dependent on the state and belongs to a vulnerable group.

2.4.3.3 Article 8 ECHR

Article 8 ECHR contains the right to respect for private and family life:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'[160]

The interests summed up in Article 8(1) are understood in an 'autonomous' manner, and thus the Court is not bound by any national interpretation of

156 *D. v. the UK*, ECtHR 2 May 1997, appl. no. 30240/96.
157 *N. v. the UK*, ECtHR (GC) 27 May 2008, appl. no. 26565/05.
158 *M.S.S. v. Belgium and Greece*, ECtHR (GC) 21 January 2011, appl. no. 30696/09, para. 253. See earlier, *Budina v. Russia*, ECtHR 18 June 2009, appl. no. 45603/05; *Laroshina v. Russia*, ECtHR 23 April 2002, appl. no. 56869/00.
159 *Cf.* Koch 2003, p. 23 (on the (possible) social element in Article 3 ECHR).
160 See, for extensive introductions to this article and the relevant case law, as well as further references, Van Dijk et al. 2006, pp. 663-750; Harris et al. 2014, pp. 522-591; Rainey et al. 2014, pp. 334-410; Pätzold, in Karpenstein/Mayer 2012, pp. 216-248; Forder et al., in Gerards et al. (eds.) 2013, pp. 534-784.

them.[161] Notably, however, instead of providing for clear definitions, the Court has interpreted Article 8 in a case-by-case manner. This makes it generally difficult to know what exact guarantees follow from the Court's case law. Nevertheless, with regard to 'private life', some general guidance has been provided in *Niemietz v. Germany*, in which the Court held that

> 'it would be too restrictive to limit the notion [of private life] to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.'[162]

By now it has become clear that interference with physical or moral integrity is covered by 'private life', and so is sexual orientation and activity.[163] More important for the purposes of this study is that the right to respect for private life can also be triggered in cases concerning the employment sphere.[164]

Also the Court's broad interpretation of 'home' can be considered relevant for Article 8's socio-economic dimension. Whether something constitutes a home for purposes of the Convention depends on 'the existence of sufficient and continuous links with a specific place'.[165] In this regard,

> 'the length of temporary or permanent stays …, frequent absence … or … use on a temporary basis, for the purposes of short-term stays or even keeping belongings in it, do not preclude retention of sufficient continuing links with a particular residential place, which can still be considered "home" for the purposes of Article 8 of the Convention.'[166]

A 'home' need not be owned or established legally,[167] which means that also those individuals who – due to a lack of alternatives – have established a place to live without having the permission to do so can expect (some) protection under the Convention.

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161 Harris et al. 2014, p. 522.

162 *Niemietz v. Germany*, ECtHR 16 December 1992, appl. no. 13710/88, para. 29, where the Court however also held that it 'does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life"'.

163 Likewise, the interpretation of 'family life' has developed significantly over time to extend beyond formal and biological relationships. According to Harris et al. 2014, p. 526, '[t]he development of the idea of "family life" is one of the best examples of the way the Commission and the Court have interpreted the Convention to take account of social changes'.

164 *Sidabras and Džiautas v. Lithuania*, ECtHR 27 July 2004, appl. nos. 55480/00 and 59330/00, para. 47. See further on this case, *infra*, S. 2.5.3.3.

165 *Lazarenko a. O. v. Ukraine,* ECtHR 11 December 2012 (dec.), appl. no. 27427/02, para. 53.

166 *Ibid.*

167 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92.

Thus, it can be accepted that Article 8(1) has come to cover a large list of interests, which may easily include socio-economic ones. Moreover, although the notion of 'respect' as it is mentioned in Article 8 has a 'negative' connotation, it has been given a distinctively positive meaning as well. More precisely, the Court has said that Article 8

> 'does not merely compel the State to abstain from … interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life … These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.'[168]

The recognition of positive duties implies that the Convention will apply not only when the interests that fall within the scope of Article 8 are clearly interfered with, but also when the state arguably failed to take measures to protect them. What is required here is that 'there is a direct and immediate link between the measures sought by an applicant and the latter's private life'.[169] Such a link has been found to exist, for example, in cases concerning environmental pollution where the state had failed to take measures,[170] but also where requests for alternative housing were concerned.[171] Depending on how exactly the 'clear and immediate link' criterion is being explained, the protection of Article 8 can thus allow for significant socio-economic protection under the Convention.

2.4.3.4 Article 1 Protocol No. 1 ECHR

Article 1 of the First Protocol to the ECHR (P1) guarantees the protection of property and reads:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accord-

168 *X and Y v. the Netherlands*, ECtHR 26 March 1985, appl. no. 8978/80, para. 23.
169 *Marzari v. Italy*, ECtHR 4 May 1999 (dec.), appl. no. 36448/97.
170 *Cf. Fadeyeva v. Russia*, ECtHR 9 June 2005, appl. no. 55723/00, where it was established that next to interfering with the applicant's private sphere, 'the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8' (para. 69).
171 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06; *Winterstein a. O. v. France*, ECtHR 17 October 2013, appl. no. 27013/07.

ance with the general interest or to secure the payment of taxes or other contributions or penalties.'[172]

Article 1 P1 is also interpreted in an autonomous manner. In a case invoking property protection the crucial question is whether the interest at stake can be considered a 'possession'. This first of all depends on the economic value this interest has or does not have.[173] Moreover, for a property right to be recognised as justiciable under Article 1 P1 it should generally be an *existing* right.[174] Alternatively, there should be a 'legitimate expectation' of obtaining effective enjoyment of such right.[175] A right to acquire property is not recognized.[176]

Over the years, the Court has given a broad reading to the notion of 'possessions'. It has recognised that company shares[177] and (an application for the registration of) trademarks[178] are covered by it, as well as a 'right to a building permit'[179] and economic interests connected with the exploitation of a restaurant.[180] A legitimate expectation based on a court judgment or arbitration award that recognises a claim against the state can be successful in Strasbourg as well.[181] These examples signal that, rather than only 'classic', tangible possessions, Article 1 P1 can cover other (legal) entitlements and constructs representing an economic value, too.

Important is that the right to protection of property may also apply in the field of social security. For some time the Court has held that when, for example,

172 See, for extensive introductions to this article and the relevant case law, as well as further references, Van Dijk et al. 2006, pp. 863-893; Harris et al. 2014, pp. 906-919; Rainey et al. 2014, pp. 492-519; Kaiser, in Karpenstein/Mayer 2012, pp. 359-376; Akkermans, in Gerards et al. (eds.) 2013, pp. 1275-1324.

173 Van Dijk et al. 2006, p. 866.

174 See Van Dijk et al. 2006, p. 869. In the case of *Stran Greek Refinieries and Stratis Andeadis v. Greece*, ECtHR 9 December 1994, appl. no. 13427/87, the Court noted that therefore the right should be 'sufficiently established to be enforceable' (para. 59).

175 Mere 'hope' is not enough. See *Prince Hans-Adam II of Liechtenstein v. Germany*, ECtHR (GC) 12 July 2001, appl. no. 42527/98, concerning the expropriation of a painting of the father of the applicant, in 1946. The right had become non-exercisable and hence did not amount to a 'legitimate expectation' (para. 85).

176 *Van der Mussele v. Belgium*, ECtHR 23 November 1983, appl. no. 8919/80, para. 48.

177 *Bramelid and Malmström v. Sweden*, EComHR 12 October 1982 (dec.), appl. nos. 8588/79 and 8589/79, p. 76.

178 See *Anheuser-Busch Inc. v. Portugal*, ECtHR (GC) 11 January 2007, appl. no. 73049/01, para. 78.

179 *SCEA Ferme de Fresnoy v. France*, ECtHR 1 December 2005 (dec.), appl. no. 61093/00.

180 *Tre Traktörer Aktiebolag v. Sweden*, ECtHR 7 July 1989, appl. no. 10873/84.

181 *E.g., Stran Greek Refineries and Stratis Andreadis v. Greece*, ECtHR 9 December 1994, appl. no. 13427/87, para. 62.

contributions had been paid, there could be room for protection under the Convention.[182] In 2005, moreover, it clarified that

> '[i]n the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognize that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right.'[183]

The ECtHR stressed that the freedom of the state to decide on whether and what kind of social security system it creates is not in any way restricted, but if a state creates a benefits scheme, regardless of whether this scheme is a contributory or a non-contributory one, 'it must do so in a manner which is compatible with Article 14'.[184] Since this 2005 decision, both contributory and non-contributory benefits have been awarded protection by the right to property, even when they are not of an allegedly discriminatory nature.[185] This has led to the rapid development of a Strasbourg social security case law. The issues the Court has dealt with concern for example access to particular social security systems or the height of a pension.[186] Moreover, the ECtHR has held that even in a case where a pension was lawfully revoked because it had been erroneously granted, the protection of property applied.[187]

Article 1 P1 has also been applied to housing issues. Generally, this is the case when someone owns a house the use of which is restricted by rent laws or other regulations.[188] Yet also when the applicant is a tenant and does not own the house he lives in, the right to protection of property can sometimes be invoked. When a lessee is deprived of the benefit of a renewal option on

182 *X v. the Netherlands*, EComHR 20 July 1971 (dec.), appl. no. 4130/69; *Mrs. X v. the Netherlands*, EComHR 19 December 1973 (dec.), appl. no. 5763/72; *Müller v. Austria*, EComHR 16 December 1974 (dec.), appl. no. 5849/72; *Van Raalte v. the Netherlands*, ECtHR 21 February 1997, appl. no. 20060/92.

183 *Stec a. O. v. the UK*, ECtHR 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, para. 51.

184 *Ibid.*, paras. 54-55.

185 That is, even when Art. 14 was not invoked. When discussing the application of Art. 14 (*supra*, S. 2.4.2.2), it was said that the protection under this article extends to more than what is covered by the scope of a Convention right. In the social security example, however, it appears that since the Court has held that both contributory and non-contributory benefits fall within the reach of Art. 1 P1 for the purposes of applying Art. 14, it has also considered this to be the case where Art. 1 P1 taken alone was at stake. See, on this development, Leijten 2013a, p. 325ff. (*supra*, Ch. 10).

186 See, *e.g.*, *Luczak v. Poland*, ECtHR 27 March 2007 (dec.), appl. no. 77782/01, and *Carson a. O. v. United Kingdom*, ECtHR 4 November 2008, ECtHR (GC) 16 March 2010, appl. no. 42184/05, respectively.

187 *Moskal v. Poland*, ECtHR 15 September 2009, appl. no. 10373/05, para. 39.

188 *E.g.*, *James a. O. v. the UK*, ECtHR 21 February 1986, appl. no. 8793/79; *Mellacher a. O. v. Austria*, ECtHR 19 December 1989, appl. nos. 10522/83, 11011/84 and 11070/84; *Hutten-Czapska v. Poland*, ECtHR (GC) 19 July 2006, appl. no. 35014/97; *Lindheim a. O. v. Norway*, ECtHR 12 June 2012, appl. nos. 13221/08 and 2139/10.

the lease granted by the local authority, he may rely on the protection of Article 1 P1 against interference with his property.[189] Also the loss of a specially protected tenancy – although the Court has refrained from answering the question whether this constitutes a 'possession' – can lead to review under Article 1 P1.[190]

Thus, albeit not so much with the help of particularly positive obligations, it can be said that the Convention's property protection extends to some important socio-economic fields and, for that reason, is of particular interest for this study.

2.5 Making Sense of the ECtHR's Economic and Social Rights Protection

As was explained in Section 2.4.1, the Court has for long acknowledged that there is no 'water-tight division' separating socio-economic matters from the rights protected by the Convention. However, more can be said about the rationale for recognising so many (positive) economic and social obligations on the basis of the procedural, substantive and non-discrimination provisions of the Convention. Having obtained an image of what is understood here by the 'socio-economic case law' of the ECtHR, this section therefore proceeds to the question of what doctrinal foundations are underlying this phenomenon.

In order to understand the explanations that can be given for the Court's case law, first of all further clarification is needed of the distinction made in this book between fundamental rights *norms*, and the *interests* and matters covered by such fundamental rights norms. This clarification is provided in Section 2.5.1, where also the practical relevance of the distinction is illuminated. Subsequently, a look is had at the various ways in which the socio-economic case law of the Court can be understood. First, the 'effectiveness thesis' is discussed, *i.e.*, the idea that the review of economic and social interests and matters under civil and political rights norms boils down to effectuating these norms, rather than creating an 'new' category of rights (2.5.2). Providing for socio-economic guarantees, the argument goes, is what logically follows from and is implied by the norms listed in the Convention. It is shown that the Court has used the notion of effectiveness, as exemplified in a number of its (interpretative) doctrines and practices, to develop the Convention so as to cover a very broad range of issues including an increasing number of socio-economic ones. Secondly, attention is had to the notions of indivisibility, interrelatedness and interdependence of human rights (2.5.3). These notions imply that there is or should be a clear and meaningful relation between civil and political and economic and social rights norms. In line with this idea, the

189 *Stretch v. the UK*, ECtHR 24 June 2003, appl. no. 44277/98.
190 *Berger-Krall a. O. v. Slovenia*, ECtHR 12 June 2014, appl. no. 14717/04.

Court has interpreted and applied the ECHR in a way that pays due account to its connection to other rights. Understood in terms of (explicit) indivisibility, socio-economic interests and matters feature in the Court's case law not only for the mere effectuation of ECHR norms, but also as an acknowledgment of the importance of economic and social rights as such.

Importantly, the two explanatory theories, *i.e.*, the 'effectiveness thesis' and the 'indivisibility thesis', are not mutually exclusive, but instead complementary, and both may help to explain the socio-economic protection provided at the Strasbourg level. However, they are distinguished here, as they allow for distinct insights related to the question where the Court's socio-economic protection could be heading. In this way, they lay the foundations for the final part of this chapter.

2.5.1 Distinguishing Between Rights Norms and Interests or Matters

One can go as far as saying that there simply exist no such categories as 'civil and political' and 'economic and social'. That is however not the stance that is taken in this book. First of all, this book starts from the assumption that there does exist an at least relatively clear distinction between civil and political rights *norms*, or provisions,[191] on the one hand, and economic and social rights *norms* on the other. Negatively phrased rights norms which provide a right for everyone (individually) and concern a 'first generation rights' topic,[192] can be called 'civil and political' norms. An example is Article 8(1) ECHR: 'Everyone has the right to respect for his private and family life, his home and his correspondence.' Also Article 3 ECHR provides a straightforward example: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' On the other hand, a norm like the one enshrined in Article 9 ICESCR ('The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance') does not fall within this category.[193] Although 'recognising' could be understood as a negative duty, it is clear that active steps are required, that the provision is

191 Note that 'norms' here in fact refers to the legal wording, *i.e.*, to the provisions as they are written down in a specific document.

192 On the different generations of fundamental rights see, generally, Tomuschat 2008, p. 25ff.

193 Koch points out that socio-economic rights norms generally follow a 'means-and-end formula', rather than an 'if-so-formula'. According to Art. 12 ICESCR, for example, in order to 'recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (the 'end'), the state must take certain steps ('means'), like 'the improvement of all aspects of environmental and industrial hygiene'. For civil and political rights, generally speaking, 'if certain conditions are fulfilled, a certain legal consequence is to occur or must not occur' (one is granted the right, except for when certain conditions are fulfilled) (Koch 2002, p. 31, fn. 8). See also Koch 2003, p. 4.

directed at the state, and that a typically socio-economic topic (social security) is concerned.

Admittedly, some norms at first glance seem borderline cases, like the 'protection of property' or the 'right to education'.[194] But if one looks at how these rights are phrased in the context of the ECHR ('Every natural or legal person is entitled to the peaceful enjoyment of his possessions', and 'No person shall be denied the right to education'), it can be said that also these provisions encompass classic human rights guarantees. Moreover, at least for the purposes of this book, in which the object of study is the socio-economic protection under the ECHR, for labelling rights norms it is also important to look at the character of the document or treaty they are found in. Considering the traditionally civil and political European Convention – which was clearly meant to cover classic rights norms and is even today generally so understood – one can speak of the norms therein as deserving the same qualification.[195]

The distinction between different categories of rights *norms* or *provisions* must be distinguished from a distinction between protected *interests* or *matters* of a civil or political character, and those of a socio-economic nature. Both distinctions do not always match neatly, let alone ally perfectly. The question of what kind of norm is at stake often leads to a different answer than the question of what kind of interest is involved. Whereas the prhasing of a rights *norm*, according to the explanation given above, can be labelled civil or political, this does not necessarily mean that the *interests it protects* deserve the same qualification. Think for example of the provision of health care, which in specific circumstances can be required under Article 3 ECHR.[196] Yet, where-

194 See, in the ECHR context, Arts. 1 and 2 of Protocol No. 1 to the ECHR, respectively. See, *e.g.*, Palmer 2009, p. 398. It is typically this ambiguous character of these rights that barred them from being taking up in the original Convention. Consider for example also the right to form and join trade unions (Art. 11(1) ECHR: 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests'), and the right to legal aid in criminal matters (Art. 6(3) ECHR: 'Everyone charged with a criminal offence has the following minimum rights: … (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given in free when the interests of justice so require'). See Brems 2007, p. 135.

195 The Court's Factsheet on social welfare, that is no longer available online, explicitly stated that '[t]he European Convention on Human Rights (the Convention) guarantees *civil and political rights* (such as the right to life, the right to liberty and security and the right to a fair trial). Meanwhile, other Council of Europe instruments, notably The European Social Charter, concern *economic and social rights* (such as housing, health, education, employment legal protection and social welfare)'.

196 Indeed, when topics like these are concerned, it may sometimes even make more sense to invoke a classical rights norm instead of a social one, This because the rights that are commonly termed 'social rights' still have a second-rank status. In the words of Mantouvalou, in Grear and Mantouvalou 2011, pp. 86-87: '[T]he most pressing question surrounding the legal protection of civil and political rights – rights which have traditionally been seen as essential for a state that respects its citizens – have largely been settled today.' At the

as it is often possible to characterise a norm in a specific context as being *either* civil or political, *or* economic or social, it might be harder to qualify the interests that form the background to a specific complaint. When an individual complains about garbage piling up in his street and the health damage this might cause, it can be asked whether the actual matter then concerns 'private life', 'the enjoyment of home', 'health', or his interest in 'a clean environment'.[197] Also when someone's social security benefit – and thereby his sole source of income – is revoked, it is both feasible to conceive of this issue as concerning property interests, as well as to perceive it as a 'social' benefits or social minimum issue.[198]

When such different interpretations are possible it is clear that the issues mentioned could, next to under Article 8 ECHR and Article 1 of Protocol No. 1 ECHR, respectively, also be brought under a socio-economic norm laying down a 'right to housing', 'a clean environment', or a right to 'social security' – at least when and where these rights are justiciable.[199] This is an important point: as was already illustrated by the examples in Sections 2.4.2 and 2.4.3, what is here delineated as the 'socio-economic case law' of the Court is its case law concerning individual complaints that *also*, or even *most logically* fit a socio-economic rights paradigm. Therefore, and regardless of their adjudication under a civil or political ECHR rights *norm*, the *interests* or *matters* at stake in this case law can be described as being of an economic or social kind.[200]

Why are these distinctions important? One way of interpreting the socio-economic protection under the Convention is to say that the ECtHR simply provides protection to individuals when their state fails to do so, and that labels (should) have nothing to do with this. To single out a part of the Stras-

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same time, 'debates about social and economic rights are far from settled'. See also Fredman 2008, p. 2; O'Connell 2012, pp. 8-17; Young on 'constituting socio-economic rights' (2012).

197 *Cf.*, for a comparable Strasbourg case, *Di Sarno and Others v. Italy*, ECtHR 10 January 2012, appl. no. 30765/08.

198 *Cf. Moskal t. Poland*, ECtHR 15 September 2009, appl. no. 10373/05; *Czaja t. Poland*, ECtHR 2 October 2012, appl. no. 5744/05.

199 This may have to do with the fact that one can view the issue in a more or less 'abstract' way. An environmental pollution issue might indeed be related to someone's private life; the revocation of a benefit can be considered a property rights issue. In more concrete terms, however, these matters can be described as related to one's right to housing, or to social security, respectively. Moreover, a right may be classical, the interests it protects socio-economic, but the underlying desire (freedom, ability to participate) again more classical (*cf.* Young 2012, in particular Ch. 2, p. 34ff.).

200 *Cf.* Gerards 2008, p. 655, p. 660ff., who also explicitly speaks of environmental, administrative, housing and other interests one would not first and foremost place under the Convention, but rather characterise as the subject of economic and social rights treaties. In the later chapters of this thesis, the case law of the Court will also be grouped under the headers of 'health and health care', 'housing' and 'social security', which underlines that rather than merely 'private life' or 'degrading treatment', this is what the relevant cases are in fact about. See, *infra*, Ch. 8, 9, and 10.

bourg case law and call it 'socio-economic' is then nonsensical in the first place. The problem with this interpretation is that it hardly provides any meaningful starting point for critically assessing the ECtHR's practice, neither in terms of legitimacy or subsidiarity generally, nor in the context of the Court's multi-dimensional task, its workload, or the question of what *fundamental rights* protection should be about. Instead, given that in daily parlance there is a distinction between what is called 'civil' and 'political' and 'economic' and 'social', it might be wise to use these words in order to get grip on a complex phenomenon like the fundamental rights protection under the ECHR. It is true that there is a risk that everything that is termed 'socio-economic' in the context of fundamental rights is perceived as second-rank or of inferior importance. Awareness of this risk, however, can ensure that it does not predominate the way in which developments are perceived, while the label 'socio-economic' can allow for a careful look whenever the complex and sensitive nature of socio-economic rights protection justifies this.

Altogether, distinguishing firstly between norms (or provisions) and interests (or matters), while secondly recognising that both can be civil or political, or economic or social, mainly serves the aim of clarification and provides a good starting point for what is to follow. When it is understood that the ECHR *norms* are generally considered civil and political, yet some of the *interests* they deal with are also, or primarily, socio-economic, an attempt can be made at providing comprehensible normative explanations for what is going on at the Strasbourg level.[201] This in turn will allow for identifying the possibilities and (potential) pitfalls inherent in the path the Court is taking.

2.5.2 The Effectiveness Thesis

The first way in which the socio-economic protection under the ECHR can be viewed places the norms enumerated in the Convention on the foreground. According to this view, economic and social protection is inevitable and inherent, not in light of the overall protection of human rights in general, but as a consequence of the protection of the norms enshrined in the Convention in particular. It can be argued that states are required to provide a broad range of guarantees in order to effectuate these classic, civil and political norms. Thereby they protect a great variety of interests, some of which are everything but classic, civil or political. In other words, according to the 'effectiveness

201 *Cf.* Koch 2006, p. 407: 'If one interprets the right to life as encompassing a fulfilment obligation to provide for basic foodstuff and basic health care, it is indeed possible to wipe out the separation between the two sets of rights. If health care and food are considered legally relevant for the fulfilment of the right to life, there is no longer any reason to uphold the distinction between civil and social rights. However, it is hardly that simple, and efforts to explain away entirely the differences between the two sets of rights do not advance the conceptual clarification.'

thesis' the Court is simply fulfilling its task of interpreting and protecting civil rights norms in an effective manner, without thereby being hindered, at least to a too great extent, by generating effects related to socio-economic rights.

In Section 2.4 it was already indicated that some of the rights taken up in the Convention do not *a priori* discriminate between the protection of civil and political and socio-economic interests. In this section the idea of 'effectiveness' will be further elaborated so that it can also explain how the economic and social dimension of the Convention has developed and expanded over the years. This requires that next to the Court's recognition of the fact that the rights enshrined in the Convention need to be 'practical and effective', attention must be had to more particular aspects of its interpretative instrumentarium. Looking at the Court's teleological and autonomous approach to the interpretation of fundamental rights, as well as at the 'living tree' character of the Convention, it will become clear that the 'effectiveness thesis' forms a dynamic explanation that is capable of making comprehensible not only the social dimension of the ECHR, but also the development thereof.

2.5.2.1 Teleological, Autonomous, and 'Living Instrument' Interpretation

Interpreting fundamental rights is everything but a straightforward task. Bygone are the days in which the judge was considered '*la bouche de la loi*' – a merely passive actor whose acts were determined by that what was written down. Especially fundamental rights, it is said, are notoriously hard to translate into concrete legal entitlements. Their wording is generally vague, which creates room for divergent interpretations. This is a topic that will be dealt with more extensively in the following chapter.[202] For now the aim is to note that the way the ECtHR has thus far approached its task to interpret the ECHR rights provides an important explanation for the socio-economic development of the Convention.

Although the Court has often expressed the importance it attaches to the Vienna Convention on the Law of Treaties (VCLT) articles on interpretation,[203]

202 See, *infra*, Ch. 3, S. 3.3.

203 United Nations, Vienna Convention of 23 May 1969 on the Law of Treaties (VCLT), 1155 U.N.T.S. 331 (entry into force 27 January 1980). See in particular Art. 31: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision: (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applic-

it is explicitly considered that the unique character of the Convention and its enforcement mechanism allow for distinct interpretive practices.[204] In addition to what the VCLT prescribes, therefore, the Court has over the years 'developed innovative techniques of interpretation that reflect the substantive nature of the Convention'.[205] For explaining the effectiveness thesis some of the various interpretive methods and principles the Court applies can be considered of particular importance.[206]

First of all, indeed, the Court directly refers to the principle of effectiveness[207] when it for example states that '[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[208] It emphasises the importance of human rights protection and rightly acknowledges that rights that are considered fundamental should not merely be illusive or of symbolic value.[209] Their worth is truly manifested only when individuals and minorities can rely on protection that meets their most fundamental needs and provides actual relief. This requires a flexible stance towards the kinds of interests rights norms 'should' protect.

Indeed, with reference to the principle of effectiveness the Court has been able to interpret the ECHR in a broad manner.[210] Moving beyond formal distinctions and labels this also implies that – at least *prima facie* – protection is required in the socio-economic sphere.[211] Effective protection often demands more from states than to remain passive.[212] It asks them to facilitate individuals so that they can actually enjoy the freedoms they have a right to under the Convention.[213] This holds true regardless of whether such positive action

able in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.' See further Arts. 32 and 33 VCLT.

204 Cleveland et al. 2009, p. 205. See also, *e.g.*, Matscher 1993, p. 66; Greer 2006, pp. 195-196; Mahoney 1990, p. 65; Rietiker 2010, p. 246; Senden 2011, p. 73, for the argument that the ECHR is different from other, more contractual treaties.

205 Mowbray 2005, p. 59, arguing that the provisions laid down in the Convention and safeguarded by a supranational and secondary organization, triggered the need for these tailor made forms of interpretation.

206 See, *e.g.*, on the Court's specific interpretative methods and principles, Ost 1992; Matscher 1993; Mowbray 2005; Letsas 2007; Gerards 2009; Senden 2011; Gerards 2014b.

207 See, *e.g.*, Senden 2011, pp. 73-77 (terming it the 'principle of practical and effective rights'). According to Kosekenniemi, 'it has become a practice of human rights bodies to adopt readings of human rights conventions that look for their *effet utile* to an extent perhaps wider than regular treaties' (International Law Commission 2006, p. 216, para. 428). See also Rietiker 2010.

208 *Airey v. Ireland*, ECtHR 9 October 1979, appl. no. 6289/73, para. 24.

209 For some more recent references to the fact that the Convention protects 'rights that are not theoretical or illusory but practical and effective', see *Chassagnou and Others v France*, ECtHR (GC) 29 April 1999, appl. nos. 25088/94, 28331/95, and 28443/95, para. 100; *Andrejeva v. Latvia*, ECtHR (GC) 18 February 2009, appl. no. 55707/00, para. 98.

210 Rietiker 2010, p. 259; Gerards 2011, p. 32; Senden 2011, p. 76.

211 Mowbray 2005, p. 72.

212 *Ibid.*, p. 78; Senden 2011, p. 76.

213 See, for some examples, *supra*, S. 2.4.

means a shift towards social guarantees that 'traditionally' were not considered to be covered by the Convention.

References to effectiveness, however, hardly ever come on their own. Consider the much-quoted case of *Soering v. the United Kingdom*, where the Court noted that

> 'the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective …. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society".'[214]

In this way the Court underlined the importance of a 'teleological' or 'meta-teleological'[215] interpretation of the Convention.[216] Underlying the Convention is a number of principles and aims that provide the necessary starting points.[217] Not surprisingly, therefore, the Court often grounds its argumentation on a reference to either the protection of 'democratic values'[218] or 'human dignity'[219,220] Also 'personal autonomy'[221] and 'pluralism'[222] play an important role.[223] Clearly, some of these underlying principles lend themselves particularly well for encouraging the protection of economic and social interests. Especially notions of human dignity and personal autonomy can be associated with, for example, the need to offer adequate health care and to guarantee a minimum level of subsistence. Indeed, in *M.S.S. v. Greece and Belgium*, the Court repeated that

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214 *Soering v. the UK*, ECtHR 7 July 1989, appl. no. 14038/88, para. 87.

215 Reference is after all not so much made to the original aims related to a specific Convention article, but rather to the broader aims and principles underlying the Convention as a whole. See on this term Lasser 2004, p. 206ff.

216 *Cf.* Lasser 2004, p. 206ff.; Gerards 2009, p. 428-430; Senden 2011, p. 91ff., in particular pp. 105-107, Ch. 9; Gerards 2014a, pp. 37-39. See also Barak's more general discussion of what he calls 'purposive interpretation', and 'is considered the best theory of constitutional interpretation' (Barak 2012, p. 46). Also according to Rainey et al., realising the objectives of the Convention is of the utmost importance. This even means that 'any general presumption that treaty obligations should be interpreted restrictively since they derogate from the sovereignty of States is not applicable …' (p. 71).

217 See, *e.g.*, the Preamble to the Convention. *Cf.* also De Schutter and Tulkens 2008, p. 169, p. 213ff.

218 *E.g.*, *Vogt v. Germany*, ECtHR (GC) 26 September 1995, appl. no. 17851/91; *United Communist Party of Turkey v. Turkey*, ECtHR (GC) 30 January 1998, appl. no. 19392/92, para. 45.

219 *E.g.*, *Pretty v. the UK*, ECtHR 29 April 2002, appl. no. 2346/02, para. 65: 'The very essence of the Convention is respect for human dignity and human freedom.'

220 Ost 1992, p. 292.

221 See, for a recent example, *R.R. v. Poland*, ECtHR 26 May 2011, appl. no. 27617/04, para. 180.

222 *E.g.*, *Kokkinakis v. Greece*, ECtHR 25 May 1993, appl. no. 14307/88, para. 31.

223 See, generally, Gerards 2011, p. 45ff.

> 'it has not excluded "the possibility that the responsibility of the State may be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity".'[224]

The case concerned an individual asylum seeker who was deprived of any means of subsistence and was living in extreme poverty. Combining the wording of Article 3 with the principle of human dignity, the Court held the state responsible and concluded that there had been a violation of the Convention.[225] Considering the 'object and purpose' of the Convention, thus, it gave substance to the effective protection of individuals' rights under the ECHR. The fact that this protection thereby extended well beyond the sphere of civil rights and brought along positive obligations was no reason for the Court to refrain from concluding that there had been a breach of the Convention.

Next to teleological interpretation, also the Court's 'autonomous' interpretation adds to an understanding of the ECHR's socio-economic dimension that holds that this phenomenon is a mere corollary of effectuating the (civil and political) norms of the Convention. Autonomous interpretation means that certain Convention terms are granted 'a status of semantic independence: their meaning is not to be equated with the meaning that these very same concepts possess in domestic law'.[226] Letsas has pointed out that autonomous concepts are seemingly inevitable since there is no shared language on the basis of which the Convention must be interpreted.[227] Hence, the existence of diverging practices and understandings in the Member States, combined with the aim of providing effective protection in *all* Member States, can form a compelling reason for the Court to go its own way.[228]

The most clear-cut example of how the Court's autonomous interpretation leads to the adjudication of economic and social cases under the Convention is the Court's understanding of 'possessions' as protected by Article 1 of the

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224 *M.S.S. v. Belgium and Greece*, ECtHR (GC) 21 January 2011, appl. no. 30696/09, para. 253. See earlier, *Budina v. Russia*, ECtHR 18 June 2009 (dec.), appl. no. 45603/05; *Larioshina v. Russia*, ECtHR 23 April 2002 (dec.), appl. no. 56869/00.

225 *Cf.* Koch 2003, p. 23, on the (possible) social element in Article 3 ECHR.

226 Letsas 2004, p. 282. *Cf.* also Gerards 2009, pp. 430-435; Senden 2011, p. 173ff., and in particular pp. 176-184, Ch. 12; Gerards 2014a, pp. 39-40.

227 Letsas 2004, p. 279. *Cf.* also Letsas 2007, Ch. 2.

228 See, *e.g.*, *Pellegrin t. France*, ECtHR (GC) 8 December 1999, appl. no. 28541/95, para. 63, where the court finds it important 'to establish an autonomous interpretation of the term "civil service" which would make it possible to afford equal treatment to public servants performing equivalent or similar duties in the States Parties to the Convention, irrespective of the domestic system of employment and, in particular, whatever the nature of the legal relation between the official and the administrative authority'. At the same time, however, it does refer to what Member States have in common when it makes use of its 'comparative' method of interpretation, see, *infra*, S. 2.5.3.3 as well as Ch. 3, S. 3.3.1.

First Protocol. In the case of *Stec and Others v. the United Kingdom* the question was whether this term covers merely contributory benefits or also non-contributory ones.[229] In an earlier case the Court had held that Article 6(1) ECHR (right to a fair trial) was applicable to a dispute over entitlement to non-contributory welfare benefits[230] and this was reason to interpret the autonomous concept of 'possessions' accordingly.[231] Moreover, the different funding mechanisms in the Member States would make it, according to the Court, 'artificial' to only include contributory benefits. This would hinder the provision of equal substantive protection throughout the Council of Europe.[232]

Thus, not relying on strictly textual interpretations and ignoring national labels is a means of giving hand and feet to the aim of effectuating the Convention rights for all individuals in the 47 Member States in a like manner.[233] Like a teleological approach, it results in a relatively broad applicability of the different Convention norms, which makes the inclusion of economic and social interests more or less inevitable.

Finally, for explaining the fact that the Court has engaged in the protection of socio-economic interests in an increasing number of cases, one more interpretative principle can be mentioned. It is important to connect the idea of ensuring effective protection of the rights as they are laid down in the ECHR to the Court's recognition of the 'living instrument' character of the Convention.[234] For example, in *Tyrer v. the United Kingdom* – dealing with corporal punishment and the question whether this constituted 'degrading treatment' under Article 3 – the Court held that it

> 'must also recall that the Convention is a living instrument which … must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards … of the member States of the Council of Europe.'[235]

229 *Stec a. O. v. the UK*, ECtHR 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, para. 47ff.

230 *Salesi v. Italy*, ECtHR 26 February 1993 appl. no. 13023/87. See also *Schuler-Zgraggen v Switzerland*, ECtHR 24 June 1993, appl. no. 14518/89, para. 46: '[T]he development in the law … and the principle of equality of treatment warrant taking the view that today the general rule is that Article 6 para. 1 does apply in the field of social insurance, including even welfare assistance.'

231 *Stec a. O. v. the UK*, ECtHR 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, para. 49.

232 *Cf.* Leijten 2013a; Leijten 2013b.

233 *Stec a. O. v. the UK*, ECtHR 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, para. 50, where the Court refers to 'the variety of funding methods, and the interlocking nature of benefits under most welfare systems'. *Cf.* Koch and Vedsted-Hansen 2006, p. 24.

234 See also Gerards 2008, pp. 663-664; Senden 2011, p. 145ff., and in particular 161-169, Ch. 11; Gerards 2014a, pp. 36-37. *Cf.* also Scott 1999, p. 642ff., about categories of rights and how they can change over time, and Koch 2009, p. 36.

235 *Tyrer v. the UK*, ECtHR 25 April 1978, appl. no. 5856/72, para. 31. Indeed, this example also shows a clear link with the Court's 'comparative' approach to interpretation. See, on this method, *infra*, S. 2.5.3.3 as well as Ch. 3, S. 3.3.1.

Hence, it has accepted that the Convention must be interpreted in what is generally called an 'evolutive and dynamic' manner.[236] This means that the Court will recognise new elements within the scope of a Convention right 'as soon as it has become clear that such aspects have become accepted throughout the Council of Europe to be part of the notion of "fundamental rights"'.[237] Like a teleological or autonomous interpretation, also this can be considered a hallmark of the Court's striving for 'effectiveness'. With the help of an evolutive interpretation the Court can ensure that when circumstances or attitudes change, the Convention norms can *continue to* provide for effective protection.[238]

That this indeed has resulted in increased protection of socio-economic interests can be illustrated as follows.[239] First, the fact that the Court takes account of developments in the Member States implies that when the practice in 'enough' states justifies recognition of new aspects as falling within the scope of specific Convention rights, the Court will adjust its interpretation accordingly. In the context of an expansive welfare state system, therefore, it is not surprising that over the years the Court has moved in the direction of a more social reading of the Convention. As an example, again the case of *Stec and Others v. the United Kingdom* can be recalled, in which non-contributory benefits were considered 'possessions' because

> '[i]n the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognize that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right.'[240]

Also the case of *Demir and Baykara* can be mentioned. There, the issue at stake concerned a prohibition on the formation of trade unions for civil servants and the Court referred to international trends for holding that this fell within the scope of Article 11 of the Convention.[241]

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236 See on what she calls the 'principle of evolutive interpretation' in relation to the Court Senden 2011, Ch. 7, S. 7.4 (see also pp. 70-73 and Ch. 11).

237 Gerards 2008, p. 663, referring to Prebensen 2000, p. 1128.

238 Or, to make sure that it does not become a 'dead letter'. See Senden 2011, p. 391.

239 *Cf.* Gerards 2008, pp. 665-666.

240 *Stec a. O. v. the UK*, ECtHR 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, para. 51.

241 *Demir and Baykara v. Turkey*, ECtHR 12 November 2008, appl. no. 34503/97. This approach however also implies that, when developments are not convincing, the Court will not increase the 'social' protection under the Convention. In the case *Stummer v. Austria*, ECtHR (GC) 7 July 2011, appl. no. 37452/02, for example, the applicant argued that standards had changed to such extent that prison work without affiliation to an old-age pension system could no longer be considered to fall under the exception of 'work required to be done in the ordinary course of detention'. For that reason it would constitute forced labour prohibited under Article 4 ECHR (para. 129). Although recognizing that increasing social security protection for prisoners in Europe was reflected in the 2006 European Prison Rules,

Hence, the (further) development of social safety nets throughout Europe, but also the increased pervasiveness of for example environmental regulations, can influence the direction in which the Convention system evolves.[242] As Palmer has put it, 'over time, commentators have accepted the increased inference of affirmative duties as a necessary part of the *effective* protection of ECHR rights or as a facet of the "dynamic interpretation of the Convention, in light of changing social and moral assumptions"'.[243]

Altogether, this section has illustrated that the development of the Court's socio-economic case law can be understood perfectly well within the boundaries of the European Convention system. It can be validly argued that it is to effectuate precisely the civil and political rights norms enshrined in the ECHR that the Court (increasingly) deals with issues of an economic and social kind.[244] In the words of Scott,

> '[t]he key point is that making rights effective, by way of interpreting rights to have social and economic dimensions that place positive duties on the state, need not proceed from borrowing from rights that already have a recognized legal pedigree as social and economic rights. Instead, effective human rights protection can, and should, be a result of contextual interpretative analysis of what is needed to make a right truly a right of "everyone".'[245]

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the Court however held that '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' (para. 131).

242 The question is of course whether evolution always results in 'more' protection. Although there is no agreement on this matter, it has been argued that 'leveling-down' is out of the question, since the Preamble to the ECHR 'supports a one-way dynamic by referring to the "maintenance and further realization" of the Convention rights' (Senden 2011, p. 169, with further references).

243 Palmer 2009, p. 402, referring to Merrills 1993, p. 102, and Feldman 2002, respectively.

244 This is what Mantouvalou 2005, p. 574, calls the 'instrumental' aspect of the integrated approach, which 'sees social rights as means for the effective protection of civil and political rights'. It does not mean, however, that the Court shows no awareness at all of the socio-economic character of the issues it deals with. In *Airey* it stated that 'the Convention must be interpreted in the light of present-day conditions … and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals …'. However, the Court also noted that it 'is aware that the further realisation of social and economic rights is largely dependent on the situation – notably financial – reigning in the State in question' (*Airey v. Ireland*, ECtHR 9 October 1979, appl. no. 6289/73, para. 26). *Cf.* also Koch 2003, pp. 21-22.

245 Scott 1999, p. 641 [footnote omitted].

The 'effectiveness thesis' hence implies that socio-economic rights protection could be understood as a mere 'by-product'[246] brought about by the adjudication of ECHR norms. Certain aspects of economic or social rights, or at least, some interests or matters that can be labelled as such, are simply protected because they necessarily fall within the scope of what to-day must be considered to be protected under the Convention.[247] This is unavoidable and serves a good cause, namely the effectuation *of the ECHR*.[248] However, as will be elaborated hereinafer, this is not the only way in which the Court's socio-economic case law can be explained.

2.5.3 The Indivisibility Thesis

The ECHR-oriented 'effectiveness' perspective presented in Section 2.5.2 on its own can offer an adequate explanation for the development of the Strasbourg socio-economic case law. It can also show why this development should not as such be regarded with suspicion, since the protection of socio-economic interests under ECHR norms fits the aims of the Convention as well as the practice of the Strasbourg Court. Nevertheless, it can be argued that the effectiveness thesis does not fully do justice to the importance of economic and social rights in and of themselves, and that it does not take sufficient account of the interwovenness of the human rights systems that evolved since the end of the 1940s. Indeed, complementary to the effectiveness thesis, the Court's socio-economic case law can also be explained from a different angle, *i.e.*, with the help of a broader, 'integrated'[249] image of fundamental rights

246 See O'Cinneide 2008, p. 587, who states that '[t]he protection that the ECHR directly confers upon the destitute is for the most part a by-product of the rigorous application of conventional civil and political rights by the Court: it will rarely take the form of a direct remedy for the denial of adequate welfare support or other forms of state (in)action in response to extreme poverty'.

247 *Cf.* Scott 1989, p. 779ff., for the idea of 'organic interdependence', implying that 'one right forms a part of another right and may therefore be incorporated into that latter right. From the organic rights perspective, interdependent rights are inseparable or indissoluble in the sense that one right (the core right) justifies the other (the derivative right)' (referring to Raz 1984, pp. 197-199, on 'core' and 'derivative' rights). Scott distinguishes 'organic' interdependence from 'related' interdependence, according to which rights 'are mutually reinforcing or mutually dependent, but distinct', 'equally important and complementary, yet separate' (pp. 782-783). Later Scott (1999) dissociated himself from these strict categories. See for criticism also Koch 2009, p. 32ff.

248 Scott 1989, p. 781, holding that the *effectivist* or *foundational* conception of organic interdependence asserts, moreover, that for example 'the right to an adequate standard of living is part of or is justified by the right to life because the effectiveness of the latter right depends on it. The goal is to render rights meaningful and non-illusory. The relationship is justificatory in nature' (referring to Raz 1984, p. 198).

249 The approach that evidences this broader view is often described as the 'integrated approach'. This term was coined by Scheinin (2001).

protection. In this explanation, the overall idea of human rights is taken as the starting point and the ECHR is regarded as being a part of a larger whole, whereby the ECtHR's work is seen as contributing to realising more than just the aims of the Convention. In human rights jargon, what is referred to here is the idea of the 'indivisibility, interdependence and interrelatedness' of fundamental rights.[250]

It is asserted in this section that an exploration of the idea of the indivisibility of fundamental rights can shed a fresh light on the topic of this research and provide for a fuller understanding of the Court's socio-economic case law. To state this argument more fully, this section first presents a brief introduction of the idea of indivisibility as it is usually understood in the context of international law. After that, several examples will illustrate the relation between the notion of what can be called 'explicit' or 'substantive' indivisibility and the case law of the Court.[251] It must be recalled here that the indivisibility thesis need not be viewed as completely distinct from the effectiveness thesis. Most authors link or conflate the two and hold that a practice that is aimed at effectively protecting the rights enshrined in the ECHR can also contribute to the 'indivisible' protection of human rights more generally. Yet whereas effective protection can indeed have indivisible *effects*, the indivisibility thesis as it is promulgated here foremost refers to an approach grounded on active, explicit recognition of (the importance of) socio-economic rights norms. 'Indivisibility' is therefore considered a specific and separate rationale underlying the Court's case law, as well as a distinct starting point for assessing the possible future development of the ECHR's social dimension.

2.5.3.1 The Indivisibility of Human Rights

Rather than being a recent invention of human rights defenders propagating the justiciability of all human rights norms, the notion of indivisibility can be traced back to the time in which the modern human rights *acquis* came into being.[252] Already the United Nations General Assembly Resolution 421 (V), dating from 4 December 1950, states that 'the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and

250 In the following, the terms 'indivisibility', 'interdependence', and 'interconnectedness' will be used interchangeably.

251 Mantouvalou 2005, p. 575, uses the term 'substantive integrated approach'. This approach is to be distinguished from the 'instrumental aspect' of an integrated approach, which 'sees social rights as means for the effective protection of civil and political rights, and embraces the idea that the enjoyment of civil and political rights is rendered meaningless if social rights are neglected' (Mantouvalou 2005, p. 574).

252 Koch 2009, p. 1: '[T]he view that economic, social, cultural, civil and political human rights are indivisible, interrelated and interdependent goes as far back as human rights themselves.'

interdependent'.[253] This resolution considered that all rights laid down in the Universal Declaration of Human Rights, *i.e.*, both the 'civil and political' and the 'economic and social' rights enumerated therein, should be taken up in one single international treaty. Although subsequently the idea of laying down the entire human rights catalogue in one binding human rights document was abandoned, the idea of interconnectedness did not disappear. It was already noted in Section 2.2 that it was not because of their 'unimportance', but instead primarily due to the political climate and the perception that economic and social rights were not immediately applicable, that two separate covenants were created.[254] The Separation Resolution continued to make mention of the idea of indivisibility and stresses that 'when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man'.[255] Also after the coming into being of the ICESCR, in the Proclamation of Teheran of 1968[256] as well as in more recent documents,[257] the 'official' position of the UN remained that the covenant covering civil and political rights and the covenant on economic, social and cultural rights together cover human rights that are all 'universal, indivisible and interdependent and interrelated'.

Important is also that the Vienna Declaration (1993) stressed that '[t]he international community *must treat* human rights globally in a fair and equal

253 UN General Assembly, Draft International Covenant on Human rights and measures of implementation: future work of the Commission on Human Rights, Fifth Session, 4 December 1950, UN Doc. A/RES/421.

254 Annotations on the Text of the Draft International Covenants on Human Rights, Tenth Session, 1 July 1955, UN Doc. A/2929, p. 9. See, on the creation of two separate covenants, *supra*, S. 2.2, as well as, *infra*, Ch. 5, S. 2.5.3.1.

255 UN General Assembly, Preparation of two Draft International Covenants on Human Rights, 5 February 1952, UN Doc. A/RES/453 (IV). The full citation is as follows: 'Whereas the General Assembly affirmed, in its resolution 421 (V) of 4 December 1950 that "the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent", and that "when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal free man".' This is also the reason why both covenants had to resemble each other to the greatest extent possible. See, Annotations on the Text of the Draft International Covenants on Human Rights, Tenth Session, 1 July 1955, UN Doc. A/2929, p. 7. More precisely, they had 'to contain "as many similar provisions as possible" and to be approved and opened for signature simultaneously, in order to emphasize the unity of purpose'.

256 See, for the text of the Proclamation, United Nations General Assembly Resolution 2442 (XLII), 19 December 1968.

257 United Nations General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23 (Vienna Declaration), para. 5. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17, Annex, reprinted in Human Rights Quarterly, Vol. 9 (1987), p. 123.

manner, on the same footing, and with the same emphasis'.[258] What this underlines is that indivisibility is not only imperative in that there exists an inevitable overlap between the civil and the social sphere. It also suggests that human rights must be treated as such, *i.e.*, that the international community and the relevant actors should *act* in accordance with the idea of indivisibility and make visible and feasible the inseparableness of the different kinds of fundamental rights norms.[259] Ideally, thus, indivisibility entails that these norms should be comprehended and applied not in isolation, but in the light of the larger whole of human rights.[260]

Also in Europe, the notion of indivisibility has always been subscribed to. On the occasion of the 50th anniversary of the Universal Declaration, on 10 December 1998, a declaration was adopted in which the governments of the Member States of the Council of Europe reaffirmed 'the need to reinforce the protection of fundamental social and economic rights … all of which form an integral part of human rights protection'.[261] What is more, in the Preamble to the Charter of Fundamental Rights of the European Union that entered into force in 2009, reference is made to 'the indivisible, universal values of human dignity, freedom, equality and solidarity'.[262]

It is not strange that the notion of indivisibility is so often brought up in the field of international and European human rights, since it is strongly based on widely shared philosophical accounts of what fundamental rights entail. It is generally argued in legal and philosophical scholarship that only when positive (social) guarantees are provided, negative freedom can truly be enjoyed. In this regard scholars such as Sen and Nussbaum, but also Fredman, have emphasised elements of positive freedom as being of crucial importance

258 Vienna Declaration, para. 5 [emphasis added]. See also the Limburg Principles, p. 123, para. 3: 'As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.'

259 According to Koch 2009, p. 4, indivisibility means the acknowledgment of human activity and human needs as being 'treaty crossing'.

260 See Koch 2006 and Koch 2009, referring to hermeneutic thinking as a normative explanation for indivisibility. *Cf.* Scott 1999, p. 659, who, speaking of the relations between human rights, points out that 'imagined, or virtual, dialogues among human rights norms across received categories find their real world analogue in the institutional dialogues among the different bodies charged with interpreting various categories of human rights'.

261 Council of Europe, Committee of Ministers, Declaration on the occasion of the 50th anniversary of the Universal Declaration on Human Rights, 10 December 1998. See also Koch 2009, p. 322.

262 Charter of Fundamental Rights of the European Union, OJ 18 December 2000 (2000/C 364/01).

for the fulfilment of human rights.[263] The different categories of rights are considered interrelated, for example, in the sense that '[a]ny form of malnutrition, or fever due to exposure, that causes severe and irreversible brain damage … can effectively prevent the exercise of any right requiring clear thought'.[264] Moreover, '[f]amines have never afflicted any country that is independent, that goes to elections regularly, that has opposition parties to voice criticisms, that permits newspapers to report freely and to question the wisdom of government policy without extensive censorship'.[265] Thus, both categories cannot be seen as distinct in the sense that one of them can be taken seriously while the other is being disregarded.

Nevertheless, regardless of its appeal, the idea that human rights must be treated as indivisible sometimes seems to be merely a 'rhetorical slogan, a sort of mantra that has to be pronounced for the sake of good order, however, having no substantial significance in itself'.[266] According to Cassese, 'this convenient catchphrase serves to dampen the debate while leaving everything the way it was'.[267] Koch in this regard makes a helpful distinction between indivisibility as a political notion, and indivisibility in the legal sphere. It is a matter of fact that someone will not survive without food – '[h]uman needs and human activity are not confined to the terms of a treaty' and this should be considered relevant at least in a political context.[268] It is a different question, however, whether in a legal context, a judge would also hold 'that the right to freedom of expression has been violated because a citizen has not learnt how to read and write'.[269] Indeed, it is clear from the existence of separate international treaties to protect different categories of rights, that indivisibility is much more contentious as a legal principle than as a political notion. Nevertheless, Koch has argued that

> 'case law from human rights treaty bodies confirms that it is possible to talk about, e.g., the right to health care, the right to housing and the right to social security under the conventions on civil and political rights. This is interesting since there is usually no individual petition right under the conventions on economic, social

263 *E.g.*, Sen 1987, p. 36ff.; Sen 2009, p. 253ff.; Nussbaum 2000, p. 5; Nussbaum 2011; Fredman 2008. What matters are 'real' opportunities, and a capabilities approach as proposed especially by Sen and Nussbaum, therefore, 'insists that all entitlements involve an affirmative task for the government: it must actively support people's capabilities, not just fail to set up obstacles. In the absence of action, rights are mere words on paper' (Nussbaum 2011, p. 65). See also West 2001, pp. 1906-1912.

264 Shue 1996, pp. 24-25.

265 Sen 1994, p. 34.

266 Koch 2009, p. 3. See also Koch 2006, p. 406: 'That human rights are indivisible has become a rhetorical slogan, and it is a regrettable fact that economic, social and cultural rights are still badly protected compared to civil and political rights.'

267 Cassese 1999, p. 159.

268 Koch 2006, p. 407.

269 *Ibid.*

> and cultural rights, and it proves that the indivisibility notion does in fact have a legal content.'[270]

In order to explain this further it can be helpful to think of human rights obligations as 'waves of duties', an idea that was outlined by Waldron:

> '[E]ach right is best thought of not as correlative to one particular duty (which might then be classified as a duty of omission or as a positive duty of action or assistance), but as generating successive waves of duty, some of them duties of omission, some of them duties of commission, some of them too complicated to fit easily under either heading.'[271]

According to Koch, in a legal context this idea of waves of duties

> 'sets free socio-economic and civil-political rights from their separated compartments. It provides a new framework for the understanding of the scope of human rights obligations, and suggests the necessity of a contextual interpretation of human rights conceivably challenging existing text-conformal interpretative traditions.'[272]

Thus, from a legal-theoretical perspective, indivisibility may be considered as requiring authorities, including courts and also the ECtHR, to acknowledge the non-isolated character of human rights guarantees. The norms as they are contained in, for example, treaty texts should not be considered merely as self-standing, specific guarantees. Rather, it should be recognised that they form part of the larger ideal of human rights protection. In a practical-legal context, this may require a broader and more inclusive understanding of the kinds of interests that norms are nominally protecting.

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270 *Ibid.*

271 Waldron 1993, p. 25. See also Koch 2009, p. 30 (and pp. 25-28); Mantouvalou 2005, p. 575. According to Waldron 1993, p. 7, 'the argument from first-generation [political and civil rights] to second-generation rights [socio-economic rights] was never supposed to be a matter of conceptual analysis. It was rather this: if one is really concerned to secure civil and political liberty for a person, that commitment should be accompanied by a further concern about the conditions of the person's life that make it possible for him to enjoy and exercise that liberty'.

272 Koch 2009, p. 30. Koch (see p. 14ff., and in particular pp. 27-28) prefers the idea of 'waves of duties' over the use of the tripartite typology that was introduced by Shue and Eide. See Shue 1996 and see, *e.g.*, the final report by Eide as Special Rapporteur, *The Right to Adequate Food as a Human Right*, UN Doc. E/CN.4/Sub.2/1987/23, 7 July 1987; Eide 1989. *Cf.* also Koch 2005. See however older work by Koch (2002, pp. 32-33), where she explicitly uses the tripartite approach to bridge the two sets of rights. In the following discussion of indivisibility and the ECHR, no further explicit reference will be made to this well-known tripartite typology. This because it is not used by the Court (which instead sometimes refers to a 'positive-negative' dichotomy) and moreover 'does not necessarily bring us further ahead' (Koch 2009, p. 28).

2.5.3.2 The ECtHR and an Indivisible Approach

It is often argued in legal scholarship that the Court's recognition of positive obligations in the socio-economic sphere can be seen as evidencing at least some degree of recognition of (legal) indivisibility. In this regard, Koch has noted that the ECtHR 'has been willing to go beyond the wording of the ECHR and read social elements into the civil rights provisions of the Convention even though several of the decisions have implications of a more general character'.[273] Indeed, the case law of the Court introduced earlier in this chapter clearly signals that there is an inevitable intersection between the civil and the social sphere. Thereby the case law strengthens the perception that human rights are in fact indivisible, interrelated and independent.

Of the authors who have specifically used the term 'indivisible' or 'integrated' to describe the Strasbourg practice, Koch and Mantouvalou have delved more deeply into the normative groundings of this notion in relation to the ECtHR context.[274] Koch, first, has linked the socio-economic rights protection by this Court to the idea of obligations to fulfil and the transition from 'a state governed by law' paradigm to a 'welfare state' paradigm.[275] In later work she has developed a hermeneutic perspective in order to find a satisfactory normative explanation for this phenomenon.[276] The hermeneutic perspective entails that interpreting a document (the ECHR) 'is conceived of as a meeting not only between past and present, but also between text and context, and the interpreter plays an active part in these meetings'.[277] In this regard, 'the whole must be understood in terms of the detail and the detail in terms of the whole'.[278] Koch's theory – with references to pre-understanding[279] and the horizontal[280] and vertical structure[281] of the hermeneutic circle[282] –

273 Koch 2003, p. 25.
274 Koch 2006; Koch 2009; Mantouvalou 2013.
275 Koch 2003.
276 Koch 2006; Koch 2009, p. 37: 'The relations between facts and norms and component parts and the unified whole, the UDHR, … trigger some of the pivotal points in hermeneutic thinking, and it seems to me worth while considering whether a hermeneutic perspective on human rights interpretation might be profitable in the understanding – and possible development – of the integrated approach.'
277 Koch 2006, p. 411.
278 *Ibid.*; Koch 2009, p. 41.
279 Koch 2006, pp. 414-417. 'Pre-understanding' concerns the role and perceptions (and prejudices) of the interpreter. In this regard, Koch points at the changing pre-understandings in the context of socio-economic rights protection in the sense that 'a future horizon will include social rights as justiciable rights to a wider extent' (p. 417). See also Koch 2009, pp. 45-51.
280 Koch 2006, pp. 417-419. This implies that '[t]he interpretation should not seek to reconstruct the original *intention*, but rather reconstruct the *situation* – the context – that caused the adoption of the provision and confront it with our contemporary context' (p. 419). This 'fusion of horizons' fits the Court's 'present day conditions' interpretation and the Conventions living instrument character (see, *infra*, S. 2.5.2.1). See also Koch 2009, pp. 51-53.

thereby illuminates the contextual dimension of the Court's indivisible approach as well as the development over time thereof.[283]

Secondly, Mantouvalou's normative justification for the Court's indivisible or integrated approach rests more concretely on capabilities theory.[284] More precisely, she refers to a positive account of freedom as (ideally) underlying the Court's approach.[285] Focusing explicitly on the ECtHR's integrated protection of the right to work, she concludes that

> '[a] positive account of freedom as capability … requires the protection of civil and political, and economic and social rights, and can shed light on important principles that are relevant to the protection of labour rights through civil rights documents … Capabilities theory leads to a better understanding of the notion of freedom and emphasises the collapse of artificial divisions of rights that traditionally placed emphasis on some elements of individual well-being (free expression, for instance), neglecting some others (like the right to work) … In addition, the understanding of freedom as capability enriches the content of human rights by moving their content beyond individualism. Finally, the interpretation of rights in light of this theory is based on values that underlie the Convention, and recognises aspects of them that have been neglected thus far.'[286]

Both Koch's and Mantouvalou's normative or justificatory theories add to an understanding of the ECtHR's socio-economic rights protection that rests on the idea of indivisibility. Moreover, they may go to show that rather than merely allowing certain indivisible *effects* to occur, what the Court is (or should be) doing is in fact *taking an approach that is inspired by this notion*. For this it is needed that socio-economic interests are not merely 'silently' included in civil and political rights norms. Instead, some active or explicit engagement with these rights or the norms that protect them is required.

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281 Koch 2006, pp. 419-423; Koch 2009, pp. 53-56.

282 See, *e.g.*, Gadamer 1989. In Gadamer's words, 'understanding is always application', or, 'discovering the meaning of a legal text and discovering how to apply it in a particular legal instance are not two separate actions, but one unitary process' (p. 309).

283 Koch (2009, p. 37) holds that '[a] hermeneutic perspective might be helpful also in understanding the dynamic interpretation of the Court reflecting contemporary views on economic, social and cultural issues'.

284 See the work of Sen and Nussbaum, *e.g.*, Sen 1987; Sen 2009; Nussbaum 2000; Nussbaum 2011.

285 Mantouvalou 2013, p. 547: 'The statement that human rights are indivisible tells us that all human rights must be protected, but it does not necessarily require that a particular body, such as the ECtHR … , which interprets a particular document, such as the ECHR … , protect all rights. The answer to this question cannot be a conceptual exercise: it has to involve the values underlying the Convention and the interests supporting the right to work and rights at work. This justification can be found in the idea of freedom'.

286 *Ibid.*, p. 554.

The distinction between what merely boils down to effectuating ECHR norms and a truly indivisibility approach resembles the distinction Mantouvalou has made between the 'instrumental' and the 'substantive' aspect of an integrated approach. The former 'sees social rights as means for the effective protection of civil and political rights',[287] whereas the substantive aspect implies that the Court deliberately takes – or rather: should take – *other human rights norms* into account *because* all norms lay down important values and form part of the same whole.[288] In the words of Mantouvalou, the substantive aspect 'stems from the belief that social entitlements are as intrinsically valuable as fundamental civil and political rights are, and "that a moral theory of individual dignity is plainly inadequate if it does not take them into account"'.[289] This approach

> 'shows that the notion of indivisibility of rights means something more than the instrumental necessity of one group of rights for the effective protection of another group of rights and puts in question whether it is possible to distinguish in the abstract which rights fall within each category for the purposes of justiciability.'[290]

To see whether the ECtHR's approach can truly be understood as indivisible in this 'substantive' sense, a closer look must be had at its adjudicational practice. By means of some examples it can be shown that – at least in some instances – the ideal of 'indivisibility' indeed seems to form a driving force.

287 Mantouvalou 2005, p. 574. One could also call this a form of 'negative indivisibility'. This would then explicitly have to be distinguished from what Scott calls 'negative textual inferentialism'. This means that references to other human rights norms might have the result of not expanding but rather limiting the scope of socio-economic protection. It would have ceiling effects by forming a reason for the Court not to interfere in a sphere covered by another treaty. See Scott 1999, pp. 638-640. See also Koch 2009, p. 29, who talks about the 'negative' counterpart to the integrated approach, which implies 'developing legal principles of guidance to law applying bodies when having to decide whether to abstain from taking into consideration objectives that are usually considered under another legal instrument and maybe by another treaty'. An example in the practice of the Court could be *Kyrtatos v. Greece*, ECtHR 22 May 2003, appl. no. 41666/98, para. 52.

288 See, *e.g.*, Rainey et al. 2014, p. 75: 'It recognizes that, on the one hand, the enjoyment of civil and political rights requires respect for and promotion of social rights, and, on the other hand, that social rights are not second best to civil and political rights.' *Cf.* also Mantouvalou 2005, p. 575.

289 Mantouvalou 2005, p. 575, referring to Waldron 1993, p. 7.

290 *Ibid.*

2.5.3.3 *References to Economic and Social Rights Norms*

The Court's case law regularly contains references to other international rights norms than those contained in the Convention.[291] These are found under the header 'Relevant international materials', where the Court regularly cites socio-economic provisions. An example is the case of *Stummer v. Austria*, where, amongst other norms, Article 1 of the European Social Charter (right to work) is mentioned as being relevant to the issue of prison work.[292] In the pension rights case *Carson and Others v. the United Kingdom*, reference is made to Article 69 of the 1952 International Labour Organization's Social Security (Minimum Standards) Convention.[293] Moreover, the Court also frequently refers to such norms in the legal reasoning part of its judgments ('The Law'). It is these references that – at least when they concern economic and social rights norms – most clearly illustrate the 'indivisible' approach underlying the protection offered under the Convention.

References in ECtHR judgments to norms outside the Convention generally are understood to be part of the Court's comparative, 'common ground', or consensus method of interpretation.[294] More than just ensuring the effective application of ECHR rights, it can be seen that these 'external'[295] comparative interpretations that are explicitly grounded on other human rights norms or on decisions or comments by other treaty bodies recognise the importance of these norms and decisions as such. An example of such indivisibility driven (rather than purely effectiveness driven) recognition of socio-economic norms can be found in the case of *Van der Mussele v. Belgium*, in which the Court, only four years after *Airey*, brought up International Labour Organisation (ILO) Convention 29 in order to construe the meaning of 'forced and compulsory labour' (Article 4 ECHR).[296]

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291 Mantouvalou 2013, p. 538, links this to the idea of 'cross-fertilization, which is said to take place when a monitoring body is willing to refer to other bodies' jurisprudence'. See on this notion also Helfer and Slaughter 1997, pp. 323-326. See, generally, on the reception of international law in the practice of the ECtHR, Senden 2011, pp. 355-358.

292 *Stummer v. Austria*, ECtHR (GC) 7 July 2011, appl. no. 37452/02, para. 59.

293 *Carson a. O. v. the UK*, ECtHR (GC) 16 March 2010, appl. no. 42184/05, paras. 49-51.

294 See, on this method of interpretation, *e.g.*, Senden 2011, in particular Ch. 6, S. 6.4, and Ch. 10; Gerards 2009, pp. 430-435; Gerards 2011, pp. 74-96; Gerards 2014a, pp. 36-37.

295 See, for the distinction between internal and external components of comparative interpretation, Senden 2011, pp. 115-119. According to Senden '[t]he *external component* of comparative interpretation refers to the use of sources that are not covered by the internal component of this method. In general that means reliance on documents or on information derived from outside the jurisdiction of the Court in question' (p. 116).

296 *Van der Mussele v. Belgium*, ECtHR 23 November 1983, appl. no. 8919/80, para. 32. Also Article 5 of the European Social Charter (the right to organise) has been mentioned by the ECtHR on several occasions in the context of complaints under Article 11 ECHR (freedom of assembly and association). See, *e.g.*, *Wilson, National Union of Journalists a. O. v. the UK*, ECtHR 2 July 2002, appl. no. 30668/96, para. 48; *Associated Society of Locomotive Engineers and Firemen*, ECtHR 27 February 2007, appl. no. 11002/05, paras. 38-39; *Sigurjónsson v.*

There are many more examples to give, but the Court's integrated interpretation can probably best be illustrated with the help of the case of *Sidabras and Džiautas v. Lithuania*.[297] In this case the Court grounded its interpretation not on a social rights norm of which the meaning was closely related to the ECHR right invoked, but on a socio-economic norm with no direct (textual) link to the relevant provision of the Convention. The case concerned two former employees of the former Soviet Security Service ('KGB') who were barred from taking up employment in the public and in the private sector for 10 years. The question arose in this case whether the issue at stake fell within the scope of Article 8 (private life) read in conjunction with Article 14 ECHR (the non-discrimination principle). The Court answered this question as follows:

> '[T]he Court considers that a far-reaching ban on taking up private sector employment does affect 'private life'. It attaches particular weight in this respect to the text of Article 1 § 2 of the European Social Charter [ensuring the effective protection of the right of the worker to earn his living in an occupation freely entered upon] and the interpretation given by the European Committee of Social Rights … and to the texts adopted by the ILO.'[298]

Thus, the Court explicitly took account of a fundamental rights norm that is not enshrined in the Convention. With the help of a particular aspect of the 'right to work' and the explanation of the European Committee on Social Rights (ECSR) thereof, it held that the Convention was applicable.[299] This signals, as Mantouvalou puts it, 'the belief that social entitlements are as intrinsically valuable as fundamental civil and political rights'.[300] Indeed, a case like *Sidabras and Džiautas* can rightfully be called a 'paradigm example of the substantive integrated approach',[301] *i.e.*, of a perspective that considers the ECHR rights to be a part of a bigger whole and hence is expressive of the idea of indivisibility. Interestingly, moreover, rather than only taking account of rules 'applicable in the relations between the parties', the Court has even given weight to rights contained in international instruments a Member State

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Iceland, ECtHR 30 June 1993, appl. no. 16130/90, para. 35; *Sørensoen and Rasmussen v. Denmark*, ECtHR 11 January 2006, appl. no. 52562/99, paras. 38 and 72.

297 *Sidabras and Džiautas v. Lithuania*, ECtHR 27 July 2004, appl. nos. 55480/00 and 59330/00. See also *Rainys and Gasparavicius v. Lithuania*, ECtHR 7 April 2005, appl. nos. 70665/01 and 74345/01.

298 *Sidabras and Džiautas v. Lithuania*, ECtHR 27 July 2004, appl. nos. 55480/00 and 59330/00, para. 47.

299 See, for an extensive discussion of this case, Mantouvalou 2005.

300 *Ibid.*, p. 575.

301 *Ibid*. See on this case in relation to the development of the Court's socio-economic dimension also Gerards 2008, p. 665; Koch 2009, pp. 214-216; Rainey et al. 2014, p. 75. The significance of the case should however be nuanced. As it was a case concerning Art. 14, the Court only had to determine whether the issue fell within the wider 'ambit' of Article 8 ECHR. Given the importance of (alleged) discrimination claims, it is relatively often willing to do so. See also Mantouvalou 2005, p. 579.

party to a case had neither ratified, nor even signed.[302] In using rights norms 'external' to the Convention in this manner, the Court clearly has gone further than Article 31(3)(c) VCLT requires for the harmonious interpretation of international treaty obligations.[303] The Court's approach thereby underlines that it values other international human rights norms in and of themselves and that it allows 'itself to be influenced by economic and social rights norms and interests'.[304]

Thus, it can be said that also in practice, the Court has taken an integrated outlook. This allows it to take into account *all* relevant norms and integrate these 'into a general theory of justice, which will address in a principled way whatever trade-offs and balancing are necessary for institutionalisation in a world characterised by scarcity and conflict'.[305] The notion of indivisibility can hence be taken as a rationale that may explain the Court's socio-economic practice apart from that of ensuring effectiveness.

2.6 The ECtHR's Economic and Social Rights Protection: Potential and Criticism

The effectiveness and indivisibility theses not only give relevant explanations for the development of the socio-economic dimension of the Convention, they also form valid justifications for the Court's active engagement in the socio-economic sphere. Instead of falling prey to the attractively clear yet artificial idea that civil and political rights norms are only about the protection of civil and political interests, they show that the task of the ECtHR cannot be so restricted. At the same time, looking at the Court's socio-economic approach

302 See, *e.g.*, *Demir and Baykara v. Turkey*, ECtHR 12 November 2008, appl. no. 34503/97. In this case the Court found common ground among the Member States on the basis of specialised international instruments and state practices without distinguishing 'between sources of law according to whether or not they have been signed or ratified by the respondent State' (para. 78). Also, it mentioned that it 'has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein' (para. 67).

303 *Cf.* Art. 31 VCLT.

304 Koch 2006, p. 408. It shows that these rights are not merely 'second best to civil and political rights', which, according to Rainey et al. 2014, p.75, is an aspect of an integrated approach. Recently, however, in the case of *Berger-Krall and Others v. Slovenia*, ECtHR 12 June 2014, appl. no. 14717/04, concerning specially protected tenancies, the Court 'recalls that in defining the meaning of terms and notions in the text of the Convention, it has on several occasions taken into account elements of international law other than the Convention' (para. 189), but with regard to the question whether the measure was 'lawful' however, it mentioned yet did not take into account Article 31 (R)ESC (promotion of access to housing of an adequate standard). This merely because this norm cannot be interpreted as imposing an obligation to achieve certain results (see para. 190).

305 Waldron 1993, p. 33.

from an 'effective rights protection' and an indivisible perspective also uncovers that potentially the protection of socio-economic rights under the ECHR can go very far. Hence, the fact that a justificatory explanation can be given for socio-economic protection under the ECHR, as such does not mean that there are no concerns left. Are there or should there be any limits to what the Court can do on the basis of the Convention?

This question is particularly relevant in the light of the ECtHR's position and role as a supranational rights adjudicator as set out in Section 2.3 of this chapter. It was explained there that the Court faces the difficult task of doing justice to individual cases while at the same time providing the necessary guidelines to Member States confronted with potential violations of ECHR rights. Its task is to ensure effective respect of fundamental rights while acknowledging their indivisible character, which may demand much-encompassing protection. At the same time, the Court cannot take too activist a stance, as this is likely to decrease the willingness of Member States to automatically comply with the standards set. Indeed, looking at the recent criticism discussed in Section 2.3, it can be argued that there are most certainly some limits to what the Court can do on the basis of the Convention.

The criticism that particularly focuses on the ECHR's socio-economic dimension also raises another issue. In the recent literature on this topic the allegation can be found that the Court's socio-economic protection is too incremental, or unprincipled, as well as inconsistent. Against the background of issues of legitimacy and subsidiarity, this criticism more specifically questions the Court's reasoning in cases concerning economic and social matters.

The present section elaborates on these points. First, it illustrates that, regardless of the wording of the norms laid down in the Convention, there still is plenty of room for further expanding the ECHR's socio-economic dimension (2.6.1). After that, building upon the remarks made about the difficult task of the Court and the criticism uttered, some critical stances regarding in particular the Court's socio-economic approach and reasoning are presented (2.6.2). Showing that in this field of application the Court indeed fails to meet the various demands it is confronted with, this leads to the conclusion that the ECtHR's protection of socio-economic rights is in need of a more principled approach.

2.6.1 Potential in Terms of Effective and Indivisible Rights Protection

It is interesting to trace back the ECHR's socio-economic dimension and investigate what protection has been provided thus far. Another question, however, is where the development of this socio-economic dimension is heading. What can be learned from the explanations provided in Section 2.5 as to how far the ECtHR's engagement can go? In this regard it must be assumed that some link between socio-economic rights and (the text of) an ECHR provision remains

imperative. The provisions laid down in the Convention provide for a frame of reference that cannot be ignored. This has not necessarily anything to do with a strictly 'textualist' or 'originalist' approach.[306] It does mean, however, that the socio-economic adjudication under the ECHR is bound by the norms enumerated in this document, albeit interpretations thereof can take unexpected directions.

Here, the distinction between indivisible approaches in the political and in the legal sphere becomes apparent.[307] It has been pointed out that 'legal bodies are … not convinced that philosophical considerations on human rights as a consistent whole will necessarily affect legal dogmatism'.[308] It is not the case that the legal field is characterised by such rigidity that there is no room for flexibility at all – whether or not inspired by philosophical considerations. However, whereas arguments for non-departmentalised protection can be convincing in a political context, actors in the legal realm, such as courts, are nevertheless bound by written rules, legal principles, and legitimate interpretations thereof. For generating legal protection of social rights under civil rights norms, there must hence be a certain 'intimate connection of proximity' between the two.[309] Generally, according to Scott, this need for a textual connection may cause 'ceiling effects' in the sense that courts stick to – a limited understanding of – the rights they are protecting and hold that other (legal) actors are responsible for the protection of other norms. A treaty body's reference to norms other than its own can then serve to limit rather than expand the scope of protection.[310] Also in the case law of the Court examples of such a ceiling effect can be found. In *Kyrtatos v. Greece*, where the applicants complained about environmental pollution, the Court considered that

> '[n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect,

306 Distinctively 'originalist' approaches have also been rejected by the Court itself. See, *e.g.*, *Loizidou v. Turkey*, ECtHR 23 March 1995 (preliminary objections), appl. no. 15318/89, para. 71; *Mamatkulov and Abdurasulovic v. Turkey*, ECtHR 6 February 2003, appl. nos. 46827/99 and 46951/99, para. 94.

307 See, *supra*, S. 2.5.3.1.

308 Koch 2002, p. 37.

309 *Ibid.*, pp. 37-38: 'We can list numerous examples that some rights are essential to the enjoyment of other rights, and this should indeed call for political consideration. However, it is not likely that legal decision-making will be affected by the fact that a social right in principle can be essential to the enjoyment of a civil right if this link is not otherwise qualified by a certain intimate connection or proximity. What is good is not necessarily right. Legal philosophy and legal dogmatism go hand in hand in the sense that legal dogmatism can be seen as a combination of description and recommendation. However, not all philosophical arguments will be recognised in a legal context. Rights can be indivisible in a philosophical context yet separated in a legal one.' See also Koch 2009, pp. 280-281.

310 Scott 1999, pp. 638-640; Koch 2002, p. 36.

> other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.'[311]

If anything, thus, it can be said that the ECHR norms can play a role in limiting the scope and extent of the Strasbourg protection.

At the same time, although the text of the Convention provides for a confined focus, the limitations that stem from this should not be overestimated. It was already shown that the ECHR norms are generally broad enough to take into account a great variety of socio-economic interests. With the help of the Court's interpretative techniques, these norms can function in a broad array of directions. Gerards in this regard refers to the 'prism character' of fundamental rights.[312] Once light falls on a prism, a spectre of colours becomes visible. Gerards holds that '[i]t is relatively easy to recognise "new" hues of colour in the prism of fundamental rights because … the colours run into one another without logical points of separation'.[313] With the help of analogical reasoning in particular, ever more fundamental interests (colours) can be discerned.

Importantly, moreover, whereas the notions of 'effectiveness' and 'indivisibility' may help to understand, and even to justify the socio-economic practice of the Court, neither of them fences off the further development of this practice. First, the aim of effectuating ECHR rights, combined with the interpretative canons of the ECtHR, in principle allows for very far-reaching interpretations of Convention rights. Secondly, also the aim to provide for truly indivisible protection can have effects that go far beyond what is already visible in the Strasbourg case law. This open-endedness of the Court's socio-economic protection is clearly illustrated by its doctrine of positive obligations. In Section 2.4.3 in particular, it was shown that the different Convention articles have come to include positive obligations as well. The relationship between these positive obligations and the socio-economic dimension of the Convention may be obvious.[314] Where positive obligations are accepted in the field of civil and political rights *norms*, they quite often cover *interests* that would very well fit the category of social rights.[315] Consider the right to respect for the home

311 *Kyrtatos v. Greece*, ECtHR 22 May 2003, appl. no. 41666/98, para. 52. See also *Ivan Atanasov v. Bulgaria*, ECtHR 2 December 2010, appl. no. 12853/03, para. 77.

312 Gerards 2012.

313 *Ibid.*, p. 180, referring to Langford 2008, p. 10.

314 See also Krieger 2014, who, in her article on positive obligations, mainly focuses on socio-economic rights protection.

315 *Cf.* Koch 2002, p. 31, who states that 'one of the main reasons [against socio-economic guarantees as *rights*] is that economic, social and cultural rights are considered positive resource-demanding rights in opposition to the civil and political rights that are seen as cost-free and negative in the sense that they indicate the areas in which the states must not interfere'. *Cf.* also Koch 2009, pp. 5-9; Scott 1989, p. 833, for some more 'dichotomous' arguments related to the (perceived) character of socio-economic and civil and political rights.

(Article 8(1) ECHR): understood in a classical sense, this norm may well apply to issues involving home searches, and thereby foremost the privacy of the applicant, whereas a positive obligation might entail that no eviction of unlawfully residing persons may take place without investigating possibilities for alternative housing.[316] Important is that the room for positive obligations can hardly be called limited. When a negative right is concerned, the state only has to do one thing, namely refraining from interfering with the individual's interests. However, when the question is whether and what action needs to be taken, in order to for example effectively guarantee respect for someone's private life, the list of obligations that could potentially be considered necessary seems more or less infinite.[317]

Another example of the potential for further socio-economic protection is offered by – the still relatively new – Article 1 of Protocol No. 12 to the Convention.[318] Different from Article 14, the applicability of this non-discrimination provision is not dependent on any other substantive provision of the Convention. In this way Protocol No 12 aims at 'broadening in a general fashion the field of application of Article 14 …'.[319] Particularly, it has been argued, the former can expand the already 'socialising' effect of the latter.[320] Without it being necessary to claim that an interest falls within the ambit of a classic Convention right, Article 1 P12 can be invoked when socio-economic laws or policies are concerned.[321] For example, when an individual is confronted with allegedly discriminatory housing regulations, regardless of

316 *Cf. Winterstein a. O. v. France*, ECtHR 17 October 2013, appl. no. 27013/07 (where the Court went short of recognising such an obligation, see, *infra*, Ch. 8).

317 In the words of Koch 2002, p. 33: '[T]he Court has not developed a general theory of positive obligations, and we find ourselves without legal principles according to which we can decide when one legal body is allowed or obliged to take into consideration objectives that are usually considered under another legal instrument and may be by another legal body'. With regard to Article 8, Cousins 2008, p. 48, holds that 'the Article has a potentially very broad reach as issues concerning personal and family life can, in principle, bring in almost any issue concerning an individual'. *Cf.* also Feldman 1997; Warbrick 1998, p. 34.

318 Art. 1 P12 reads: '1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.'

319 Explanatory report to Protocol No 12, para. 10, available at www.conventions.coe.int.

320 Brems 2007, pp. 162-163; Mjöll Arnardóttir 2014, pp. 332-334 (who however holds that because of a broad interpretation of the 'ambit' of Art. 14, there will not be much of a difference (p. 345)).

321 According to Brems 2007, p. 162 '[t]his innovation may result in large numbers of claims being brought before the Court in many 'new' areas, including the entire field of social rights'.

whether these have an impact on his private life or property rights or not, he can invoke his right under the Convention.[322]

Finally, brief mention can be made of the greater focus on economic and social rights due to the economic and financial crises that have arisen in the past years. Together with the increased acceptance of socio-economic righs in general, this has led to an increased number of social rights complaints and proceedings. Besides under treaties like the (Revised) European Social Charter, these are also regularly brought under the Convention.[323] Also in this regard, although it is not a given that the Court will make use of it to a greater or a lesser extent, there is certainly room for further expansion of the socio-economic dimension of the Convention.

Thus, regardless of the need of a textual connection between the Convention text and socio-economic rights, it is clear that what effective Convention protection requires is not *a priori* limited.[324] Also the opportunities for the development of an indivisible approach are still plentiful, since there is a great number of economic and social rights norms left the Court could actively link to the protection offered under the Convention.[325] The fact that there is hence no automatic stopping-point for the recognition of socio-economic rights under the ECHR, begs the question how far the Court nevertheless can and will go in this regard.[326]

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322 It must however be noted that, at least thus far, the practical added value of Article 1 P12 has turned out to be limited. The Court explained in the case of *Sejdic and Finci v. Bosnia and Herzegovina* that it interprets 'discrimination' under this article in the same way as under Art. 14 ECHR. See *Sejdic en Finci v. Bosnia and Herzegovina*, ECtHR (GC) 22 December 2009, appl. nos. 27996/06 34836/06, para. 55. *Cf.* also *Ramaer and Van Willigen v. the Netherlands*, 23 October 2012 (dec.), appl. no. 34880/12, para. 28.

323 See, for example, the various (recent) crisis-related social security complaints that are discussed in, *infra*, Ch. 10.

324 *Cf.* Gerards 2008, p. 686, who stresses that 'a further rise of "borderline cases" is to be expected in the future. In academic literature, an increase is expected in the acceptance of new fundamental rights, reflecting novel aspects of various conditions of human life relating to food, environment, and resulting from technological advances in mass communications, information technology, and reproductive techniques. It is highly probable that these future developments will even further soften the borderline between fundamental rights and what are currently called "individual interests", especially in the field of social, economic and cultural rights'.

325 With the Charter of Fundamental Rights of the European Union in this regard a new source has come into being. The Charter also includes economic and social rights norms, and although the effect of these might be limited, there is nevertheless room for linking their underlying principles to the various rights of the Convention.

326 *Cf.* Kapuy 2007, p. 238, who holds that in regard to the socio-economic protection under the Convention, '[a] great deal has changed … over the past twenty or more years. What future developments there will be remains a crucial question for individuals whose rights in social security disputes have been violated, but also an exciting one for observers of the European protection system of human rights'.

2.6.2 Criticism of the ECtHR's Reasoning in Socio-Economic Cases

Discussing the socio-economic case law of the ECtHR, Brems holds that '[t]here is an inherent tension between this reality of indivisibility, on the one hand, and, on the other, the need for the Court to draw the line somewhere with regard to its competence to deal with social rights'.[327] In relation to the Court's reasoning on socio-economic matters, however, other – related – concerns have been voiced as well. The Court should not go 'too far', yet in addition to this the literature suggests that its reasoning is characterised by certain shortcomings. The Court's socio-economic case law has been called 'incremental' – which not necessarily is a problem as such but can become one once the complex task the Court faces is considered. Also, the Court has been accused of using an opaque approach and, thereby, creating uncertainty for states as well as for (potential) applicants. Whereas it has often stressed that the Convention 'does not guarantee, as such, socio-economic rights',[328] it remains unclear about how much and what kind of (indirect) socio-economic protection can nevertheless be expected.[329] It is important to investigate the different critical remarks in relation to the position and the role of the ECtHR, which will lead to the conclusion that a more principled approach might be required.

One of the things that is considered problematic in regard to the Court's development of the socio-economic protection is that it often reasons in a case-by-case fashion. Although in several socio-economic cases it has concluded that there had been a violation of the Convention, these conclusions are generally unaccompanied by principled reasoning and closely linked to the particular facts of the case. This means that great effort is required in order to understand from the case law what socio-economic guarantees more generally follow from the Convention. Case-based reasoning also relates to Gerards' prism metaphor.[330] It can be said that '[t]he flowing character of the colours of the fundamental rights prism can … easily result in a case-based argument-

327 Brems 2007, p. 165: 'Obviously, where the line is drawn will be determined not by the logic of the social rights that are indirectly protected, but by the logic of the civil and political rights into which they are incorporated.' According to Koch 2002, p. 34, '[i]t is an open question how far this integrated approach can and should be taken'. See also Krieger 2014, p. 200, who notes that it is not a matter of altering the systematic of the Court's practice. What matters is 'den längst in der Rechtsprechung des Gerichtshofs angelegten methodisch-dogmatischen Vorkehrungen Rechnung zu tragen, die subjektiv-rechtlich einklagbaren Handlungspflichten mit dem Konsensprinzip ebenso wie mit den Grundsätzen von Gewaltenteilung und Demokratie in Mehrebenensystem in Einklang zu bringen: der angemessen begrenzten Anwendung der dynamisch-evolutiven Auslegungsmethode und der Bestimmung der Kontrolldichte im Rahmen des Beurteilungsspielraums der Mitgliedstaaten'.

328 *Cf. Pancenko v. Latvia*, ECtHR 28 October 1999 (dec.), appl. no. 40772/98.

329 *Cf.* Leijten 2014.

330 Gerards 2012, pp. 178-180.

ative approach that is strongly supported by analogical reasoning'.[331] Analogical reasoning can have unintended and undesirable effects, leading courts where they did not intend to go or giving the suggestion of broader developments that are in fact not there.[332]

Also Mantouvalou and Palmer hold that the incremental, case-oriented approach of the Court in socio-economic issues is problematic, mainly because of the opacity that results from this. According to Mantouvalou a court like the ECtHR can no longer rely on dichotomies stemming from the Cold war. It should 'tackle social rights issues according to a coherent theory of adjudication, instead of having recourse to case-by-case solutions that lack comprehensive reasoning'.[333] Palmer sees improvement, but also holds that 'in the light of differences between national policies and administrative procedures for the fair distribution of public resources, the incremental approach to the protection of socio-economic rights through the interpretation of Articles 6 and 14 ECHR remains problematic'.[334]

Indeed, the idea that 'cases make bad law'[335] is especially relevant in the sensitive field that forms the focus of this study. After all, focusing on cases and their analogies leaves little room for developing a principled approach to this expanding field of Convention protection, even though judgments can have far-reaching policy and budgetary effects.[336] Much attention is always had to the Court's interpretative principles, *i.e.*, to problems inherent especially in its autonomous and evolutive approach. According to Gerards, however, 'the criticism that is often rendered on the Court's use of such methods misses the point', and the actual (interpretative) problems may in fact lie in the Court's incremental approach and analogical reasoning.[337] This means that if one wants to solve particular issues concerning the Court's case law, this is where potential room for improvement could be found.

Another strand of criticism of the Court's socio-economic case law is that it tends to promise a lot, while eventually, actual protection is not often granted. In more technical terms: the ECtHR's interpretation generally leaves room for *prima facie* protection of economic and social interests, but at the application stage not much of this protection is left. Krieger in this regard speaks of 'ein

331 *Ibid.*, p. 180.
332 *Ibid.*, p. 183.
333 Mantouvalou 2005, p. 584.
334 Palmer 2009, p. 397.
335 With reference to the context of the Court, see Gerards 2012, p. 183. In his famous dissenting opinion in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401 (1904), US Supreme Court Justice Holmes wrote that '[g]reat cases, like hard cases, make bad law'. See also, *e.g.*, Schauer 2006; Sunstein 1996, pp. 67 and 72.
336 According to Mantouvalou 2005, p. 583, '[t]he adoption of the integrated approach has not been a matter of conscious choice for the ECtHR. That is why it is still unclear what exactly it entails and what outcomes it may lead to'.
337 Gerards 2012, p. 183.

leeres Versprechen' ('an empty promise').[338] Of course, it is almost self-evident that fundamental rights do not work as trumps in the socio-economic sphere.[339] Most of the time there are important general interests and budgetary concerns at stake. The way a state shapes its welfare policies lies at the heart of its democratic prerogatives. In the light of this, however, it must be asked whether it is sensible to hold that a great variety of socio-economic interests are covered by the Convention in the first place. Should there be a promise of meaningful review when it is likely that the Court defers to the position of the national authorities and eventual protection is more or less illusory? There are plenty of socio-economic interests that can be directly linked to, *e.g.*, an individual's private life. The question is however whether all of these should be allowed to form the starting point for review under the Convention when only few stand a chance against the general interests concerned.[340]

Of particular relevance here is also the Court's use of the margin of appreciation. Developed for granting deference to decisions of the national authorities, and thus underlining the Court's subsidiary task, this doctrine has become one of the scapegoats of those who critically analyse the Strasbourg fundamental rights system. It is said that the margin 'has become slippery and elusive as an eel' and seems to be used 'as a substitute for coherent and legal analysis of the issues at stake'.[341] In line with this, Palmer speaks of the 'variable use of the malleable margin of appreciation' as undermining the development of a more coherent approach to socio-economic protection.[342]

338 Krieger 2014, pp. 191-193.

339 See in this regard also the 'progressive implementation' requirement in the context of socio-economic protection under the ICESCR, *infra*, Ch. 5, S. 5.2.2.

340 Harris et al. 2009, pp. 365-366: 'It must be said also that the Court's expansive approach to the scope of private life holds out a promise of protection of individual interests which ultimately is rarely conceded by the Strasbourg authorities. The margin of appreciation allowed to states to determine what is required by "respect" and what interferences are "necessary in a democratic society" means that there are substantial burdens for an individual in making out his case successfully in Strasbourg even if he is able to identify his interest as falling within "private life". In fact, it would appear that establishing the relevance of a private life interest under Article 8(1) is relatively straightforward, the greater challenge is proving that there has been a disproportionate interference with that interest.' *Cf.* also Gerards 2012, p. 187ff. (on 'delineating fundamental rights); Harris et al. 2014, p. 531.

341 Lord Lester of Herne Hill 1998, p. 76. See, for criticism on this doctrine, also, *e.g.*, Kratochvíl 2011. See, further on the margin of appreciation, *infra*, Ch. 3, S. 3.5.

342 Palmer 2009, p. 399. In the words of Krieger 2014, p. 209: 'Entscheidend für die Legitimität der Spruchpraxis ist … eine konsistente Bestimmung des Umfangs der Kontrolldichte.' See also p. 212.

Unsurprisingly, the Court's incremental approach in combination with its broad interpretation and hesitant application leads to a great measure of uncertainty.[343] This is problematic not only for academics trying to make sense of the development of the Convention. It is also a shortcoming in practical terms where the interests of the Member States responsible for compliance with the Convention and the needs of individuals are concerned.

Altogether, it can be said that the Court has mainly been concerned with individual situations and with interpreting the Convention in a way that implies protection for complaints of a not so typically 'civil and political' kind. It is praiseworthy that it has created this room, thereby showing the willingness to move beyond categorisations of rights that should no longer form the starting point for a meaningful fundamental rights approach. According to the literature, however, in doing so it has failed to 'develop a position on socio-economic rights as such'.[344] In other words, no matter how much protection has been offered, the Court's approach

> 'has been flawed by a deep-seated reluctance … to define appropriately the parameters of its own adjudicative role in shaping the normative content of resource-intensive rights through the development of values and principles embodied in the ECHR'. [To a certain extent this] continues to undermine the development of a principled justificatory framework for the protection of socio-economic rights in member states.'[345]

But what about the notions of effectiveness and indivisibility? It is worth underlining here that although the theses presented in Section 2.5 allow for comprehending the developments thus far, they arguably cannot do much more than that. Obviously, both ideas serve well as a starting point for ensuring individual protection, which is what the practice of the Court should focus on. However, it has been argued that the Court also needs to consider other aims. It should also be mindful of its supranational task and show deference to national (democratic) decisions. It moreover has a 'constitutional' task in the sense that it should provide the necessary guidance to the Member States. Hence, whereas effectiveness and indivisibility serve one of the main aims of the Court and may urge it to recognise socio-economic interests as part of the Convention rights, reliance on these notions cannot as such ensure that the Court in its socio-economic case law strikes the right balance between individual, subsidiary and standard-setting protection.

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343 Mantouvalou 2013, p. 530: 'Even though the [ECtHR] has sometimes been willing to expand the scope of civil and political rights in the area of labour rights, at other times there has been uncertainty, which is evident both in the outcomes reached and the reasoning'.

344 Brems 2007, p. 164.

345 Palmer 2009, pp. 399-400.

The same goes for the normative justifications that according to Koch and Mantouvalou (should) underlie the Court's indivisible approach.[346] A hermeneutic approach that allows for interpreting the rights norms of the Convention in their broader context can ensure indivisible protection unrestricted by traditional labels.[347] Again, however, it focuses on creating interpretative room rather than on developing a principled approach to dealing with this leeway. Also the idea of freedom as a normative starting point for providing indivisible protection can be said to provide an interesting focus underlying a protective mechanism that captures both classic and social interests, and negative and positive ones.[348] It can clarify what the Court's socio-economic protection should be about, but fails to illuminate the way in which the Court in its reasoning can combine the protection of freedom with showing respect for national considerations and decisions.

Hence, effective and indivisible rights protection is at most a partial answer to the challenges the Court is facing. A principled approach, it can be argued, would be in need of additional starting points that allow the Court to really 'shape' its effective and indivisible protection. Ideally, these not only provide the necessary space for integrated rights protection that does justice to human needs and wants, but also fit the institutional position of the Court and the various roles it is expected to play.

2.7 Conclusion

This chapter has served a number of purposes. First, it aimed at introducing the ECHR's socio-economic dimension by showing how the different Convention articles can be engaged in the protection of economic and social interests. Secondly, it tried to make sense of this development by introducing two, partly overlapping outlooks on how this development can be understood. And thirdly, it problematised the approach of the ECtHR by pointing out some crucial questions and criticisms with regard to the further development of the ECHR's economic and social dimension.

The chapter could not have addressed these different topics without first analysing the specific background of the European Convention and the Court. The former was introduced as a civil and political rights treaty that foremost aims at the protection of civil and political liberties. This 'classic', 'negative' character of the Convention not only follows from the wording of the different norms it enumerates, it also is apparent from the historical groundings of the Convention. Like in the UN context, under the umbrella of the Council of

346 See, *supra*, S. 2.5.3.2.
347 Koch 2006; Koch 2009.
348 Mantouvalou 2013.

Europe economic and social rights have been laid down in a separate instrument (the (R)ESC), the status of which ranks second to that of the ECHR.

From the inception of the Convention, the collective enforcement mechanism this treaty envisaged has been one of its distinguishing features. Today, the ECtHR is perceived as setting an unparalleled example of effective supranational fundamental rights protection. Nevertheless, the smooth functioning of the Convention system cannot be taken for granted. With a steadily growing number of applications the Court has been confronted with a serious backlash endangering the functioning of the Strasbourg system. Moreover, especially in recent times the Court has been subject to serious criticism. The different avenues of criticism, it was argued, can be viewed against the backdrop of the Court's complex, multi-dimensional task. As a supranational court – as an important strand of criticism confirms – it is expected to take a deferential stance towards democratically legitimised decisions made at the national level. At the same time, the Court was created to serve the important task of providing effective fundamental rights protection, while it is also confronted with the demand for clear and general standards that enable the Member States to, where possible, ensure Convention guarantees by themselves. In addressing the criticism and assessing the Court's practice more generally, it is of paramount importance that, rather than highlighting a specific one, all of these aspects of the Court's task are taken into account.

Coming to the socio-economic dimension of the ECHR, attention was had to the various relevant Convention articles and the way in which these allow for the protection of interests of an economic or social kind. With the help of a broad interpretation of certain Convention norms as well as the recognition of positive obligations, growing attention has been dedicated to such interests. Anticipating a more thorough investigation of the Court's protection of socio-economic interests in later chapters of this study, it was shown that the ECtHR by now is dealing not only with classic freedoms like the right to life, the freedom of expression or of religion, but also with issues concerning social security benefits, housing policy, work-related rights, etc.

The socio-economic protection offered by the Court was then explained by outlining two different 'theses'. The effectiveness thesis provides an understanding of the development of the Convention's socio-economic dimension that rests on the need to 'effectuate' Convention norms even if this requires moving beyond their foremost classic and negative character. The different interpretative canons of the Strasbourg Court, in combination with its willingness to recognise positive obligations, can explain the ECtHR's (increasing) interference in the socio-economic sphere. An alternative yet related thesis is that of indivisibility. The idea of the interrelatedness, interconnectedness and indivisibility of civil and political and economic and social rights was presented as another angle from which the socio-economic dimension of the ECHR can be perceived. According to this idea, it is not the mere effectuation of Convention norms, but rather also the importance of economic and social

rights as such that explains the Court's engagement in this field. An important illustration of this idea is provided by the Court's explicit references to economic and social rights norms outside the Convention.

At least for analytical purposes, it is not necessary to make a choice between the effectiveness and the indivisibility thesis. In discussing the future potential of the protection of socio-economic interests under the Convention, it was shown that both understandings create room for further entering the field of economic and social rights, albeit a link with the wording of the ECHR norms remains imperative. At the same time, it was argued that reliance on these theses alone fails to form a sufficient starting point for a principled socio-economic case law. Even though they provide an explanation of, as well as a justification for the Court's interference in this sphere, more seems required for a sufficient response to the criticism directed at the Court and improving its reasoning in socio-economic cases in particular.

In this chapter it was everything but suggested that the Court should refrain from interfering in the social sphere altogether. Rather, the concern that has been voiced is how it can bring the evolving Strasbourg rights protection system in line with the different roles the Court is required to fulfil.[349] How can it provide for economic and social protection while refraining from overstepping the borders of its legitimate task? And more concretely, how can its reasoning be improved in order to ensure effectiveness while granting deference *and* providing for a more principled standard? In scholarly literature, some authors have already hinted at the possible role of 'core rights protection' in relation to the ECtHR's socio-economic case law.[350] Besides further investigating the socio-economic case law as well as the reasoning of the ECtHR, it is the particular purpose of this study to thoroughly explore this possibility for enhancing the Court's socio-economic practice in line with the parameters introduced in this chapter. Before starting this investigation, the following

349 See Krieger 2014, p. 200, who notes with regard to the protection of positive interests that it is not a matter of altering the systematic of the Court's current practice. What matters is 'den längst in der Rechtsprechung des Gerichtshofs angelegten methodisch-dogmatischen Vorkehrungen Rechnung zu tragen, die subjektiv-rechtlich einklagbaren Handlungspflichten mit dem Konsensprinzip ebenso wie mit den Grundsätzen von Gewaltenteilung und Demokratie in Mehrebenensystem im Einklang zu bringen'.

350 See Brems 2007, p. 167 ('[T]he Court might want to examine which benefits it can draw from the work accomplished by the social rights experts of other entities. In addition to defining the essence of each right, the UN General Comments have, in particular, emphasized issues of availability … , acceptability and quality.'), and also Koch 2002, p. 46ff. (speaking of '[t]he existence of minimum core standards?'); Koch 2003, p. 23 (asking 'whether the Court has established a not very well defined minimum core right to treatment for dying patient[s] without anyone to take care of them'); Palmer 2009, p. 408ff. (speaking of 'developing core responsibilities for socio-economic provision' in relation to Arts. 2, 3, and 8 ECHR); Koch 2009, p. 181ff. (asking whether there is 'a minimum core right to social cash benefits' under the Convention). *Cf.* also Gerards 2008, pp. 688-689; Gerards 2012, p. 195 (concerning the practice of the ECtHR in general).

chapter first provides some insights in the practice of fundamental rights adjudication, and rights reasoning in particular, to provide the necessary background for understanding where improvements to the Court's reasoning could be made.

3 The Stages of Fundamental Rights Adjudication

3.1 INTRODUCTION

The previous chapter aimed at setting the baseline for understanding the development of the socio-economic dimension of the ECHR. It was concluded that the socio-economic case law of the ECtHR is in need of a more principled approach. It is the purpose of this research to investigate what the notion of 'core rights' can add in this regard. However, before the idea of core rights can be explored and confronted with the practice of the Strasbourg Court, some further stage-setting needs to be done. It has become clear in Chapter 2 that much of the criticism of the ECtHR's socio-economic case law has to do with perceived shortcomings in the Court's reasoning. For exploring means for improvement, thus, it must first be understood what possibilities the Court has in this regard.

Important is that in fundamental rights adjudication different stages can be distinguished that together form the framework for a court's reasoning in a given case. These stages and the ways in which they can be approached will be outlined in this chapter. This reveals the different tasks inherent in the adjudicative process the fulfilment of which may help to structure the eventual judgment. In this way, the chapter will serve as the background against which later the different manifestations of core rights can be grouped and understood.[1]

The two main stages of fundamental rights adjudication distinguished in the present book are the determination of the scope of the right at stake (interpretation) and the review of the justification given for interfering with that right (application).[2] This distinction follows from the structure of fundamental rights and moreover serves a number of practical aims. Next to these stages, the task of determining the intensity of review can be identified. The determination of the intensity of review is generally not considered to form a separate adjudicative stage, but it is submitted here that this task is of central

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1 See, *infra*, Ch. 7, and in particular S. 7.2.2.

2 The starting point here is that there are *two* main stages. In the literature sometimes also a third stage is recognised. This third stage concerns that what happens after a violation has been found and can hence be called the 'remedy stage'. See Barak 2012, pp. 26-27; Gerards 2005, pp. 28-29 (with regard to equality issues). This possible third stage, however, is beyond the scope of this book.

importance to the work of (supranational) courts ruling on conflicts concerning fundamental rights and, for that reason, deserves separate attention.

Although this book concentrates on the ECtHR, this chapter speaks of 'courts' more generally. Taking the Strasbourg context as the point of departure would create the risk of limiting the view to the ECtHR's current practice. Thereby, too little attention would be given to alternative approaches to the different stages and tasks that might prove valuable for the remainder of this book. At the same time, because of this study's focus, there is no need for providing an exhaustive overview of all the shapes fundamental rights adjudication can take. The eventual aim is to improve the reasoning of the Strasbourg Court and the options presented should hence be sufficiently relevant to this court's problematic.

In the following, first of all the distinction made between the different stages and tasks relevant to fundamental rights adjudication will be further illuminated (Section 3.2). After that, the interpretation stage, the application stage,[3] and the task of determining the intensity of review are explored separately. The focus thereby lies on the array of alternatives available to courts when they are dealing with the respective tasks. First, the determination of scope is discussed (Section 3.3). It is explained that, at this stage, a court can opt for a more wide or a more narrow scope. Also it is seen how the positive or negative, classical or socio-economic character of the rights concerned may have an impact on the determination of the *prima facie* meaning of fundamental rights norms. Secondly, in Section 3.4, the focus shifts to the review of the justifications given for interferences with fundamental rights. It is set out in this section that courts can opt for a broader or narrower definition of limitations of rights and that they can use different tests for establishing whether such limitations pass muster. They can apply a proportionality test and engage in 'balancing' interests, but they also could rely on more categorical and less *ad hoc* forms of reasoning. Finally, in Section 3.5, the determination of the intensity of review is discussed. Here it is explained that courts usually apply either more fluid or less flexible levels of scrutiny, and that the factors that determine the level of intensity can vary, too. The findings of this chapter are summarised in Section 3.6.

3 'Application stage' must not be confused with the moment at which the applicability of a right is determined (that, indeed, is here termed the 'interpretation stage'). Application is used here to mean the same as 'reviewing the justification' or 'reviewing the limitation', *i.e.*, *applying* the applicable right to the circumstances of the case at hand.

3.2 The Structure of Fundamental Rights and the Stages of Fundamental Rights Adjudication

It might seem natural that, when talking about fundamental rights adjudication, a distinction is made between the determination of scope and the review of the justification.[4] Former ECtHR Judge Fitzmaurice, for example, stated in his dissenting opinion in the case of *Marckx v. Belgium* that the two main stages distinguished here 'are elementary, standard propositions which should not need stating because they are such as everyone would assent to in principle'.[5] Still, it is worth explaining in some detail why this distinction is so valuable in adjudicating fundamental rights cases.[6] Next to that, it requires clarification why in this research a third important task, *i.e.*, the determination of the intensity of review, is singled out.

3.2.1 Distinguishing Between Two Main Stages

In legal scholarship the distinction between determining the scope of rights and assessing the justification for limitations of these rights is generally recognised. It stems from the idea that most fundamental rights are no absolutes. It is recognised that individual rights alone do not suffice to meet the needs of society, and that there can be countervailing (legal) interests that under certain circumstances take precedence. Alexy, in his famous *Theorie der Grundrechte*,[7] explains the existence of limits to constitutional rights by linking this to the differentiated structure of fundamental rights.[8] The concept of a limit to a right signals that there are two things, connected by a 'relation of limitation'. First, there is 'the *right in itself*, which is not limited, and secondly, there is what is left over when the limit has been applied, *i.e.*, the *right as*

4 See, *e.g.*, Faigman 1992, pp. 1522-1523; Alexy 2002, p. 196ff. (*cf.* also p. 84ff., 178ff.); Van der Schyff 2005, p. 11ff.; Gerards and Senden 2009, p. 620; Cohen-Eliya and Porat 2010, p. 263; Barak 2012. Many high courts around the world have adopted this distinction, see, Gardbaum 2007, pp. 806-807; Möller 2012, p. 23. According to Weinrib 2006, p. 93: 'In the postwar juridical paradigm, the determination of whether a right has been infringed requires a two-stage analysis.'

5 *Marckx v. Belgium*, ECtHR 13 June 1979, appl. no. 6833/74, see paras. 3-5 of the dissenting opinion.

6 Not in the least because some authors do question the relevance of the distinction, or at least do not use it, especially when it comes to human rights issues. See, *e.g.*, Matscher 1998, p. 18 and 37; Letsas 2007; Greer 2006; Miller 2008; Webber 2009; Jakab 2010; Letsas 2014.

7 Alexy 1985; Alexy 1994. In what follows, references will be made to the 2002 English translation by Julian Rivers, *A Theory of Constitutional Rights* (Alexy 2002).

8 Alexy 2002, p. 178ff.

limited.'[9] Hence, a differentiation is made between the *scope* of a fundamental right, and the room for limitation – or extent of *protection*.[10]

Phrased in this way, the distinction is of relevance not only at a conceptual level; it also plays a crucial role in the practice of fundamental rights adjudicators. It implies that courts must differentiate between the right and its scope on the one hand, and the question to what extent in a given case this right deserves protection on the other. More concretely this means that a court first needs to interpret the relevant right in order to see whether the complaint brought before it falls within this right's scope.[11] Only when this preliminary question is answered in the affirmative, it can review the justification adduced for the interference and reach a conclusion on whether the individual interest eventually is protected or not.

An example can clarify this. Article 11 ECHR, which contains the 'freedom of assembly and association', reads as follows:

> '1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.'

The first paragraph of this article states the rights norm in question. It makes clear that everyone enjoys the right to freedom of peaceful assembly, etc. In order to know when this right applies, it must be determined what 'peaceful assembly' as well as 'association with others, including the right to form and join trade unions for the protection of his interests' exactly means. The scope of this right, in other words, needs to be identified. Paragraph 2, then, indicates that in certain circumstances Article 11 ECHR can be justifiably limited. For this to be the case, the limitation must be prescribed by law.[12] Moreover, it must be 'necessary in a democratic society', *i.e.*, meet the requirements of proportionality, while fulfilling at least one of the purposes mentioned.[13] The phrasing of this particular fundamental rights norm thus clearly supports the

9 *Ibid.*, pp. 178-179.
10 Barak 2012, p. 19. See also Alexy 2002, p. 196.
11 This can be called the 'threshold question', see Faigman 1992, pp. 1522-1523.
12 Note that the word 'law' in the Convention means not just formal laws, or statutes. The Court has explained this notion 'autonomously', and moreover in a 'substantive' way. *Sunday Times v. the UK*, ECtHR 26 April 1979, appl. no. 6538/74, para. 47.
13 See, for a further discussion of proportionality, *infra*, S. 3.4.2.

idea of a division between the determination of scope and review of the justification. Whereas paragraph 1 states the *prima facie* right, paragraph 2 contains the 'limitation clause'.[14] The same goes for a number of other ECHR norms, such as Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), and Article 10 ECHR (freedom of expression). Also Article 1 of Protocol No. 1 to the ECHR (protection of property) communicates a clear division – just like indeed many of the norms enshrined in other fundamental rights catalogues.

Nevertheless, an express distinction in the wording of a right is not necessary for distinguishing between the two stages of adjudication in practice. Many fundamental rights norms do not contain express limitation clauses included in the article itself. Instead, in several fundamental rights documents the rights that are protected are enumerated as such, and the conditions for limitation relevant for these rights can be found in a general limitation clause.[15] Most often such a clause can be found at the end of the list of rights that is taken up in a constitution or treaty.[16] Moreover, there is a category of fundamental rights that neither contain a separate limitation clause, nor are subject to a general one, but for which an 'unwritten limitation clause' applies.[17] The possibility for limitation is then implied in the right at stake and can only be

14 In the words of Alexy, 2002, p. 185, a 'limiting clause is part of the complete constitutional norm which states how what is prima facie guaranteed by the constitutional right is or may be limited'. He holds that also qualifications in the norm of a right can be perceived as 'constitutionally immediate limits' and gives the example of the 'peaceably and without weapons' qualification in the rights norm of Art. 8(1) GG, the freedom of assembly. Because such a qualification can be perceived as a description 'of the material extent of the guarantee contained in a constitutional provision', he considers it to be a limiting clause applicable to the *prima facie* right (pp. 185-186). See, for a different view, Barak 2012, p. 33.

15 See, *e.g.*, Art. 1 of the Canadian Charter of Rights and Freedoms: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Also the South African constitution contains a general limitation clause: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including a) the nature of the right; b) the importance of the purpose of the limitation; c) the nature and extent of the limitation; d) the relation between the limitation and its purpose; and e) less restrictive means to achieve the purpose'(Art. 36(1)). For some rights, however, the South African Constitution also contains specific limitation clauses. See, *infra*, Ch. 6, S. 6.2. A final example is the clause contained in the Charter of Fundamental Rights of the European Union, in Art. 52(1): 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

16 See, *e.g.*, the South African Constitution and the Charter of Fundamental Rights of the European Union.

17 Alexy 2002, p. 185, 188.

seen from its application in practice.[18] Finally, there is the category of 'absolute rights'.[19] These rights are 'non-derogable' in the sense that they cannot be limited.[20] When an absolute right is interfered with, it is also violated. In other words, '[t]he extent of their protection or realization is equal to their scope as their limitation cannot be justified'.[21] The twofold structure of determination of scope and evaluation of limitations therefore does not seem relevant to these rights. This does not mean, however, that absolute rights do not have to be adjudicated in a 'structured' way. Just like limitable fundamental rights they require interpretation, *i.e.*, the scope of what is absolutely protected needs to be identified. Only once it is found that the interest complained about falls within the reach of a right, and is effectively interfered with, the conclusion follows that the right is violated. Article 3 ECHR provides a good example. According to this norm 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. As already indicated in Chapter 2, the ECtHR explains this article in an absolute manner,[22] and what it needs to do is therefore to answer the scope question by deciding what 'torture' or 'inhuman or degrading treatment or punishment' entails.

The distinction between scope and limitations fits well with an understanding of rights as principles. According to Alexy, derogable fundamental rights have a 'double aspect' and contain both rules and principles. The right as stated can be perceived as the 'rule', but it is not a 'complete rule' as it does not allow for solving a case by mere subsumption. Instead, there is room for competing interests, which means that a balance needs to be struck between the right and one or more of these interests. In this regard the constitutional right can be perceived as a principle, or, in Alexy's terminology, as an 'optimization requirement'.[23] It cannot be conceived of as a rule that – when valid – is fully protected. Rather, as a principle it states what is *prima facie* required, and it is up to a court to then 'review the limitation', *i.e.*, decide whether the funda-

18 Consider for example the rights laid down in the US Constitution. See, *e.g.*, Gardbaum 2007, who emphasises the power to override rights, even though it 'tends to be somewhat obscured in the United States by the absence of express limits on rights and, thus, a textually mandated two-stage process of rights adjudication' (p. 789).

19 Also called 'unqualified' rights, see Kavanagh 2009, p. 257.

20 And thereby not in the sense of Art. 15(2) ECHR, where certain exceptions to the derogability of ECHR rights in times of emergency are outlined.

21 Barak 2012, p. 27.

22 *Cf. Ramirez Sanchez v. France*, ECtHR (GC) 4 June 2006, appl. no. 59450/00, para. 115. See, *supra*, Ch. 2, S. 2.4.3.2. See, however, on the debate on het absolute character of Article 3, Smet 2014 (with further references) and Van der Schyff 2014, p. 68.

23 'Principles are *optimization requirements*, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules' (Alexy 2002, pp. 47-48).

mental rights principle, or rather the principle with which it conflicts (the competing interest), prevails.[24]

However, for relying on a bifurcated approach it is not necessary to conceive of rights as principles in the way Alexy does. Alexy's theory implies that whenever a conflict between a fundamental rights principle and another principle occurs, neither will enjoy 'precedence *per se*'.[25] Importantly, thus, his theory does not prioritise fundamental rights over other principles or interests. Rights can however also be perceived as particularly important, and *a priori* weighty 'rules'. This does not have to mean that they are seen as 'trumps'[26] in the sense of not allowing for any interference whatsoever, yet it does imply that rights have a special status conferred on them.[27] Barak, for example, distinguishes quite strongly between 'constitutional rights' and 'public interest' concerns.[28] The reason he does not want to use the term '*prima facie* rights' is because in his view, also when a fundamental right is limited, this does not alter this right's scope at the constitutional level.[29] In other words, he accords a special status to the right as it is initially stated, which may then also be reflected in a court's interpretation or its review of limitations. Thus, although Alexy's is probably the most sophisticated explanation of the structure of rights, acting upon this structure as such does not require that rights are understood in his particular way.

At the same time, of those authors who do not see rights as principles, some thereby also explicitly reject a bifurcated approach. Sceptics of the idea of

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24 *Ibid.*, p. 50ff.

25 *Ibid.*, p. 51.

26 Dworkin 1984. Dworkin's notion of 'trumps' and the related distinction between principles and policies (Dworkin 1977, Dworkin 1985) as well as Habermas' description of rights as firewalls (Habermas 1996, p. 254; see also Rawls' priority of the right over the good, Rawls 1993, p. 173) present an image of rights as blocking any potentially overriding powers or interests *Cf.* also Fried 1978, p. 81. In its pure form, however, this idea has been criticised, for it would imply that the category of rights could only be a very limited one. Kumm 2004, p. 592, for example points out that the category of these absolute rights would be mainly empty, or, that this asks for a definition of rights that includes 'only the reasons against which the rights-holder enjoys categorical protection'. This however, entails the problem of dealing with infringements of an individual's interest that is massively disproportionate. The categorically exclusion of reasons does not take account of this. The possible exception given by authors defending the 'trumps theory' is in case of genuine 'catastrophe'. As Schauer 1993 (p. 424) however points out, this does not explain 'the possibility that deontologically conceived rights may have to be overridden when interests would otherwise have to be sacrificed to a very large, but short of catastrophic, extent'.

27 *Cf.*, for a critical response to Alexy in this regard, *e.g.*, Habermas 1992, p. 309ff., 317.

28 Barak 2012, p. 39ff.

29 *Ibid.*, pp. 37-38: '[W]hen a constitution defines a right ("scope"), and at the same time allows for the placement of justifiable limitations upon the realization of that right through sub-constitutional law ("the extent of its protection"), the existence of the power to limit the realization of the right, in and of itself, cannot turn the constitutional right into a *prima facie* right'.

distinguishing between the determination of what is *prima facie* covered by a right and applying this 'principle' in the light of conflicting ones, underline that this distinction should be at most of inferior concern.[30] What counts when fundamental or human rights are at stake is after all the end-result.[31] It is not necessary to speak of *prima facie* application since, in the words of Jakab, 'provisions protecting fundamental rights (… [like] the freedom of speech) do not prohibit a restriction … of the freedom of expression, only its breach'.[32] Strictly seen, the latter point is correct, yet it does not follow from this that there can be no reasons for determining a '*prima facie* right' at all.

Indeed, next to the somewhat theoretical reason related to the structure of rights, there are certain other considerations that argue in favour of distinguishing between the stages of interpretation and review of the limitation. First, this distinction can help to make visible what are actually the rights (or interests) that can be labelled 'fundamental'. It requires fundamental rights to be stated and delineated as recognisable individual spheres, before they are shaped by majority concerns and decisions. According to this argument, whilst majority interests might impart a presumptive validity to limitations of rights by the state, these should not conceal what these rights are first and foremost about.[33] The identification of *prima facie* rights is important not only for individuals who want to know when they can invoke their rights, but also for state authorities whose responsibilities are thereby clarified, too. It illuminates from what point on a legislative or executive act or omission is perceived as interfering with something that is part of the realm of fundamental individual rights. That is when the least intrusive measures need to be opted for and when it must be possible to state a sufficient justification.[34] Alternatively, the awareness that a fundamental right will be interfered with may be reason to preclude the act in order not to touch upon it in the first place.

30 On a more theoretical level, moreover, it is argued that rights and other interests are 'conceptually interconnected' or 'interdependent'. See Fallon 1993 and for a comment on his view Schauer 1993.

31 *E.g.*, Miller 2008; Webber 2009. See, with regard to the ECtHR. Both do not make a clear distinction between methods and principles important for the definition of scope and methods and principles concerning the review of justification. See also Ostrovsky 2005, p. 57, who in discussing the margin of appreciation also not clearly distinguishes between making interpreting a right and applying it. According the Gerards and Senden 2009, p. 623, '[i]nterpretation is thus regarded as a conglomerate of judicial decision making where only the final result counts'.

32 Jakab 2010, p. 150.

33 *Cf.* Faigman 1992, pp. 1525-1526. Linked to this is the idea that only by distinguishing the different tasks it can be ensured that rights are interpreted without taking into account the interests of the majority, whereas these indeed are of crucial importance at the second stage. See, for a further discussion of this point, *infra*, S. 3.3.3.

34 *Cf.* Barak 2012, p. 22, who holds that the burden of proof of such a justification falls on the state. See further Barak 2012, p. 435ff.

A two-stage approach is also important for the identification of judicial competences. More precisely, the distinction between interpretation and application is helpful because it enables the demarcation of the judicial task. Interpreting rights at a separate, preliminary stage urges a court to explain why its jurisdiction does or does not extend to the case at hand. In other words, by means of interpretation it needs to clarify whether and why the individual interest does or does not fall within the scope of the right invoked. Only when it is convincingly argued that it does, a court is competent to review the matter.

In the light of these points, it can be said that especially also in the context of the ECtHR it is important to appreciate the distinction between the determination of scope and the application of a right. The ECtHR has to adjudicate the rights laid down in the Convention, of which some highly relevant ones, as was already discussed, contain an express limitation clause and hence urge for making this distinction.[35] Perhaps more importantly, also the specific role and position of the ECtHR as outlined in the previous chapter,[36] underline the need for bifurcated fundamental rights review. The ECtHR plays a guiding role, and needs to illuminate the standard set by the Convention in order for the Member States to apply this standard by themselves. Moreover, in order to not encroach upon state powers to a too serious extent, it should be clarified when and why the review of a case is a task for the Strasbourg court. A transparent determination of whether a Convention right is involved, and a justification is thus required, can help to meet these demands. Indeed, considering the multidimensional task of courts like the ECtHR that should not exclusively aim at ensuring effective, eventual individual protection, but also provide insightful reasoning, an undifferentiated approach seems unsatisfying.

Altogether, thus, this section has shown that the distinction between the two main stages of determining the scope and reviewing the limitation of a right is logically linked to the structure of fundamental rights. It is important, moreover, as it shows what fundamental rights are, where a court's competences start and end, and when a justification needs to be provided. How exactly the different stages have to be approached is yet another issue, and a particularly intricate one. Before discussing this issue, however, first the task of determining the intensity of review will be further introduced.

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35 See, in particular, Arts. 8-11 ECHR. Indeed, the distinction between the two phases generally plays an important role in the argumentation of the Court. The ECtHR habitually makes explicit that what it is doing is first determining whether or not the interest at stake falls within the right concerned, and only if that is the case it proceeds to the application stage. See Gerards and Senden 2009, p. 620. However, Gerards and Senden make clear that the Court sometimes, problematically, refrains from making a clear distinction. See also Leijten 2014, pp. 114-115.

36 See, *supra*, Ch. 2, S. 2.3.

3.2.2 The Task of Determining the Intensity of Review

In the introduction to this chapter it was indicated that next to the stages of interpretation and application it is valuable to also highlight the task of determining the intensity of review. This task is related mainly to the application stage. After a court has determined that an individual interest falls within the scope of a fundamental rights norm, it proceeds to reviewing the justification given for the interference and as a part of this process it decides – either more implicitly or explicitly – on the measure of deference that should thereby be granted.

An important reason for discussing this task separately can be found in the particular aim of this research, which is to identify how the idea of core rights can aid the adjudicative practice of the ECtHR in particular in dealing with socio-economic issues. Singling out the task of establishing the appropriate level of review could help to uncover possibilities for doing so that would have gone unnoticed had the investigation been restricted to the two stages dictated by the structure of fundamental rights. Besides this, there are two other reasons for why the intensity of review is considered a vital issue here. These relate to the character of fundamental rights review on the one hand, and to the supranational context in which the ECtHR is operating on the other.

When dealing with fundamental rights issues a court is generally confronted with a conflict between the State and an individual.[37] Phrased differently, in the context of fundamental rights conflicts a court usually has to decide on individual rights in the light of the room allowed to more general interests – or the rights of others – for interfering with these rights. These 'other' interests often are protected by means of a formal act or an authoritative decision, which cannot be considered lightly. Particularly according to the theory of separation of powers, courts need to grant a certain measure of leeway to publicly accountable bodies and democratic decision-making.[38] Indeed, whereas there is generally some room for individualised review of the effects of majority decisions, it remains the prerogative of authorities with (indirect) democratic legitimacy to balance individual and other concerns. In order to position themselves in relation to these authorities and their decision-making powers, it is necessary for courts to expressly take a deferential stance.

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37 Of course there is also the 'horizontal effect' ('*Drittwirkung*') of fundamental rights (*e.g.*, Möller 2012, pp. 10ff.). At least in the case of the ECtHR, however, complaints can only be filed against the state. To the extent that horizontal protection is relevant in this context, it relates to the obligations of the state for ensuring this protection. Harris et al. 2014, pp. 23-24, speak of the 'misleading' use of the term *Drittwirkung* in this regard, and note that there is a special responsibility for the state in case of 'privatisation'.

38 The counter-majoritarian difficulty (Bickel 1986) concerns the problem that unelected judges overrule the decision-making of elected officials. See also Waldron 2006 (on 'the core of the case against judicial review'). See however Ely 1980.

Furthermore, especially in the context of *supranational* rights adjudication the notion of intensity of review is an important one. Even more so than for national (constitutional) courts, for supranational courts it can be said that their task is of a subsidiary nature,[39] and thereby inherently limited. Whereas the former at the national level are to counterbalance decisions taken by the legislature or the executive, and can with relative ease engage in a dialogue with the other branches, the position of the latter is a more complex one. A supranational court's intervening power is generally subject to political concerns and when lacking the power to strike down national laws, the success of its efforts is for a great part dependent on acceptance and willingness at the national level. In line with this, a supranational court like the ECtHR will often be 'too far away' from the national level to assume the authority to closely scrutinise what has occurred there.[40] This seems to hold true especially when it comes to culturally or politically sensitive matters. Thus, providing for a measure of deference allows a supranational court to act in accordance with its subsidiary position, and can increase the acceptance of its judgments.

Given these points, however, it can be asked why one should speak of *the task of determining* the intensity of review in the sense of 'taking a decision' on the appropriate level of strictness. Should there not simply always be a great measure of deference? Indeed, the limited role of (supranational) courts implies that their review should generally be of a deferential kind. At the same time, when the protection of fundamental rights is concerned this is not always the case. The reason for diversification, *i.e.*, for sometimes opting for a more, and sometimes for a less deferential stance, is that regardless of the position of courts the importance of fundamental rights sometimes requires close scrutiny. It was already illustrated in the previous chapter that fundamental rights norms can cover a great variety of interests.[41] They can cover environmental nuisances or claims for higher pensions, but also instances of torture or serious interferences with someone's privacy. Not all of the issues covered by rights norms can be considered as fundamental: whereas in relation to some issues there may be ample room for differentiated ways of ensuring protection, when very serious interferences are concerned, a stricter stance seems appropriate.

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39 In fact, the task of a supranational court can be said to be of a 'double' subsidiary nature. Not only does it need to have regard to the (democratic) decisions made at the national level, but also to how the national courts have resolved a rights conflict.

40 In the words of the Court: '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 its "manifestly without reasonable foundation".' See *James and others v. the United Kingdom*, ECtHR 21 February 1986, appl. no. 8793/79, para. 46.

41 *Cf.* Gerards 2004, p. 139; Gerards 2005, pp. 79-81, on the need for differentiation in the intensity of the assessment in equal treatment cases.

Hence, the intensity of review is not something that is static, but instead may require a decision in the light of the individual interest concerned and the more specific room for manoeuvre that should be accorded to the state.[42]

Another point is whether, given the particular role and position of (supranational) courts, a measure of deference should not also be explicitly considered at the interpretation stage. A theoretically sound answer could be that because fundamental rights issues concern conflicts between the state and individuals they explicitly do not allow for showing deference, *i.e.*, for leaving room for democratic preferences, at the interpretation stage. *Prima facie* rights, different from the room for limitation, need to be determined to the greatest extent possible without taking into account what the legislature considers to be covered by fundamental rights, as this could make actual individual protection illusory.[43] However, in practice also at the interpretation stage a court's (supranational) position may result in some form of deference. This may for example entail that individual rights are not interpreted in the broadest way possible. A very generous interpretation would after all increase the fields and cases in which a court has the final say,[44] and this may be particularly problematic when (morally or politically) sensitive issues are concerned.[45] However, what is in this book referred to as the task of determining the intensity of the review, relates to the choice made for a measure of deference at the application stage, when it is reviewed whether, in the light of the fundamental right at stake, an interference is justified. To the extent that 'interpretive deference' is nevertheless relevant for this research, it will be dealt with in the following section, where the element of scope is discussed.

3.3 The First Stage: Determining the Scope of Fundamental Rights

Defining the scope of a fundamental right forms an important step in the process of fundamental rights adjudication, yet there is no single answer to the question how this should be done. It was indicated in the introduction to this chapter that the different steps a court needs to take when dealing with a fundamental rights complaint imply possibilities for taking one argumentative path rather than another. Also the definition of scope involves deliberate choices, informed by more and less authoritative viewpoints. The measure

42 In this regard 'it is interesting to examine what possible gradations in the intensity of the assessment are possible, what effects the variation in intensity may have on the judicial assessment … and what factors should be decisive when determining the appropriate level of intensity' (Gerards 2005, p. 81). To these issues, *infra*, S. 3.5 will turn.

43 See, *infra*, especially S. 3.3.3.

44 See, on the delineation of fundamental rights in the Strasbourg context, Gerards 2012, p. 187ff.

45 *Cf. e.g.*, *Vo v. France*, ECtHR 8 July 2004, appl. no. 53924/00, where the Court refrained from determining when, in the light of Art. 2 of the Convention (the right to life), 'life begins'.

of leeway a court has in choosing amongst the various options depends on the interpretative traditions considered important in a certain legal culture.[46] It is the aim of this section to elucidate the different possible approaches to determining the scope of a right that have at least the potential of being relevant to the Strasbourg practice.

As a preliminary, it is useful to stress that 'determining the scope of a right' does not demand that for all imaginable interests, a court's judgment clarifies whether or not they are covered. Rather, the starting point is whether the individual interest involved in a particular case can be subsumed under the relevant norm's header. Hence, 'determining the scope of a right' in fact must be taken to mean 'determining whether the individual interest at stake falls within the scope of the right'.[47] For practical reasons, however, this chapter will mainly speak of 'determining the scope of a right'.

Since determining the scope of a right is a matter of interpretation, this section first looks at the practice of interpreting fundamental rights norms (3.3.1). Subsequently, other perspectives are addressed that can inform a decision on the scope of a right (3.3.2). Finally, this section discusses why state interests should not play a role at the interpretation stage, and the problems this may lead to when rather than negative, positive (socio-economic) interests are concerned (3.3.3).

3.3.1 Interpreting Fundamental Rights

In order to see if an individual interest is sufficiently related or not to the fundamental rights norm invoked, this norm must be interpreted. Doctrines of constitutional and fundamental rights interpretation have been discussed in abundance and in much depth elsewhere.[48] In Chapter 2, moreover, the interpretative methods and principles most relevant for the ECtHR and this study in particular have already been illuminated.[49] Rather than providing a thorough investigation of such methods and principles, therefore, this section only briefly mentions a few pertinent issues.

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46 Barak 2012, pp. 63-64: '[A]lthough the judge is sometimes accorded judicial discretion by the system, this discretion is bounded by a limited set of values, traditions, history, and text that are unique to the system in which he operates'.

47 *Cf. ibid.*, p. 23, where he argues that the scope generally is not as time and place dependent as limitations are. This is true, but he is also right in writing that the scope depends on the rules of interpretation. This means that, for example in the case of the ECHR, the idea of a 'living instrument' weakens the 'static' character of the scope of a right.

48 With regard to the different aspects of the ECtHR's interpretive practice, see Gerards 2009; Senden 2011.

49 See, *supra*, Ch. 2, S. 2.5.2 in particular.

The interpretive aids that can be used in fundamental rights adjudication are manifold. Some of them are very well known and broadly shared, while others are less common because they for example relate to the practice of a specific court. There are methods of interpretation that explicitly focus on the relevant fundamental rights norm and its (static) meaning, while others rely on more dynamic sources and ideas not necessarily captured in the norm itself. Examples of the former are textual and originalist interpretation – methods that that are known for aiming at finding the 'true' meaning of a right according to what the text prescribes or its initiators intended, respectively.[50] While textual interpretation explicitly looks at the wording used, originalism (or 'intentionalism') focuses on the subjective intent of the drafters of specific fundamental rights. Both methods are often combined in the sense that what is sought after, is that what the founding fathers of a particular rights document thought they were writing down.

Other methods of interpretation include purposive, or teleological interpretation, as well as comparative interpretation. Teleological interpretation refers to the aim behind a provision or, alternatively, to the overarching objectives of the rights document.[51] This implies that the interpreter moves beyond the intended meaning of a text, *i.e.*, beyond what can be termed the 'subjective purpose' relevant for originalism or intentionalism,[52] and also looks at the aim behind the provision or the system as a whole ('objective purpose').[53] Comparative interpretation, on the other hand, makes use of comparative insights for determining the way in which the scope of a rights norm must be interpreted.[54] The idea behind this is that many jurisdictions share basic fundamental understandings and that comparative insights can therefore be helpful. Especially for a supranational court (internal) comparative interpretation can aid in finding the right middle way between too much restraint and activism. Once societal developments or understandings of rights are

50 These methods are especially visible still in the US (debate on the) interpretation of the constitution.

51 Barak 2012, p. 45, states that 'the right's scope is determined by the interpretation of the legal text in which it resides'. This should be done according to 'what is considered the best theory of constitutional interpretation, the theory of purposive interpretation' (p. 46). *Cf.* Barak 2005; Du Plessis 2002, paras. 32-52. See also, with regard to the ECtHR, Senden, p. 55ff., 91ff., in particular pp. 105-107, Gerards 2009, pp. 428-430; Senden 2011; Gerards 2014a, pp. 37-39.

52 Barak 2012, p. 48.

53 *Ibid.*, p. 48: '[P]urposive interpretation, with its holistic approach, takes into account both subjective and objective purposes … The constitutional purpose is therefore a synthesis between the study of the subjective purpose, as provided by the constitutional text and other external sources, and from the objective purpose, as provided again by the constitutional text and external sources … in case of conflict the latter "intention" will have the upper hand.' See also Barak 2005, p. 371; Du Plessis 2002, paras. 32-42.

54 See on this method of interpretation in relation to the practice of the ECtHR, *e.g.*, Senden 2011, in particular Ch. 6, S. 6.4, and Ch. 10; Gerards 2009, pp. 430-435; Gerards 2011, pp. 74-96; Gerards 2014b, pp. 36-37.

recognised and accepted by Member States, this can provide a good reason for a supranational court to develop its interpretation accordingly.[55] Sometimes consensus amongst Member States seems required, at other times a clear trend may be considered convincing enough, too.[56] It was already explained in Chapter 2 that both a teleological and a comparative method of interpretation are of particular relevance to the Strasbourg practice.[57]

What particular method(s) a court opts for, partly depends on the interpretative principles that are considered relevant in a given legal context.[58] An example can be given in relation to the principle of 'evolutive' interpretation. As indicated previously, according to this principle interpretations of rights can change over time.[59] When a court attaches value to an interpretation that keeps pace with societal changes, it is less likely that it will adhere to a textual method of interpretation compared to a consensus or a teleological method of interpretation. Also, it was said that in relation to some rights norms, the ECtHR relies on the principle of autonomous interpretation.[60] Such an interpretation expressly does not look at what certain notions imply in terms of national legal positions and for that reason can help identifying *prima facie* guarantees that ensure actual protection.[61] Also this principle can hence provide the necessary guidance in determining which methods to use in interpreting a particular rights norm.

Indeed, relevant for choosing between as well as combining adequate methods and principles of interpretation, is the particular adjudicative context. When it comes to the adjudication of fundamental rights, interpretative techniques must be used that fit the specific characteristics of these rights. Typically, fundamental rights provisions are more open-textured and vaguely formulated than other legal guarantees, thereby creating quite some room for creative interpretations as well as for development over time. Whether this is desirable,

55 *E.g.*, Senden 2011, p. 66ff.

56 See, with regard to the ECtHR, *ibid.*, p. 245ff.

57 See, *supra*, Ch. 2, S. 2.5.2.1 and S. 2.5.3.3, respectively.

58 See, for the distinction between interpretative methods and principles, Senden 2011, especially Ch. 4, and pp. 390-391.

59 See, *supra*, Ch. 2, S. 2.5.2.2. See also, *e.g.*, in relation to the ECtHR, Letsas 2012; Gerards 2008, p. 663-664; Senden 2011, Ch. 7, S. 7.4 (see also pp. 70-73 and Ch. 11).; Gerards 2014a, pp. 36-37. Barak speaks of 'pouring new content into old constitutional principles' (2012, p. 65). Next to the examples given in Ch. 2, this principle is clearly illustrated in a judgment of the German *Bundesverfassungsgericht* concerning life imprisonment without parole in which this court stated that '[s]ince the adoption of the Basic Law, our understanding of the content, function, and effect of basic rights has deepened. Additionally, the medical, psychological, and sociological effects of life imprisonment have become better known. Current attitudes are important in assessing the constitutionality of the imprisonment. New insights can influence and even change the evaluation of this punishment in terms of human dignity and the principles of a constitutional state'. See BVerfGE 45, 187.

60 See, *supra*, Ch. 2, S. 2.5.2.2.

61 *Cf.* Letsas 2004; Gerards 2009, pp. 430-435; Senden 2011, p. 176ff., Gerards 2014a, pp. 39-40.

however, depends on the way fundamental rights are perceived, as well as on the particular role and competences conferred upon a court vis-à-vis the other branches.

Finally, what must be noted in regard to the interpretation of fundamental rights is the importance of consistency. Even though it could be argued that effective, individual protection of fundamental rights demands a case-by-case determination of a norm's scope, it is generally agreed that once an interpretation has been given it acquires a certain permanence. Consistency implies that an interpretation is taken seriously by courts in future cases, and can hence be relied on by prospective complainants as well.[62] Gardbaum, who describes the determination of scope as a determination of a right's internal limits, holds that 'once [these are] specified, they always apply so that, where triggered, there simply is no constitutional right to be infringed'.[63] In turn, what has been considered to be covered by a rights norm, will continue to be understood as such in future cases. This is not to say that interpretations of a right, or 'internal limits', can never be adjusted. Indeed, certain interpretive starting points just discussed especially allow for this to happen, albeit in a transparent manner. It does mean, however, that the scope of a right must be determined keeping in mind that it will be meaningful beyond the specific context of a rights case. Closely related to the importance of consistent interpretation is the idea of 'analogical' interpretation, *i.e.*, of determining whether or not a specific interest falls within the scope of a right by comparing the case to earlier cases.[64] On the basis of analogies, similarities, and differences found, it can be decided whether the interest deserves *prima* protection.

3.3.2 Wide Scope versus Narrow Scope

As indicated previously, most individual fundamental rights norms contain 'vague' wording that is open to different understandings. One can think of liberties like the 'freedom to expression' or 'freedom of religion', both of which can be explained as covering less or more individual interests. For example, the right to freedom of expression can include a *prima facie* right to offend or stigmatise, whereas this could also be considered to fall outside of this right's scope. Even more indeterminate is the scope of general rights to liberty and

62 *Cf.* Barak 2012, p. 23, who holds that 'the extent of the right's realization or protection changes from time to time and from one issue to another, reflecting the needs of the time and place … The scope of the right itself, on the other hand, reflects the fundamental principles upon which the community is built, as interpreted according to the rules of constitutional interpretation. A change in the right's scope comes only via constitutional amendment or a change in the court's interpretation of the constitutional text'.

63 Gardbaum 2007, p. 803.

64 *Cf.*, in relation to the practice of the ECtHR, Gerards 2012.

equality, like the ones enshrined in the German Basic Law.[65] It is the interpreter's outlook on the desired inclusiveness of a right that can influence the shape these rights will obtain in practice.

Indeed, besides the different interpretative methods and principles just mentioned, also a court's – or a given legal culture's – preference for a broad or rather a narrow understanding of the concept of 'fundamental rights' can play an important role in the determination of scope. A distinction between the two approaches is clearly visible in legal thinking as well as in legal practice. Usually the two strains of thought not only inform the scope of rights, but also the accompanying room for limitations.[66] On the one hand, it is argued that both should be defined in a broad manner.[67] The idea is then that once an extensive interpretation of a fundamental right is given, there should be more room for justifiably interfering with this right.[68] On the other hand, fundamental rights can be defined more narrowly. Incorporating only few, particularly fundamental interests, is generally considered to leave little room for limitations and is likely to result in a less deferential attitude in applying the right. This section explores the reasons for choosing either of the two approaches to the extent that they concern the first stage of fundamental rights adjudication.[69]

Alexy is a clear proponent of a broad definition of fundamental rights. He holds that '[a] wide conception of scope is one in which everything which the relevant constitutional principle suggests should be protected falls within the scope of protection'.[70] According to Alexy a narrow interpretation is problematic, because the conclusions it prescribes do not ally with the permissive character of the norms enumerated in the constitution.[71] Excluding certain modes of exercising a right[72] 'means that acts which have the characteristics set out in the scope of constitutional permissive norms do not enjoy constitutional protection if they have further characteristics which are to be classified

65 Art. 2(1) GG provides that '[e]very person has the right to free development of their personality, to the extent that they do not infringe the rights of other s or offend against the constitutional order or public morals; Article 3(1) GG reads: 'All people are equal before the law.'

66 See, *e.g.*, Alexy 2002, p. 201; Kumm 2004; Kumm 2006; Kumm 2006a; Gerards and Senden 2009.

67 *E.g.*, Alexy 2002, Kumm; 2004 Van der Schyff 2005; Barak 2012; Van der Schyff 2014. More generally Gerards and Senden 2009.

68 *E.g.*, Kumm 2004, p. 583.

69 See for a further exploration of the 'application parts' of both approaches, *infra*, S. 3.4.1.

70 Alexy 2002, p. 210. Van der Schyff 2014 also proposes a wide definition specifically in the context of the ECtHR.

71 Alexy 2002, p. 205.

72 See Alexy's discussion on the theory of Müller 1969 (*ibid.*, p. 202ff.).

as unspecific modes of exercise'.[73] A rightsholder is consequently left with a liberty without the right to decide on the manner he wants to make use of it.[74]

Alexy's preference for a wide scope can be said to generate space for constitutional courts functioning as forums for principled justification.[75] In the words of Kumm:

> 'Alexy's construction of the relationship between judicially enforced constitutional rights and the democratic process is guided, ultimately, by the idea of realizing substantive justice as defined by the model of constitutional rights as principles. Rather than asking what justifies the 'countermajoritarian' imposition of outcomes by non-elected judges, he asks what justifies the authority of a legislative decision, when it can be established with sufficient certainty, by way of principled reasoning, that the decision clearly falls short of what constitutional justice requires.'[76]

In this way, Alexy's understanding of the scope of rights and the role of rights review can be linked to the more general idea of a 'culture of justification',[77] *i.e.*, to the idea that governmental action whenever it interferes with the individual sphere must be duly justified.[78] Also Möller, in expounding his 'global model of constitutional rights',[79] ties a broad interpretation of rights to the idea of justification. For him, 'the point of rights … is not to single out certain especially important interests for heightened protection'.[80] Rather than setting up some kind of threshold, 'the scope of freedom protected by rights must

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73 *Ibid.*, p. 205. Instead, 'Everything which has at least one characteristic, which – viewed in isolation – would suffice to bring the matter within the scope of the relevant right, does so, regardless of what other characteristics it has', and 'within the semantic leeway of the concepts defining the scope, wide interpretations are to be adopted'. Alexy 2002, p. 210; Alexy 1980, p. 186ff. A court should not take what falls within the scope of a right, away from it. When choosing between a relaxation of the meaning of a right or of the limitations, the latter should be preferred also for 'a citizen … who is interested in the form of argument and justification as well as the decision itself will find it more honest and more persuasive if the refusal to extend the protection of constitutional rights is justified by appeal to the constitutional rights of others or to competing public interests which the Constitution to be respected, than if he is told that his behaviour is not materially specific, or that it is covered by general laws, or that it is excluded from protection for some other reason which takes it outside the scope'. *See* Alexy 2002, pp. 212-213.

74 *Cf.* Isensee 1980, p. 10ff.

75 Kumm 2004, p. 384.

76 *Ibid.*, p. 589.

77 See, on a 'culture of justification', *e.g.*, Mureinik 1994; Dyzenhaus 1998; Cohen-Eliya and Porat 2011. *Cf.* also Cohen-Eliya and Porat 2013 (reviewing Barak's theory of proportionality in the light of the idea of a culture of justification) and Van der Schyff 2014 (speaking of the ECHR and the 'constitutionalisation of disputes', p. 73ff.).

78 *E.g.*, Barak 2012, p. 22.

79 Möller 2012. His theory is 'reconstructive', in the sense that 'it is a theory of the actual practice of constitutional rights law around the world' (p. 2).

80 *Ibid.*, p. 87

extend to everything which is in the interest of a person's autonomy'.[81] Combining a broad understanding of autonomy, with the acknowledgement of a right to autonomy, this means that

> 'any state action or omission which affects a person's ability to conduct his life according to his self-conception interferes with a constitutional right and thus triggers the duty of *justification*: to be legitimate, the state policy which denies the right-holder some element of control over his life must *take his autonomy interests adequately into account*.'[82]

As such, a broad scope provides individuals with a possibility to demand reasons for the decisions made by the majority, even when this often – and especially when more trivial interests are concerned – does not lead to the finding of a violation. In any case, including much in the scope of a right ensures that those cases that deserve eventual protection are not overlooked.[83]

What, then, would argue in favour of the second approach, *i.e.*, in favour of a generally more narrow definition of scope? It can be said that according to a narrow approach 'rights cover only a *limited domain* by protecting only certain *especially important* interests of individuals'.[84] Phrased differently, it holds that only individual interests that are particularly qualified enjoy protection,[85] so that instead of encompassing '[s]uch mundane matters as the prima facie right to ride horses in public woods or to feed pigeons in public squares',[86] a right to liberty would for example be limited to what could be called its more

81 *Ibid.*, p. 77.

82 *Ibid.*, p. 95. Indeed, although Möller considers that the two-stage approach to rights, 'reflects a useful way of splitting the question of whether the person's autonomy interest have been taken seriously' (p. 207), his approach clearly emphasises the second part of the test. This follows from the fact that in his account also trivial and even immoral activities are *prima facie* covered by the category of rights.

83 See Van der Schyff 2005, p. 32: '[T]he justification or source of a wide approach in respect of the protection rendered by a given right is to be sought in the primary function of a declaration of rights: namely that of a guarantor of fundamental rights. In other words, a wide interpretation should be followed in order to extend protection in terms of such a declaration to as many forms of conduct and interests as possible, both in range and depth, thereby contributing to the optimal satisfaction of its purpose as the primary, or at least an important, fundamental rights protection'. See, with reference to the ECHR, also Van der Schyff 2014.

84 Möller 2012, p. 2, who holds that this understanding is one of the characteristics of the dominant narrative of the philosophy of fundamental rights. However, he argues that under the global model of constitutional rights one can no longer speak of such a narrow interpretation.

85 *Cf.* Kumm 2004, p. 583, referring to the US Supreme Court's understanding of rights and their limitations.

86 *Ibid.*, p. 584; BVerfGE 39, 1; BVerfGE 88, 203.

essential features.[87] Generally, two sets of reasons have been given for opting for a narrow, or 'limited' understanding of the scope of rights.

First, there are the arguments that focus on the particular role of courts, perceived in the light of the balance amongst the different powers. Supporters of a narrow scope hold that a broad definition of fundamental rights creates too much room for courts to interfere with the choices made by the legislature.[88] It would 'disable the legislature in favor of the courts, which would be empowered, in many cases, to strike down unfavorable legislation that might interfere with individual rights'.[89] Even if a court does not have the power to invalidate legislative acts, it can be questioned whether its competences should stretch so far that it has a say on virtually every thinkable conflict of interests. This would after all be the consequence of interpreting fundamental rights in a very wide, or practically unlimited manner.

Secondly, reasons in favour of a limited scope of rights can be based on a preferred understanding of fundamental rights as being truly *fundamental* in kind, rather than as principles upon which no special status is conferred.[90] According to this line of argument it is undesirable to frame every conceivable individual interest in terms of a fundamental (or constitutional) right, as this might lead to the 'constitutionalisation' or 'juridification' of society.[91] In other words, an almost limitless *prima facie* understanding of rights may entail inflation of the concept of fundamental rights.[92] In this regard it has been argued that 'a premature rhetoric of rights can inflate expectations while masking a lack of claimable entitlements'.[93] Conceiving of rights in a broad manner could 'lead first to delusion and then to frustration', since much of what seems to be guaranteed is subsequently excluded from protection by means of legitimate limitations.[94]

The problem is then how to come to an appropriate delineation of the category of fundamental rights.[95] Generally, it is considered important that in outlining a right's scope, state interests should not be taken into account.

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87 *Ibid.*, p. 589 (referring to the US tradition). *Cf.* Ely 1980.

88 *Cf.* Van der Schyff 2005, p. 213 (with references); Alexy, 2002, p. 211; Gerards and Senden, 2009, p. 626. See also, *infra*, S. 3.2.1.

89 Gerards and Senden 2009, p. 626.

90 *Cf.* Alexy 2002, as discussed in, *supra*, S. 3.2.1.

91 *Cf.* Möller 2012, p. 107; Van der Schyff 2014, p. 73ff.

92 See, on the argument of 'constitutional rights-ification', Alexy 2002, p. 213, referring to Starck 1981, pp. 245 -246; Möller 2012. *Cf.* also Gerards and Senden 2009, p. 626ff; Gerards 2012; Gerards 2014.

93 O'Neill 1996, p. 133.

94 Alexy 2002, p. 345 (on the criticism directed at his two-stage approach; referring to Isensee 1980, pp. 382-383).

95 In the view of Griffin, for example, there are criteria for delineating what does and what does not belong to the notion of fundamental human rights. His substantive account is based on 'personhood' and uses this idea as a threshold for distinguishing such rights from mere personal interests. See Griffin 2008, pp. 32-33. For critique see Möller 2012, p. 60ff, who instead focuses on (a protected interests conception of) 'autonomy'.

It is obvious, however, that especially when for the reasons stated above a more limited interpretation of a fundamental right is favoured, there is a risk that its contours will nevertheless be influenced by state concerns and general interests. This point of concern will be elaborated further in the following subsection.

Besides the different reasons for and against a broad interpretation of fundamental rights, two final remarks can be made on this topic in relation to the current study. First, it must be kept in mind that the adjudicative context concerned here, namely that of the ECHR, is a supranational one, and that this sheds a particular light on the arguments presented. Importantly, to the extent that the arguments in favour of a more narrow understanding of *prima facie* guarantees focus on the appropriate and practically feasible role for courts in the broader web of public authority, they arguably gain particular significance in the context of supranational fundamental rights adjudication. The deference associated with this kind of adjudication provides a ground for not engaging in every individual interest-related matter. Rather, courts like the ECtHR emphasise that they are no 'courts of fourth instance', *i.e.*, not tasked to review the justification of every decision taken at the national level. For the Strasbourg court, moreover, also the workload argument is a valid one. The enormous backlog it has been facing for years now, intuitively would argue for everything but an 'as wide as possible' interpretation of ECHR rights.[96] However, as was explained in Chapter 2, at the same time the Strasbourg Court is there to provide 'practical and effective' fundamental rights protection, and it is of course true that a broad interpretation of rights ensures that even when interests appear trivial at first, the Court can review the matter at hand in order to see whether there has nevertheless been a breach of a fundamental ECHR right.

Secondly, and finally, it is worth noting that the wide/narrow distinction need not be a matter of either/or. A wide scope can be opted for with regard to the interpretation of one norm, while a court decides in favour of a more narrow approach in regard to another. Moreover, a wide scope need not be limitless in the sense that practically every time a right is invoked, a court considers that the claimant's interest falls within its scope.[97] In turn, 'narrow-

96 According to Gerards and Senden 2009, p. 629: 'The stage of the definition of scope would become rather empty if all individual interests, however far removed from the core of the right in question, were covered by the Convention. Instead, the determination of the scope of fundamental rights must be taken seriously so as to avoid having the court become overburdened with cases that have little to do with fundamental rights.' See also Gerards 2014, on 'the relationship between proliferation of rights and the case load of the ECtHR'.

97 Barak, who clearly prefers a broad interpretation, in this regard says the following: 'The interpretation of the constitutional text should not include, as per its proper interpretation, tenuously related issues not reflecting the reasons for which it was made' (Barak 2012, p. 71).

ness' does not necessarily imply that a *prima facie* right covers only a very limited number of interests, or that the interests that are considered to fall within a norm's scope cannot change or increase over time. Indeed, there are several in-between options a court may consider, too.

3.3.3 The Anti-Majoritarian Scope, Negative Rights and Positive Guarantees

It was already hinted at previously that courts should determine the scope of a right only on the basis of factors related to the right itself. State interests should not be a relevant consideration in defining what actually constitutes a fundamental right. Before moving to the second adjudicative stage, this subsection investigates this idea more thoroughly and asks in particular what this means for cases involving negative guarantees as well as for those that deal with positive obligations.

It is generally considered that in searching for a proper balance between individual rights and democratically legitimised decisions and actions, sufficient account must be had to the majoritarian principle that imparts a presumptive validity to state action. However, what should be prevented is that the majority also decides what is covered by the category of rights in the first place. Consider the example of the freedom of speech, which is considered to be a basic right and has therefore obtained a prominent position in constitutions and other fundamental rights catalogues. Thereby, however, protection against the majority is not automatically guaranteed. To avoid that individual guarantees like the freedom of speech become meaningless, it must be ensured that the interpretation of rights occurs *independently of* majority interests. What 'speech' *in concreto* means should not be for the government to decide, as true protection of this right thereby could become illusory.[98] State interests only should be taken into account at the right time and place, *i.e.*, after it is decided that an individual interest is covered by a right.[99] As was argued in Section

98 In the words of Faigman 1992, p. 1528: 'The *meaning* of the Constitution derives from factors outside the will of the majority. If the Constitution operates as a bulwark against majority tyranny, the majority's reasons for acting cannot define what actions constitute tyranny'.

99 *Cf.* Gerards and Senden 2009, p. 624: 'Whereas the courts must place the constitution in the forefront when defining individual rights, they have to step back when scrutinizing the limitation of these rights so as to respect the primacy of the legislature.' Also Barak makes clear that the proper place of public interest considerations in a two-stage approach to fundamental rights adjudication is not the determination of scope (Barak 2012, p. 76). Instead, these concerns need to inform the proportionality test. See also, *e.g.*, Van der Schyff 2005, p. 33; Van der Schyff 2014. According to Emiliou 1996, p. 53, '[t]he doctrinal separation between the constituent elements of basic rights and their limits avoids the inclusion of public interest and welfare considerations directly in the element of basic rights themselves. In this way, the danger of arbitrarily restricting freedom by way of an *ad hoc* definition

3.2.1, the importance of an independent interpretation of *prima facie* rights forms an important reason for why a distinction between the stages of interpretation and application should be made in the first place.

It must however be emphasised that it is not an easy task to determine the reach of a fundamental rights norm purely on the basis of the right itself.[100] It is difficult to perceive of a right in isolation from its particular societal context as well as from (state) traditions and practices.[101] Any delineation, therefore, runs the risk of being at least indirectly influenced by a 'balancing' of individual and general interests. For this reason the desirability of an anti-majoritarian scope may well form another ground for opting for a (very) broad interpretation of rights. After all, the more the *prima facie* understanding of a right encompasses, the less likely it is that minority interests are insufficiently taken into account, and where appropriate, the general interest may still prevail at the application stage.

Yet whereas such an approach may seem harmless in the context of negative freedoms, it is argued here that it is somewhat more problematic when complaints about omissions by the state are concerned. Generally, it is considered that the interpretation in cases concerning positive claims can proceed in the same way as when negative aspects of rights are concerned.[102] In principle, also for defining *prima facie* positive guarantees it is desirable to refrain from taking state interests into account,[103] and it can be argued that the interpretation of a right's positive scope should hence also take place in a 'generous' manner. According to Barak:

> 'First, one has to establish the scope of the positive constitutional right in question. That task is achieved through the process of constitutional interpretation, and the rules of constitutional interpretation apply. The positive constitutional right, much like the negative one, is interpreted from a generous viewpoint. The scope of the

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of basic rights is also avoided, ultimately ensuring optimal freedom'. See, for further authors (and jurisdictions) supporting this idea, Barak 2012, p. 77.

100 *Cf.* Fallon 1993, p. 344: 'In American constitutional law, rights typically do not operate, as we often assume, as conceptually independent constraints on the powers of government. We have no way of thinking about constitutional rights independent of what powers it would be prudent or desirable for government to have.'

101 In particular in a supranational rights context, moreover, it can be asked whether a fully independent approach to determining the scope of a right is always possible. Consider for example the ECtHR's 'consensus method of interpretation'. This method can hardly be understood as leaving out state concerns, but rather takes the standards applied in the different Member States as the starting point for determining what an ECHR right should *prima facie* entail. By applying a consensus method of interpretation, however, the Court not only has regard to consensus amongst legislatures, but instead to national standards – including those that are approved of or set by national highest court – more generally. See, on consensus interpretation, *e.g.*, Senden 2011, Ch. 6 and 10; Gerards 2009, pp. 430-435; Gerards 2011, pp. 74-96. See also, *infra*, S. 3.3.1.

102 Gerards and Senden 2009; Barak 2012. See on this topic also Lavrysen 2014.

103 Gerards and Senden 2009.

> positive constitutional right may conflict with the scope of another constitutional right – whether positive or negative. The resolution of the conflict is not through the limitation of the scope of the positive constitutional right.'[104]

It can be asked, however, whether giving a broad, 'independent' interpretation to positive (aspects of) rights is this straightforward. The scope a right determines a court's competences, but it also informs the other branches about when a fundamental right is at stake. Although an interference with a *prima facie* right does not automatically entail a breach of this right, a 'rights statement' can thus serve to show that there are certain obligations, which can only remain unfulfilled once there is a sufficient justification. However, there is an important difference between negative and positive obligations in this respect. Whereas in the case of negative guarantees *prima facie* protection means that the authorities need to *refrain from doing something*, *i.e.*, do nothing, unless there is a satisfactory reason for acting, in the case of positive obligations *action needs to be taken*, except for when the authorities can adduce a sufficient justification for failing to fulfil the relevant right.

If rights statements are taken at least somewhat seriously, thus, especially a broad interpretation of positive *prima facie* rights and obligations can be problematic. This can be the case for example when a court states that as of right, in principle everyone needs to be provided with adequate housing or the necessary medication.[105] Particularly when it comes to positive (socio-economic) guarantees adjudicated under negative, classic rights norms, there will then be a risk that a court is perceived as acting in a too activist manner. Indeed, rather than opting for an explicit, wide positive scope, the desire to avoid a 'majoritarian' interpretation may then result in the fact that no clear decision on the scope of a right is taken at all, *i.e.*, that no distinction is made between interpretation and application and the court instead resorts to an overall test of whether the omission of the state was justified. In the light of the importance of a bifurcated approach, such a practice seems questionable.[106]

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104 Barak 2012, pp. 429-430. To be sure, when speaking of positive constitutional rights, Barak does not only refer to rights norms or provisions, but also to 'positive rights' that are aspects of the broader right as stated.

105 Alexy, however, speaking of rights to positive state action, holds that '[i]t is the hallmark of balancing that more is prima facie required than definitively', thereby trying to overturn the critique that especially in the case of social rights, it is impermissible to state broad rights that can then be limited as this would lead 'first to delusion and then to frustration' (2002, p. 345).

106 *Cf.* also Leijten 2015.

3.4 THE SECOND STAGE: APPLICATION OF FUNDAMENTAL RIGHTS (REVIEWING THE LIMITATION)

In line with what was said in the previous section, it is clear that, rather than at the interpretation stage, state interests should foremost play role in the eventual review process. Having account to state interests in applying fundamental rights ensures 'an institutional dialogue about rights between the three arms of government, in contrast to representative or judicial monologues about rights'.[107] In determining what rights eventually entail, in other words, account must be had to public concerns and majority decisions in particular. It is in accordance with a traditional understanding of the separation of powers that the legislator, first, decides on the distribution of freedom by means of generally applicable laws. Only thereafter, a court can judge upon individualised claims, *in the light of* this democratically legitimised legal framework.[108]

In dealing with *prima facie* rights in relation to other 'goods', however, a range of possible approaches is thinkable. Different approaches are discussed and defended in detail elsewhere, and in line with the aim of this chapter the goal of this section is instead limited to introducing a few possible outlooks that are or could be relevant to the ECtHR's practice. First, the possibilities for applying fundamental rights will be phrased in terms of a wide versus a narrow understanding of limitations (3.4.1). Subsequently, more specific approaches to the application of fundamental rights are discussed, whereby the focus lies on the ideas of proportionality and 'balancing' on the one hand, and more categorical tests on the other (3.4.2).

3.4.1 Broad Definition of Limitations versus Narrow Definition of Limitations

Just like the scope of a fundamental right, the possibility of limiting fundamental rights can be understood either more broadly or more narrowly. As was already mentioned, the interpretation and the application stage interrelate on this point, and the reasons for preferring one understanding rather than the other are hence similar to those discussed in Section 3.3.2.[109] It is worth coming back to this issue, however, because it forms the baseline for the various approaches to rights review that will be discussed in following subsection. First, when many interests fall within the category of fundamental rights, this means that a great variety of disputes are perceived as conflicts

107 Debeljak 2008, p. 423.

108 For a recent contribution to the theory of separation of powers and the debate on the distinct roles of the different branches, see Möllers 2013.

109 In sense that a choice can be made for defining the scope *and* the limitation narrowly, or understanding *both* in a broad manner. See, *supra*, S. 3.2.2. But *cf.* Barak 2002, p. 72, who also presents a possible second and third view (wide scope, narrow limitations; narrow scope, wide limitations).

between the general interest and an individual fundamental right. From this it seems to follow that there should be ample room for limitations, in the sense that not all of these conflicts – and not even the majority of them – are then likely to constitute a breach of a fundamental right.[110] The combination of a 'wide scope' and a 'wide' understanding of justifiable limitations corresponds with what was called a 'culture of justification'.[111] This idea requires that a state provides reasons for its actions or omissions in a broad array of fields, and holds that it is the task of the court to assess these reasons. It also has the effect that the 'interim' conclusion that a state act or omission infringes upon a fundamental right, is not a very informative one, in the sense that 'having a right' does then not necessarily confer much on the rightsholder,[112] except for him having the right to have his complaint reviewed.

Secondly, according to a more 'narrow' approach only interests that are 'qualified', *i.e.*, that can truly be considered to stand out from individual interests more generally, fall within the category of fundamental constitutional or human rights. In turn, this means that there is less room for legitimate interferences. A narrow understanding of rights and limitations allies with a more limited understanding of the role ascribed to courts: rather than having the competence to review and judge upon complaints concerning a great deal of the conflicts that occur in modern society, it circumscribes this role so that it only covers the power to conclude on issues in which truly *fundamental* rights at stake. In line with this, the mere fact that an interest falls within a rights' scope has some predictive value to what the final outcome might be. There is, after all, less room for a flexible approach, because the seriousness of the infringements that come before a court demand prescribes a generally strict form of review.[113] The same argument applies to cases concerning positive obligations: when only a limited range of positive claims is perceived to be *prima facie* protected, it will be more difficult to justify an omission.

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110 In the practice of the *Bundesverfassungsgericht* this can mean that an infringement interfering with the penumbra of a right is justified as long as it was made in a procedurally correct fashion. According to Kumm 2006, p. 348, the requirements laid down in the limitation clause of Art. 2(1) ('rights of others, constitutional order, public morals'), 'in the jurisprudence of the Court translate into the requirements of legality and proportionality', and in case of a limitation of a not so crucial aspect of a right this test is easier to meet.

111 See, on a 'culture of justification', Mureinik 1994; Dyzenhaus 1998; Cohen-Eliya and Porat 2011. *Cf.* also Cohen-Eliya and Porat 2013 (reviewing Barak's theory of proportionality in the light of the idea of a culture of justification) and Van der Schyff 2014 (speaking of the ECHR and the 'constitutionalisation of disputes', see p. 73ff.).

112 Speaking of Alexy's theory, Kumm explains that '[h]aving a right does not confer much on the rights holder; that is to say, the fact that he or she has a prima facie right does not imply a position that entitles him/her to prevail over countervailing considerations of policy' (Kumm 2004, p. 582).

113 Hence, when it takes a 'particularly qualified' interest to speak of a fundamental right, the importance of this interest should be mirrored in the fact that only few limitations can be justified. When there is no such interest, this means that there is no room for judicial assessment under a fundamental rights norm in the first place.

Especially when backed by an individual complaints mechanism, like in the case of the ECHR, one of the purposes of a fundamental rights catalogue seems to be to detect those instances in which the authorities have gone too far, or alternatively, have done too little. This could be reason to argue for broad possibilities of review, as long as democratically supported reasons for interferences or omissions are taken serious. At the same time, the institutional setting of a court like the ECtHR may form an argument for not giving a too wide interpretation to both scope and limitations. After all, it can be asked whether supranational courts are always equipped for reviewing a very broad range of fundamental rights-related issues. In the previous chapter it was submitted that the ECtHR needs to provide for effective individual protection, but that it also is expected to outline a clear, basic standard that provides the necessary guidance to the Member States.[114] It is because of these different and sometimes conflicting aims, that the choice for one approach rather than the other is hard to make. Fortunately, the wide-narrow divide is not as dichotomous as it might appear: just as in the case of interpretation, a middle way may be available. Different rights, moreover, may ask for different approaches. Important is that a court's attitude in relation to this issue is not a given, but can be chosen and adjusted, at least to the extent the particular legal context allows for this.

3.4.2 Proportionality (Balancing of Interests) versus More Categorical Modes of Review

Besides the distinction between a broad and a more narrow understanding of limitations, there are different ways in which a court can reach a conclusion on the question of whether an interference with a right was justified. In particular, courts can either rely on proportionality review and *ad hoc* balancing exercises, or revert to more categorical modes of testing. As part of the broader debate on the role of courts the vices and virtues of both approaches have – especially in the US – been extensively discussed.[115] The arguments in favour of or against one of the two types of approaches are closely connected with questions on how courts can best ensure the rationality and insightfulness of their argumentation, as well as some degree of legal certainty and foreseeability of the law. In discussing the different arguments, the current section

114 According to Letsas 2007, p. 9, 'the ECHR is treated by the relevant actors (ie Member States, applicants, and judges) as enshrining rights that states have a *primary* duty obligation to respect when deploying coercive force, as opposed to a *secondary* obligation to compensate victims should they be found to be in breach of the Convention by the European Court of Human Rights. This attitude towards the ECHR is no less shared in Member States which follow dualism and in which domestic courts may not have jurisdiction to apply the Convention'. See, *supra*, Ch. 2, S. 2.3.

115 See, *e.g.*, Schlag 1985; Aleinikoff 1987; Pildes 1994.

will focus on those aspects of the debate that are or could become relevant for the Strasbourg practice.

Since most fundamental rights are relative in nature, as has been discussed previously,[116] there is in certain circumstances room for justifiably not fulfilling them. The measure by which the extent of the realisation of a right is measured is often that of proportionality. Put simply: 'Proportionate limitations of rights are justifiable; disproportionate ones are not'.[117] Proportionality entails more than the question of whether a limitation is proportional in the sense that there is a proper relation between the aims of the limitation and the means used. Instead, the proportionality of an interference is reviewed in the light of the fundamental nature of the right concerned. Only when the benefit of realising the purpose of the limitation is greater than the costs associated with the limitation of the right, it can be justified.[118]

The popularity of proportionality is mirrored in the fact that in many constitutions and other fundamental rights instruments this test is prescribed in more or less direct wording by (general or specific) limitation clauses.[119] Several articles of the ECHR for example require that an interference with a right is 'necessary in a democratic society'.[120] This is generally reviewed by means of a proportionality test. Also the three-fold requirement related to the right to freedom enumerated in the German *Grundgesetz* – 'Every person has the right to free development of their personality, to the extent that they do not infringe the rights of others or offend against the constitutional order or

116 See, *supra*, S. 3.2.1.

117 Rivers 2006, p. 174 (speaking of the Convention rights/the Human Rights Act).

118 In the words of Barak 2012, p. 132: 'Typically, proportionality is described as a criterion determining the proper relation between the aims and the means. This description may be misleading. It may suggest that the only relevant factors in considering proportionality are the purposes and the means chosen to achieve it; this is not accurate. The means chosen are not only examined in relation to the purpose they were meant to achieve; they are also examined in relation to the constitutional right. They provide the justification for limiting the right. Only means that can sustain both examinations are proper means. Only when the social importance of the benefit in realizing the proper purpose is greater than the social importance of preventing the harm caused by limiting the right, can we say that such a limitation is proportional. Thus, proportionality examines the purpose of the means, the constitutional right, and the proper relationship between them.'

119 See, for an example of a general limitation clause that explicitly refers to the principle of proportionality, Art. 52(1) Charter of Fundamental Rights of the European Union, which – for the relevant part – reads: 'Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

120 *Cf.* Arts. 8-11 ECHR, dealing with the right to respect for private and family life; the freedom of thought, conscience and religion; the freedom of expression; and the freedom of assembly and association, respectively. These articles expressly require an interference to be necessary in a democratic society (and lawful), which is followed by a list of legitimate aims.

public morals'[121] – tends to be translated into demands of proportionality.[122] The same can be said for the requirement of 'reasonableness'.[123]

This does not mean, however, that there is only 'one' proportionality test. Proportionality review comes in various forms, and its application is coloured by the relevant legal culture.[124] Generally, however, the principle of proportionality is concretised into four sub-principles or tests.[125] First, a limitation of a right should serve a *legitimate aim*. Secondly, it should meet the requirement of *suitability* for achieving the desired (legitimate) objective. This means that the law or measure the affects the right at stake should realise or at least advance the (legitimate) aim of that law or measure. When this is not the case, the interference is disproportional. Thirdly, there is the principle of *necessity*, which requires infringing measures to go no further than is necessary to achieve their objective.[126] The question that needs to be asked is whether there would have been less interfering means available by which the purpose would have nevertheless been realised. A positive answer would imply that the right concerned is breached. Finally, there is the aspect of *proportionality in the narrow sense*, or proportionality *stricto sensu*, *i.e.*, the requirement of a proper relation between the fulfilment of the purpose and the harm done to the right at stake.[127] The mode of assessment used to determine the latter is what Alexy, and with him many others, has termed 'balancing'.[128]

Indeed, ours, it is said, is an 'age of balancing'.[129] Regardless of the importance of the lawfulness, the suitability, and the necessity test, it is the idea of balancing that is omnipresent in today's legal thinking and practice practice. In the words of Pildes,

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121 Art. 2(1) GG.

122 Kumm 2006, p. 348.

123 *Cf.* Art. 1 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitutional Act 1982: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

124 *Cf.* Bomhoff 2014, for the argument that 'balancing' in fact means different things in different settings.

125 Möller 2012, pp. 13-14 (referring to the test of the German *Bundesverfassungsgericht*), Ch. 7. See also Alexy 2002, p. 66 (with references, see fn. 82); Rivers 2006, p. 178. For a slightly different understanding, see Barak 2012, p. 131, who identifies the following components: 'proper purpose, rational connection, necessary means, and a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right'.

126 In the wording of the *Bundesverfassungsgericht*: 'The end cannot equally well be achieved by the use of other means less burdensome for the individual' (BVerfGE 38, 281, (302)).

127 See, for an extensive study of this requirement in the practice of the ECtHR (and the Court of Justice of the European Union), Den Houdijker 2012.

128 Alexy 2002, p. 100.

129 This term is borrowed from Aleinikoff's influential article 'Constitutional Law in the Age of Balancing' (Aleinikoff 1987).

> '[c]ontemporary constitutional law presents most constitutional conflicts as ones between individual rights and state interests. The central role that metaphors of judicial balancing play in modern constitutional decision making emerges from organizing constitutional conflicts in these terms. When rights and state interests, each with their claim to legitimacy, are perceived to be in collision, we are compelled toward "weighing" the "strength" of state interests against the "degree" of intrusion on individual rights. "Balancing" becomes the principle technique of judicial decision.'[130]

Important in this regard is that the eventual balancing test is not only the most prominent one of the different tests, but that in reviewing cases concerning (positive) socio-economic obligations, it may also be considered the only meaningful one. In the words of Möller:

> 'The statement that constitutional rights law is all about proportionality must be qualified slightly because proportionality is generally applied only with regard to negative civil and political rights … It does not make much sense with regard to, in particular, socio-economic rights and positive obligations because in almost all circumstances the realization of those rights requires scare resources; therefore any limitation will always further the legitimate goal of saving resources and will always be suitable and necessary to the achievement of that goal. The only meaningful test would be the balancing stage.'[131]

It can be argued, however, that also negative rights can be costly, while on the other hand it is conceivable that a limitation of a positive right is not suitable or necessary for the achievement of any *more specific* goal. Nevertheless, also because in the case of omissions – when the state arguably has done 'too little' – it is harder to ask whether the 'aim' was legitimate, and the 'means' suitable or necessary, there is a great likelihood that review of positive rights boils down to an overall balancing exercise.

According to Aleinikoff, balancing is 'uncontroversial today because of its resonance with current conceptions of law and notions of rational decision-making'.[132] He holds that the balancing metaphor takes two distinct forms: First, a court can be guided by the fact that one interest 'outweighs' the other, and secondly, a court may conclude its test by stating that a 'fair balance' was struck.[133] Both conceptions have in common the idea that constitutional law

130 Pildes 1994, p. 711.
131 Möller 2012, p. 179.
132 Aleinikoff 1987, p. 944. Also: 'If constitutional interpretation is ultimately a reflection of larger, deeper trends in social consciousness, we may now simply be deaf to the criticisms of balancing. It is deeply engrained in us to see law as a forum for competing interests and moral and legal choice as turning on an evaluation of the strength of those interests' (p. 1004).
133 *Ibid.*, p. 946.

concerns disputes regarding competing interests, and the 'claimed ability to identify and place a value on those interests'.[134]

Alexy embraces the idea that constitutional conflicts are 'organized around the dynamics of individual rights versus state interests'.[135] Concurrently, however, he argues that '[s]uch interests and requirements cannot have weight in any quantifiable sense'.[136] According to his 'Law of Competing Principles', in the case of a conflict between an individual right and a state interest neither of these enjoys 'precedence *per se* over the other'.[137] Both have equal weight in the abstract, but one principle can be more important in a concrete case. The relation of precedence of one principle over the other is hence a conditional one: 'The circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence.'[138]

Alexy's theory is famous for the fact that it deduces the necessity of a balancing act from constitutional rights norms in their capacity as principles.[139] As was mentioned previously in this chapter, principles require optimisation, but they only do so to the extent legally and factually possible. The requirement of balancing – or: the principle of proportionality in the narrow sense – is derived from what is legally possible. Confronted with a conflict between principles, thus, according to Alexy it is imperative that the Law of Competing Principles be applied.[140]

Regardless of these justifications, however, balancing is often criticised for giving too much leeway to the court in charge of the balancing exercise. Consider for example the criticism propelled by Habermas concerning the Alexy-inspired case law of the German *Bundesverfassungsgericht*.[141] Habermas considers the '*Wertordnungslehre*', which rests on the idea of fundamental rights as value-laden principles that are to be optimised, to be an expression of wrong

134 *Ibid.*, p. 946.
135 Which Pildes seems to reject, see Pildes 1994, p. 749.
136 Alexy 2002, p. 52.
137 *Ibid.*, pp. 51-54 (referring to BVerfGE 51, 324 (345)).
138 A more technical reading of the 'Law of Competing Principles' (LCP) is: 'If principle P_1 takes precedence over principle P_2 in circumstances C: (P_1 **P** P_2)C, and if P_1 gives rise to legal consequences Q in circumstances C, then a valid rule applies which has C as its protasis and Q as its apdosis: C _ Q.' (Alexy 2002, p. 54.)
139 *Ibid.*, pp. 66-69. Or, as the *Bundesverfassungsericht* has stated, it emerges 'basically from the nature of constitutional rights themselves'. See BVerfGE 19, 342 (348f.); BVerfGE 65, 1 (44).
140 Alexy 2002, p. 67. Rather than considering it to be a logial necessity, Barak instead considers proportionality review 'the best' manner possible for dealing with conflicts involving rights (Barak 2012, p. 243). Möller, then, provides a substantive moral underpinning for Alexy's formal approach (Möller 2012, p. 2, fn. 1).
141 Habermas 1992, p. 309ff.

self-image of this court.[142] Balancing does not always lead to one necessary outcome, yet Alexy argues that it should not be regarded as a non-rational or irrational procedure for that reason.[143] The rationality of balancing indeed is not derived from the decision-making process leading to conditional preferences on the basis of the Law of Competing Principles, but instead from the *justification* of this statement of precedence. It is hence the rationality of the established statement that is important, which comes about by using 'all the arguments available in constitutional argumentation generally'.[144] The constitutive role for balancing exercises leads to the Law of Balancing that can be phrased as follows: 'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.'[145]

This, however, does not answer the other point of criticism, namely that a balancing test is too *ad hoc*. Balancing review focuses on the specific characteristics of a single fundamental rights matter and therefore does not have much predictive value. More generally, it is also argued that balancing may fail to recognise the crucial importance of fundamental rights. Even when not thinking of rights as trumps, it can be asked whether (certain aspects of) fundamental rights should in fact be capable of being 'balanced away'.[146] Finally, indeed, a more or less exclusive focus on balancing has the effect that

142 Habermas (*ibid.*, pp. 310-311) distinguishes between values and norms (and considers fundamental rights to belong to the second category): 'Prinzipien [in Habermas' understanding: 'norms', *not* Alexy's 'principles'] oder höherstufige Normen, in deren Licht andere Normen gerechtfertigt werden können, haben einen deontologischen, Werte hingegen einen teleologischen Sinn. Gültige Normen verpflichten ihre Adressaten ausnahmslos und gleichermaßen zu einem Verhalten, das generalisierte Verhaltenserwartungen erfüllt, während Werte als intersubjektiv geteilte Präferenzen zu verstehen sind.' 'Wer die Verfassung in einer konkreten Wertordnung aufgehen lassen möchte, verkennt deren spezifisch rechtlichen Charakter; als Rechtsnormen sind nämlich die Grundrechte, wie moralische Regeln, nach dem Modell verpflichtender Handlungsnormen geformt – und nicht nach dem attraktiver Güter' (p. 312).

143 Alexy 2002, p. 100ff.

144 *Ibid.*, p. 101: 'Since conditional statements of preference lead to rules, the justification of these is similar to the justification of other rules derived from the provisions in the constitution. In the latter case, all kinds of constitutional arguments can be made, and this hence also goes for the case of conditional statements of preference.'

145 Alexy 2002, p. 102. 'Degree' and 'importance' can indeed not be quantified in such way that an 'intersubjectively binding calculation of the result' can take place. See Alexy 2002, p. 105.The Law of Balancing does however identify what it is that counts, namely the degree to which one principle is not satisfied, versus the importance of satisfying the other. The lack of a concrete standard is made up for by the balancing model as a whole that ties the Law of Balancing to the general theory of rational legal argumentation (p. 107). Just like in the case of a separate determination of the scope of rights, it can be argued that in case of positive obligations it is more difficult to 'balance' the different interests. See, for the distinction, based on Alexy's model, between negative and positive rights, Klatt 2011.

146 *Cf.* Von Bernstorff 2011 (according to whom a strong judicial focus on balancing 'versperrt … die Herausbildung einer kerngehaltsschützenden menschenrechtlichen Rechtsprechung' (p. 167)). See also Von Bernstorff 2014.

the other important questions (necessity, suitability) do not obtain the attention they deserve. Arguably, the questions of whether an interference is suitable for achieving the aim and necessary for doing so can be dealt with in a more objective manner on the basis of more factual observations.[147] One way to address the different concerns would hence be to emphasise the other tests, making them more workable where necessary.[148] It must be kept in mind, however, that also the tests of suitability and necessity are not without problems, and can likewise evoke criticism.[149]

A different response would be to opt for a more 'categorical' approach. Rather than proposing *ad hoc* balancing this approach to reasoning fundamental rights cases uses rule-like tools.[150] Categorical approaches rely on legal categories that allow for classifying circumstances, thereby determining the legal outcome without having to 'weigh' the relevant rights and interests against each other.[151] An example is the use of 'exclusionary reasons',[152] which Pildes has defined as 'reasons *not* to act'.[153] These are reasons which a state *by definition* cannot invoke as justification for limiting rights: '[E]xclusionary reasons are preemptive, in that they categorically rule out the reasons they exclude. Thus, exclusionary reasons are not weighed against the reasons they exclude; rather they prevail in such conflicts.'[154] When an interference with a fundamental right is grounded on an exclusionary reason, a court will decide in favour of the individual, whose rights are then considered to be breached. Another form of 'categorical' reasoning would be to single out a category of especially important aspects of a right. Particular consequences can then be linked to this, in the sense that once such an aspect is concerned, a very strong

147 As Gerards 2013, p. 488, holds with regard to the ECtHR: '[I]f the Court would find, on the basis of empirical data, that the means chosen were inadequate or unnecessary, there would be no further need for it to investigate whether, in the end, the legislature or the administration did strike a reasonable balance'.

148 See, for suggestions with regard to the necessity test, *e.g.*, Gerards 2013, Bilchitz 2014a; Von Bernstorff 2014.

149 Indeed, it may be that extensive empirical data are needed in order to determine whether an interference was truly 'necessary'. This also goes for the question what the alternatives would be, en to which extent these would be effective.

150 See, *e.g.*, Sullivan 1992, who speaks of 'brightline boundaries'.

151 The difference between the two modes of thinking is well visible in the historical distinction between the German value-based '*Interessenjurisprudenz*' and more systematic '*Begriffsjurisprudenz*'. Barak 2012, pp. 503-504. See also Schauer 1981; Sullivan 1992. Pildes 1994, speaks of 'avoiding balancing' when he emphasises how in an era in which a balancing approach is held to be dominant, what courts in fact do is rather a qualitative than a quantitative exercise. In other words: conditions are formulated that enable a court to determine the case without truly having to 'weigh' the individual right against state interests.

152 Raz 1990, p. 190; Pildes 1994. For critique, see, *e.g.*, Edmundson 1993.

153 Pildes 1994, p. 712.

154 *Ibid.*, referring to Raz 1990: 'The very point of exclusionary reasons is to bypass issues of weight by excluding considerations of the excluded reasons regardless of weight.'

justification is required or an interference is simply not allowed. Categorisation may result in the identification of different kinds of 'rules' for different (aspects of) rights. Even with such differentiation, it can provide relative predictability as categories apply to more than one case only.

If a categorical approach is taken, however, a potential problem surfaces that concerns the formation of appropriate legal categories. When the applicable category determines the outcome of a case, but also when it merely informs the strictness of the test, the definition of the category or the 'rule' becomes of crucial importance.[155] Indeed, when a categorical approach is used, it is likely that a body of case law will emerge that concentrates on the creation of new categories or the modification of already existing ones.[156] Categorical approaches hence may seem to provide clarity and be of less *ad hoc* character, they also entail a degree of creativity and case-based analogy reasoning.[157] It is the task of the court to employ this creativity in an adequate manner to guarantee consistency and predictability, which in fact is not much less of a challenge than the task it faces when it resorts to a balancing approach.

Looking at proportionality/balancing versus categorisation debate, it is not immediately clear which approach is preferable. This is even more so because the two approaches cannot be fully separated to the extent that the act of 'categorising' may also be based on a kind of balancing, even if this balancing is of a more definitional or interpretative kind.[158] It can be asked, however, whether it is actually necessary to make a choice between a completely balancing-oriented approach and a completely categorisation-based approach. In fact, the different outlooks can relatively easily be combined, whereby categorisation can influence the 'how' of proportionality review. In particular, in respect to (one or all of) the respective tests (suitability, necessity, balancing) regard can be had to certain pre-fixed 'rules' or considerations. These can for example determine certain 'thresholds' that inform the applicable test. For example, the suitability and necessity requirements could be applied more strictly in a case in which a 'high level' right is at stake.[159] With regard to balancing,

155 This does not mean that these categories are only based on rights considerations. Rather, policy concerns and general interests can be taken into account for the determination of a category, see Barak 2012, p. 504.

156 *Ibid.*, p. 504.

157 According to Barak (*ibid.*, p. 505), '[s]uch creativity is expressed through a constant re-examination of the scope, the status, and the application of existing categories, as well as the creation of new ones'.

158 *Cf.* Stone Sweet and Mathews 2011.

159 The proper purpose requirement should be informed by a distinction between 'fundamental' or 'high level' rights and 'all the other rights', see Barak 2012, p. 531ff. The quality of the right hence sets the threshold for the proper purpose requirement. Also the rational connection component should pay due account to the character of a fundamental right and

the 'exclusionary reasons' approach can be used for certain interests, while for others *ad hoc* balancing could be applied. More or less in line with this, Barak suggests a 'principled balancing formula', which reflects 'a general legal norm which sets a constitutional principle that applies on a set of similar circumstances'.[160] In this way, 'balancing' could have more rule-like characteristics and an approach to proportionality review influenced by categorical reasoning can be developed.

In sum, at the application stage, different judicial approaches are thinkable. At the outer edges of the balancing-categorisation continuum there are approaches that focus on case-based circumstances that are 'weighed' and balanced against each other in an *ad hoc* fashion and pre-fixed categories that determine whether a right has been violated or not, respectively. Between these extremes, additional options can be found. Generally, it can be said that although proportionality review is currently the predominant method of rights application, it can easily be informed by at least some 'rules' that follow from earlier case law and set the stage for the particular instance of review. This study will return to the different tools a court has at its disposal in this respect when discussing possible ways for the ECtHR to enhance its socio-economic rights review by means of a 'core rights perspective'.[161]

3.5 Determining the Intensity of Review

It was explained at the outset of this chapter that, next to the stages of interpretation and application, special regard must be had to the definition of the intensity of the court's review. This has to do with the purpose of this chapter, namely to illustrate the different moments in the process of adjudicating a fundamental rights case at which a court can choose between different approaches. The task of determining the intensity of review does not represent an independent stage, but can rather be understood as a sub-part of the application stage. Indeed, the intensity of review is generally considered to be determined before the eventual proportionality or other test is applied and it is decided whether the right concerned has been breached.

In Section 3.2.3 it was explained why the intensity of review must be determined in the first place. The reason for this is that the variety of (more and less fundamental) issues a court is confronted with demands that the strictness of the test varies, too.[162] It was also submitted that especially a

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necessity, moreover, should be perceived as a 'threshold' and not lead to balancing (p. 338, 541).

160 *Ibid.*, p. 544.

161 See, *infra*, Ch. 7, and especially S. 7.4.

162 Craig 2006, p. 657; Gerards 2004, p. 139; Gerards 2005, pp. 79-81.

supranational fundamental rights court like the ECtHR can be expected to 'generally' show a reasonable measure of deference. In its function as a guarantor of fundamental individual rights that have been disregarded at the national level, however, in certain circumstances strict review seems required. In this section, different approaches to determining what level of strictness is appropriate are explored.

As a note on terminology, it must be stressed that a distinction can be made between 'standards of review' or 'levels of scrutiny', and the notion of 'deference'. All three notions are intrinsically linked to the question of how strict a court's test should be, but the first two concepts indicate the thoroughness of the test that will be applied, while 'deference' refers to the amount of distance that is considered appropriate in a particular case. Hence, the latter is mainly used to emphasise the degree of 'passivity' of a court, rather than the action that is taken. Nevertheless, just like in the practice of most courts, these different concepts will be used more or less interchangeably here.

In the following, attention will first be had to the distinction between 'sliding scale' approaches to determining the strictness of the test and 'categorical' levels of intensity (3.5.1). Combined with a basic explanation of the pros and cons of the two different approaches, this will serve to grasp the questions, options and limitations a court faces in relation to its task of determining the intensity of review. After that, the grounds for determining the appropriate intensity of review will be discussed (3.5.2). When deciding on the leeway that is granted, a court can look foremost to the right or interest that is at stake and reach a conclusion on the basis thereof. Alternatively, it can take into account multiple considerations in order to make a well-founded decision on the intensity of the test.

3.5.1 Fluid Degrees of Deference versus Categorical Levels of Scrutiny

The different approaches to the determination of the intensity of review can roughly be placed under two distinct headings. There are approaches that work with fluid degrees of deference, whereas also models with more strictly separated levels of intensity can be identified.[163] A preference for the latter – more 'categorical' approach – is especially visible in the US. Outside the US, and indeed also in the Strasbourg case law,[164] a less tangible 'degree' of deference usually characterises the applicability test.

Deference can be understood as the competence of a court to conclude on a violation only if any reasonable person could see that the measure taken was not appropriate or unreasonable. It can also imply that the court asks whether the measure is 'arbitrary', 'clearly excesses the bounds of discretion',

163 See, for this distinction, also Gerards 2004.

164 See, *e.g.*, Arai-Takahashi 2002; Gerards 2004; Greer 2006; Christofferson 2009; Gerards 2011a.

or is based on a 'manifest error'.[165] At the same time, a 'narrow margin of appreciation' can demand a detailed and thorough investigation of the justification adduced for the interference with a right.[166] Although the outer extremes, *i.e.*, a check of 'arbitrariness' or rather a very strict form of review, are less and more likely, respectively, to result in the finding of a violation, one of the characteristics of an approach that relies on 'degrees of deference' is that it remains unclear what the applicable degree exactly implies. Moreover, when it comes to such an approach the 'degrees in-between' are often even harder to concretise. In this regard one can speak of a 'sliding scale approach', which due to a lack of clearly separated levels may lead to confusion as regards the exact requirements as well as the expected outcomes of a particular intensity of review.[167]

By contrast, a more categorical 'levels of intensity' approach can be taken. The notion of 'categorisation' was discussed in the previous section, where it was presented as a particular approach to reviewing the justification advanced. This idea may also be used, however, merely in relation to the determination of the strictness of this review. The best example of a more 'categorical' approach to determining the intensity of the test applied in a given case can be found in the US. According to Barak, there, 'the categorical attributes of the right determines the level of constitutional scrutiny; that level of scrutiny, in turn, determines the limitations that may be placed on the rights at issue'.[168]

Traditionally, US black letter law distinguishes between three basic standards of review. The weakest form is labeled the 'rational basis test'. This test will be passed if the state's action was rationally related to a legitimate government purpose.[169] The burden of proof lies on the individual complaining of an alleged fundamental rights violation, and thereby the instances in which his interests prevail are rare. On the other end of the spectrum, 'strict scrutiny' can be found. When this level of intensity is applied, state action has to be

165 *E.g.*, Gerards 2011a, p. 87 (with further references).

166 Gerards 2004, p. 140 (with regard to the ECtHR's non-discrimination review): 'In these cases, the ECHR is willing to probe rather deeply into the reasonableness and legitimacy of the objectives themselves. Furthermore, the Court is especially severe with respect to the suitability, necessity and proportionality of the difference in treatment' [footnote omitted].

167 Gerards (*ibid.*, p. 141) with regard to the ECtHR notes that '[i]n between the two extremes of a wide and narrow margin of appreciation … there are many hybrids. Although the ECHR seems to have recognized this, it has not opted for a clear division in different levels of intensity having concrete and measurable effects for the substantive review of a justification. Instead, the Court sometimes speaks of the accordance of "a certain margin of appreciation", "a margin of appreciation", or of "less discretionary power of appreciation", without indicating the effects of such an in-between form'.

168 Barak 2012, p. 506.

169 485 U.S. 1, 14 (1988); 449 U.S. 166, 175, 177 (1980); 385 U.S. 522, 527 (1959).

necessary (narrowly tailored) for achieving a compelling government purpose.[170] It is up to the government to show that there is no less intruding alternative with which the – compelling – interest can be achieved. In this context there is a presumption in favour of the right, and the strict scrutiny test is hence famous for being 'strict in theory, but fatal in fact'.[171] Finally, different from the 'fluid', sliding scale model just presented, the US model also knows a clearly delineated in-between tier, namely, 'intermediate scrutiny'. According to this test an interfering law must be 'substantially related to an important government purpose'.[172] Here, the government's purpose does not need to be compelling, and neither do the means have to be necessary. However, this level of scrutiny does shift the burden of proof from the individual applicant contending a breach of his fundamental right, to the state.

Thus, the categorical approach as it is illustrated by the model used in the US is characterised by – at least[173] – three concrete tiers of scrutiny. These are intended to cover all possible cases, *i.e.*, also the cases in between the ones that deserve a very strict test and a very deferential one, and also provide for a clear indication of what the different levels of strictness in fact imply.

A comparison of the fluid and the categorical approach shows that a model consisting of clearly divided and described levels of scrutiny provides for more clarity than a sliding scale approach. Such clarity is provided not only with regard to what kinds of scrutiny exist in the first place, but also when it comes to the accompanying requirements and the outcome of a case. However, this comes with a serious downside. Depending on how exactly it is determined what tier of scrutiny should be applied, a categorical approach may lack the necessary flexibility for dealing with conflicts involving fundamental rights. Once a case falls into a specific category, after all, there is no room for the court to apply a different test than the one this category prescribes.[174]

In turn, when it comes to a sliding scale approach, it is the potential flexibility this approach is associated with that can be considered its most laudable characteristic. It allows for adjusting the strictness of the test to the unique fundamental rights issue at stake. Especially for a court like the ECtHR, which aims at individual rights redress, this seems to be important. Moreover, once a 'certain' margin of appreciation is opted for, this generally does not bring about concrete expectations as to what is required – let alone as to what will be the outcome of the case.

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170 466 U.S. 429, 432 (1984).

171 Gunther 1972, p. 8.

172 429 U.S. 190, 197 (1976); 463 U.S. 248, 266 (1983).

173 It is generally recognised that there are in fact more levels that have been developed in judicial practice. See, *e.g.*, Sunstein 1996, p. 77; Gerards 2005, pp. 393-395; Chemerinsky 2006, p. 542.

174 Indeed, as was also explained in, *supra*, S. 3.4.2, the question then becomes how the different categories are determined in the first place.

Nevertheless, the question remains whether the benefits of flexibility outweigh the lack of clarity it brings along. In answering this question a final issue cannot go unnoticed, namely, the question of which factors are considered relevant in deciding on the applicable standard, whether this is a fluid one or not.

3.5.2 Determination on the Basis of the Right versus on the Basis of a Combination of Factors

For providing a basic outlook on the different modes of determining the intensity of the review it is important to analyse the factors that are considered relevant for deciding the level, degree, or measure of deference to be employed. Put differently: what is the determination of the strictness of the test based on and to what extent does this matter?

In typical US fundamental rights review, the applicable level of scrutiny depends on the right that is concerned, in the sense that it is determined on the basis of the ground of discrimination at stake. As was just indicated, the interest of the state must always pass the rational basis test, but when specific rights are at stake, stricter tests will be applied. For example, according to the US doctrine intermediate scrutiny is the appropriate test in cases concerning gender discrimination, and those involving discrimination against non-marital children. Strict scrutiny is used when discrimination based on race or national origin is evaluated, or when alleged discrimination of aliens (generally) is concerned.[175] Grounding the choice for a particular level of scrutiny on the individual fundamental right at stake does not mean that state interests and the rights of others are completely left out of the equation. To the contrary, they play a crucial role in the actual assessment of the justification. In the categorical 'tiers of scrutiny' approach, after all, what is demanded in terms of the general interest is very well described.

A 'rights-based' approach seems attractive from the perspective of clarity and predictability, but is not always unproblematic. First, there is the issue of the level of abstractness. It may be asked whether the categorisation is based on the general right that is at stake, *e.g.*, by linking the level of scrutiny to the 'right to life' or the 'right to privacy' broadly speaking, or rather on a more concrete interpretation of what is at stake for the individual concerned.[176] Secondly, there is the inherent difficulty of determining which rights (or aspects thereof) deserve more or less intensive review. Especially when the

175 See, *e.g.*, Chemerinsky 2006, p. 671-672.

176 In this regard, it must be noted that the US approach, with its focus on the ground of discrimination concerned, does not necessarily take account of the severity of the interest involved. Discrimination on a less 'serious' ground may nevertheless have great impact on the individual concerned.

category to which a specific right belongs is likely to determine the outcome of the review of an interference with this right, identifying the rights or interests that deserve a thorough investigation of the justification adduced is a challenging exercise.

Alternatively, of course, an approach can be used that allows for taking more factors into account, such as the nature and level of intrusiveness of the measures taken or the actions not taken. The Strasbourg margin of appreciation for example 'will vary according to circumstances, subject matter and background'.[177] This may have the effect that 'a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy',[178] whereas the right these measures interfere with may at the same time speak in favour of a stricter test. Although an approach that looks at different factors is more flexible, it is equally vulnerable to criticism, albeit for different reasons. Once a choice is made for having regard to more than just the right at stake, the question arises exactly which other factors should be considered relevant. It may be questioned, for example, whether it is relevant that the measure was part of heavily debated social policy reforms, or whether its aim or the possibility of alternatives should be considered important. A court can also take into account the seriousness of the effects of the particular interference, or leave this out of the equation. The 'relevant factors' are hence difficult to determine, and to this it can be added that when aiming at taking into account 'all' relevant considerations advance is thereby taken on what is meant to be part of the eventual review. It may then easily occur that a court does not determine the applicable intensity of review as the starting point for reviewing the issue at hand, but that it concludes that the non-finding of a violation implies that the state acted within its margin of appreciation.

At least, the benefit of taking into account multiple considerations, in line with that of a 'sliding scale approach', is that there is some flexibility with regard to the relevant factors and/or the way in which these are balanced against one another. Again, however, the potential lack of clarity and predictability clearly argue against such an approach. Finally, what is preferred in this regard is indeed inherently related to whether a choice is made for a wide or rather a more narrow understanding of scope and limitations. In case of the latter, the issue of intensity of review may be somewhat more straightforward as the cases concerned are then generally of a more 'fundamental' kind. Yet when the former is opted for, it becomes all the more important that a court develops a well-thought-out and variable approach to the intensity of review.

177 *E.g.*, *Petrovic v Austria*, ECtHR 27 March 1990, appl. no. 20458/92, para. 38.
178 *E.g.*, *Stec a. O. v. the UK*, ECtHR (GC) 12 April 2006, appl. nos. 65731/01 and 65900/01, para. 52.

3.6 CONCLUSION

This chapter has investigated the different stages of fundamental rights adjudication. It explored the interpretation stage, the review of the justification, and the determination of the intensity of this review. The aim of this was first of all to show that distinguishing these stages is important, since they address different issues that require distinct judicial approaches and methods. It was shown that a court needs to decide, first, whether in a given case the individual right or interest concerned is *prima facie* protected by the norm invoked. Only if this threshold question is answered in the affirmative, the court can review whether an interference with this right can be justified. Also the task of determining the intensity of review was presented as an important one. In conflicts concerning fundamental rights and state interests a (supranational) court needs to take a deferential stance towards decisions made at the national level. Since fundamental rights issues may vary greatly, however, this measure of deference cannot always be the same.

Secondly, next to emphasising (the distinction between) the different stages as such, this chapter has shown that a court has multiple options at its disposal when dealing with the different tasks. At both adjudicatory stages, but also when a decision is being made on the strictness of the courts' review, different paths can be chosen. At the interpretation stage, a court can make use of different interpretive methods and principles, and moreover opt for a wider or rather a more narrow understanding of (certain) rights. Generally, it is considered that state interests should not be taken into account at the interpretation stage, yet it was shown that especially when positive rights are concerned this is not an easy task.

When applying the right, *i.e.*, when reviewing the limitation, a choice can be made between a wide and a more narrow understanding of limitations. Besides, when reaching a conclusion on the justification adduced, a proportionality test can be applied – which usually means that a court will engage in 'balancing' the different interests at stake. Alternatively, it can opt for less *ad hoc*, 'categorical' methods of review, or combine proportionality analysis with more rule-like tools.

Finally, when it comes to deciding on the strictness of the review, one possible approach is to use clearly separated levels of strictness that prescribe a particular test – and sometimes also a particular outcome. Another option is to choose for a 'sliding scale' model of deference, which implies that more fluid degrees of strictness are employed, the effects of which are less predictable. Moreover, a distinction was made between approaches that determine the measure of deference on the basis of the right concerned, and others that take more factors into account.

With the help of the different discussions, a picture has emerged of the adjudicatory process as a process consisting of various tasks that can be accom-

plished in different ways. This does not mean that a court always has to choose between extremes. Often, a middle way or combination of approaches is possible. Important is that these different approaches exist and that a choice for one approach rather than the other – albeit influenced by the relevant legal culture and traditions – is not a given.

All of the issues touched upon in this chapter could have been discussed in much greater detail. The overall aim of this chapter has however been to 'set the stage': to provide an insight in the framework of adjudication and fundamental rights reasoning that can be taken as the starting point for the remainder of this study. Although the chapter spoke of 'courts' generally, alternated with some references to the specific practice of the ECtHR, the discussion has focused on what are, or could be, more or less feasible options for the Strasbourg court. It is against the background of these options that later on in this study the different manifestations of core rights and their potential value for the ECtHR's reasoning in socio-economic cases can be understood and assessed. In the next part of this book a look is had at different core rights doctrines in order to show what exactly this notion can entail.

PART II

Core Rights Doctrines

4 The *Wesensgehaltsgarantie* and the German Constitution

4.1 INTRODUCTION

Part II of this book (Chapters 4, 5, and 6) explores the notions of core rights and core rights protection. It does do so by means of a comparative study of three 'core rights doctrines', which is conducted in order to investigate the potential as well as the pitfalls inherent in these notions. Thereby, the aim is to gain insights on the understanding and use of core rights in legal reasoning that could potentially be interesting for the ECtHR's protection of socio-economic rights.[1] In selecting the cases for this part of the study, a choice was made for three of the most well-developed core rights 'doctrines', namely the German *Wesensgehalt* doctrine, the protection of (minimum) core rights in the context of the International Covenant on Economic, Social and Cultural Rights, and the debate on the use and added value of core rights for the protection of socio-economic rights under the South African Constitution. Although these doctrines might not represent an exhaustive picture of what core rights protection can be about, they do allow for capturing the most significant features thereof, both in the context of civil and political and of economic and social rights, and at the national as well as at the international level.[2]

The first chapter of this part of the book discusses the German *Wesensgehalt* doctrine. In order to obtain a clear image of what this doctrine is about the chapter introduces the idea behind the *Wesensgehaltsgarantie* as well as its more concrete implications and content. It is demonstrated that the *Wesensgehaltsgarantie*, which is laid down in Article 19, Section 2 of the German *Grundgesetz* (the German Constitution or Basic Law; GG), first and foremost aims at preventing fundamental rights from becoming meaningless. The *Wesensgehaltsgarantie* conceives of the idea of 'core rights' as a positive, 'defensive' idea that under-

1 On the possible goals and potential pitfalls of comparative (constitutional) law, see, *e.g.*, Jackson 2010; Jackson 2012. In conducting the various comparative (or 'inspirational') studies, the different challenges of this exercise were taken into account in the best way possible. That is, the (legal) historical and cultural contexts of the different core rights doctrines have been regarded and described to the extent relevant for the current study. Moreover, for 'translating' the various core rights possibilities to the Strasbourg context, concern was given to the practice of the Strasbourg Court and the possibilities of rights reasoning as outlined in, *supra*, Ch. 2 and 3, respectively (see for this 'translation', *infra*, Ch. 7).

2 See further, *infra*, Ch. 7.

lines the importance of a broad range of fundamental rights as a category of individual guarantees, the essence of which deserves special protection.

In line with this, the reason to start Part II with a discussion of the German *Wesensgehaltgaratie* is that this doctrine presents a 'traditional' understanding of the notion of core rights. It perceives of this idea as a starting point for developing a protective mechanism against too extensive limitations of fundamental rights. The *Wesensgehaltsgarantie* is often characterised as a '*Schranken-Schranke*', *i.e.*, a limit to limitations.[3] This understanding can be taken as a point of departure for a further exploration of the possibilities and potential pitfalls inherent in the use of cores of rights in the following chapters.

To ensure a fair picture of the German doctrine and its implications, the *Wesensgehaltsgarantie* will be presented in the broader context of the German *Grundgesetz*. The discussion will focus on the meaning of Article 19, Section 2 GG, as well as on the role of this norm in the German approach to fundamental rights protection. In scholarly work, and especially in numerous commentaries, the various aspects of the *Wesensgehaltsgarantie* have received ample attention, which it why this topic can be discussed into relatively great detail. In Section 4.2 Article 19(2) GG is introduced and the provision's background, addressees and applicability are briefly discussed. Section 4.3 then concerns the debate on the concrete meaning and content of the *Wesensgehaltsgarantie*. In the more than sixty years of the existence of Article 19(2) GG there has remained quite some controversy over its precise interpretation and material protection. The debate concerns first the question of whether the *Wesensgehaltsgarantie* provides objective protection or rather (also) creates a subjective, individual guarantee. Secondly, the debate is about the important issue of whether the core of a right is to be understood in an absolute or in a relative manner, *i.e.*, whether the core of a right is independent from context and bars a balancing exercise, or instead always hinges upon the circumstances of the case. It is important to carefully look into both facets of the *Wesensgehaltsgarantie* debate as these shed light on when core rights could be utilised, *i.e.*, at what stage of fundamental rights adjudication, as well as on how this could be done, at least according to the German constitutional law understanding.

It must be noted at the outset that the German *Wesensgehaltsgarantie* is discussed in this book for the inspiration that can be found in its theoretical features, rather than for the role it plays in German constitutional adjudication. As Section 4.4 will show, the practical meaning of the *Wesensgehaltsgarantie* in German constitutional doctrine has remained limited. This section however also addresses some alternative notions resembling core rights that are readily visible in the practice of the *Bundesverfassungsgericht*, and that may prove inspiring for the current research, too.

3 *E.g.*, Dreier, in Dreier 2013, Vorb., no. 144, Art. 19 II, no. 7; Stern 1994, Bd. III/2, p. 865.

4.2 ARTICLE 19, SECTION 2 *GRUNDGESETZ*

Article 19, Section 2, of the German Constitution from 1949 reads as follows:

> 'In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden.'

This can be translated as follows:

> 'In no case may the core content of a constitutional right be infringed.'[4]

Article 19(2) GG is designated '*Sicherung des Wesengehalts*'[5], '*Garantie des Wesensgehalts*'[6], or simply '*Wesensgehaltsgarantie*'[7]. These descriptions stress the section's two most important aspects: the provision first concerns the *Wesen*, *i.e.*, the *core* or *essence*, of constitutional rights, and secondly, it aims at the *assurance* or *guarantee* thereof.

Next to the *Wesensgehaltsgarantie*, there are three more provisions contained in Article 19 GG. The article deals with the limitation of constitutional rights more generally, as well as with their applicability to legal persons and the right to access to court. More precisely, the *Wesensgehaltsgarantie* is found amongst the *Verbot des einschränkenden Einzelfallgesetzes* (Article 19(1), first sentence GG),[8] the *Zitiergebot* (Article 19(1), second sentence GG),[9] the *Geltung für Juristische Personen* (Article 19(3) GG)[10] and the *Rechtsweggarantie* (Article 19(4) GG).[11] Especially the guarantees laid down in Article 19(1), namely, that

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4 Alexy 2002, p. 432. Where possible, translations of the norms enshrined in the German Basic Law have been provided on the basis of Alexy 2002 (Appendix: The Constitutional Rights Provisions of the German Basic Law). Furthermore, citations from German literature in this chapter have been provided with a non-official translation, *i.e.*, a free translation by the author.

5 *E.g.*, Jarass, in Jarass/Pieroth 2012, Art. 19, no. 8ff.

6 *E.g.*, Sachs, in Sachs 2011, Art. 19, no. 33ff.

7 *E.g.*, Enders, in Epping/Hillgruber 2012, Art. 19, no. 19ff.

8 Art. 19(1) GG, first sentence: 'Soweit nach diesem Grundgesetz ein Grundrecht durch Gesetz oder auf Grund eines Gesetzes eingeschränkt werden kann, muß das Gesetz allgemein und nicht nur für den Einzelfall gelten' ('To the extent that this Basic Law permits a constitutional right to be limited by statute or on a statutory basis, that law must apply generally and not for a specific case.').

9 'Außerdem muß das Gesetz das Grundrecht unter Angabe des Artikels nennen.' See Art. 19(1) GG, second sentence ('Apart from that, the statute must identify the constitutional right by its article.').

10 'Die Grundrechte gelten auch für inländische juristische Personen, soweit sie ihrem Wesen nach auf diese anwendbar sind.' See Art. 19(3) GG ('Constitutional rights are also valid for domestic legal persons, to the extent that their substance makes them so applicable.').

11 'Wird jemand durch die öffentliche Gewalt in seinen Rechten verletzt, so steht ihm der Rechtsweg offen. Soweit eine andere Zuständigkeit nicht begründet ist, ist der ordentliche Rechtsweg gegeben. Artikel 10 Abs. 2 Satz 2 bleibt unberührt.' See Art. 19(4) GG ('If any person's rights are violated by a public authority, they have access to the courts. If no other

a limitation of fundamental rights must always be of a general nature and that the fundamental right that is being limited is identified in the statute, are often considered to be relevant for the interpretation of the *Wesensgehaltsgarantie*, as will be seen later. This can be explained by the fact that also the *Allgemeinheits-* and *Zitiergerbot* explicitly concern restrictions to the limitation of rights.

With regard to Article 19 GG it is often held that it forms part of a general fundamental rights doctrine.[12] In any case the provisions of Article 19 GG do not contain self-standing fundamental rights.[13] Rather, they concern requirements for the addressees of the different provisions concerning the protection of fundamental rights laid down elsewhere.[14] At the same time, when a fundamental rights-related act of the state is in breach of Article 19, Section 1 or 2 GG, this means that the fundamental constitutional right concerned is likewise violated.[15] Hence, a failure of the state to keep intact the core content of a fundamental right, means that a limitation of this right went too far and thus constitutes its violation. The law or act concerned is then unconstitutional, and must be regarded as null and void.[16]

Before further expanding on when exactly this is the case, the current section will first present some more background information on the *Wesensgehaltsgarantie* and the ideas behind it (4.2.1). Thereafter, the discussion will proceed to the question of who exactly is bound to take Article 19(2)GG into account (4.2.2). Finally, the applicability, or scope, of this guarantee will be addressed (4.2.3).

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courts with jurisdiction are established, recourse may be had to the ordinary courts. Article 10(2)(2) remains unaffected.').

12 This goes at least for Sections 1-3. See, *e.g.*, Remmert, in Maunz/Dürig 2012, Art. 19, Vorb., no. 3; Sachs, in Sachs 2012, Art. 19, no. 7. However, although this is clearly true when it comes to Art. 19(3) GG, for Sections 1 and 2 this is less obvious. It depends on whether these guarantees are considered relevant for all types of fundamental rights, or just for certain categories thereof (Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 3). See further, *infra*, S. 4.2.3.

13 See, *e.g.*, Remmert, in Maunz/Dürig 2012, Art. 19, Vorb., no. 4. See also Sachs, in Sachs 2012, Art. 19, no. 7; Hofmann, in Schmidt-Bleibtreu/Hofmann/Hopfauf 2011, Art. 19, no. 4; Drews 2005, p. 16; BVerfGE 1, 264 (280); BVerfGE 117, 302 (310): 'Soweit die Beschwerdeführerin einen Verstoß … gegen Art. 19 Abs. 1 und 2 … rügt, macht sie nicht die Verletzung eines Grundrechts geltend.'

14 Remmert, in Maunz/Dürig 2012, Art. 19, Vorb., no. 4. See also, *e.g.*, Dreier, in Dreier 2013, Art. 19 II, no. 7; *cf.* Zivier 1960, p. 35. According to Sachs, in Sachs 2011, Art. 19, no. 7, Art. 19 'trifft ergänzende Anorderungen für die Anwendung der Grundrechtsgewährleistungen'.

15 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 4.

16 *E.g.*, *Ibid.*, Art. 19 Abs. 2, no. 48. See also Stern 1994, Bd. III/2, pp. 876-877; Dreier, in Dreier 2013, Art. 19 II, no. 19; Sachs, in Sachs 2011, Art. 19, No. 47; Enders, in Epping/Hillgruber 2012, Art. 19, no. 32; Brüning, in Stern/Becker 2010, Art. 19, no. 43; Hofmann, in Schmidt-Bleibtreu/Hofmann/Hopfauf 2011, Art. 19, no. 17; BVerfGE 22, 180 (219f.).

4.2.1 Historical Background

Article 19(2) GG is often described as an '*originäre Neuschöpfung*', *i.e.*, as an 'original creation'.[17] A predecessor of the *Wesensgehaltsgarantie* can, at least in German constitutional history, not be found.[18] This can be explained by the fact that the *Wesensgehalt* as it is generally understood assumes a positively defined sphere of individual liberty. It builds upon the idea that there exists a separate sphere of self-realisation that is independent from the aims and purposes of the state and that even the legislature has to respect.[19] At the time of the Weimar Republic, this was not yet an accepted notion. The power of the legislature at the time was such that fundamental rights could be limited to the extent that practically nothing remained.[20] Fundamental rights were therefore sometimes characterised as '*leerlaufend*' ('running idle')[21].

Even though at the time of Weimar Republic the idea of a separate, protected individual sphere had not yet led to a distinct understanding of the relation between constitutional rights and 'ordinary' legislation that allowed for the security of fundamental rights,[22] this understanding was beginning to develop and the question was asked whether the power of the legislature should not be more restrained. In the light of this, the thought came up that there should perhaps be an 'unchangeable' core of fundamental rights.[23] This development partly explains why after the Second World War, guarantees of core rights entered German constitutional law.[24] Obviously, moreover, the disrespect of constitutional rights by the Nazi regime also played a significant

17 Remmert, in Maunz/Durig 2012, Art. 19 Abs. 2, no. 2; Dreier, in Dreier 2013, Art. 19 II, no. 1; Zivier 1960, p. 1 (speaking of a 'verfassungsrechtliches Novum').

18 Stern however, points out that in the Argentinean Constitution of 1853 a comparable guarantee can be found. Nevertheless, this guarantee has in no way influenced the coming into being of Art. 19(2) GG (Stern 1994, Bd. III/2, p. 838). See also Drews 2005, p. 28, fn. 31; Dreier, in Dreier 2013, Art. 19 II, no. 1; Häberle 1989, p. 374ff., p. 386ff.

19 *Cf.* Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 2.

20 See, *e.g.*, Drews 2005, p. 26.

21 *Ibid.*, p. 26.

22 Remmert, in Maunz/Durig 2012, Art. 19 Abs. 2, no. 2. See also Enders, in Epping/Hillgruber 2012, Art. 19, no. 19.

23 See, *e.g.*, Dreier, in Dreier 2013, Art. 19 II, no. 1; Brüning, in Stern/Becker 2010, Art. 19, no. 2.

24 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 4. Guarantees resembling Art. 19(2) GG were first taken up in the constitution of several federal states. See the Constitution of Hessen of 1946 ('Soweit diese Verfassung die Beschränkung eines der vorstehenden Grundrechte durch Gesetz zuläßt oder die nähere Ausgestaltung einem Gesetz vorbehält, muß das Grundrecht als solches unangetastet bleiben.'); the Constitution of Baden from 1947 ('Soweit diese Verfassung die Beschränkung eines Grundrechtes durch Gesetz vorbehält oder die nähere Ausgestaltung einem Gesetz vorbehält, muß das Grundrecht als solches unangetastet bleiben.'); and the Constitution of Saarland of 1947 ('Die Grundrechte sind in ihrem Wesen unabänderlich. Sie binden Gesetzgeber, Richter und Verwaltung unmittelbar.').

role in the creation of specific guarantees to prevent that fundamental rights could too easily, or even entirely be ignored.[25]

A first proposed reading of the core rights guarantee that was to be laid down in the post-war German Constitution, was the following:

> 'Eine Einschränkung der Grundrechte ist nur durch Gesetz und unter der Voraussetzung zulässig, daß es die öffentliche Sicherheit, Sittlichkeit oder Gesundheit zwingend erfordert. Die Einschränkung eines Grundrechts oder die nahere Ausgestaltung durch Gesetz muß *das Grundrecht als solches* unangetastet lassen.'[26]

Another proposal, made by the then Parliamentary Council, was somewhat more concrete. It stressed that, instead of interfering with the 'fundamental right as such', it was in fact an interference with the *Wesen*, the 'core' of a right, that had to be forbidden: 'Soweit nach den Bestimmungen dieses Grundgesetzes ein Grundrecht eingeschränkt werden kann, darf es in seinem Wesensgehalt nicht angetastet werden.'[27] Later the *Wesensgehaltsgarantie* was given its present wording ('In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden'), and it was grouped together with the *Allgemeinheits-* and *Zitiergebot* in one single provision.[28]

Even though in the drafting period the difficulty of determining the inviolable substance of a right had been put on the table, it was not discussed at any length.[29] The historical background of the *Wesensgehaltsgarantie* hence does not tell much about how it should be understood. Indeed, the most important insight that can be inferred from the provision's genesis is that it came into being because there was an awareness of the danger that fundamental rights could become meaningless especially through acts of the legis-

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25 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 4; Stern 1994, Bd. III/2, p. 864; Dreier, in Dreier 2013, Art. 19 II, No. 2; Herbert 1985, p. 322; Drews 2005, p. 28; Zivier 1960, p. 74.

26 Art. 21 Abs. 4 Verfassungsentwurfs von Herrenchiemsee [emphasis added] ('A limitation of fundamental rights is only possible by means of a legislative act and under the condition that the limitation is required for the protection of public order, morals or health. The limitation of a fundamental right or the further concretisation thereof by means of a legislative act should leave intact *the fundamental right as such*.'). See also Stern 1994, Bd. III/2, p. 841ff. Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 5, points out that it is remarkable that in this reading, not only 'Einschränkungen' (limitations) but also 'Ausgestaltungen durch Gesetz' (definitions, explications through law) are mentioned. This implies that, next to when a right is limited, also when it is 'interpreted' the core must be protected.

27 'In so far as a fundamental right can be limited in accordance with the provisions of this Constitution, its core must not be touched upon.' See Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 6.

28 *Ibid.*, Art. 19 Abs. 2, nos. 7-9. Attempts to include the *Wesensgehaltsgarantie* in the '*Ewigkeitsklausel*' of Art. 79(3) GG (the section that indicates the aspects and articles of the Constitution that may never be changed) remained without success. See Dreier, in Dreier 2013, Art. 19 II, no. 2.

29 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, nos. 8, 10; Dreier, in Dreier 2013, Art. 19 II, no. 2.

lature. This concern can therefore serve as the starting point for the remainder of this discussion.[30]

4.2.2 Addressees of the *Wesensgehaltsgarantie*

The text of Article 19(2) GG does not indicate a particular addressee.[31] As follows from its historical origins, however, the *Wesensgehaltsgarantie* was created in the light of the danger that especially legislative acts would render fundamental rights meaningless, since usually it is the legislature who is involved in the regulation and the limitation of rights. It is hence not disputed that in any event the legislature is bound by the *Wesensgehaltsgarantie*.[32] Beyond this point of agreement, however, different views become apparent. Some hold that Article 19(2) GG *only* addresses the legislature,[33] or at least discuss the *Wesensgehaltsgarantie* only in relation to the legislative branch.[34] Most authors, however, rather insist that 'alle drei Gewalten', *i.e.*, the legislature as well as the executive and the judiciary, are bound by the *Wesensgehaltsgarantie*.[35]

There is something to say in favour of the view that the *Wesensgehaltsgarantie* exclusively binds the legislature, as it can be argued that Section 2 of Article 19 GG naturally needs to be read in relation to Section 1 of that Article. Since the *Allegmeinheits-* and the *Zitiergebot* are exclusively directed at the legislative branch,[36] obliging it to refrain from creating limitations to fundamental rights that only apply to a single case and to always cite the article that is being limited, it can be contended that the same goes for the *Wesensgehaltsgarantie*.

Nevertheless, the arguments that favour a broader understanding of the addressees of the *Wesensgehaltsgarantie* appear more convincing. First, on the connection with Article 19(1) GG it can be said that the *Wesensgehaltsgarantie*

30 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 10; Brüning, in Stern/Becker 2010, Art. 19, no. 2.

31 Sachs, in Sachs 2011, Art. 19, no. 33; Brüning, in Stern/Becker 2010, Art. 19, no. 36.

32 See, *e.g.*, Stern 1994, Bd. III/2, p. 877ff.; Drews 2005, pp. 23-24; Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 26.

33 *E.g.*, Häberle 1983, p. 236; Dürig 1953, pp. 329-330, 336, and in light of a discussion of the fundamental right to protection of property, Chlosta 1975, p. 39. *Cf.* also Enders, in Epping/Hillgruber 2012, Art. 19, no. 21ff.

34 *E.g.*, Krüger 1955, p. 599ff.

35 See, *e.g.*, Drews 2005, p. 24. Examples are Dreier, in Dreier 2013, Art. 19 II, no. 11; Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 27; Brüning, in Stern/Becker 2010, Art. 19, no. 36; Von Hippel 1965, p. 47 and 40ff.; Jäckel 1967, p. 44ff.; Schlink 1976, p. 80; Schneider 1983, p. 34ff.; Zivier 1960, p. 85ff.; Stern 1994, Bd. III/2, p. 877ff.

36 At least this is the general understanding. See, *e.g.*, Jäckel 1967, p. 44; Jarass, in Jarass/Pieroth 2012, Art. 19, no. 1ff.; Sachs, in Sachs 2011, Art. 19, no. 1, 13ff.; Hofmann, in Schmidt-Bleibtreu/Hofmann/Hopfauf 2011, Art. 19, no. 7ff. But see also Schneider 1983, p. 37.

was expressly laid down in a separate section and was not included in Section 1 as a 'rule of limitation'. Secondly, the provision's wording forms an argument in favour of a broader understanding. Different from Section 1 it does not speak of '*Gesetz*', but explicitly stresses that '*in keinem Falle*', *i.e.*, '*in no case*', the core of a right can be infringed upon.[37] Sachs in this regard concludes as follows:

> 'Trotz entstehungsgeschichtlicher Verbindungen zu den Anforderungen an einschränkende Gesetze … ist die ebenso apodiktisch wie umfassend formulierte Garantie für jede Person oder Stelle maßgeblich, die der Grundrechtsbindung unterliegt.'[38]

Moreover, an argument in favour of a wider reading of the provision is that the very rationale of including the core of rights provision was the protection against the possible nullification of fundamental rights. From that perspective, regarding the legislature as the only addressee of the guarantee would limit its effectiveness in an undesirable manner. As Zivier has noted, it is not decisive whether an infringement of a right occurs by means of a statute or in a different way,[39] and therefore all state powers that can potentially 'empty out' the importance of fundamental rights must be considered to be addressees. Finally, this particular reading finds support in the text of Article 1, Section 3 GG. In this section, found at the beginning of the German fundamental rights catalogue, it is stressed that '[d]ie nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht'.[40] When the *Wesensgehaltsgarantie* is understood as further elaborating what these fundamental rights require, it should in line with Article 1(3) GG be understood as counting for all three branches of government.[41]

Regardless of the conclusion that all branches are concerned, however, it is generally accepted that the legislature is *primarily* addressed.[42] This indeed

37 Brüning puts it as follows: 'Mag die Genese der Vorschrift primär auf eine Anwendung bei der gesetzlichen Einschränkung der Grundrechte hindeuten, so kann aufgrund der allumfassenden Formulierung "in keinem Falle" dabei nicht stehen geblieben werden.' See Brüning, in Stern/Becker 2010, Art. 19, no. 36. See also Zivier 1960, p. 85; Jäckel 1967, p. 44; Drews 2005, p. 28ff.

38 'Notwithstanding the links in the drafting history with the requirements for limiting statutes, the cryptically as well as comprehensively worded guarantee addresses every person or institution that is bound by the fundamental rights.' Sachs, in Sachs 2011, Art. 19, no. 33.

39 Zivier 1960, p. 85.

40 Art. 1(3) GG ('The following constitutional rights bind the legislature, the executive, and the judiciary as directly applicable law.').

41 Drews 2005, pp. 28-29. See also Jäckel 1967, p. 44, fn. 2; Schneider 1983, p. 37, who in this context points out that the guarantee of Art.19(2) GG has an 'accessory' character.

42 Dreier, in Dreier 2013, Art. 19 II, no. 11; Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 27; Enders, in Epping/Hillgruber 2012, Art. 19, no. 25; Sachs, in Sachs 2011, Art. 19, no. 34.

follows from the simple fact that when a fundamental right is limited in a potentially too far-reaching way, this is usually due to a legislative, rather than an administrative or judicial act.[43] As mentioned above, of all branches, the legislature is most likely to be confronted with a situation in which decisions must be made regarding the width/extent and depth of (general) limitations of constitutional rights.[44]

As Remmert puts it, for determining the extent to which the other state powers are bound by the *Wesensgehaltsgarantie* it 'ist maßgeblich, inwieweit von Entscheidungen der Executieve oder der Judikative eigenständige Gefahren für den faktischen Bestand der Grundrechte ausgehen können'.[45] It must be asked when and in what circumstances exactly Article 19, Section 2 GG becomes a relevant touchstone for administrative and judicial acts. It turns out that this is not often the case. Generally, the executive and the judiciary are thought to have an 'eigenständiges "Aushöhlungspotential"'[46] only when they work on the basis of vague legal terminology or when they have wide discretionary powers that can be used in such a way that the core of a right is infringed upon.[47]

In explaining this, Drews makes a distinction between 'direct' and 'indirect' binding of the other branches.[48] She stresses that executive acts, for example, must always be based on an act of parliament. When a statutory act does not comply with the *Grundgesetz*, *i.e.*, is not in compliance with Article 19(2) GG, then it is not the administrative act, but rather the legislation itself for which the *Wesensgehaltsgarantie* becomes the relevant touchstone. The addressee is then still the legislature – in these situations there is no specific role for Article 19(2) GG as a yardstick for executive acts.[49] When, however, the statutory act on which an administrative act is based itself is in compliance with the Constitution, the executive is 'indirectly' bound to comply with Article 19(2). After all, in a situation like this it is the executive's task to act in compliance with the statute, and hence in line with what Article 19, Section 2 GG requires. Nevertheless, it is firstly the conditions and the priority of the law that it then

43 *Cf.* Enders, in Epping/Hillgruber 2012, Art. 19, no. 25; Drews 2005, p. 31.

44 Dreier, in Dreier 2013, Art. 19 II, no. 11. Indeed, also from the case law of the *Bundesverfassungsgericht* it follows that it is mostly a legislative act, *i.e.*, a statute that is tested for being in compliance with Art. 19(2) or not. There exist only of few examples concerning executive or judicial acts. See for several references Drews 2005, p. 25, fn. 16 and 17, respectively.

45 '[It] is important to what extent decisions of the executive and the judiciary can in themselves create a danger for the factual meaning of fundamental rights'. Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 27.

46 *Ibid.*, Art. 19 Abs. 2, no. 27.

47 *Ibid.* See also, Stern 1994, Bd. III/2, p. 881; Sachs, in Sachs 2011, Art. 19, nos. 36-37; Schneider 1983, p. 32ff.

48 Drews 2005, p. 30ff.

49 *Ibid.*, p. 30.

needs to respect. The manner in which the executive in this situation is bound by the *Wesensgehaltsgarantie* is therefore of an indirect kind.[50]

On the other hand, Article 19(2) GG is 'directly' relevant when a statute creates discretionary powers, or is open to different interpretations, and therefore compliance of the executive with the statutory text does not necessarily imply that the *Wesensgehalt* of fundamental rights is left intact.[51] In these circumstances the executive's exercise of discretion can be tested against Article 19(2) GG directly, rather than against the statutory act on which it was based, since the statute leaves the necessary 'elbow room'.[52] The executive is then not 'indirectly', but '*unmittelbar*', or '*ungefiltert*' bound by Article 19(2).[53] Something similar goes for the judiciary: when decisions are taken or judgments are reached by a court having latitude in dealing with a statute that is in itself constitutional and 'core avoiding', it is obliged to act in conformity with Article 19, Section 2 GG.[54] Article 18, second sentence GG presents a clear illustration.[55] According to this provision the extent to which rights can be forfeited is to be determined by the *Bundesverfassungsgericht*. It goes without saying that in making this determination, the core of the right at stake should be protected.

A final remark concerning the addressees of the *Wesensgehaltsgarantie* concerns the following: regardless of the 'in keinem Falle' formulation, it can be doubted whether the *Wesensgehaltsgarantie* binds the '*verfassungsändernden*' and the '*Hoheitsrechte übertragenden*' legislature, *i.e.*, the legislature that is competent to amend the constitution and the legislature that transfers sovereign power, respectively.[56] With regard to the former it is considered that the relevant requirements for changing the constitution are exhaustively laid down in Article 79, Section 3. This important provision holds that any changes that alter Article 1 or Article 20 GG are forbidden.[57] In this reasoning, Article 19(2)

50 *Ibid.*, pp. 30-31.
51 See also Schneider 1983, p. 35.
52 Drews 2005, pp. 31-32.
53 *Ibid.*, p. 32 (with furhter references). See also Stern 1994, Bd. III.2, p. 881.
54 Drews (2005), p. 32, 296. *Cf.* also Sachs, in Sachs 2011, Art. 19, no. 37.
55 Art. 18 (in its entirety) reads: 'Wer die Freiheit der Meinungsäußerung, insbesondere die Pressefreiheit (Artikel 5 Absatz 1), die Lehrfreiheit (Artikel 5 Absatz 3), die Versammlungsfreiheit (Artikel 8), die Vereinigungsfreiheit (Artikel 9), das Brief-, Post- und Fernmeldegeheimnis (Artikel 10), das Eigentum (Artikel 14) oder das Asylrecht (Artikel 16a) zum Kampfe gegen die freiheitliche demokratische Grundordnung mißbraucht, verwirkt diese Grundrechte. Die Verwirkung und ihr Ausmaß werden durch das Bundesverfassungsgericht ausgesprochen.'
56 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 28.
57 Art. 79(3) GG: 'Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig' ('Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.').

GG would not have to be taken into account.[58] Yet, since Article 79, Section 3 GG prohibits any alteration by the constitution-changing legislature of what is called the *Menschenwürdegehalt*,[59] this conclusion is valid only to the extent that it is considered that the *Wesensgehalt* does not equal the *Menschenwürde* guarantee. When both are considered identical, the *Wesensgehaltsgarantie* must be said to *de facto* bind the '*verfassungsändernden*' legislature as well.[60] The 'sovereign power transferring' legislature needs to take account of Article 79(3) GG, too.[61] Also here, thus, a direct role for Article 19, Section 2 GG seems to be lacking.[62] Again, however, this would be different if one would accept that Article 19(2) and Article 1(1) GG are identical, or at least that the *Menschenwürdegehalt* covers the *Wesen* of a right.[63] Finally, as far as the implementation and carrying out of EU law leaves the legislative, executive, or judiciary power some discretion, Article 19, Section 2 GG is considered to be (directly) relevant.[64]

Thus, the conclusion must be that in determining the addressees of the *Wesensgehaltsgarantie*, the outcome should not so much depend upon historical understandings, possible relations with Article 19(1) GG, or on the question of which branch is most likely to touch upon the core of a right. Instead, the importance of fundamental rights and the aim of preventing these from becoming futile should form the focal point. The *Wesensgehaltsgarantie*, therefore, binds – with the exceptions just mentioned – all national branches whenever they can place the essence of a fundamental right at risk.

4.2.3 Scope of Application

Next to the addressees of the *Wesensgehaltsgarantie*, it is important to also pay some attention to the 'object' of this provision. It must be asked what can be understood by '*Grundrecht*' ('fundamental right') and hence, when exactly

58 BVerfGE 109, 279 (310); Dreier, in Dreier 2013, Art. 19 II, no. 11; Sachs, in Sachs 2011, Art. 19, no. 35; Hofmann, in Schmidt-Bleibtreu/Hofmann/Hopfauf 2011, Art. 19, no. 18.

59 Art. 1(1) GG: 'Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.' ('Human dignity is inviolable. It is the duty of all public authorities to respect and protect it.')

60 As this is a matter concerning the meaning, or the content of the *Wesensgehaltsgarantie*, it will be discussed in more detail in, *infra*, S. 4.3.2.

61 See Art. 23(1), third sentence, GG.

62 See Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 32; Drews 2005, p. 38, who speaks of 'indirekten Schutz'. But see Hofmann, in Schmidt-Bleibtreu/Hofmann/Hopfauf 2011, Art. 19, no. 16.

63 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 32. For secondary European Union law, more or less the same could be said, see Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 33.

64 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 35; Drews 2005, p. 42f. See more generally Pieroth/Schlink 2012, no. 201.

Article 19(2) applies. At first glance, discussing this in detail might seem irrelevant, since it is a matter specifically linked to the German Constitution and the rights it protects. Nevertheless, as the issue of the object of Article 19(2) centres on the question to *what kind of* rights a guarantee like the *Wesensgehaltsgarantie* can logically apply, the conclusions reached are relevant for the possibilities for using the idea of core rights also beyond the specific German context.

First of all, the notion of '*Grundrecht*' refers to the fundamental rights laid down in the German Basic Law.[65] However, in the academic literature both a narrower and a broader interpretation of 'fundamental right' have been put forward. The difference in understanding can be partly explained by whether or not Article 19(2) GG is read in conjunction with Section 1 of that article.[66] When it is considered that the two provisions are related and the term '*Grundrecht*' means the same for both,[67] and moreover when it is understood that Section 1 is only relevant for rights that contain express possibilities for limitation, then this would imply that the *Wesensgehaltsgarantie* only applies to a limited number of constitutional guarantees.[68]

The applicability of the *Allgemeinheits-* and the *Zitiergebot* does not, however, have to be understood in such a limited way. It also has been argued that these provisions apply to all 'defensively' formulated fundamental rights norms, *i.e.*, negative freedoms,[69] as well as to what in Germany are called '*grundrechtsgleiche Rechte*'.[70] The latter are rights that fall outside the fundamental rights catalogue enumerated in the first chapter of the German Constitution, but that can nevertheless form the basis for a constitutional complaint.[71] In line with this, the object of the *Wesensgehaltsgarantie* can be understood in the same, broader manner. Some even allege that Section 1 – and thereby also Section 2 – concerns also equality rights and norms the text of which requires active

65 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 19 (indicating that the *Wesensgehaltsgarantie* does not apply to the fundamental rights laid down in the constitutions of the federal states – unless these constitutions contain a similar requirement).

66 *Ibid.*, Art. 19 Abs. 2, no. 21ff.

67 *Cf.*, *e.g.*, Chlosta 1975, p. 39ff.; Jarass, in Jarass/Pieroth 2012, Art. 19, no. 8; Enders, in Epping/Hillgruber 2012, Art. 19, no. 21.

68 Remmert, in Mauz/Dürig 2012, Art. 19 Abs. 2, no. 21 (with references). See also, *e.g.*, Enders, in Epping/Hillgruber 2012, Art. 19, nos. 21, 23.

69 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 1, no. 31; Enders, in Epping/Hillgruber 2012, Art. 19, no. 22. Drews 2005, p. 46, speaks in this regard of an 'abgeschwächte Variante', a 'weaker variation' of the interpretation of S. 2 in light of S. 1 of Article 19 GG.

70 See, *e.g.*, Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 1, no. 34.

71 Art. 93(1), under 4a, GG establishes that the *Bundesverfassungsgericht* shall rule 'über Verfassungsbeschwerden, die von jedermann mit der Behauptung erhoben werden können, durch die öffentliche Gewalt in einem seiner Grundrechte oder in einem seiner in Artikel 20 Abs. 4, 33, 38, 101, 103 und 104 enthaltenen Rechte verletzt zu sein' ('on constitutional complaints, which can be raised by anyone on the grounds that their constitutional rights, or their rights contained in articles 20 (4), 33, 38, 101, and 104, have been infringed by a public authority').

performance by the state, as well as so-called positive obligations.[72] From this perspective, the '*Grundrecht*' notion has a very broad reach and the *Wesensgehaltsgarantie* accordingly covers a large number of fundamental guarantees.

However, it has already become clear that a reading of the *Wesensgehaltsgarantie* that relates to Article 19(1) is not imperative.[73] The 'in keinem Falle' phrasing can indeed be linked to the situations covered by Section 1, but for the reasons mentioned above, the *Wesensgehaltsgarantie* can just as well be disconnected from the *Allgemeinheits-* and the *Zitiergebot*.[74] Indeed, in line with a 'teleological' understanding the applicability of the *Wesensgehaltsgarantie* is likely to be understood more broadly compared to Section 1. Therefore, according to Remmert, if one looks at the meaning and purpose of the norm, namely to protect fundamental rights from substantively running idle, it makes sense to apply Art. 19(2) GG to all fundamental rights that can be hollowed out by acts of the state.[75]

It can be said that the general aim to prevent the core of fundamental rights from being infringed upon allows for understanding the term '*Grundrecht*' in such a way that as many fundamental norms as possible obtain the necessary protection.[76] The reason why one cannot simply speak of 'all' fundamental rights norms is merely that the protection of the core of a right should at least be logically possible.[77] In this respect, there is no problem as far as negatively formulated fundamental freedoms are concerned, regardless of whether these contain a specific limitation clause or not, since interferences with these rights can be forbidden to the extent that they do not even leave the essence of a right intact.[78] Likewise, it is imaginable that the state disrespects the core of a right when it does nothing, or does 'too little'.[79] Hence, it can be said that also positively formulated guarantees run the risk of becom-

72 *I.e.*, positive obligations that do not directly follow from the positive wording of a right but are implied by negatively formulated fundamental rights. See, for references as well as inherent complications, Remmert, in Maunz/Dürig 2012, Art. 19 I, no. 32f.

73 See, *supra*, S. 4.2.2. *Cf.* also Drews 2005, pp. 47-48.

74 See, *supra*, S. 4.2.2.

75 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 22.

76 *Cf.* also Drews 2005, p. 48; Sachs, in Sachs 2011, Art. 19, no. 44; Jarass, in Jarass/Pieroth 2012, Art. 19, no. 8.

77 *Cf.* Drews 2005, p. 45, with regard to *Freiheitsrechte*: 'Wenn also gefragt wird, *welche* Freiheitsgrundrechte der Wesensgehaltsgarantie unterfallen, so geht es um diejenigen Rechte mit der Eigenschaft, dem Inhaber einen Handlungsspielraum einzuräumen, innerhalb dessen er sich nach seinem Willen betätigen kann, also z.B. um die Rechte aus Art. 2 II 1, Art. 2 II 2, Art. 12 I oder Art. 14 GG.'

78 See, *e.g.*, Drews 2005, p. 46. *Cf.* also Dreier, in Dreier 2013, Art. 19 II, no. 10; Drews 2005, p. 47f.; Herbert 1985, p. 331; Jäckel 1967, p. 45; Krüger 1955, p. 599; Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 23; Stern 1994, Bd. III/2, p. 878; Zivier 1960, p. 85; Brüning, in Stern/Becker 2010, Art. 19, no. 36.

79 Drews 2005, pp. 56-57.

ing futile and require the protection of Article 19 Section 2 GG.[80] There are only few positively formulated guarantees,[81] however, and it is therefore important to note that there is also a category of positive obligations that do not follow directly from the text of the constitution, but that have been inferred from negatively formulated norms. This was the result of the development from a liberal to a social *Rechtsstaat*, and of the growing importance of the idea that it is the state that needs to create and secure the conditions in order for individuals to make use of their fundamental freedoms in the first place.[82] For the purposes of this chapter, however, it is mainly important to note that the reading provided here implies that the state can violate the *Wesensgehaltsgarantie* when it does not, at least to a certain minimum degree, ensure that positive rights, regardless of whether these have been expressly laid down in the Constitution, are guaranteed.[83] In the words of Drews:

> '[S]oweit die Grundrechte Gewährleistungsnormen zugunsten "realer Freiheit" seien, sei es nicht ausgeschlossen, dass die Vernachlässigung staatlicher Schutzpflichten und die Vorenthaltung staatlicher Leistungen bei Unterschreitung einer grundrechtlich gebotenen Mindestausstattung Art. 19 II GG verletze.'[84]

When it comes to equality rights, views are more divided.[85] This has to do with the fact that many authors regard *Gleichheitsrechte*[86] as having a distinct structure.[87] They do not come with a specific possibility for limitation, and it is instead *in any case* forbidden to constrain equality guarantees as they are formulated.[88] Article 19(2) GG, according to this view, then is not applicable.[89]

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80 *Ibid*. Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, nos. 23, 45.

81 Drews 2005, p. 54.

82 *Ibid.* [footnotes omitted]. *Cf.* BVerfGE 33, 303 (331).

83 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, nos. 23, 45; Dreier, in Dreier 2013, Art. 19 II, no. 10; Drews 2005, p. 54ff. *Cf.* also Häberle 1983, p. 369ff., 422ff.

84 'To the extent that fundamental rights are norms securing "actual freedom", it cannot be excluded that – in the event a constitutionally guaranteed minimum is not assured – the neglect of protective duties and the denial of state performance is in breach of Art. 19(2) GG.' Drews 2005, p. 56.

85 See, *e.g.*, Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 24. Cf. also Jarass, in Jarass/Pieroth 2012, Art. 19, no. 8.

86 As Gleichheitsrechte are considered Arts. 3(1-3) and 6(5) GG. Also, there are *grundrechtsgleiche Gleichheitsrechte*, these can be found in Arts. 33(1-3) and 38(1), first sentence, GG.

87 Dreier, in Dreier 2013, Art 19 II, no.9; Enders, in Epping/Hillgruber 2012, Art. 19, no. 21.

88 There is hence no 'outer layer' that can justifiably be interfered with. According to Dreier, in Dreier 2013, Art. 19 II, no. 9, equality rights carry 'ihr Wesenskriterium im allgemeinen Verbot sachwidriger Ungleichbehandlungen … gleichsam in sich'.

89 However, a different conclusion can be reached here as well. The 'absoluteness' of the prohibition of discrimination can just as well be understood to signal a fundamental rights 'core': in no case, shall discriminatory treatment take place. This insight becomes especially relevant in a context in which the non-discrimination principle is linked to other fundamental rights (as in the context of the ECHR), while then a 'core' aspect of these funda-

Only when it is considered that the 'interference-model' also applies to fundamental equality norms, and certain limitations are hence possible, the *Wesensgehaltsgarantie* could become relevant.[90]

Thus, although seemingly uncomplicated at first sight, the term '*Grundrecht*' clearly has led to some discussion. The conclusion can be that, in the light of the aim of the *Wesensgehaltsgarantie*, the term '*Grundrecht*' is mostly understood in a broad, rather than in a narrow manner. Thereby it is important to stress that, although there remains some doubt as to equality rights because of their special structure, positive rights and obligations – also when these are recognised under negative fundamental rights norms – are generally considered to fall within the scope of Article 19, Section 2 GG, which means that their core must always be protected.[91]

4.3 The Meaning of the German *Wesensgehaltsgarantie*

The discussion thus far has already presented a number of views on several aspects of the *Wesensgehaltsgarantie*. Compared to the question of the concrete meaning of the *Wesensgehalt*, the debate on the addressees and applicability of Article 19(2) GG is however fairly straightforward. Indeed, as Drews has put it, there are only two things about the *Wesensgehaltsgarantie* that are really beyond dispute.[92] First of all it is clear that, as was already mentioned, the *Wesensgehaltsgarantie* is not a self-standing fundamental right.[93] Secondly, it is not disputed that an interference with a fundamental right that breaches Article 19, Section 2 GG, is unconstitutional.[94] By contrast, and perhaps not surprisingly, the *content* of the *Wesensgehalt*, *i.e.*, its meaning for different fundamental rights and in the adjudication of individual cases, is a highly

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mental rights can be said to be their non-discriminatory provision. *Cf.* also, *infra* Ch. 5, S. 5.5.1; Ch. 7, S. 7.4.2.1.

90 See, for the implicit possibility that Art. 19(2) GG applies, Enders, in Epping/Hillgruber 2012, Art.19, no. 22; Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 24; Drews 2005, p. 59. Finally, yet this seems relevant only in the specific German constitutional context, an argument similar to the one used to justifiy the application of the *Wesensgehaltsgarantie* to positive rights and obligations can be given to include '*grundrechtsgleiche Rechte*'. When it is considered that the difference between the 'official' '*Grundrechte*' and the '*grundrechtsgleiche Rechte*' is merely terminological and does not see to the content of and the protection provided by both categories, the term '*Grundrecht*' in Art. 19(2) can be considered *directly* applicable to '*grundrechtsgleiche Rechte*', too. See, e.g., Drews 2005, p. 53; Jarass, in Jarass/Pieroth 2012, Art. 19, no. 8; Dreier, in Dreier 2013, Art. 19 II, no. 9; Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 25.

91 The applicability of the idea of core protection to positive rights will be confirmed and further explored in the following, see, *infra*, Ch. 5 and 6.

92 Drews 2005, pp. 16-17.

93 See, *supra*, S. 4.2.

94 *Ibid*.

controversial matter.[95] Article 19, Section 2 GG has been described as 'bisher konturloseste Norm des Grundgesetzes',[96] but it has also been characterised as 'zentrale Sicherung gegen inhaltliche Aushöhlung'[97]. The difficulties related to identifying cores of rights in a workable manner are such that, even after more than 60 years since the provision came into being, a broadly shared understanding of the content of the *Wesensgehaltsgarantie* is still lacking.[98]

In the following, the complicated question as to how, if at all, cores or rights can be identified, will nevertheless be taken up. The ambition is thereby not so much to resolve the matter and provide for a decisive answer. Rather, the perspective taken here will be that of an outsider, whose goal is not to take a stand in the debate but rather to describe the dominant standpoints that have been propagated. A more or less descriptive overview of the different interpretations and, where possible, their weight in the debate, will offer a fair picture of how in theory, but also in practice, the *Wesensgehalt* of rights is recognised and dealt with.

The debate on the meaning of the *Wesensgehaltsgarantie* can be systematised by focussing on two distinct issues. The first point to be discussed concerns the question whether the protection of Article 19, Section 2 GG is *objective* or rather *subjective* in kind (4.3.1). Also from the case law of the *Bundesverfassungsbericht* it does not become entirely clear whether this provision is directed at individual rightsholders (a subjective reading) or instead (also) at fundamental rights 'in general' (an objective reading).[99] The second important matter worth addressing is whether the '*Wesen*' should be understood in an *absolute* or in a *relative* way. This has implications for the test applied by courts and the relation between the *Wesensgehaltsgarantie* and the requirement of proportionality. The absolute-relative question has been extensively discussed in various scholarly articles and dissertations. These signal numerous detailed and nuanced views on the matter, some of which will be outlined below (4.3.2).

4.3.1 Objective versus Subjective Protection

Of the two main focal points of the debate on the meaning of the *Wesensgehaltsgaratie*, *i.e.*, the absolute-relative and the objective-subjective question, the latter is the easier one to deal with. By contrast, as will become clear soon, the debate on whether cores of rights should be, or are indeed understood in an absolute or in a relative manner, is a very technical one that meanwhile has become

95 See Drews 2005, p. 59ff.
96 Dürig 1956, p. 133.
97 Schneider 1983, p. 17.
98 See Drews 2005. In her dissertation Drews tries to unravel the discussion that has come to include numerous positions and has become quite untransparent for that reason.
99 See Stern 1994, Bd. III/2, p. 868ff.; Pieroth/Schlink 2012, no. 315; Sachs, in Sachs 2011, Art. 19, no. 45.

the subject of numerous detailed interpretations. That the objective-subjective issue is more straightforward, however, is not to say that an unequivocal conclusion can be reached on the matter of whether '*Grundrecht*' refers to an individual right or not. In concreto, the debate centers around the question

> 'ob unter 'Grundrecht' im Sinne des Art. 19 II GG das subjektive Grundrecht des Einzelnen zu verstehen ist oder aber das "objektive Grundrecht", womit … das Grundrecht in einer über die subjektive Schutzposition des Einzelnen hinausgehenden Bedeutung gemeint ist, gleichsam als das Grundrecht "in seiner Bedeutung für die Allgemeinheit".'[100]

In the following, the subjective interpretation will obtain the most attention. One important reason for this is the aim to present the *Wesensgehaltsgarantie* in such a way that inspiration is provided for a possible use of the idea of core rights in the context of the ECtHR. The subjective interpretation fits best with the field of international human rights adjudication since it underlines the importance of individual protection. Before turning to this point, however, some remarks will be made with regard to the objective theory.

4.3.1.1 Objective Protection

Logically, the supporters of the 'objective theory'[101] interpret the term '*Grundrecht*' in an 'objective sense'.[102] This means that the focus lies not on the individual protection a fundamental right offers, but instead on the fundamental rights norm as such.[103] When the objective interpretation is followed and '*Grundrecht*' is understood as '*Grundrechtsartikel*', the *Wesensgehaltsgarantie* must be understood as forbidding any interference with a fundamental rights norm

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100 '… whether the term "fundamental right" in Art. 19(2) GG is to be understood as referring to the subjective individual right or to the "objective fundamental right" going beyond the subjective position of an individual, quasi to the fundamental right in its meaning for society in general.' Drews 2005, p. 17. Also the *Bundesverfassungsgericht* has asked 'ob Art. 19 Abs. 2 GG die restlose Entziehung eines Grundrechtskerns im Einzelfall verbietet oder ob er nur verhindern will, dass der Wesenskern des Grundrechts als solcher, zB durch praktischen Wegfall der im Grundgesetz verankerten, der Allgemeinheit gegebenen Garantie angetastet wird'. See BVerfGE 2, 266 (285). This question was answered differently in different cases, see Pieroth/Schlink 2012, no. 315; Sachs, in Sachs 2011, Art. 19, no. 45. See also Jäckel 1967, pp. 57ff., who presents the distinction in terms of a *Rechtsstellungsgarantie* v. an *Institutsgarantie* (a guarantee of a 'legal status' or 'position' v. of a 'legal institution').

101 See for this term Schneider 1983, p. 79.

102 According to Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, nr. 20, '[d]as Wort Grundrecht kann sprachlich sowohl das Grundrecht als objektiv-rechtliche, den Staat verpflichtende Norm als auch das Grundrecht als subjektives Recht bezeichnen'. See on this theory, *e.g.*, Drews 2005, p. 77ff., and for an overview of supporters of the objective view, p. 299. Some supporters are (implicitly) Dreier, in Dreier 2013, Art. 19 II, no. 13; Jäckel 1967, pp. 57ff., 91, 108, 111ff.; Jarass, in Jarass/Pieroth 2012, Art. 19, no. 9.

103 *E.g.*, Jarass, in Jarass/Pieroth 2012, Art. 19, no. 12.

that has the effect of nullifying this norm in the constitutional order.[104] Inversely, this implies that in an individual case someone can be deprived of his right entirely, as long as beyond his individual situation, the right itself remains meaningful.[105]

What exactly this means remains relatively unclear in the literature,[106] but a common understanding of the objective theory is that it is mainly 'institutional' in character.[107] It is then seen to relate to the guarantee of particular '*Einrichtungen*' ('institutions') that can be deduced from certain constitutional provisions, such as marriage, or personal property, which have to be guaranteed in a general fashion.[108] Whereas a narrow interpretation of '*Einrichtung*' in this regard would unduly limit the application of the *Wesensgehaltsgarantie*, the notion of 'institutions' is usually understood in a broader sense in order to include more generally the fundamental rights laid down in the German Constitution.[109] In this regard one can also speak of a 'social theory', *i.e.*, an understanding that emphasises the importance of fundamental rights for society in general, rather than their importance for an individual case or person:[110]

> 'Der Schutz des Art. 19 II GG, in diesem Sinne auf das Grundrecht als "Einrichtung des Lebens" bezogen, ist demnach – im Vergleich zum Schutzumfang nach der subjektiven Theorie – allgemeiner Art. Nicht die konkrete Grundrechtsposition einer einzelnen Person ist es, auf die der Wesensgehaltsschutz abzielt, sondern die "generelle Bedeutsamkeit einer Grundrechtsbestimmung für die Verfassungsordnung insgesamt", ihre Bedeutung für "das soziale Leben im Ganzen".'[111]

The objective theory may seem to be at odds with the idea behind fundamental rights, *i.e.*, with the idea that these rights first and foremost provide individual protection. However, the fact that the objective theory in Germany nevertheless finds significant support should not be understood as signalling that there are some who simply do not think of fundamental rights as subjective, individual guarantees. Rather, it is in order to give the *Wesensgehaltsgarantie* a

104 See, *e.g.*, Dreier, in Dreier 2013, Art. 19 II, no. 13. *Cf.* BVerfGE 100, 313 (376).
105 See, *e.g.*, Herbert 1985, p. 324.
106 See, in more detail, Drews 2005, p. 78ff.
107 *Ibid.*, p. 80ff. See also, *e.g.*, Enders, in Epping/Hillgruber 2012, Art. 19, no. 27; Jäckel 1967, p. 57ff. One can also speak of a 'Grundrechtsnorm als objektieve Rechtseinrichtung', see Herbert 1985, p. 324.
108 *Cf.* Stern 1994, Bd. III/1, p. 774ff.
109 Drews 2005, p. 81.
110 See, *e.g.*, Chlosta 1975, p. 40.
111 Drews 2005, p. 81 [footnotes omitted] ('The coverage of Art. 19(2), in this sense relating to the fundamental right as "institution of life", is – in contrast to its coverage according to the subjective theory – of a general nature. It is not the specific fundamental rights position of an individual that the protection of the *Wesensgehalt* aims at, but rather the general significance of a fundamental rights norm for the entire constitutional order, its meaning for "social life" in its entirety.')

workable meaning, that some authors favour an objective understanding.[112] In practice, examples can be found of instances in which fundamental rights are taken away completely.[113] To make sure that in the light of this fact Article 19(2) GG is not devoid of meaning it is then argued that this provision underlines not so much the subjective, but rather the objective importance of rights' cores.

4.3.1.2 Subjective Protection

The subjective view holds that in every individual instance the *Wesen* of a fundamental right needs to be protected.[114] The main argument for this point of view is the aim of Article 19, Section 2 GG in particular, as well as the aim of fundamental rights protection more generally. Dürig, for example, indicates that the underlying idea of the *Wesensgehaltsgarantie* is that '[d]er Grundrechtsträger darf nicht zum Objekt des staatlichen Geschehens gemacht werden'.[115] The term '*Grundrecht*' in Article 19, Section 2 GG is hence to be read as referring to an individual, subjective right.[116] More in general, it is held that from the historical background and aim of the *Grundgesetz* it must be inferred that its protection concerns individuals and their isolated legal positions.[117] According to Pieroth and Schlink:

> 'Im Zweifel ist der Wesensgehalt in der Gewährleistung nicht für die Allgemeinheit sondern *für den Einzelnen* zu suchen. Den Einzelnen sind die Grundrechte verbürgt,

112 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, nos. 20, 37; Brüning, in Stern/Becker 2010, Art. 19, no. 42; Jarass, in Jarass/Pieroth 2012, Art. 19, no. 9; Dreier, in Dreier 2013, Art. 19 II, no. 14. *Cf.* also Enders, in Epping/Hillgruber 2012, Art. 19, no. 27 (with various examples).

113 *Cf.* Herbert 1985, p. 324; Jäckel 1967, p. 111; Sachs, in Sachs 2011, Art. 19, no. 46; Enders, in Epping/Hillgruber 2012, Art. 19, no. 27. Think about life-long sentences, deadly police shooting, etc. *Cf.* BVerfGE 45, 187 (270f.); BVerfGE 109, 133 (156); BVerfGE 115, 118 (165). See, however, *infra*, S. 4.3.1.2, for the argument that this can be explained in other ways, too.

114 See, generally, *e.g.*, Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 20; Drews 2005, p. 77; Pieroth/Schlink 2012, no. 319; Borowski 2007, p. 287; Stern 1994, Bd. III/2, pp. 868-870; Sachs, in Sachs 2011, Art. 19, nos. 45-46; Enders, in Epping/Hillgruber 2012, Art. 19, nos. 26, 28; Jarass, in Jarass/Pieroth 2012, Art. 19, no. 9; Dreier, in Dreier 2013, Art. 19 II, nos. 13-14; Brüning, in Stern/Becker 2012, Art. 19, no. 42. For support of this view see also, *e.g.*, Dürig 1956; Herbert 1985; Krüger 1955, Schlink 1976; Von Hippel 1965; Chlosta 1975 (see for further references Drews 2005, p. 299).

115 'The rightsholder must not become the object of state action.' Dürig 1956, p. 136.

116 See, *e.g.*, Von Hippel 1965, p. 48, fn. 4; Herbert 1985, p. 324, 332, pp. 334-335.

117 See, *e.g.*, Chlosta 1975, p. 41ff.

> und wenn der eine von seinen Grundrechten keinen Gebrauch mehr machen kann, dann nützt ihm nicht, dass ein anderer es noch kann.'[118]

In this regard it can even be said that the dismissal of the subjective interpretation misconceives what the *Wesensgehaltsgarantie* is all about.[119]

It must be noted, however, that a purely subjective interpretation of the *Wesensgehaltsgarantie* is hard to ally with the practical finding that sometimes the complete derogation of a fundamental right is held constitutional. This interpretation hence does not always seem to be meaningful.[120] Various authors, perhaps for that reason, do not conceive of the matter as an either/or question. They contend, at least implicitly, that the *Wesensgehaltsgarantie* can have both an objective and a subjective meaning.[121] Borowski, for example, holds that because fundamental rights first and foremost constitute individual rights, Article 19(2) GG in any case must be understood as being relevant for rights as subjective guarantees.[122] When no clear choice is made, however, it mostly remains unclear if and why in certain cases – and if so, in which cases – the *Wesensgehaltsgarantie* does not require protection of an individual position. At the same time examples of a complete erosion of an individual right have been explained by other limits inherent in the Constitution, or with the help of other constructions, and therefore the mere existence of such examples does not necessarily imply that the *Wesensgehaltsgarantie* is irrelevant in those instances.[123]

4.3.2 Absolute versus Relative Understandings of the *Wesensgehalt*

Above, it has been mentioned that, besides the 'subjective/objective' debate there is also a debate on the absolute or relative nature of the *Wesensgehalt*. Sometimes it is held that the objective-subjective question and the absolute-relative question are inherently related.[124] This is to say that when, for example, the objective-subjective matter is resolved in favour of a subjective

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118 'In case of doubt the *Wesensgehalt* must be considered relevant for he individual rather than for society in general. Fundamental rights belong to individuals, and if one individual can no longer make use of his fundamental rights, the fact that someone else can is of no use to him.' Pieroth/Schlink 2012, no. 319.

119 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 20.

120 *Cf.* what was just mentioned in, *supra*, S. 4.3.1.1.

121 See, *e.g.*, Dreier, in Dreier 2013, Art. 19 II, nos. 13-14. Brüning, in Stern/Becker 2010, Art. 19, no. 42; Enders, in Epping/Hillgruber 2012, Art. 19, nos. 27-28.

122 Borowski 2007, p. 287.

123 See, *e.g.*, Dreier, in Dreier 2013, Art. 19 II, nos. 14, 16 (with further references); Brüning, in Stern/Becker 2010, Art. 19, no. 42; Enders, in Epping/Hillgruber 2012, Art. 19, no. 29. See also Von Bernstorff 2011, pp. 175-176. See further the discussion on the *Wesensgehaltsgarantie* and the *Verhälnitsmäßigkeitsgrundsatz* in, *infra*, S. 4.3.2.2. and 4.4.1.

124 See, *e.g.*, Drews 2005, pp. 60-61.

interpretation, it is likely that the meaning of the *Wesensgehalt* is considered to be circumstantial or relative.[125] Inversely, when the *Wesensgehalt* is considered to be absolute, this might invite a non-subjective perception of the protected core.[126] Regardless of the possible connections between the answers given to both questions, however, in this section the absolute and the relative theories will be introduced as independent theses, providing for insights in, as well as signalling concerns with regard to fundamental rights adjudication and the role cores of rights can play therein. Compared to the objective-subjective thesis, the absolute-relative question is in that regard the 'eigentlich bedeutsame',[127] since it deals with the actual content of the *Wesensgehalt* and the concrete way in which it is protected. It is this issue that is most often problematised, and the stance one takes here is decisive for the understanding, use and value that can be attached to Article 19, Section 2 GG.

The essential question, in short, is whether the *Wesensgehalt* of a right implies an absolute or rather a relative boundary.[128] In other words:

> 'Enthält jede Grundrecht einen Kernbestand an "Substanz", der niemals in Frage gestellt werden darf und der damit als Wesensgehalt absolut gegenüber jeder staatlichen Einwirkung geschützt ist? ... Oder ist der Wesensgehalt eines Grundrechts für jeden Fall seiner Anwendung gesondert durch ein Abwägen der im Einzelfall widerstreitenden Interessen zu ermitteln, mit der Folge, dass der Wesensgehaltsschutz nur relativ wirkt?'[129]

First, the absolute theories will be discussed, followed by an overview of various relative understandings.

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125 After all, when one insists that the *Wesensgehaltsgarantie* concerns the core of individual, subjective rights, and it becomes apparent that sometimes these rights are nevertheless eroded completely, the conclusion must be that the subjective *Wesensgehalt* is still subject to a proportionality test, and hence determined in a relative way. See further S. 4.3.2.2. However, it is also said that for those who think the *Wesensgehalt* of a right is relative, the objective-subjective question does not even need to be asked. *Cf.* Drews 2005, p. 60.

126 Or, it is an absolute understanding of the core of rights that necessitates asking the objective-subjective question in the first place. *E.g.*, Dreier, in Dreier 2013, Art. 19 II, no. 16.

127 Drews 2005, p. 61.

128 *Ibid.*, p. 60. See also p. 62ff.

129 'Does every fundamental right provide for a substantive core, that may never be put into question and that thereby is protected in an absolute way against state interference? Or is the *Wesensgehalt* of a fundamental right only to be determined in the context of a specific case by means of balancing the conflicting interests at stake, as a result of which the *Wesensgehalt* only has a relative meaning?' Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 36 [footnotes omitted].

4.3.2.1 Absolute Theories

According to various 'absolute theories', the '*Wesen*' of a fundamental right is something *absolute*.[130] This means that the *Wesensgehaltsgarantie* 'absolutely' protects those aspects of a constitutional right, without the availability of which one can no longer speak of that right.[131] These aspects form the actual '*Kern*', or alternatively the 'substance' or 'heart' of a fundamental right.[132]

Absolute theories are generally considered to be founded on a spatial understanding of fundamental rights.[133] This means that a fundamental right is seen as a structure that consists of two parts, 'nämlich einem inneren, dem "Kern", vor dem der Staat in jedem Fall Halt zu machen hat sowie aus einem weiteren, diesen "Kern" umgebenden Bereich, in den einzudringen dem Staat nicht schlechthin verwehrt ist'.[134] Alternatively, one can visualise the core of a right by thinking of different layers covering the '*Wesen*' of a right, as for example the peel of a piece of fruit.[135] Important is that as long as a limitation of a fundamental right only interferes with the 'peripheral part', *i.e.*, with the area surrounding the core, it may be constitutional.[136] This is the case when the requirement of *Verhältnismäßigkeit*[137] (proportionality) is met, which requires that a limitation is suitable, necessary, and proportional in the narrow sense.[138] What characterises an absolute understanding of the *Wesensgehalt* is hence that in the predetermined 'core area' the requirement of proportionality does not apply.[139] There can be no justification for interfering with the *Wesen* of a constitutional right, *i.e.*, there are no 'höherrangigen

130 See, generally, Drews 2005, p. 62ff.; Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 36ff.; Stern 1994, Bd. III/2, pp. 865-868; Pieroth/Schlink 2010, no. 314; Borowski 2007, p. 288ff.; Sachs, in Sachs 2011, Art. 19, no. 41ff.; Enders, in Epping/Hillgruber 2012, Art. 19, no. 29ff.; Jarass, in Jarass/Pieroth 2012, Art. 19, no. 9; Dreier, in Dreier 2013, Art. 19 II, no. 16ff.; Brüning, in Stern/Becker 2010, Art. 19, no. 40f. Authors that (explicitly) favour an absolute view are, *e.g.*, Jarass, in Jarass/Pieroth 2012, Art. 19, no. 9; Chlosta 1975; Dürig 1956; Enders, in Epping/Hillgruber 2012, Art. 19, no. 31; Herbert 1985; Jäckel 1967; Krüger 1955; Schlink 1976; Stern 1994, Bd. III/2, p. 865ff.

131 Drews 2005, p. 62, referring to Knüllig 1954, p. 118, 124.

132 See, *e.g.*, Krüger 1955, p. 599. See also Pieroth/Schlink 2012, no. 314.

133 Drews 2005, p. 63. But *cf.* also Enders, in Epping/Hillgruber 2012, Art. 19, no. 29.

134 Drews 2005, p. 63 [footnote omitted] ('… namely an inner part, the "core", in which the state can in no case interfere, as well as another, this core surrounding area, in which interferences are not by definition precluded').

135 See, *e.g.*, Stern 1994, Bd. III/2, p. 875; Herbert 1985, p. 323. Drews notices that the image of the skin of a fruit is however less suitable since it draws attention to the most outer layer, and by piercing through the peel the 'core' is not yet interfered with (Drews 2005, p. 63, fn. 222).

136 *E.g.*, Borowski 2007, p. 288.

137 The idea of *Verhaltnismäßigkeit* will be further discussed in, *infra*, Sections 4.3.2.2 and 4.4.1.

138 *E.g.*, Pieroth/Schlink 2012, no. 289ff. In German, the terms 'Geeignetheit', 'Erforderlichkeit', and 'Angemessenheit' are used. See on the different aspects of a proportionality analysis also, *supra*, Ch. 3, S. 3.4.2.

139 Dreier, in Dreier 2013, Art. 19 II, no. 16.

Güter'.[140] The protection is unqualified and balancing of the right at stake with the purposes of the state does not take place.[141] In an early comment on the *Wesensgehaltsgarantie* Krüger argues that, even though limits to fundamental rights are necessary,

> '[d]ie Eigenart des Grundgesetzes besteht darin, daß es nichtsdestoweniger im letzten der Autonomie des Bürgers den absoluten Vorrang zuerkennt: Im Bereich des Wesensgehaltes entscheidet allein der Bürger über das Ob und Wie des Gebrauches der Freiheit.'[142]

Indeed, from the genesis of the German Constitution and the role of Article 19, Section 2 therein, it can be inferred that there is a sphere that needs to be protected from interferences by the state.[143] To the absoluteness of this conclusion adds the wording 'in keinem Falle', as this implies that there are no exceptions and limitations of the core are prohibited.[144] Also the *Bundesverfassungsgericht* has held that, because of this wording, 'die Frage, unter welchen Voraussetzungen ein solcher Eingriff ausnahmeweise trotzdem zulässig ist, ist … gegenstandslos'.[145]

More particularly, it is not seldom contended that especially 'personality-aspects' of rights – also because of their link with the *Menschenwürdegehalt* – are protected in this absolute manner. In the words of the *Bundesverfassungsgericht*:

> 'Selbst schwerwiegende Interessen der Allgemeinheit können Eingriffe in diesen Bereich nicht rechtfertigen; eine Abwägung nach Maßgabe des Verhältnismäßigkeitsgrundsatzes findet nicht statt … Dies folgt einerseits aus der Garantie des Wesensgehalts der Grundrechte (Art. 19 Abs. 2 GG), zum anderen leitet es sich daraus ab,

140 See Stern 1994, Bd. III/2, p. 867; Brüning, in Stern/Becker 2010, Art. 19, no. 40; Sachs, in Sachs 2011, Art. 19, no. 41.

141 *E.g.*, Borowski 2007, p. 288;

142 Krüger 1955, p. 597 ('It is a specific characteristic of the Constitution that it nevertheless in the end grants absolute priority to citizens' autonomy: When the *Wesensgehalt* of a right is concerned, it is up to the citizen to decide whether and how to make use of his freedom.').

143 See also, *supra*, especially S. 4.2.1.

144 See, *e.g.*, Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 37; Stern, Bd. III/2, p. 867. However, since it is not entirely clear what 'in keinem Falle' refers to, this argument should not be given too much weight. See Dreier, in Dreier 2013, Art. 19 II, no. 15, fn. 55.

145 BVerfGE 7, 377 (411) (*Apothekenurteil*) ('The question, under which circumstances such an interference can exceptionally be accepted, is of no relevance.'). See, *e.g.*, Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, nos. 38f.; Sachs, in Sachs 2011, Art. 19, no. 41; Hofmann, in Schmidt-Bleibtreu/Hofmann/Hopfauf 2011, Art. 19, no. 17; Brüning, in Stern/Becker 2010, Art. 19, no. 40.

dass der Kern der Persönlichkeit durch die unantastbare Würde des Menschen geschützt wird.'[146]

Regardless of such statements, however, it cannot be said that every time it comes to the question of the core of a right, balancing exercises are truly avoided.[147] Instead, as many authors point out, the German Constitutional Court's case law is neither consistent, nor clear on this matter.[148]

Absolute protection would imply that not even for the protection of the rights of others, an individual can be limited in the exercise of his core rights.[149] Herbert however contends that in the case of conflicts between (core) fundamental rights, protection of the *Wesensgehalt* is sometimes necessarily 'only' relative.[150] In Herbert's view, the guarantee will apply only if there is no such conflict, *i.e.*, if in opposition to the interference with a right, no other fundamental rights concern is found, but rather public aims that cannot directly be legitimised with reference to fundamental rights. In cases where there is only one individual fundamental right at stake, in other words, the qualification that something is proportional implies that the *Wesensgehalt* is not interfered with; in these cases the protection of the concrete core indeed has an absolute meaning.[151]

Although the majority of authors appear to favour an absolute understanding of the *Wesensgehaltsgarantie*,[152] this understanding leaves open a crucial question. Indeed, little is said on what exactly the cores of the different fundamental rights enshrined in the German Constitution consist of, and how these can be identified.[153] Even though it is regularly held that the *Wesensgehaltsgarantie*

146 BVerfGE 80, 367 (373) (*Tagebuchaufzeichnungen*) ('Even heavy-weighing general interests cannot justify interferences in this area; a balancing in accordance with the proportionality principle is not to be carried out … This follows on the one hand from the *Wesensgehaltsgarantie*, on the other hand it can be traced back to the fact that the core of 'personality' is protected by the inviolable guarantee of human dignity.'). *Cf.* also Enders, in Epping/Hillgruber 2012, Art. 19, nos. 148, 131; Dreier, in Dreier 2013, Art. 19 II, no. 17.

147 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 36; Enders, in Epping/Hillgruber 2012, Art. 19, no 30. See also BVerfGE 80, 367 (373).

148 Brüning, in Stern/Becker 2010, Art. 19, no. 40; Hofmann, in Schmidt-Bleibtreu/Hofmann/Hopfauf 2011, Art. 19, no. 17.

149 Krüger 1955, p. 599.

150 Herbert 1985, p. 333.

151 *Ibid.*

152 Jarass, in Jarass/Pieroth 2012, Art. 19, no. 9. Authors that (explicitly) favour an absolute view are, *e.g.*, Jarass, in Jarass/Pieroth 2012, Art. 19, no. 9; Chlosta 1975; Dürig 1956; Herbert 1985, Jäckel 1967; Krüger 1955; Schlink 1976; Stern 1994, Bd. III/2, pp. 865-868.; Enders, in Epping/Hillgruber 2012, Art. 19, no. 31.

153 Drews 2005, p. 63 (who holds that only few authors actually address this question). *Cf.* also Pieroth/Schlink 2012, no. 314.

is comparable to the *Menschenwürdegehalt*,[154] the fact that this would make Article 19(2) GG more or less redundant is one reason to hold differently.[155] It is agreed, however, that the (absolute) *Wesensgehalt* in any case is interfered with, when any 'Störungsabwehranspruch materiell-rechtlich beseitigt oder wenn seine wirkungsvolle Geltendmachung verfahrensrechtlich verwehrt wird'.[156] Moreover, as follows from the case law too, the content of the *Wesensgehalt*, even in an absolute understanding, should be determined for each fundamental right separately.[157] Moreover, as Remmert emphasises: 'Hat ein Grundrecht unterschiedliche Verpflichtungsgehalte, Schutzrichtungen und Funktionen, wird der Wesensgehalt auch insoweit unterschiedlich zu bestimmen sein.'[158] This underlines that it is very difficult, if not impossible, to provide general information with regard to the content of the *Wesensgehalt*.[159]

Herbert nevertheless attempts to provide some overarching insights. Having established that the *Verhalnismäßigkeitsgrundsatz* plays a very important role in fundamental rights adjudication, and that this leads to a loss of practical meaning for Section 2 of Article 19 GG,[160] he tries to concretise the additional value of this provision. Herbert distinguishes the *Wesensgehalt* from that what is left over after a proportionality test has taken place. In doing so he underlines the *positive* understanding of the *Wesensgehalt*, which 'kann vielmehr als Leitprinzip dienen bei der Klärung der Frage, in welchem Maße der sachliche Gehalt des Grundrechts aufgrund seiner wesensgemaßen Struktur und Funktion Bewahrung beansprucht und Entfaltung verdient'.[161] To determine the content of this 'guiding principle', that indeed determines whether or not a

154 *Cf.* Brüning, in Stern/Becker 2010, Art. 19, no. 41; BVerfGE 80, 367 (373f.); Sachs, in Sachs 2011, Art. 19, no. 43; Borowski 2007, p. 288, with further references (fn. 305); Stern III/2, p. 873f.; Jarass, in Jarass/Pieroth 2012, Art. 19, no. 9.

155 Stern/Becker 2010, Art. 19, no. 41. *Cf.* also Enders, in Epping/Hillgruber 2012, Art. 19, no. 28.

156 *Cf.* BVerfGE 61, 82 (113) ('… right to fend off interferences substantively is annulled or its efficient invocation is procedurally precluded'); Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 43; Brüning, in Stern/Becker 2010, Art. 19, no. 41; Sachs, in Sachs 2011, Art. 19, no. 44.

157 BVerfGE 22, 180 (219) and BVerfGE 109, 133 (156): 'Der unantastbare Wesensgehalt eines Grundrechts muss für jedes Grundrecht aus seiner besonderen Bedeutung im Gesamtsystem der Grundrechte ermittelt werden'. See also Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 40 (emphasising the word 'seinem' in Article 19(2) GG); Stern 1994, Bd. III/2, p. 874; Sachs, in Sachs 2011, Art. 19, no. 44; Enders, in Epping/Hillgruber 2012, Art. 19, no. 26; Jarass, in Jarass/Pieroth 2012, Art. 19, no. 9; Dreier, in Dreier 2013, Art. 19 II, no. 15.

158 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 40 [footnote omitted] ('If a fundamental right provides for different obligations, directions of protection and functions, the *Wesensgehalt* will have to be interpreted accordingly.').

159 *Cf.* Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 41.

160 Herbert 1985, p. 330.

161 *Ibid.*, p. 333 ('… can serve as a guiding principle when assessing the issue to which extent the substantive content of the fundamental right calls for preservation and deserves to be developed').

proportionality test is necessary in the first place, the starting point must be the '*sachliche Geltungsgehalt*' ('material scope') of a right,[162] from which the *Wesensgehalt* can be delineated.[163]

Next to emphasising that the content of the core right follows from the meaning of the right itself, Herbert identifies a few more general guidelines:[164] First, the *character and function of fundamental rights* provides some guidance.[165] Fundamental rights are first of all rights of individuals, and as such they primarily serve to guarantee self-determination in fields typically imperilled by state powers, as well as secure the conditions and possibilities for the free and self-accountable development, participation and contribution of the individual in the community.[166] Fundamental rights are concerned with individual persons, and the more the freedom of the individual concerns a social relation or function, the more broadly can the authority of the legislature be understood.[167] This does however not mean that the *Wesensgehalt* is limited to aspects of the private sphere. After all, various fundamental rights move beyond this sphere and concern for example public speech, or association and assembly.[168]

Secondly, according to Herbert, also the 'dignity of man', the *Menschenwürde*, forms a guiding principle that ensures a minimal level of individual autonomy and social dignity.[169] He thereby seems to suggest that the core of a right at least includes its *Menschenwürde* aspects, but that these do not exhaust the *Wesensgehalt*. It remains unclear, however, whether his theory implies that the 'remainder' of the *Wesensgehalt* should also be determined by (what comes closest to) the *Menschenwürdegehalt*. Potentially, at least, this notion could play such a role by pointing out the direction in which one should look for determining core aspects.

Finally, Herbert argues that comparative insights can be helpful in determining the *Wesensgehalt* of a right. This means that other bodies of law or legal obligations may help in clarifying the contours of a right's core. Referring to prohibitions following from the ECHR, as well as *ius cogens*, he however notes that these usually present an absolute *minimum* that mostly does not reach the level of protection that is or should be granted by Article 19(2) GG.[170] This means, hence, that comparative international insights in the German

162 *Ibid.*, p. 331. *Cf.* also Sachs, in Sachs 2011, Art. 19, no. 44.
163 *Ibid.*, p. 331 (where several examples concerning German constitutional rights are given).
164 *Ibid.*, p. 332.
165 *Cf.* also Enders, in Epping/Hillgruber 2012, Art. 19, no. 31, referring to the 'Wortlaut, Sinn und Zweck' (the wording, meaning, and aims) of fundamental rights as providing the necessary guidelines.
166 Herbert 1985, p. 332. *Cf.* also Enders, in Epping/Hillgruber 2012, Art. 19, no. 28.
167 Herbert 1985, p. 332.
168 *Ibid*.
169 *Ibid*.
170 *Ibid.*, pp. 332-333.

context would not suffice for determining the *Wesensgehalt* as one would then end up with a 'too' minimal protection.[171] Like in the case of the *Menschenwürdegehalt*, comparative insights can however point out the direction in which to look; they can form the stepping-stones for carving out a more inclusive 'minimum' protection through Article 19(2) GG.[172]

In sum, it can be concluded that those who favour an absolute understanding of the *Wesensgehalt*, stress the importance of giving Article 19, Section 2 GG a meaning of its own. Moreover, and most importantly, they emphasise the importance of the protection of individuals against the state. This does not merely imply that a core is *absolutely protected*, but also that the *meaning* of this core is '*absolute*', *i.e.*, established in an abstract, case-independent fashion. 'Absolutists' hold that there needs to be a predetermined area the legislature, as well the executive and the judiciary, cannot touch upon. Delineating and defending this area is hence what the *Wesensgehaltsgarantie* should be used for.

Static versus Dynamic Absolute Theories

Before moving to a discussion on the relative understanding of the *Wesensgehaltsgarantie* and a further exploration of the relation between this guarantee and the *Verhaltnismäßigkeitsgrundsatz*, one last aspect of the absolute theory should be looked into. Generally, the absolute theory is thought to be a very strict one.[173] A distinction must however be made between those who support a, what Drews calls, *statisch-absolute Theorie* and those who believe the core of a right must be understood as *dynamisch-absolut*.[174] At least with regard to the content[175] of the *Wesensgehalt*, the latter interpretation is not a strict one – it holds that the core of a right is dynamic and can change over time. According to Herbert, it implies that the *Wesensgehalt* should not be understood as a 'versteinerte Kern':[176]

> 'Die Grundrechte sind auf die soziale Wirklichkeit bezogen, die stetem geschichtlichem Wandel unterliegt. Im Vorgang ihrer "Konkretisierung" bleibt ihr sachlicher Gehalt von sozialem Wandel nicht unberührt. Soweit die Verfassung 'offen' ist

171 However, Herbert's article was written in 1985, and it can be argued that international legal standard setting – not in the least by the ECtHR – has expanded to such extent that this point is no longer valid.

172 *Cf.*, *infra*, Ch. 5, S. 5.5.2.2.

173 *Cf.* Knüllig 1956, p. 118 (who is speaking of those 'core' elements of a fundamental right that remain the same regardless of any changes in the perception of the right).

174 Drews 2005, pp. 65-66.

175 And indeed, not with regard to the protection offered, in the sense that when a 'dynamic core' is identified, it is absolutely protected and no exceptions are hence possible. See, on the distinction between absolute content and absolute protection, *infra*, Ch. 7, especially S. 7.2.1.

176 Herbert 1985, p. 334. *Cf.* also Stern 1994, Bd. III/2, p. 875, who takes into account the historical development of the fundamental right when the *Wesensgehalt* is to be determined.

> und durch den Text der Norm begrenzte Auslegung ihres Inhalts mit dem Blick auf die reale Umwelt zuläßt und ermöglicht, trägt das nicht zu ihrer allmählichen Auflösung, sondern zu ihrer "Verstetigung" bei. … [Auch] der jeweilige Wesensgehalt hat, wenngleich mit gebremster Dynamik, teil an der Entwicklung des Grundrechts.'[177]

By way of example, Herbert mentions the fundamental right to protection of property as a right the *Wesensgehalt* of which has altered over time – from the guarantee of '*freien Herrschaftsbeliebens*', *i.e.*, the unlimited right to do with your property whatever you like, to protection merely of 'private use' of property and the right to dispose of it.[178] More broadly speaking, according to the 'dynamic' theory, (social) changes in society and a changing understanding of what fundamental rights should provide for, can affect the *Wesensgehalt* and alter its content. In this way, the advantage of 'absolute' protection of an important fundamental rights interest can be combined with the possibility to adjust the definition of the core of rights to reflect new circumstances. Phrased differently, the strict character of the absolute understanding can be nuanced and 'softened' by the idea that fundamental cores need not be determined once and for all. Of course this brings along extra, and particularly difficult questions, as when and how an absolute core should be altered, to which the literature does not provide concrete answers.

4.3.2.2 Relative Theories

According to a relative understanding of the *Wesensgehaltsgarantie*, the *Wesen* of a right does not constitute an absolute, pre-determined boundary to limitations to the exercise of that right. Rather, a right's *Wesen* is something that needs to be determined in the context of a specific case by balancing the different interests.[179] Different from the 'absolute' understanding, a relative *Wesensgehalt* does not preclude a proportionality test, but instead the *Wesen*

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177 Herbert 1985, p. 334 ('The fundamental rights [enumerated in the *Grundgesetz*] relate to social reality, which is subject to constant historical change. In the course of their "concretisation", their substantive content remains not unaffected by social change. To the extent that the constitution is "open" and enables and allows for an interpretation of its content in the light of social reality, this does not contribute to it subsequent dissolution, but rather to its "consolidation" … the respective core right [as well], participates, albeit less dynamically, in the development of the fundamental right.').

178 Herbert 1985, p. 334. *Cf.* also Enders, in Epping/Hillgruber 2012, Art. 19, no. 31.3.

179 See, generally, Drews 2005, p. 66ff.; Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 36ff.; Stern 1994, Bd. III/2, pp. 867-868; Pieroth/Schlink 2010, no. 313; Borowski 2007, p. 287f.; Sachs, in Sachs 2011, Art. 19, nos. 41ff.; Enders, in Epping/Hillgruber 2012, Art. 19, no. 29ff.; Jarass, in Jarass/Pieroth 2012, Art. 19, no. 9; Dreier, in Dreier 2013, Art. 19 II, nos. 17-18; Brüning, in Stern/Becker 2010, Art. 19, nos. 40f. For some supporters of a relative theory, see Von Hippel 1965; Zivier 1960; Hamel 1957; Alexy 2002; Häberle 1983; Kaufmann 1984; Borowski 2007.

is that what is left over once such a test has been performed. Hence, the *Wesen* of a right is what results from the adjudication of a fundamental rights case, rather than that it guides this process by being determined on forehand and 'steering' the way in which a court deals with a given rights issue.[180] However, apart from sharing the assumption that the *Wesensgehalt* is by definition circumstantial, relative theories are based on different perceptions of the role of (the cores of) fundamental rights in relation to conflicting interests and societal aims. By presenting different 'relative' views, this section gives an overview of what the relative theory can stand for.

First and foremost, a relative understanding of the *Wesensgehalt* can imply that Article 19, Section 2 GG *de facto* equals the requirement of proportionality, *i.e.*, the *Verhältnismäßigkeitsgrundsatz*.[181] According to Von Hippel, every fundamental rights norm can only be effectuated, if and to the extent there are no higher-ranking interests conflicting with the freedom protected.[182] Limitations of fundamental rights are, according to this view, *always* allowed, *as long as* they serve interests that *outbalance* the individual fundamental rights interest at stake.[183] Important to note is that when general (societal) interests prevail, this cannot mean that the *Wesensgehalt* of the individual right is interfered with.[184] Instead, this signals that the limitation is actually in compliance with the *Wesensgehaltsgarantie*. The core of a right is not interfered with at all, but the *Wesen* of a right is 'outlined' in the sense that only when a decision on proportionality is taken it becomes clearer what the *Wesensgehalt* could entail in the first place.

In Von Hippel's view, this understanding makes the *Wesensgehaltsgarantie* more or less redundant, as it really does not add anything to the *Verhältnismäßigkeitsgrundsatz*.[185] The same position has been taken by Zivier.[186] Zivier mentions three starting points that have to be taken into account when funda-

180 *Cf.* Herbert 1985, p. 333, who introduces his absolute understanding as a 'positive', guiding norm, implying that a relative understanding does not play this role, but should rather be seen as the 'residue' of a balancing exercise. See, *supra*, S. 4.3.2.1.

181 Especially, *e.g.*, Von Hippel 1965; Hamel 1957; Zivier 1960. See further Drews 2005, pp. 67-68. *Cf.* also Dreier, in Dreier 2013, Art. 19 II, nos. 17-18.; Sachs, in Sachs 2011, Art. 19, no. 42; Brüning, in Stern/Becker 2010, Art. 19, no. 40. See on the requirement of proportionality, generally, *supra*, Ch. 3, S. 3.4.2.

182 Von Hippel 1965, pp. 25-26. *Cf.* also p. 47.

183 Indeed, it is not necessary that the countervailing interests are of a fundamental nature. *Cf.* Herbert 1985, p. 333, who instead holds that *only* when this is the case, a core right can be relative.

184 Von Hippel 1965, p. 47. An understanding that in exceptional cases allows for interferences with the core of a right, is a different 'relative' understanding (*Cf. infra*, Ch. 7, S. 7.2.1.). See, for examples of relative core protection understood in this way, *infra*, Ch. 6, S. 6.5.2, and, more indirectly, Ch. 5.

185 See Drews 2005, p. 67.

186 Zivier 1960.

mental rights are interpreted. First of all, attention has to be paid to the fundamental rights norm itself. Secondly, account needs to be taken of the possibility to limit the fundamental right, and, thirdly, of the relation between this possibility and the fundamental rights norm.[187] From this he infers that the *Wesensgehalt* of a right can only be determined when both the '*Grundrechtssatzes*' and the '*Vorbehaltssatzes*' are considered, *i.e.*, balanced against each other. According to Zivier, '[d]ies ist … nur nach dem *Verhältnismäßigkeitsgrundsatz* möglich'.[188]

From the positions of Von Hippel and Zivier one can quite easily move to Alexy's understanding of the *Wesensgehaltsgarantie*. Also Alexy sees a close connection between the *Wesensgehaltsgarantie* and the *Verhältnismäßigkeitsgrundsatz*. He grounds his view on his constitutional rights theory, and on the idea of fundamental rights as principles in particular.[189] His theory, which was introduced already in Chapter 3,[190] in brief entails that fundamental rights are 'optimisation requirements', which can be fulfilled to different degrees depending on the legal and factual possibilities.[191] As principles, fundamental rights can conflict with other principles concerning the general interest. When this is the case, neither the individual interest nor the general interest takes precedence per se.[192] Instead, the principle of proportionality becomes of crucial importance.[193] Alexy's theory implies that even when the individual interest at stake involves a very important aspect of a fundamental right, this alone is not a reason to give precedence to it.[194] The *prima facie* rights that are put forward by constitutional provisions can always – depending on the concrete circumstances – be outbalanced by limitations of a more forceful character. What matters is the relation between the degree of interference and the importance of satisfying the competing interest. Alexy by no means denies that there are limits to limitations of fundamental rights.[195] These limits however cannot be determined at the outset but are, indeed, always dependent on the requirement of *Angemessenheit*, *i.e.*, proportionality in the narrow sense.[196] Speaking of the *Wesensgehaltsgarantie* in particular, Alexy holds that '[t]he absolute theory goes too far in saying that there are legal positions such

187 *Ibid.*, p. 76ff. See also Drews 2005, p. 68.
188 'This is only possible according to the *Verhältnismäßigkeitsgrundsatz*.' Zivier 1960, p. 79.
189 Alexy 2002. More precisely, according to Alexy fundamental rights have both a 'rule' and a 'principle' aspect, see, *supra*, Ch. 3, S. 3.2.1. See also Borowski 2007, pp. 287-288.
190 See, *supra*, Ch. 3, and in particular S. 3.2.1 and 3.4.2.
191 Alexy 2002, pp. 47-48. See also Alexy 1992, p. 120; Alexy 1987, p. 407.
192 Alexy 2002, pp. 51-54.
193 Alexy 2002, p. 65.
194 This follows from the 'Law of Balancing', see Alexy 2002, p. 102, see also, *supra*, Ch. 3, S. 3.4.2.
195 Alexy 2002, p. 192.
196 *Ibid.*, p. 194. *Cf.* also Dreier, in Dreier 2013, Art. 19 II, no. 18; Hofmann, in Schmidt-Bleibtreu/Hofmann/Hopfauf 2011, Art. 19, no. 18.

that no possible legal reason can ever restrict them'.[197] He does not deny that there are conditions under which it is very likely that there is no conflicting principle that can ever take precedence of an individual right. When this is the case, 'essential cores' become visible.[198] This 'absolute' conclusion is however still something relative – it is grounded on a specific relation between the different principles at stake, and there always remains a possibility that competing principles do take precedence if the facts of a case would be different.[199] The *Wesen* of a right cannot be identified without first balancing the relevant principles against one another. It is the *Angemessenheit*, the proportionality in the narrow sense, that enables the assessment of the various legal possibilities, and hence to determine the *relative* core of a fundamental right.

Borowski concurs with Alexy's interpretation: he holds that even though what follows from the proportionality test is a 'rule-like core', this 'rule' nevertheless remains dependent on a rights-principle being *balanced against* conflicting principles. The upshot is hence that the *Wesensgehaltsgarantie*

> 'hat daneben materiell keine eigenständige Bedeutung. Damit dürfte feststehen, daß mangels autoritativer Festsetzung eines absoluten Wesensgehalts die Wesensgehaltsgarantie gem. Art. 19 Abs. 2 GG im Sinne der Theorie vom relative Wesensgehalt zu deuten ist.'[200]

The conclusion that the individual core of a right can never be affected as long as state or other interests are of higher importance nevertheless remains somewhat counterintuitive. After all, fundamental rights are generally considered to provide protection against the will of the majority, and should therefore not entirely be dependent on state interests. Hamel tries to clarify the matter by referring to the 'social aspect' of fundamental rights.[201] In his view, '[d]er verfassungspolitische Sinn der Menschenrechte und der Grund-

197 Alexy 2002, p. 195

198 *Ibid.*, referring to Häberle 1983, p. 64: 'What is described as the inviolable "core" of freedom of action, or freedom of contract, is that area in which there are without question no legitimate legal interests capable of limiting constitutional rights which are of equal or higher value.'

199 Alexy 2002, pp. 195-196. See also Borowski 2007, p. 287ff. Borowski holds that the absolute theory holds that the core of a right has a 'rule character', whereas the periphery must be understood as a principle. Nevertheless, '[m]angels besonderer autoritativer Festsetzung bleibt diese Regel jedoch jederzeit insofern vorläufig, als besondere Umstände eine Überprüfung und gegebenenfalls Korrektur erfordern. Mit der Begründung der Wesensgehalts-Regel aus Prinzipienkollisionen ist jedoch die Position der absoluten Wesensgehaltsgarantie bereits verlassen' (p. 289).

200 Borowski 2007, p. 290 ('… besides that, the rule has no self-standing substantive significance. As a result, it should be clear that as there is no authoritative definition of an absolute *Wesensgehalt*, the *Wesensgehaltsgarantie* according to Art. 19(2) GG must be understood in line with the theory of the relative *Wesensgehalt*.').

201 Hamel 1957, pp. 23-24, 38-39.

rechte umfaßt den sozialpolitischen'.[202] Individual rights do not only concern individual freedoms, but also individual duties, and are inherently related to human coexistence.[203] Referring to the fundamental '*Berufsfreiheit*' (freedom of profession), as well as to the protection of property and the freedom of association, Hamel stresses that these rights (and their cores) must be understood in light of the purpose of fundamental rights in a '*soziale Rechtsstaat*'.[204] It is the task of the state to develop the '*Werte menschlicher Gemeinexistenz*'. Limitations of fundamental rights that are *necessary* to serve this goal cannot be said to interfere with the *Wesen* of these rights.[205] Indeed, the *Wesen* of a right cannot be determined without considering such limitations.

Another, somewhat different relative approach follows from the theory laid out by Häberle.[206] Häberle's influential work on the *Wesensgehaltsgarantie* not only presents a rich example of a relative understanding of Article 19(2) GG, it moreover incorporates this understanding into a broader institutional theory of fundamental rights and their limits.[207] While most authors take this as the starting point, Häberle's theory argues against the 'Eingriffs- und Schrankendenkens' that is predominant in German constitutional law.[208] He does not regard freedom, and the constitutional rights that protect individual freedoms, as 'Reservaten individueller Beliebigkeit' ('areas of individual discretion'),[209] which exclude room for definition by the legislature. According to this interpretation, rights are understood as 'boundless', at least before they are restricted 'from outwards'.[210] Instead, Häberle considers rights as being limited 'from the outset'. He stresses that there is a strong link between rights and their boundaries – these boundaries 'wiesen dem Grundrecht den Platz zu, den es von vornherein im Ganzen der Verfassung einnimmt'.[211]

Häberle's theory thus focuses on the '*ineinanderstehen*' of freedom and law, *i.e.*, on the interrelatedness of the two.[212] He argues that it is generally mis-

202 'The constitutional-political meaning of human rights and fundamental rights comprises a socio-political one.' Hamel 1957, p. 23.
203 *Ibid.*, p. 23-24. *Cf.* the individual-oriented theory presented by Herbert, 1985. See, *supra*, S. 4.3.2.1.
204 *Hamel 1957*, p. 39. This moreover goes for all fundamental rights, see p. 40.
205 *Ibid.*, p. 41ff.
206 See, foremost, Häberle 1983, but also Häberle 1989.
207 The following, however, should not be confused with the 'institutional' *objective* understanding of the *Wesensgehaltsgarantie*. See, *supra*, S. 4.3.1.1.
208 See, *e.g.*, Häberle 1983, p. 3.
209 *Ibid.*, p. 152, referring to natural law ideas, as well as to the theories of Jellinek, Schmitt and Kelsen.
210 *Ibid.*, p. 51ff., 126ff. *Cf.* the two-fold structure of fundamental rights as is was discussed previously. See, *supra*, Ch. 3, S. 3.2.1. The distinction Häberle speaks of resembles that between *prima facie* and 'eventual' rights.
211 *Ibid.*, p. 51 ('… give the fundamental right its position in the Constitution in the first place.').
212 *Ibid.*, p. 152, 161, 225.

conceived that freedom and law refer to each other, which in the context of fundamental rights implies that these rights form a system of 'rechtlich geregelter Freiheit' ('regulated freedom').[213] Fundamental rights are not '*beschränkt*', *i.e.*, not 'limited' by the legislature, but instead have immanent boundaries. They are not only 'defensive' rights, but they belong to the state instead, and have the aim to protect 'incorporated' citizens rather than purely 'autonomous' ones.[214] The task of the legislature is therefore not to limit 'pre-existing' rights when this is deemed necessary, but instead to identify the boundaries of fundamental rights and thereby determine what these entail in the first place. In this way '[j]ede Begrenzung ist zugleich inhaltliche Bestimmung, punktuelle Inhaltsbestimmung des Grundrechts'.[215]

For the *Wesensgehaltsgarantie* this means that Häberle sees the '*Wesen*' of fundamental rights, just as these rights themselves, as from the outset determined in the light of conflicting interests: '[D]er Wesensgehalt der Grundrechte [ist] keine Größe …, die "an sich" und unabhängig vom Ganzen der Verfassung und den neben den Grundrechten anerkannten Rechtsgütern zu gewinnen ist.'[216] More particularly, the determination of fundamental rights takes place by means of a balancing test, and the same goes when it comes to settling the 'core' of a right.[217] The *Wesensgehaltsgarantie* as understood by Häberle is thus identical to the requirement of proportionality. Interestingly, however, he endeavours to demonstrate that this is not contradictory to the idea of fundamental rights as important 'institutions' nor to the very notion of core rights, by explaining that it is exactly the balancing that enables to demarcate fundamental rights as 'institutions' from other legal interests, or *Rechtsgütern*.[218]

All in all, Häberle's relative theory does not depart from the other relative views presented here when it comes to the conclusion that 'cores' are by definition relative because they exist only by virtue of a proportionality

213 *Ibid.*, p. 152.
214 *Ibid.*, p. 19.
215 'Every limitation is at the same time a substantive determination, an exact determination of substance of the fundamental right.' *Ibid.*, p. 180.
216 *Ibid.*, p. 58 ('The *Wesensgehalt* of fundamental rights is no factor … that can be determined *an sich* and identified independently from the whole of the Constitution and the interests recognised next to the fundamental rights'. See also Häberle 1989, p. 388; Häberle 1983, p. 61, and 183, where he formulates it as follows: 'Welche Bedeutung dies Begrenzungs- und Gestaltungsfunktion für den Wesensgehalt der Grundrechte und die wesensmäßigen Grundrechtsgrenzen besitzt, ist unschwer zu erkennen: Der Gesetzgeber, der die Grundrechte in de beschriebenen Weise ausgestaltet, stattet sie mit ihrem jeweiligen Wesensgehalt aus, d.h. er schafft Normenkomplexe und einzelne Rechtsinstitute, welche zum Wesen des betreffenden Grundrechts gehören, oder (und) er schafft die Voraussetzungen dafür, daß die einzelnen Grundrechtberechtigten in der Lage sind, vom Wesen ihrer Freiheit Gebrauch zu machen. Daß die Funktion des Gesetzgebers auch wesentlich mit dem "Ineinanderstehen" von Recht und Freiheit zusammenhängt, liegt auf der Hand.'
217 Häberle 1983, p. 31, 51, 58.
218 *Ibid.*, p. 125.

analysis. Nevertheless, his account of the *Wesensgehaltsgarantie* signals an important and particular outlook. Whereas Alexy – as well as implicitly also most of the other 'relativists' – builds his relative theory on the idea that individuals have broad, *prima facie* rights that should be upheld to the greatest extent possible, Häberle does not distinguish between a 'prior', broadly understood fundamental right and the limited version of this right after a – potentially justifiable – interference has taken place. Häberle's institutional theory does not speak of pre-existing rights, but of rights that are determined in a legal context. Thus, in his view, also cores of rights are by definition carved out by the legislature.

One last account to be briefly mentioned in this section is that of Kaufmann, who explicitly rejects an 'institutional' characterisation of fundamental rights and is sceptical when it comes to the *Wesensgehalt* as it is commonly understood, namely in a 'substance-ontological' sense.[219] From his point of view, the search for a substantial *Wesensgehalt* is 'sinnlos'.[220] Law, according to Kaufmann, is *relational*, rather then substantive:

> 'Ein Recht kann gar nicht sinnvoll ohne Bezug (Relation) zu anderen Rechten und Rechtssubjekten gedacht werden. "Recht" ist nicht dann gegeben, wenn ein bestimmter "Zustand" … geschaffen ist, sondern wenn das "rechte Verhältnis" besteht zwischen den Personen sowie den Personen und den Dingen.'[221]

Also the *Wesen* of a right can therefore only be understood in a relational sense. Hence, when it comes to a limitation of a fundamental right, there is nothing left over that can be described as a 'meßbaren, zählbahren, wägbaren "Wesensgehalt"'.[222] Kaufmann argues that his theory is neither absolute, nor relative.[223] Drews however, makes clear that his understanding of the *Wesensgehalt* could be positioned amongst the relative theories.[224] After all, Kaufmann sees a central role for the principle of balancing in order to determine the '*rechte Verhältnis*' he considers crucial.[225] And even when the result of this balancing is not labelled '*Wesensgehalt*' – for he indeed abolishes this depiction –, Kaufmann in fact does the same thing as the other relativists, namely

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219 Kaufmann 1984, p. 390ff. Kaufmann points at the fact that different theories speak of a '*Restbestand*', or a '*substantielles Minimum*'.

220 *Ibid.*, p. 391.

221 *Ibid.*, p. 393. ('A right cannot be understood in a meaningful way, but in relation to other rights and rightsbearers. One cannot speak of "law", when a certain condition is created … but when an "adequate relation" exists between persons as well as between persons and things'.)

222 *Ibid.*, p. 392.

223 And for that matter, he also holds his theory to overcome the distinction between 'objective' and 'subjective' theories. See *ibid.*, p. 394, 397, and, *supra*, S. 4.3.1.1 and 4.3.1.2.

224 Drews 2005, p. 69ff.

225 *Cf.* Kaufmann 1984, p. 396.

determining the limits to limitations with the help of a circumstantial proportionality test.[226]

Altogether, the different relative theories have in common that they emphasise the possibility of limiting fundamental rights. They do not recognise a core that is determined in advance and they deny that such a core should take a guiding role in the adjudicative process by defending a particular area of freedom against interference by the state. Rather, they state that what can be considered the *Wesen* of a right always has to be determined by taking into account countervailing interests. Indeed, this *Wesen* might still be considered to be 'absolutely protected' in the sense that it cannot be interfered with, which is in fact what Article 19(2) GG dictates. It is, however, relative because what the core *is* cannot be determined in an absolute way. The main difference between the different relative theories is then that some of them focus on the technical impossibility of avoiding a balancing test for determining whether an interference with a *prima facie* right is justified (e.g., Alexy, Borowski),[227] whereas others stress the socio-political or institutional character of fundamental rights (e.g., Hamel, Häberle) – and thereby the impossibility of taking a bifurcated approach and determining a *prima facie* right in the first place – in order to explain why the protection of the core of a right is by definition relative.

4.4 Core Rights in the Practice of the *Bundesverfassungsgericht*

Already in the introduction to this chapter, it was noted that the German *Wesensgehaltsgarantie* as it is laid down in Article 19(2) GG would be discussed mainly for its theoretical relevance. The debate that has just been outlined shows a rich array of understandings of the idea of protecting the core, or *Wesen*, of fundamental rights. Not only the addressees and the object of protection of Article 19(2) GG have been subject to discussion, elaborate arguments have also been put forward regarding whether cores of rights are something 'absolute', or rather necessarily dependent on the case at hand. In terms of practical relevance, there is less that can be said. Although for this study no extensive research has been done into the case law of the German *Bundesverfassungsgericht*, it can be concluded on the basis of the literature and (up-to-date) commentaries that in practice Article 19(2) GG does not play an explicit role. However, this does not necessarily imply that the protection of cores of rights cannot be considered an important value underlying in a more general way the practice of the *Bundesverfassungsgericht*.

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226 Drews 2005, pp. 70-71.

227 Thereby relying on the binary structure of fundamental rights. See, *supra*, Ch. 3, S. 3.2.1.

Therefore, after having made a few remarks as regards the limited concrete relevance of Article 19(2) GG (4.4.1), the concluding part of this chapter will also look beyond this specific constitutional provision (4.4.2). It is submitted here that besides the manifold theoretical insights that can be gained from the academic debate on the *Wesensgehaltsgarantie*, for the purpose of this research another 'core rights guarantee' apparent in German constitutional law should be discussed. Especially given the emphasis of the present study on the protection of economic and social rights in particular, the guarantee of an *Existenzminimum* (subsistence minimum) and the way this guarantee has been elaborated in the *Bundesverfassungsgericht*'s case law is worth attention. This will not only present an example of how the protection of essential (socio-economic) levels of a right plays a concrete role in fundamental rights adjudication in Germany, but may also provide an interesting source of inspiration for the ECHR system.

4.4.1 The Limited Practical Use of the *Wesensgehaltsgarantie*

As mentioned previously, the *Bundesverfassungsgericht* has held with regard to interferences with the core of a right, that because of the wording of Article 19(2) GG, 'die Frage, unter welchen Voraussetzungen ein solcher Eingriff ausnahmeweise zülassig ist, ist … gegenstandslos'.[228] Some authors consider this to be a confirmation of the fact that the *Wesensgehaltsgarantie* is something absolute. This could be considered true when 'absolute' protection is understood merely as 'not allowing for any exceptions'. However, the quote of the *Bundesverfassungsgericht* does not rule out a 'relative' understanding in the sense that what is to be protected 'absolutely', can only be determined in a relative manner, *i.e.*, by taking into account the particular circumstances at stake in a given case. In this understanding, the concrete added value of Article 19(2) GG to the test of proportionality may seem non-existing.

When looking at the reasoning of the *Bundesverfassungsgericht*, it becomes clear that, indeed, this court generally resorts to proportionality analysis and 'balancing'. The question of what concerns the core of a specific right is then answered on the basis of the *Verhältnismäßigkeitsgrundsatz* and not determined on forehand.[229] In a case concerning the fundamental right to liberty of the person,[230] for example, it concluded that

228 BVerfGE 7, 377 (411), see, *supra*, S. 4.3.2.1.

229 *E.g.*, Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 39.

230 Art. 2(1) GG reads: 'Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt' ('Every person has the right to free development of their personality, to the extent that they do not infringe the rights of others or offend against the constitutional order or public morals.').

> '[d]er schwerwiegende Grundrechtseingriff, den die möglicherweise lebenslange Verwahrung bedeutet, verstößt nicht gegen die Wesensgehaltsgarantie, solange gewichtige Schutzinteressen den Eingriff zu legitimieren vermögen und insbesondere der Grundsatz der Verhältnismäßigkeit gewahrt ist.'[231]

This does not imply that there can be sufficient reasons for interfering with the *Wesen* of a right. Rather, as long as there are sufficient reasons – and an interference is thereby proportional – the *Wesen* of a right has not been touched upon.

In German constitutional law, the omnipresence of the requirement of proportionality has had the effect that interferences with fundamental rights are not seldom held to be unconstitutional, even if they cannot (yet) be said to have touched upon the possible *Wesen* of a right.[232] From this it follows that, in practice, when an interference is, or could arguably be considered to be in violation of the core of a right, the *Verhältnismäßigkeitsgrundsatz* generally functions as the relevant criterion.[233] In this respect, a distinction can be made between a proportionality analysis in the context of negative, or 'defensive' guarantees, and positive (aspects of) fundamental rights.[234] With regard to the former it is noted that the *Übermaßverbot* is the most important criterion for determining whether or not an interference can be justified. This requirement prohibits 'übermäßigen Eingriffen' (disproportionate interferences), and hence implies that '"[i]n keinem Falle" darf … eine konkrete Beeinträchtigung eines Freiheitsgrundrechts in Bezug auf den verfolgten Zweck ungeeignet, nicht erforderlich oder unverhältnismäßig sein'.[235] Also the *Menschenwürdegehalt* is of crucial relevance here, and can likewise 'stand in the way' of a more specific *Wesensgehalt* test.[236] When it comes to positive (aspects) of rights, active participation by the state is required and the state is instead confronted with the 'Untermaßverbot'.[237] This means that it is not allowed to 'do too little' and provide for insufficient, or 'undersized' protection. Also this requirement is seen to have the effect that the *Wesengehaltgarantie* requirement becomes redundant, since core rights protection is in fact included in proportionality review.

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231 BVerfGE 109, 133 (156) (*Sicherungsverwahrung*) ('The enormous interference a potentially life-long detention means, does not violate the *Wesensgehaltsgarantie* as long as important protected interests can justify the interference, and the principle of proportionality in particular is respected.'). *Cf.* also BVerfGE 117, 71 (96) (*gefährliche Straftäter*); BVerfGE 115, 118 (165) (*Luftsicherheitsgesetz*); BVerfGE 27, 344 (352) (*Ehescheidungsakten*).

232 See, *e.g.*, Dreier, in Dreier 2013, Art. 19 II, no. 18.

233 *E.g.*, BVerfGE 22, 180 (219). *Cf.* Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 38.

234 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 42.

235 *Ibid.*, Art. 19 Abs. 2, no. 43. ('In no case may a concrete interference with a fundamental freedom be unsuited, unnecessary, or disproportionate with regard to the aim pursued').

236 *Cf.*, on the role of this guarantee in relation to the *Wesensgehaltsgarantie*, *supra*, S. 4.3.2.1.

237 Remmert, in Maunz/Dürig 2012, Art. 19 Abs. 2, no. 45.

The conclusion must thus be that the added value of the Article 19(2) GG in everyday practice is limited, if not non-existent.[238] Remmert holds that the *Wesensgehaltsgarantie* essentially is simply a notion summarising principles that can be inferred from the Constitution even if there would not be Article 19(2).[239] Likewise, Häberle concludes that the *Wesensgehaltsgarantie*

> 'ist die deklaratorische Sanktion, die zusätzliche und überflüssige Sicherung von Prinzipien, die bereits in der Verfassung zum Ausdruck gelangt sind. Seine Bedeutung erschöpft sich darin, die Prinzipien in spezifischer Weise in einer Formel zusammenzufassen. Auch ohne ausdrückliche Wesensgehaltsgarantie ist der für jedes Grundrecht gesondert zu ermittelnde "Wesensgehalt" von der Verfassung gewährleistet.'[240]

In line with these comments, the limited use of the *Wesengehaltgaratie* can be considered to result from the presence of other constitutional instruments, in particular the notion of proportionality, that serve equally well the goal of judging whether or not an interference with a fundamental right is justified. However, this does not mean that the idea of protecting, at the very least, the core of a right does not play a valuable role for determining how to make use of these instruments.

4.4.2 An Alternative Example: The Right to an *Existenzminimum*

Speaking of the protection of essential guarantees apart from that (explicitly) based on the *Wesengehaltgarantie*, there is one example from the *Bundesverfassungsgericht*'s practice that cannot go unnoticed. In its recent case law, this court has recognised an individual right to an '*Existenzminimum*', *i.e.*, a subsistence minimum or a 'dignified minimum existence'.[241] As will become clear especially later on, this right is highlighted here not for its close, doctrinal relationship to Article 19(2) GG in particular – which is in fact not there[242] –, but instead because of its particular relevance for the study into core rights possibilities that can potentially be helpful for the socio-economic practice of the ECtHR.[243]

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238 *E.g.*, *Ibid.*, Art. 19 Abs. 2, no. 47.

239 *Ibid.*, Art. 19, Abs. 2, no. 47.

240 Häberle 1983, p. 234. ('[The *Wesensgehaltsgarantie*] is the declaratory sanction, a complementary and redundant guarantee of principles that are already expressed in the Constitution. Its meaning is limited to summarising the principles in a specific way in one formula. Even without an explicit *Wesensgehaltsgarantie* the *Wesensgehalt*, which is to be determined for each fundamental right individually, is guaranteed by the Constitution'.

241 BVerfGE 125, 175, 1 BvL 1/09 of 9 February 2010 (*Hartz IV*), para. 133ff.

242 See however Herbert 1985, p. 334 (*supra*, S. 4.3.2.1), who mentioned the *Existenzminimum* as an example of the protection of the *Wesen* of a right.

243 See, in particular, *infra*, Ch. 7.

4.4.2.1 The Absolute Right to an Existenzminimum

The *Existenzminimum*, or subsistence minimum, is not a recent legal phenomenon in Germany. Already for a long time, the duty to provide for this minimum has been considered to follow from Article 20(1) GG.[244] This provision holds that '[t]he Federal Republic of Germany is a democratic and federal social state' and is known as the 'social state principle'.[245] Article 20 does not fall under the header of 'Basic Rights' but forms the start of the chapter of the *Grundgesetz* on 'The Federation and the Länder'. This means that the protection of the subsistence minimum was considered only a duty for the state, and not a subjective, individual constitutional right. Thus, although the state had to provide for tolerable living conditions on the basis of statutory entitlements in the law,[246] individuals could not go to court arguing that their fundamental rights had been breached when the state allegedly failed to do so.

On the basis of two landmark cases dating from 2010 and 2012, this has now changed.[247] In the *Hartz IV* judgment, as well as later in the *Asylbewerberleistungsgesetz* (*Asylum Seekers Benefits*) judgment, the *Bundesverfassungsericht* has clarified that the *Existenzminimum* can be seen as an individual, constitutional right.[248] The *Hartz IV* case concerned the constitutionality of social assistance benefits paid under federal legislation. As of 2005, the Second Book of the German Code of Social Law arranges for basic provisions for employable persons either without any income or earning low wages. The payments are not linked to prior wages and are completely tax-funded. They include, next to a standard benefit, benefits for accommodation and heating, and became known as *Hartz IV*. With regard to these benefits, the *Bundesverfassungsgericht* held that Article 1 GG (human dignity), in combination with Article 20 (the "social state principle"), confers a right on individuals to a dignified minimum existence.[249] According to the *Bundesverfassungsgericht*, the right to an *Existenzminimum*

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244 BVerfGE 1, 97 (104). See, *e.g.*, Bittner 2011, p. 1942.

245 'Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.'

246 *E.g.*, BVerwGE 1, 159 (161).

247 *Hartz IV* and BVerfGE 132, 134, BvL 10/10, of 18 July 2012 (*Asylum Seekers Benefits*), respectively. However, combining Art. 20 with Art. 1 GG (human dignity), already in the early 1990s the *Bundesverfassungsgericht* held that in the field of income tax, the taxpayer must be allowed a tax-free income that ensures an existence in human dignity (*e.g.*, BVerfGK 82, 60). In order for parents to provide for their children, moreover, aliments to be paid have to be tax free. Also, it became clear that the subsistence minimum cannot take the form of retroactive payments, but has to be provided for immediately. See BVerfGE 5, 237.

248 See, on this development also, *e.g.*, Seiler 2010; Kingreen 2010; Schnath 2010; Hörmann 2010. As Bittner notes, '[t]he special thrust of the *Hartz IV* decision is its subsequent step from a state's obligation to formulate an individual's enforceable constitutional right to statutory state benefits as the reverse image of the state's obligation'. Bittner 2011, p. 1944.

249 *Hartz IV*, para. 133ff.

> 'only covers those means which are vital to maintain an existence that is in line with human dignity. It guarantees the whole subsistence minimum by a uniform fundamental rights guarantee which encompasses both the physical existence of the individual, that is food, clothing, household goods, housing, heating, hygiene and health …, and ensuring the possibility to maintain inter-human relationships and a minimum of participation in social, cultural and political life.'[250]

The 2012 *Asylum Seekers Benefits* judgment on the other hand, concerned benefits paid under the Asylum Seekers Benefits Act 1993 (AsylbLG). This statute arranged for a 'separate rule for social benefits' in the sense that asylum seekers were not covered by arrangements made in the Second (including *Hartz IV*) and Twelfth Book of the Code of Social Law, but by this statute. The benefits granted under the AsylbLG were adjusted to the needs of people only staying in Germany for a short time and were significantly lower.[251] Over time, however, the arrangements of the AsylbLG were also applied to people who remained in Germany for a significant period of time due to humanitarian reasons (*e.g.* war refugees); they received the lower benefits for up to four years. Importantly, moreover, the rate of the benefits had not been increased since 1993, when the statute entered into force.[252]

The *Bundesverfassungsgericht*, asked to decide upon the constitutionality of section 3(2)(2) and (3) in conjunction with section 3(1)(4) of the AsylbLG, in this case held that

> '[w]enn Menschen die zur Gewährleistung eines menschenwürdigen Daseins notwendige materiellen Mittel fehlen … ist der Staat im Rahmen seines Auftrages zum Schutz der Menschenwürde und in Ausfüllung seines soziaalstaatlichen Gestaltungsauftrages verpflichtet, dafür Sorge zu tragen, dass die materiellen Voraussetzungen dafür Hilfebedürftigen zur Verfügung stehen … *Als Menschenrecht steht dieses Grundrecht deutschen und ausländischen Staatsangehörigen, die sich in der Bundesrepublik Deutschland aufhalten, gleichermaßen zu.* Dieser objektiven Verpflichtung aus Art. 1 Abs. 1 GG korrespondiert ein individueller Leistungsanspruch, da

250 *Ibid.*, para. 135. Indeed, there is a right to both the physical and socio-cultural aspects thereof. *Cf.* Bittner 2011, pp. 1952-1953: 'The Court explicitly denied a division of this guarantee into an absolute part (for example food, housing and clothing) and additional parts covering the participation in social and political life'. See, for a different view, Egidy 2011, p. 1976.

251 The shortfall was calculated to be at least 31 percent. See also Winkler and Mahler 2013, p. 391.

252 In fact, already for some time, and especially after the *Hartz IV* judgment, doubts had been voiced as regards the constitutionality of the act. See, *e.g.*, Kingreen 2011; Hörmann 2012, p. 208; Haedrich 2010, p. 227; Görsch 2011, p. 646.

> das Grundrecht die Würde jedes einzelnen Menschen schützt … und sie in solchen Notlagen nur durch materielle Unterstützung gesichert werden kann.'[253]

Thus, it was clarified that the right to a subsistence minimum applies to all persons, regardless of their residential status, in Germany.[254]

Why can the protection of a right to an *Existenzminimum* be understood as a kind of core rights protection?[255] This is the case because it ensures that there is always an absolute minimum provided for that cannot be interfered with. Rather than implying a right to material prerequisites and means of subsistence generally, the right to an *Existenzminimum* protects the '*Wesen*' of the guarantee of human dignity in combination with the *Sozialstaatsprinzip*.[256] It does not entail a right to the full range of possibilities of participating in social, cultural and political life, but ensures that there is always an 'essential' level thereof. Importantly, the guarantee of an *Existenzminimum* is 'absolutely' protected. It is based on the guarantee of human dignity (Article 1 GG), which is considered to not allow for any exceptions. In other words, once the *Bundesverfassungsgericht* has found an interference with human dignity, it does not review this interference in the light of the requirements of proportionality but instead directly finds that the constitution has been violated.[257] This implies that also the right to an *Existenzminimum* is a strict, non-derogable guarantee. Interesting, moreover, is indeed that this 'essential'

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253 *Asylum Seekers Benefits*, para. 63 [emphasis added]: 'When people lack the material means to guarantee a life in dignity … the state is – in accordance with its responsibility to protect human dignity and in compliance with its general social state mandate – obliged to ensure that the material conditions are provided to those in need. *As a human right, this fundamental right is granted to Germans as well as foreigners residing in Germany alike*. This objective obligation inferred from Article 1 S. 1 GG corresponds with an individual entitlement to state action, because the fundamental right protects the dignity of every single person … and in circumstances of economic distress it can only be guaranteed through material support'.

254 The *Bundesverfassungsgericht* underlines this by referring to Germany's obligations under international law: it refers to secondary EU law (EC Directive 2003/9 (laying down minimum standards for the reception of asylum seekers) of 27 January 2003, O.J. 2003, L 31/18) as well as to Articles 9 and 15(1) ICESCR (the right to social security and to take part in cultural life) and the Convention on the Rights of the Child (CRC) (Arts. 22(1) and 28 of the CRC). See *Asylum Seekers Benefits*, para. 94. On the importance of external references for determining core obligations, see, *infra*, Ch. 5, S. 5.5.2.2.

255 *Cf*. Egidy 2011, p. 1972.

256 The right to an *Existenzminimum* 'only covers those means which are vital to maintain an existence that is in line with human dignity. It guarantees the whole subsistence minimum by a uniform fundamental rights guarantee which encompasses both the physical existence of the individual, that is food, clothing, household goods, housing, heating, hygiene and health'. See *Hartz* IV, para. 135. See also *Asylum Seekers Benefits*, para. 90.

257 See, *e.g.*, Dreier, in Dreier 2013, Art. 1(1), nos. 43, 46.

protection of socio-economic interests, is provided under a norm that is of a particular 'civil and political' kind.[258]

4.4.2.2 Procedural Requirements

In addition to what was just said, it must be noted that the absolute character of the right to an *Existenzminimum* is of a particular kind. After all, that what is protected in an absolute manner is stated in relatively vague terms. In fact, in the *Hartz IV* case, after concluding that there was an individual right to an *Existenzminimum*, the *Bundesverfassungsgericht* held that the constitution does not permit for determining the precise shape of this right.[259] Thereby, it seemed to imply that what it *in concreto* means, *i.e.*, what it 'absolutely' protects, is eventually left to the legislator to decide. No wonder, therefore, that scholars have called the right to an *Existenzminimum* 'seiner Natur nach relativ'.[260] Indeed, according to this view there are still no exceptions possible, yet it is the *content* of the minimum that is not entirely 'pre-determined', and thereby is considered 'relative'.

However, the *Bundesverfassungsgericht* continued by stating that even though it cannot determine the requirement's exact contours, this does not mean that there cannot be any meaningful judicial assessment. It first of all stressed that the leeway of the legislature ends where the subsistence minimum provided is "evidently insufficient".[261] Within this leeway, it can review the basis and methods of calculation of the benefits, even if it cannot set any quantified requirements. In the words of the FCC:

> 'The protection of the fundamental right therefore also covers the procedure to ascertain the subsistence minimum because a review of results can only be carried out to a restricted degree by the standard of this fundamental right. In order to ensure the traceability of the extent of the statutory assistance as commensurate with the significance of the fundamental right, as well as to ensure the review of the benefits by the courts, the assessment of the benefits must be clearly justifiable on the basis of reliable figures and plausible methods of calculation.'[262]

258 This is particularly interesting in regard to the possibilities of core rights protection for the ECtHR. See, further on how the right to an *Existenzminimum* provides an interesting example in this regard, *infra*, Ch. 7.

259 *Hartz IV* , para. 142.

260 Indeed, the 'absoluteness' of the right is of a distinct kind. *Cf.* Dreier, in Dreier 2013, Art. 1(1), no. 155; Neumann 1995, p. 429; Bittner 2011, p. 1953. Seiler 2011, p. 504, even holds that, because the right has to be carved out by the legislature, it is by nature relative.

261 *Hartz IV*, para. 141: 'Since the Basic Law itself does not permit any precise figure to be put on the claim, the material review as regards the result is restricted to whether the benefits are evidently insufficient' (referring to BVerfGE 82, 60 (91-92)).

262 *Hartz IV*, para. 142.

More concretely, the *Bundesverfassungsgericht* held that four criteria need to be complied with: 1) the legislature needs to cover and describe the objective of ensuring an existence in line with Article 1(1) in conjunction with Article 20(1); 2) it needs to select – within its margin of appreciation – a procedure of calculation fundamentally suited to an assessment of the subsistence minimum; 3) in essence, the necessary facts must be completely and correctly ascertained, and 4) the legislature needs to stay within the bounds of what is justifiable within the chosen method and its structural principles at all steps of the calculation process.[263]

In the *Hartz IV* case, the conclusion was that the benefits granted were not 'evidently insufficient'. Also the first three of the set of requirements had been met. However, since in calculating the subsistence minimum some expenditures were not fully considered and deductions had been estimated randomly, the fourth requirement, which is essentially one of consistency, had not been fulfilled.[264] This, indeed, constituted sufficient reason for the *Bundesverfassungsgericht* to conclude that there had been a breach of Article 1(1) in conjunction with Article 20(1) GG.[265]

In the *Asylum Seekers Benefits* judgment, the *Bundesverfassungsgericht* added that if the legislature in its protection of this minimum uses different methods of calculation for different groups, this must be objectively justified.[266] Like the *Hartz IV* benefits, it did not consider the asylum seeker benefits to meet the different procedural requirements. Moreover, it held that these were in fact 'evidently insufficient'.[267] This because the level of the payments had not changed since 1993 to take account of the considerable inflation since that time and regardless of the fact that Article 3 (3) of the relevant statute provided for regular adjustments.[268] Also the fact that the asylum seekers benefits were one-third lower than those provided under the Second and Twelfth Book of

263 *Ibid.*, para. 143. These can be translated in the 'rationale', 'transparency' and 'consistency requirement', see Bittner 2011, p. 1948.

264 *Hartz IV*, para. 171. There it holds that '"random" estimates … run counter to a procedure of realistic investigation, and hence violate Article 1.1 of the Basic Law in conjunction with the principle of the social welfare state contained in Article 20.1 of the Basic Law. To make it possible to examine whether the valuations and decisions taken by the legislature correspond to the constitutional guarantee of a subsistence minimum that is in line with human dignity, the legislature handing down the provision is subject to the obligation to reason them in a comprehensible manner; this is to be demanded above all if the legislature deviates from a method which it has selected itself'. See, for a more detailed overview of the (very detailed) review of the *Bundesverfassungsgericht*, Bittner 2011, pp. 1949-1950.

265 *Hartz IV*, para. 144, 210.

266 *Asylum Seekers Benefits*, para. 97. See also para. 99.

267 *Ibid.*, paras. 106-115.

268 *Ibid.*, paras. 108-111.

the Code of Social Law, led to the straightforward conclusion that the constitutional right to an *Existenzminimum* had not been guaranteed.[269]

Altogether, the approach taken by the *Bundesverfassungsgericht* is an interesting one that allows for some valuable insights. First, it is often argued in respect of the use of 'core rights' that it is not suitable or possible for a court to identify these, at least not without duly considering the circumstances of a particular case and the general interests at stake therein. The *Bundesverfassungsgericht* has solved this by opting for a quite abstract guarantee of a subsistence minimum that is hardly objectionable and moreover fits the aims and development of the *Grundgesetz*.[270] It thus shows that a court is capable of defining core guarantees independent from the case at hand. Secondly, although one could say that this is 'meaningless' as the exact content is still left to the legislator to determine, the *Bundesverfassungsgericht* has found an interesting way of giving the abstract core requirement and the fact that it cannot be interfered with 'bite'. This it has done by opting for a 'second step', namely, the concretisation of the right to a subsistence minimum with the help of specific conditions the method used by the legislature needs to be in line with. Considering the sensitive field of social policy, it has thereby refrained from determining a quantitative minimum – which is indeed not the task of judicial body – while nevertheless providing for a clear standard that can guide the legislative as well as the adjudicative practice.

As already indicated, the full implications of this example of 'core rights protection' – for the field of socio-economic protection and in particular that of the Strasbourg Court – will only become apparent later on in this book.[271] It nevertheless made sense to outline this particular guarantee at this point, not only because it concerns a German example that should hence find its place in the chapter on German law, but also because it was thereby already shown that regardless of the apparent redundancy of the *Wesensgehaltsgarantie* in legal practice, the idea of (absolute) protection of essential levels of a right *can* play a meaningful role in the adjudication of fundamental rights.

4.5 Conclusion

This chapter has provided an overview of the debate on the German *Wesensgehaltsgarantie*. The goal was not to come up with yet another theory on the

269 *Ibid.,* paras. 112-115.

270 Having held for a long time that the *duty* of providing for a subsistence minimum could be conferred on the state on the basis of the social state principle (which does not entail individually enforceable fundamental rights), in the cases presented above it goes one step further. Combining the *Sozialstaatsprinzip* with Art. 1(1) GG, an actual and autonomous *right* to a subsistence minimum has been identified.

271 *Infra*, Ch. 7.

proper understanding of Article 19, Section 2 GG. Instead, taking into account the overall direction this research is planned to take, the objective was to present a mostly descriptive account of the *Wesensgehaltsgarantie*, including theoretical as well as more practical insights, that can moreover be useful for the chapters to come. The most important findings will briefly be summarised here.

First, from the genesis of Article 19(2) GG it was inferred that the *Wesensgehaltsgarantie* was created in order to ensure that fundamental rights could no longer be limited too easily, or even entirely. At the time of drafting the *Grundgesetz*, there was a particular awareness that (especially) the legislature could form a danger for the realisation of fundamental rights. Hence, holding that '[i]n keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden', Article 19(2) GG can be seen as a provision that emphasises the importance of fundamental rights, thereby recognising that at least the core of these rights must at all times be protected in order to render them meaningful.

It was discussed that throughout the years, many legal writers have reflected on the *Wesensgehaltsgarantie* and how exactly it is to be understood. What followed from this was a diverse picture containing various understandings of what core rights protection, or 'placing a limit on limitations', can entail. After having elaborated on the issue of the addressees of the *Wesensgehaltsgarantie* – which led to the conclusion that this norm generally is considered to bind the legislature as well as the executive and the judiciary –, several insights concerning the debate on the scope of application of this norm were presented. It has become clear that Section 2 of Article 19 GG is understood to apply to as many fundamental rights as is logically possible. In order to increase the value of the *Wesensgehaltsgarantie*, not only classical fundamental rights norms are concerned, but also other rights that can (justifiably) be limited. Important for the purposes of this research, is that this implies that the *Wesen* of a right can be interfered with when 'too little' is done, *i.e.*, in the case of positively formulated norms or positive aspects of (negatively formulated) rights. This provides a first indication of the fact that, besides in the context of negative guarantees, 'core rights' can also be important in the case of 'positive' (socio-economic) claims.

As regards the content of the *Wesensgehaltsgarantie*, the chapter first discussed the objective-subjective debate. This debate concerns the question whether the core of fundamental rights norms needs to be protected 'for society in general', or rather for individual, subjective cases. It has been demonstrated that, in the light of the aim of fundamental rights protection, the latter seems to be the preferable understanding. The most important point that was discussed with regard to the *Wesensgehaltsgarantie* was however whether the boundary it sets is of an absolute, or rather of a relative nature. The absolute interpretation is an attractive one, for it underlines the importance of individual freedoms and guarantees a predetermined area in which state interference

is not allowed. Difficult to answer, however, is the question of how the *Wesen* of a right should be determined, even when the guarantee of human dignity, as well as comparative insights and the character of fundamental rights can provide important starting points. Relative theories instead hold that core rights protection will always be the result of a balancing exercise. This is not to say that they do not provide for *absolute protection* and instead allow for justifiable interferences with rights' cores. Rather, according to the various 'relativists' *the core itself* is non-absolute or relative because it necessarily is dependent on the specific circumstances and other interests at stake. In discussing different relative theories, a distinction was noted between those that start from *prima facie* rights the core of which might become apparent after a balancing exercise has taken place, and those that do not think in terms of *prima facie* rights at all but instead hold that what rights – and thereby their cores – are cannot be seen apart from a specific societal and legal context. Altogether, the various understandings of the *Wesensgehaltsgarantie* have served to show that core rights protection can be perceived in different ways. What exactly the content of the core of a particular right is, and what role it should play in a court's reasoning, can hence be a point of discussion, and arguably needs to be determined in the way best suited to (the demands of) the particular legal context.

The final part of this chapter dealt with the practice of the *Bundesverfassungsgericht*. It was illustrated that in the German context the *Verhältnismäßigkeitsgrundsatz*, *i.e.*, the requirement of proportionality, is of crucial importance. In practice, this means that the *Wesensgehaltsgarantie* appears superfluous. Nevertheless, protecting their essence can be considered a relevant principle underlying the rights enshrined in the *Grundgesetz*. Arguably, this also becomes apparent from the example of the right to an *Existenzminimum*. This example was brought up to show how the *Bundesverfassungsgericht* has defined an individual 'core' guarantee of a subsistence minimum that cannot be interfered with. It has concretised this socio-economic guarantee in a way that leaves room for the legislature albeit allowing for judicial review on the basis of certain 'procedural' requirements. Besides the insights on the different (absolute and relative) understandings of the *Wesensgehalt*, this example of the right to a social minimum may prove to be valuable for developing a core of rights perspective for the ECtHR.

5 The ICESCR and Minimum Core Obligations

5.1 INTRODUCTION

In German constitutional doctrine, the notion of core rights relates to a specific constitutional provision and underlines that there are (absolute) limits to limitations of rights. However, the idea of core rights also features in legal discourse and practice in other ways, elsewhere. Of particular interest for the purposes of this study is the field of international economic and social rights law, and more specifically the International Covenant on Economic, Social and Cultural Rights (ICESCR; Covenant).[1] Also in this context, in the academic debate as well as in the policy and practice related to the ICESCR, the notion of core rights protection holds a prominent place.

More precisely, where international socio-economic rights are concerned, the label used is often that of 'minimum cores' or 'minimum core obligations'. This label refers to the recognition of core aspects that constitute the most basic and important guarantees or obligations related to a particular socio-economic right. The current chapter aims at explaining and investigating the idea of the minimum core by describing how it evolved and by presenting an account of its implications. It discusses the contribution the minimum core has made to the development of the ICESCR rights as well as some of the complications inherent in this concept.

The reason why a discussion of the concept of minimum core obligations is of particular interest for this research is not just the fact that it provides insights quite distinct from the ones that can be derived from the discussion of German constitutional law. The panorama that is about to be presented has great inspirational potential also because it explicitly concerns the protection of economic and social rights.[2] After all, at the heart of this study lies the question of whether and how cores of rights can be useful for improving the ECtHR's reasoning in cases concerning the protection of exactly these rights.

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1 As was already briefly indicated in the introduction to this book (*supra*, Ch. 1, S. 1.3), the present study uses the term 'socio-economic rights', or 'economic and social rights', rather than 'economic, social, and cultural rights'. This for reasons of legibility, but most importantly because the eventual aim is to come up with suggestions exclusively for the protection of economic and social rights under the Convention.

2 However, also in the previous chapter this emphasis on socio-economic protection was already visible (see, *supra*, Ch. 4, S. 4.2.2.).

In this regard it can be recalled that protection of economic and social rights is a particularly delicate matter that brings up specific problems in relation to democratic decision-making and resource allocation. When looking at the ICESCR system for inspiration, it must be kept in mind that, in the context of the ECtHR, what is at stake is not protection on the basis of socio-economic norms, but rather the protection of socio-economic interests on the basis of norms that are of a civil and political kind. Nevertheless, a discussion of the ICESCR allows for drawing interesting parallels. To the extent that the specific features of core rights protection that are presented here relate to or confront the particularities of economic and social rights, they may often also be of relevance for the Strasbourg socio-economic case law.[3]

In order to illuminate the relevant features of the idea of cores of rights in the context of the ICESCR, this chapter starts out with an introduction to the Covenant (Section 5.2). This introduction pays attention to the requirement of 'progressive realisation' and the problems that occur when attempts are made at effectuating broadly stated economic and social rights. Section 5.3 presents a discussion of the idea of the minimum core and the way in which it is perceived to address these problems. Section 5.4, then, illuminates the content of the minimum core. In this section, an overview is given of the concrete minimum cores recognised on the basis of the ICESCR. Section 5.5 addresses the way in which minimum cores are determined, by presenting an analysis of the various cores that can be useful also beyond the ICESCR context. The main conclusions of the chapter are summarised in Section 5.6.

5.2 The International Covenant on Economic, Social and Cultural Rights

The idea of minimum cores in the field of social and economic rights is generally considered to be introduced by the United Nations Committee on Economic, Social and Cultural Rights (CESCR; Committee), the body that is tasked with monitoring the implementation of the ICESCR.[4] The notion has its genesis in General Comment No. 3 of this Committee on the nature of States

3 According to various authors, moreover, the particular concept of minimum core obligations can also be of use in different contexts. According to Young 2008, p. 118, 'the concept of a minimum core is not confined structurally at least, to economic and social rights. Conceivably, claimants and advocates could apply the concept of a minimum essential content to all universal, compelling, and predictable interests appropriately labelled as rights'. See also Bilchitz 2003, p. 13.

4 As will be seen shortly however, at the time the CESCR introduced this notion, there had already for some years been discussion on the identification of core elements. See, *infra*, S. 5.3.1. But see also Bilchitz 2003, p. 13, who states that 'it is arguable that the origins of this concept do not merely lie with the third General Comment released in 1990, but rather that its emergence has to do with its usefulness in addressing questions of importance in the enforcement of rights'.

Parties' obligations, dating from 1990.[5] Before turning to General Comment No. 3, however, a short introduction to the ICESCR may serve to illustrate the coming into being of this Covenant (5.2.1). Besides that, this section illuminates the difficulties related to the effectuation of economic and social rights, which eventually have led to the adoption of the idea of the minimum core (5.2.2).

5.2.1 Binding Economic, Social and Cultural Rights

It was already briefly mentioned in Chapter 2 that the Universal Declaration of Human Rights (UDHR; Declaration), adopted in 1948, contains a nearly complete range of fundamental rights.[6] The UDHR was, however, merely a declaratory document and the rights it contains still had to be laid down in a binding international bill of rights in order to sort actual legal effect. As the result of extensive discussions and under pressure from the Western-dominated United Nations Commission on Human Rights, the United Nations General Assembly eventually agreed to create not one such bill, but to divide the rights into two separate covenants.[7] One of these had to cover civil and political rights while the other had to take up the economic, social and cultural rights enumerated in the Declaration.[8] Those favouring the drafting of two separate covenants argued that the former 'were enforceable, or justiciable, or of an "absolute" character, while economic, social and cultural rights were not or might not be'.[9] Economic, social and cultural rights were seen as not immediately applicable – they were considered not truly 'individual' rights and were regarded as guarantees that required the state to take positive action.[10]

The process of translating the economic and social rights recognised in Articles 22-28 UDHR – dealing with, *e.g.*, social security, an adequate standard of living, housing and education – into binding treaty obligations took until

5 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2(1) of the Covenant), 14 December 1990, E/1991/23 (General Comment No.3).

6 See, *supra*, Ch. 2, S. 2.2. In the Declaration, the 'socio-economic' right of everyone 'to a standard of living adequate for the health and well-being of himself and of his family' (Art. 25, S. 1) can be found in the same list as for example the prohibition of torture (Art. 5) and the right to freedom of movement (Art. 13). See, *e.g.*, Eide 2001, pp. 14-15. Nevertheless, the UDHR can be said to signal somewhat of a preference for civil and political rights, if only because these rights are stated first, followed by the more economic and social ones. *Cf.* Craven 1995, p. 17.

7 See the analysis, prepared by the United Nations, of the drafting process: Annotations on the Text of the Draft International Covenants on Human rights, Tenth Session, 1 July 1995, UN Doc. A/2929 (Annotations on the Text of the Draft International Covenants on Human Rights), p. 7. See also Eide and Rosas 2001, p. 3; Craven 1995, pp. 17-20.

8 Together called the 'International Bill of Human Rights'.

9 Annotations on the Text of the Draft International Covenants on Human Rights, p. 8. *Cf.* also Eide 2001, p. 10.

10 Annotations on the Text of the Draft International Covenants on Human Rights, p. 8.

1966. The delay was caused by considerable debate on the nature of States Parties' obligations, which took place against the backdrop of the difficulties arising out of the Cold War and opposition from various countries.[11] When the General Assembly eventually adopted the International Covenant on Economic Social and Cultural Rights, this did not mean that all concerns related to the creation of a list of binding socio-economic rights had been resolved.[12] According to the official UN position the covenant covering civil and political rights, and the one on economic, social and cultural rights, together cover human rights that all are 'universal, indivisible and interdependent and interrelated'. Therefore, '[t]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'.[13] However, the specific character of economic and social rights and the political sensitivities that surface in this context have continued to overshadow these rights' importance. In comparison to civil and political rights, the economic, social and cultural rights that were laid down in the ICESCR have proven difficult to realise and have been considered second rank ever since this document came into being.[14]

11 Steiner et al. 2007, p. 271; Craven 1995, pp. 20-21.

12 *E.g.*, Alston 1987.

13 United Nations General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, para. 5. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17, Annex (Limburg Principles), reprinted in 9 *Human Rights Quarterly* 1987, p. 123, para. 3: 'As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.' The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/13 (Maastricht Guidelines), reprinted in 20 *Human Rights Quarterly* 1998, p. 692, at para. 4, state that because of their indivisibility, 'states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights'. See, on the notion of indivisibility also, *supra*, Ch. 2, S. 2.5.3, and in particular S. 2.5.3.1.

14 *E.g.*, Eide and Rosas 2001, p. 3; Robertson 1994, pp. 693-694. In their recent and extensive commentary on the ICESCR, Saul et al. (2014) start on a positive note by stating that 'economic, social and cultural rights have long been seen as the poor cousins of civil and political rights', and that '[o]verall, … economic, social and cultural rights have moved from the subject of theoretical debates (are they "real" and "enforceable" rights?) to being increasingly accepted as important international norms with significant practical application'. They refer to the adoption of the Optional Protocol to the ICESCR (United Nations General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution/adopted by the General Assembly, 5 March 2009, A/RES/63/117, which entered into force in May 2013 (Optional Protocol to the ICESCR)) as being indicative for this development.

5.2.2 The Requirement of Progressive Realisation

When it was decided to divide the content of the UDHR over two separate covenants, it was stressed that because of the indivisible character of the different categories of rights, both covenants at least had to resemble each other to the greatest extent possible.[15] Nevertheless, even a superficial glance at both treaties reveals that their setup and wording differs in significant ways. Whereas the International Covenant on Civil and Political Rights (ICCPR) generally uses terms as 'everyone has the right to …', or 'no one shall …', the ICESCR instead speaks of 'States Parties' that 'recognize the right of everyone to …'.[16] One of the most important differences between the ICESCR and the ICCPR can be found in Article 2(1) of the ICESCR. This article forms the keystone of the Covenant, laying out the obligations of states with regard to the rights enumerated in the document. It stipulates that

> 'each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'[17]

In other words, the extent to which ICESCR rights like the right to work, social security or the highest attainable standard of health must be guaranteed is not necessarily the same for all states, as it is subject to the resources available. Moreover, it follows from Article 2(1) that the standard of implementation of the ICESCR is 'progressive realisation', which means that the rights contained

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15 See, Annotations on the Text of the Draft International Covenants on Human Rights, p. 7. More precisely, they had 'to contain "as many similar provisions as possible" and to be approved and opened for signature simultaneously, in order to emphasize the unity of purpose'.

16 Note that the formulation of socio-economic rights in the UDHR did contain the words 'everybody has the right to …', signaling that when translated into binding legal guarantees, their phrasing had been weakened down.

17 Art. 2(1) ICESCR [emphasis added]. Art. 2(1) of the ICCPR instead establishes the obligation of each State Party 'to respect and ensure' the rights recognised therein. The CESCR, however, does not want to recognise a sharp distinction between both Articles 2(1). In its General Comment No. 3, para. 1, it states that 'while great emphasis has sometimes been placed on the difference between the formulations used in this provision [Art. 2(1) ICESCR] and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognised that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect'. See on the nature and the drafting of Article 2(1) ICESCR, *e.g.* Alston & Quinn 1987, pp. 165-181; Sepúlvelda 2003, Ch. 4, pp. 133-134; Griffey 2011, pp. 280-285.

therein can be realised to various degrees.[18] This is remarkable, and indeed there is no such provision in the ICCPR, which rather contains obligations of result that require the state not to interfere with the rights protected unless there is a proper justification for doing so. The references to 'available resources' and the concept of progressive realisation relate to the perceived special character of the rights protected by the ICESCR. They are an expression of the drafters' acknowledgement of the fact that most States Parties to the Covenant would not have the means to fully realise every economic, social and cultural right immediately upon ratification or even shortly thereafter.[19]

Even though Article 2(1) is in line with practical realities and the perceived differences between the two types of human rights,[20] the progressive realisation standard is said to have hindered the conceptualisation as well as the monitoring of ICESCR rights.[21] On the one hand, what argues in favour of the standard is that it acknowledges that the obligations under the ICESCR may be so onerous that not every state will be able to comply with them straightaway. In this regard, rather than resigning to the fact that a right would then simply not be guaranteed at all, the obligation to ensure compliance progressively is meant to ensure that at least best efforts are being made. The non-fulfilment of a right in its entirety hence should not stand in the way of guaranteeing this right at least in so far as the available resources allow for. On the other hand, it can be asked whether this 'special treatment' of duties related to the fulfilment of economic and social rights does justice to the importance of these rights and the awareness that the difference between civil and political and socioeconomic rights is, in the end, artificial. After all, also realising civil and political rights can be costly and difficult. More important from a practical point of view is however that the requirement of progressive realisation can provide what has been called 'a loophole large enough in practical terms to nullify the Covenant's guarantees: the possibility that states

18 See, for an elaborate discussion of this requirement, Saul et al. 2014, Ch. 3, and in particular pp. 151-157. *Cf.* also Craven 1995, pp. 129-134; Alston and Quinn 1987, pp. 172-177.

19 Chapman and Russell 2002a, pp. 5-6. However, even though realization may vary in different contexts, the requirement of progressive realization is understood as in principle prohibiting retrogressive measures. See, *e.g.*, CESCR, General Comment No. 3, para. 9; United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10 (General Comment No. 13), para. 45; United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4 (General Comment No. 14), para. 32; Report of the High commissioner for Human Rights on the implementation of economic, social and cultural rights, 8 June 2009, E/2009/90, para. 15; Griffey 2011, pp. 281-282.

20 Like the belief that resource constraints are especially, or even exclusively related to the provision of socio-economic rights. See, for this, and other alleged differences related to states' obligations under the two categories of rights, *e.g.*, Sepúlvelda 2003, pp. 122-133.

21 Chapman and Russell 2002a, p. 4.

will claim lack of resources as the reason they have not met their obligations'.[22] Indeed, particularly in the light of the 'availability of resources' phrasing, the obligation to 'only' progressively guarantee economic and social rights can become empty.[23] A state can, at least theoretically speaking, always claim that at a particular moment in time, due to a lack of resources, it simply could not comply with one or more aspects of an ICESCR right. Because the available resources differ from state to state, the progressive realisation standard recognises an element of subjectivity that makes that obligations are not uniform or universal and that may obscure evaluating compliance with the Covenant.[24]

It is a challenge per se to identify effective approaches to the implementation of ICESCR rights. In May 2013 the Optional Protocol to the ICESCR has entered into force, allowing for individual and collective communications, but thus far only sixteen states have ratified this protocol and no communications have yet been addressed.[25] Primarily, the CESCR has supervised (as it continues to do) the national implementation of the Covenant on the basis of regular reports by the States Parties written in conformity with the 'reporting guidelines'.[26] However, supervising whether states comply with the requirement of progressive realisation in the light of their particular resource constraints brings along significant methodological difficulties. It is very difficult, if not impossible for the CESCR to determine or verify a state's maximum available resources, or to check if best efforts were made to achieve an adequate standard of protection.[27] Effective monitoring would require an enormous amount of high quality data and statistics, as well as a good overview of national

22 Chapman and Russell 2002a, p. 5. According to Steiner et al. 2007, p. 275, '[g]overnments can present themselves as defenders of ESR without international imposition of any precise constraints on their policies and behaviour'.

23 Steiner et al. 2007, p. 275. But *cf.* the Limburg Principles, p. 125, para. 21: 'Under no circumstances shall this [the obligation to realise progressively the full realisation of the rights] be interpreted as implying for states the right to defer indefinitely efforts to ensure full realization.'

24 *Cf.* Chapman 1996.

25 See the Optional Protocol to the ICESCR, and for a chart showing the status of ratifications, treaties.un.org.

26 See the CESCR's most recent Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights', adopted on 18 November 2008, E/C.12/2008/2, 24 March 2009. *Cf.* also the Limburg Principles, pp. 131-134, paras. 74-91.

27 *E.g.*, Chapman and Russell 2002a, p. 5: 'This necessitates the development of a multiplicity of performance standards for each enumerated right in relationship to the varied social development and resource contexts of specific countries'. See also Chapman 1996, p. 29ff; Robertson 1994 (introducing a methodology for measuring state compliance with the obligation to devote the maximum available resources). According to Fredman 2008, p. 82, there has been progress in the assessment of resource use. She refers to the publication *Dignity Counts* (Hofbauer et al. 2004) that demonstrated the possibility of assessing the sufficiency of government investment, the equity of the expenses by the government and their efficiency.

developments over time. Only on the basis of correct and precise information it can possibly be assessed whether states are indeed using all their available resources in order to move expeditiously towards full implementation of the rights laid down in the ICESCR.[28] Thus, no matter how sensible the requirement of progressive realisation in the light of available resources might appear at first glance, it has significantly complicated the CESCR's monitoring of states' compliance with economic and social rights. It became clear that this requirement in the end seems incapable of improving the effectiveness of these rights, at least, that is, when taken on its own.[29]

5.3 Progressive Realisation Through Minimum Core Obligations

With regard to the CESCR's monitoring process it can be said that even with plenty of data available it would remain hard to determine what progressively moving towards full implementation *in concreto* entails. After all, this requirement does not clarify whether it suffices for states to spend their available resources on whatever they think is relevant for complying with the rights enumerated in the Covenant, as long as it can be considered as a step towards complete realisation, or whether more specific action is required. For that reason, when the need to concretise the ICESCR's content and actual obligations became more pressing, the CESCR made an important effort to provide for clarification in this regard. In this section it is shown how the idea that certain rights and certain aspects of rights require immediate fulfilment came about (5.3.1) and was eventually consolidated by the CESCR (5.3.2).

5.3.1 Immediate Requirements and Minimum Guarantees

In order to effectuate compliance with the ICESCR, it was recognised that there are certain elements of the Covenant that need to be fulfilled immediately. In 1986, a group of experts, convened by the International Commission of Jurists, came together in the province of Limburg in the Netherlands. They elaborated state obligations for economic and social rights, which resulted in

28 *Cf.* Chapman & Russell 2002, p. 5; Chapman 1996, p. 30. However, in the words of Saul et al. 2014, p. 143, '[t]he questions of whom or what is to determine which resources are available, and what is their maximum, must inevitably rely heavily, or at least initially, on the shoulders of the state under consideration' (see also p. 144).

29 According to Steiner et al. 2007, p. 275, 'the relative open-endedness of the concept of progressive realization, particularly in the light of the availability of resources, renders the obligation devoid of meaningful content'.

the formulation of the Limburg Principles.[30] Paragraph 8 of these Limburg Principles reads as follows: 'Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time.'[31] Thus, a distinction was made between duties that have to be satisfied instantaneously, and requirements that – should the available resources not allow for their immediate satisfaction – could be fulfilled at a later point. Some of the immediate duties could be inferred directly from the text of the ICESCR. Article 2(2) of the Covenant, for example, holds that

> '[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'[32]

It was considered that this non-discrimination requirement is of such importance that rather than progressively, it has to be realised immediately.[33]

Next to pinpointing certain ICESCR provisions that need to be complied with no matter what a state's programme of working towards full realisation exactly entails, a second way of identifying the immediate obligations arising out of the Covenant was proposed that consisted of marking certain *aspects of rights* as being more important than others. In 1987, Philip Alston, then Rapporteur of the Committee, wrote about the Committee's endeavours to clarify the normative content of the ICESCR-rights.[34] He stated that 'each right must … give rise to a minimum entitlement, in the absence of which a state party is in violation of its obligations'.[35] In other words, Alston propelled

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30 These principles have also been called the 'best guide available to state obligations under the CESCR' (Eide 2001, p. 25). Consider however the right-specific General Comments, see, *infra*, S. 5.4.

31 Limburg Principles, p. 124, para. 8.

32 Article 2(2) ICESCR. See also General Comment No. 3, para. 1. For further references to the principle of non-discrimination see also the later General Comments (*infra*, S. 5.4). See, for an elaborate discussion on this requirement, Saul et al. 2014, Ch. 4.

33 *E.g.* Chapmann & Russell 2002, p. 6. The non-discrimination requirement is further emphasised in Article 3 ICESCR: 'The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant'. See also the Limburg Principles, p. 125, paras. 22 and 35.

34 Alston 1987, p. 352 ff. This was necessary because, 'even a state that is deeply committed to achieving the fullest possible implementation of the Covenant will be hard pressed to determine for itself exactly what the Covenant requires of it with respect to a given right' (p. 352).

35 Alston 1987, p. 353. *Cf.* also the Limburg Principles, p. 126, para. 25: 'States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.' *Cf.* also para. 28.

the idea that not only a provision like the right to non-discrimination could give rise to an immediate obligation, but that in fact every economic and social right contains specific (substantive) elements that should be fulfilled forthwith.

One may consider, for example, the right to health (Article 12(1) ICESCR[36]), to social security (Article 9 ICESCR[37]), or to education (Article 13(1) ICESCR[38]). These rights are phrased in relatively vague terms like 'the highest attainable standard of physical and mental health', which in principle allows for a very broad interpretation and for the acceptance of potentially very costly and far-reaching obligations. Alston in this regard admitted that in most cases it is impossible to fulfil these rights immediately in their entirety.[39] Nevertheless, he argued that this did not mean that there are no aspects of these rights that can and should be fulfilled first and foremost. Pointing out the 'core elements' of these norms thereby could help make them more workable and effective. As Bilchitz later put it: 'The notion of progressive realisation must thus be read to include as a base-line the provision of minimum essential levels of a right which the state is then required to build upon'.[40]

5.3.2 General Comment No. 3

Three years after Alston's article was published, the CESCR explicitly adopted the notion of 'core elements'. To avoid that states would deprive the ICESCR rights of their content completely, it issued its third General Comment, entitled *The Nature of States Parties Obligations*, in which it embraced the idea of 'minimum core obligations'.[41] Paragraph 10 of General Comment No. 3 states that:

> 'On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States

36 Art. 12(1) ICESCR reads: 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'

37 Art. 9 ICESCR reads: 'The States Parties to the Present Covenant recognize the right of everyone to social security, including social insurance.'

38 Art. 13(1) ICESCR reads: 'The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.'

39 Arguably, indeed, this is even impossible per se because of a lack of a concrete definition of what this 'full' compliance would entail. *Cf.* Alston 1987, p. 352.

40 Bilchitz 2003, p. 12. Or, in the words of Fredman 2008, p. 84: 'One way of responding to the charges of both indeterminacy and lack of immediacy is to specify a core obligation which is determinate and requires immediate fulfilment.'

41 CESCR, General Comment No. 3.

> parties' reports the Committee is of the view that *a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party*. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'[42]

This is followed in paragraph 12 by the following considerations:

> 'Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programs. In support of this approach the Committee takes note of the analysis prepared by UNICEF entitled "Adjustment with a human face: protecting the vulnerable and promoting growth, the analysis by UNDP in its *Human Development Report 1990* and the analysis by the World Bank in the *World Development Report 1990*.'[43]

These paragraphs make clear that the Committee differentiates between guaranteeing the core elements of a right and ensuring full compliance of the right as a whole. Even though the Comment signals that account can still be had to possible resource constraints,[44] such constraints do not relieve states of their duty to guarantee the minimum core of a right.[45] If a minimum core obligation has not been complied with, it is up to the state to demonstrate

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42 *Ibid.*, para. 10 [emphasis added].

43 *Ibid.*, para. 12.

44 This is evidenced by the point that a state will not, *prima facie*, comply with its obligations under the Covenant when core rights are not guaranteed (*ibid.*, para. 10). As also follows from the last sentence of this Comment, the burden of proof then however lies on the state.

45 In the words of Saul et al. 2014, p. 145: '[T]he Committee has adopted a baseline perspective to try to establish "minimum" or "core" standards of rights protection, beneath which no state can be permitted to fall. Thus, even when economic times are most straitened – indeed, especially then – no state can rightfully claim that the poorest and most vulnerable must suffer (further) diminution of their enjoyment of economic, social and cultural rights.' (On the importance of socio-economic rights especially in times of crisis see also Bilchitz 2014a.) *Cf.* also, already, Limburg Principles, para. 25; Robertson 1994, p. 702; Maastricht Guidelines, p. 695, para. 10.

that every effort has been made to use its limited resources in order to meet the most basic requirements of the Covenant.[46] Implicit herein is the obligation that even when there are not many resources, the distribution of these should be adjusted in such a way as to enable fulfilment of at least the minimum essential levels of the ICESCR rights, *i.e.*, those aspects that are considered to belong to these rights' core.

As discussed previously, the practical reality that for many states it is impossible to guarantee the economic, social and cultural rights enshrined in the ICESCR immediately and to their full extent, constituted the main reason for the formulation of a requirement of progressive realisation. Now, with General Comment No. 3, the idea of minimum cores was introduced to clarify that there is nevertheless an area that leaves no room for 'delayed' compliance. The minimum core, defined as a an obligation to guarantee in any case the minimum essential level of the different rights, can thereby be said to narrow down the problematically wide scope of the economic and social rights of the ICESCR. As Alston explained, '[t]he fact that there must exist such a core (which to a limited extent might nevertheless be potentially subject to derogation or limitations in accordance with the relevant provisions of the Covenant) would seem to be a logical implication of the use of the terminology of rights'.[47] The guarantees enumerated in the Covenant are 'rights', which implies that their normative content cannot be so indeterminate as to give a rightsholder 'no particular entitlement to anything'.[48] When no further differentiation within the potential reach of socio-economic rights is made the result may be that any thinkable claim can become a trivial one.[49] With the help of minimum cores, the rather vague notion of what these rights could potentially entail and what they *de facto* require is replaced by the clear-cut expectation that at least their core must be respected. Put differently, by defining the minimum core, the concrete entitlement becomes apparent.

Indeed, the requirement of core rights protection is one states as well as monitoring bodies can more readily deal with than the requirement of pro-

46 See also Fredman 2008, p. 85: '[T]he State is not required to do more than is possible given its resources; but it must be able to show that it could not do more than it has done, given its resources.'

47 Alston 1987, p. 352,

48 *Ibid.*, p. 353. *Cf.* also Fredman 2008, p. 70ff, on the supposed indeterminacy and incommensurability of positive duties. Mentioning several caveats, however, she concludes that '[n]one of these … deprive the [positive] duty of all normative content – if they did, no decisions could be reached on anything' (p. 72). *Cf.* also Scott and Alston 2000, p. 227: 'To read the principle of progressive realisation as incompatible with immediate duties to ensure key protections would be, in effect, to conceptualise duties to ensure positive rights as never capable of being violated, as constantly receding into the future.'

49 *Cf.* CESCR, General Comment No. 3, para. 9: '[T]he fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content.'

gressive realisation. The notion of the minimum core guides the way in which a state should move towards full realisation by pointing out what should be done first, namely securing the essential aspects of a right. In turn, this makes it easier to monitor their achievements, and it may prevent states from using the argument that scarce resources were used for other purposes as a means towards the fulfilment of ICESCR rights.

A possible point of criticism, however, is that working with minimum core obligations creates the danger that expectations as well as possible achievements will not raise above the minimum level set. It might hence threaten the broader goals of protecting economic and social rights.[50] Yet at the same time, it can also be argued that opting for a less inclusive definition of rights by identifying minimum core obligations may enhance the potential of their workability as well as their effectiveness. According to Koch,

> '[i]t reflects a "minimalist" rights strategy, which implies that maximum gains are made by minimizing goals. It also trades rights-inflation for rights ambition, channeling the attention of advocates towards the severest cases of material deprivation and treating these as violations by states towards their own citizens or even to those outside their territorial reach.'[51]

In other words, constricting the potential reach of economic and social rights norms could, at least in theoretically speaking, further the effectiveness of, and compliance with these rights and/or their core aspects. The mere requirement of progressive realisation provides states with an argument as to why certain aims could not have been achieved, while at the same time it fails to provide an answer to the problem that it is difficult, if not impossible, to control whether *all* means were at least spent on furthering the increase of the standard of protection of socio-economic rights in the first place. Minimum cores, by contrast, prevent states from using their limited resources in the way they see fit. Not only can the recognition of core obligations ensure that something actually is being done, it can also guarantee that attention is dedicated foremost to the fulfilment of certain, very basic guarantees, *i.e.*, to the fulfilment of *the most important aspects of rights*. When these are not complied with, there is a *prima facie* breach of the Covenant, and it is then up to the state

50 See, for this point and other points of criticism (with further references), Fredman 2008, p. 84ff.; Young 2012, pp. 69-71.Young refers, for example, to the supposed indeterminacy of minimum cores (see further, *infra*, S. 5.4 and 5.5 and Ch. 6, S. 6.4.3.2), the fact that these direct the attention to developing states, and rank different claimants of rights.

51 Young 2008, pp. 113-114 [footnote omitted]. Speaking of minimising goals, Young calls this a 'variation on the perspective of Michael Ignatieff', who defines minimalism as something capable of addressing the fact that 'people from different cultures may continue to disagree about what is good, but nevertheless agree about what is insufferably, unarguably wrong' (Ignatieff 2001, p. 56). See also Young 2012, p. 66, fn. 3.

to adduce evidence for the fact that it could not allocate its (scarce) resources so that at least the minimum core would be guaranteed. This indeed seems to be a way of effectuating actual compliance, and thereby of 'maximising', rather than 'minimising' socio-economic rights protection. Moreover, in the light of the requirement of progressive realisation, it must be kept in mind that fulfilling the minimum core is and must be seen as the starting point. Whenever extra resources are or become available, these should hence always be directed at providing further guarantees.[52]

5.4 The Content of the Minimum Core

The fact that minimum cores direct the attention to the fulfilment of the most important, basic aspects of a right begs the question what, then, these aspects exactly are. As explained, in theory, the notion of the minimum core has the advantage of narrowing down the often overbroad and vague contours of economic and social rights and creates more workable requirements. The question that has not been answered thus far is, however, how these minimum cores can then actually be defined. What are the 'minimum essential levels' a state has to start with realising first, *i.e.*, what obligations exactly fall within the scope of the core content of the rights enumerated in the ICESCR?

When a closer look is had at General Comment No. 3, it becomes clear that besides introducing the idea of minimum core obligations the Comment does not delve deeply into the content of these obligations. The Comment states a few examples; it mentions that a state will not, *prima facie*, comply with its obligations under the Covenant when 'any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education'.[53] These examples, however, are still quite vague. About the rights other than those concerning food, health, housing and education, moreover, General Comment No. 3 remains completely silent.

Only some years after the adoption of General Comment No. 3, the CESCR started giving some more clarity in this regard. Starting with General Comment No. 4 on the right to housing, in the 1990's the CESCR commenced the adoption of several Comments that deal with separate Covenant rights. Together these Comments have provided the building blocks for a more precise and workable picture of the minimum core obligations belonging to the Covenant.

52 *Cf.* Bilchitz 2007, p. 193

53 CESCR, General Comment No. 3, para. 10.

In the following, several minimum core obligations enumerated in the different Comments will be presented.[54] The examples given will provide a rich overview of what is regarded to be the more concrete content of the minimum cores of the different ICESCR rights. Because later on in this book the discussion will turn to the protection by the ECtHR of the right to housing, the right to health, and the right to social security, the minimum cores belonging to these ICESCR rights first and foremost will be given attention (5.4.1, 5.4.2, and 5.4.3, respectively). After that, some other minimum cores that may also prove relevant for a better understanding of what this notion entails are presented (5.4.4).

5.4.1 The Right to Adequate Housing

The first General Comment that exclusively deals with a particular ICESCR right is the 1991 Comment on the right to adequate housing contained in Article 11(1) ICESCR.[55] In General Comment No. 4, the Committee does not explicitly list a number of minimum core obligations, as it does in subsequent general comments. However, this Comment, as well as later General Comment No. 7 that specifically concerns the issue of forced evictions, has been of vital importance in defining the scope and content of the right to housing.[56] It is therefore worth mentioning some issues the CESCR seems to consider essential in this regard.

The right to housing is ranked amongst the most important of the rights enumerated in the ICESCR. This is the case partly because housing is intimately linked to the enjoyment of many other rights, as was confirmed in General Comment No. 4 where the Committee underlined the right's importance 'for

54 But see, for an extensive discussion on the different core obligations under the various Covenant rights, *e.g.*, Chapman and Russell 2002 (as well as Brand and Russell 2002). In this volume, different contributions are dedicated to outlining and clarifying the obligations under the various individual rights. On some of the rights, however, the Committee only adopted a Comment indicating core obligations after this book had been published. See, therefore, for a more up-to-date overview of the obligations stemming from the ICESCR, Saul et al. 2014.

55 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant), 13 December 1991, E/1992/23 No. 4 (General Comment No. 4). Art. 11(1) ICESCR reads: 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'

56 *E.g.*, Saul et al. 2014, p. 928.

the enjoyment of all economic, social and cultural rights'.[57] Its significance is moreover reflected in the fact that before Comment No. 4 was adopted the CESCR had already been able to 'accumulate a large amount of information pertaining to this right'.[58] With the help of this information, stemming from state reports as well as international materials, it could now provide for clarification on what the right to housing exactly entails.

In particular, the CESCR has made clear that 'the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity'.[59] Also, it established 'seven factors' that illuminate what constitutes *adequate* housing. Fist of all, there must be legal security of tenure, *i.e.*, legal protection against forced eviction, harassment and other threats.[60] Moreover, a house must contain certain facilities like access to natural and common resources, energy for cooking, sanitation, etc., and it should be affordable, habitable, accessible and 'culturally adequate'.[61] Finally, the requirement of 'location' entails that 'adequate housing must be in a location which allows access to employment options, health-care services, schools, child care centres and other social facilities'.[62] It was further stressed that 'there are certain steps that must be taken immediately'. Importantly,

> '[a]s recognized in the Global Strategy for Shelter and in other international analyses, many of the measures required to promote the right to housing would only require the abstention by the Government from certain practices and a commitment to facilitating "self-help" by affected groups.'[63]

57 CESCR, General Comment No. 4, para. 1. Very obviously, however, the right to housing is also linked to the right to privacy, which is, indeed, a 'civil and political' right. See further, Craven 1995, p. 330.

58 CESCR, General Comment No. 4, para. 2. More concretely, it was stated that '[s]ince 1979, the Committee and its predecessors have examined 75 reports dealing with the right to adequate housing. The Committee has also devoted a day of general discussion to the issue at each of its third and fourth sessions. In addition, the Committee has taken careful note of information generated by the International Year of Shelter for the Homeless (1987) including the Global Strategy for Shelter to the Year 2000 adopted by the General Assembly in its resolution 42/191 of 11 December 1987. The Committee has also reviewed relevant reports and other documentation of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities'. *Cf.* also, *infra*, S. 5.5.2.2.

59 *Ibid.*, para. 7.

60 *Ibid.*, para. 8(a).

61 *Ibid.*, para. 8(b, c, d, e, and g). 'Cultural adequacy' means that '[t]he way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing'.

62 *Ibid.*, para. 8(f).

63 *Ibid.*, para. 10.

Moreover, the Committee clarified that due priority must be given to those social groups living in unfavourable conditions,[64] that a national housing strategy needs to be adopted,[65] and that the housing situation in a state needs to be monitored.[66]

As already indicated, the seven 'adequacy factors', as well as the immediate duties and other concrete demands, were not explicitly presented as the 'minimum core' of the right to housing. However, they do serve to narrow down and concretise the potentially very broad scope of this right.[67] In this regard it becomes clear, as Saul et al. note, that the right to housing apparently must not be considered to mean that it is the task of the state to ensure the *provision* of housing.[68] Moreover, the immediate obligations, *i.e.*, the 'negative' obligation to abstain from certain practices and the duty to commit to facilitating self-help, can indeed be understood as providing a baseline from which further, progressive realisation can be achieved.

Reflecting the importance of legal security of tenure, in 1997 another General Comment related to the right to housing was adopted.[69] This comment specifically concerned forced evictions and stated at the outset that

> 'having considered a significant number of reports of forced evictions in recent years, including instances in which it has determined that the obligations of States parties were being violated, the Committee is now in a position to seek to provide further clarification as to the implications of such practices in terms of the obligations contained in the Covenant.'[70]

Basing itself on various statements by international organisations on the matter, the CESCR then stated, amongst other things, that 'legislation against forced evictions is an essential basis upon which to build a system of effective protection'.[71] More precisely, this should include 'measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out'.[72] The Committee indeed

64 *Ibid.*, para. 11.
65 *Ibid.*, para. 12.
66 *Ibid.*, para. 13.
67 In the words of Saul et al. 2014, p. 931: 'The seven factors set, and remain, the benchmark for realization of the right to housing'.
68 *Ibid.*, p. 931.
69 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 7: The right to adequate housing (Art.11(1)): forced evictions, 20 May 1997, E/1998/22 (General Comment No. 7).
70 *Ibid.*, para. 1.
71 *Ibid.*, para. 9.
72 *Ibid.*

recognised that there are situations in which forced evictions can be justified,[73] but emphasised that in that case these should always take place in compliance with certain important conditions. For example, measures must be taken 'to ensure that no form of discrimination is involved'.[74] Moreover, a number of 'procedural' guarantees must be in place, including the provision of legal remedies,[75] and the eviction should be carried out 'in accordance with general principles of reasonableness and proportionality'.[76] According to the CESCR,

> '*[a]ppropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights*. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.'[77]

And finally and importantly,

> 'Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.'[78]

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73 *E.g.*, 'in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause' (*ibid.*, para. 11).

74 *Ibid.*, para. 10.

75 *Ibid.*, para. 13.

76 *Ibid.*, para. 14: 'In this regard it is especially pertinent to recall general comment No. 16 of the Human Rights Committee, relating to article 17 of the International Covenant on Civil and Political Rights, which states that interference with a person's home can only take place "in cases envisaged by the law". The Committee observed that the law "should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances". The Committee also indicated that "relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted".'

77 *Ibid.*, para. 15.

78 *Ibid.*, para. 16.

Also the requirements related to forced evictions are not explicitly phrased as 'core obligations'. They are, in fact, rather encompassing and may for that reason be considered as entailing more than just a minimum level of protection. However, the requirements do create a specific focus, and with the help of General Comment No. 7, the Committee has been able to make clear that especially procedural protection and protection against discrimination are of crucial importance. Moreover, the fact that an entire Comment is dedicated to the topic of forced evictions – as an important aspect of security of tenancy, which in turn is an important aspect of the right to adequate housing – can be seen to imply that generally, appropriate guarantees in relation to this particular topic must be considered of essential importance for compliance with Article 11(1) ICESCR.

5.4.2 The Right to the Highest Attainable Standard of Health

The right to the 'highest attainable standard of health' as it is taken up in Article 12 ICESCR[79] is notoriously hard to define.[80] The full realisation of this right encompasses a lot and requires extensive measures and costly provisions in various fields. In General Comment No. 14, adopted in 2000, the CESCR underlined that the right to health is interpreted as

> 'an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.'[81]

Given all these various aspects, however, Comment No. 14 also indicates which guarantees must be considered of the utmost importance by explicitly referring to the core obligations that stem from the right to health. The announcement

79 Art. 12 ICESCR reads: '1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.'

80 *Cf.* Chapman 2002, pp. 187-190, and more generally, Toebes 1999, pp. 16-26. This became clear already at the time of drafting this right, see, *e.g.*, Saul et al. 2014, pp. 979-981.

81 CESCR, General Comment No. 14, para. 11.

of these minimum cores is preceded by various references to other international legal documents.[82] The Comment mentions the Programme of Action of the International Conference on Population and Development and the Alma-Ata Declaration as 'providing compelling guidance on the core obligations arising from article 12'.[83] With the help from these authoritative documents the Committee rather precisely defined various core obligations as well as a few 'obligations of comparative priority'. The former include the following:

> '(a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
> (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
> (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
> (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
> (e) To ensure equitable distribution of all health facilities, goods and services;
> (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.'[84]

What the Committee considered to be of 'comparative priority', then, is this:

> '(a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
> (b) To provide immunization against the major infectious diseases occurring in the community;
> (c) To take measures to prevent, treat and control epidemic and endemic diseases;
> (d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;
> (e) To provide appropriate training for health personnel, including education on health and human rights.'[85]

It has been argued that the core obligations recognised under the right to health are somewhat problematic as it is potentially unreasonable to oblige

82 See, generally, on the dialogue between the CESCR and specialised agencies and other international organs, the Limburg Principles, para. 94.
83 CESCR, General Comment No. 14, para. 43.
84 *Ibid.*, para. 43.
85 *Ibid.*, para. 44.

poor countries to comply with them.[86] As Saul et al. argue, they require 'an activist, committed state party, with a carefully honed set of public policies related to the right to health', including a national public health strategy and plan for action, yet only few countries can be said to live up to this image.[87] Regardless of this issue, however, the minimum cores recognised signal some interesting points. First of all, not only is reference made to international documents and expert guidelines at the outset of the General Comment, the CESCR also mentions one such document in listing the core obligations, namely the WHO Action Programme on Essential Drugs. It thereby explicitly relies on 'external expertise' for determining one of the essential aspects of the right to health.[88] Secondly, just like in the context of the right to housing particular attention must be had to discrimination and to 'vulnerable and marginalised groups'. Interesting is moreover that the cores of the right to health, according to the Comment, clearly show some 'overlap'. Amongst them, for example, a right to 'minimum essential food' and 'basic shelter, housing and sanitation' can be found, which emphasises the interrelatedness of the different economic and social rights.[89] More particularly, this seems to show that economic and social rights do not only overlap with respect to their more peripheral aspects, but in fact also when it comes to the very core of these rights, at least as these are explicated by the CESCR.

5.4.3 The Right to Social Security

No matter how briefly it is phrased ('The States Parties to the present Covenant recognise the right of everyone to social security, including social assistance'), Article 9 ICESCR can be understood to cover a great variety of things.[90] In 2008 General Comment No. 19 was adopted, in which the Committee aimed to clarify the normative content and obligations related to this right.[91] It started out by stating that '[t]he 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

86 Chapman 2002, p. 205. Perhaps therefore, Chapman seems to argue, the language used is carefully chosen, or left unspecific, like in case of the words 'to provide'.

87 *Ibid.*.

88 See, further on this point, *infra*, S. 5.5.2.2.

89 See, with regard to the right to health in particular Toebes 1999, pp. 259-272. See also, *infra*, S. 5.5.1.

90 What it intends to mean, though, can at least to some extent be clarified by reference to ILO standards on this topic, which can arguably be seen as the right's *lex specialis*. See Saul et al. 2014, p. 618.

91 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19 (General Comment No. 19).

rights'.[92] This was followed by recognition of the fact that '[s]ocial security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion'.[93] Having stated these purposes, the Committee continued by outlining certain elements that apply to all aspects of the right, namely, availability, (the coverage of) social risks and contingencies, (*i.e.*, health care, sickness, old age, unemployment, employment injury, family and child support, and maternity), adequacy and accessibility.[94] It also underlined the importance of the relation between the right to social security and other rights.[95]

Coming to the obligations that follow from the right to social security, the CESCR stated that 'States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant'. In the case of social security, this requires a state:

> '(a) 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. If a State party cannot provide this minimum level for all risks and contingencies within its maximum available resources, the Committee recommends that the State party, after a wide process of consultation, select a core group of social risks and contingencies;
> (b) To ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups;
> (c) To respect existing social security schemes and protect them from unreasonable interference;
> (d) To adopt and implement a national social security strategy and plan of action;
> (e) To take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalized individuals and groups;
> (f) To monitor the extent of the realization of the right to social security.'[96]

Evident from obligation (a) is once more that what the Committee considers to be the most important requirement following from a specific right, does not stand on its own but is intimately connected to the realisation of the other (core) rights contained in the Covenant.[97] Again, also, the importance of non-discrimination and the targeting of especially disadvantaged and marginalised

92 *Ibid.*, para. 1.
93 *Ibid.*, para. 3.
94 *Ibid.*, paras. 10-27.
95 *Ibid.*, para. 28.
96 *Ibid.*, para. 59 [footnotes omitted].
97 See, *e.g.*, also the discussion of the right to health, *supra*, S. 5.4.2.

individuals and groups are emphasised.[98] Interesting is further the 'negative' core obligation to 'respect' social security schemes that are in place and protect them from unreasonable interferences.[99] This signals that authorities need not necessarily 'do much' to ensure basic guarantees.[100] However, according to Saul et al.,

> '[t]he core obligations … identified nevertheless remain slippery. On the one hand, the CESCR requires states to provide the benefits necessary to guarantee basic subsistence rights (at paragraph 59(a) above), but in the next sentence allows for states which cannot provide a "minimum essential level of benefits" to "select a core group of social risks and contingencies" after consulting widely. There is thus an ill-defined lower minimum within a better defined higher minimum – even though the higher minimum itself is pegged at a very low level, namely the provision of subsistence rights (plus basic education).'[101]

Indeed, it can be considered problematic to first recognise a core obligation, and then trivialise it. It remains unclear whether the selection to be made by the state that is short of resources is bound by certain requirements, or whether respect for Article 9 ICESCR demands that at least some specific risks or contingencies are taken into account. Saul et al. rightly note that the selection the CESCR allows for can moreover result in a conflict with the non-discrimination requirement, which is indeed of an immediate nature.[102] What these problems with core obligation (a) thereby underline is that, when, within a range of possibilities for fulfilment, the choice is left to the authorities, the provision of the most important, basic guarantees is not necessarily guaranteed. Indeed, this mirrors the 'progressive realisation problem' this chapter started out with, and thereby the sensible role core obligations can play.

5.4.4 Other Minimum Core Obligations

As indicated previously, for reasons related to the setup of this book, most attention is given here to the content of the minimum core of particular socio-

98 See, on the important requirement of non-discrimination, also CESCR, General Comment No. 19, paras. 29-30. This is also considered to be an 'obligation of immediate effect', see para. 40, just like ensuring equal rights of men and women. For an extensive discussion on the right to social security and non-discrimination, see Saul et al. 2014, pp. 654-694.

99 See further, *infra*, S. 5.5.1.

100 Which is not to say, however, that refraining from disproportionally interfering with existing social security rights is not a 'costly' obligation. Indeed, this would be an example of a negative right having obvious budgetary consequences.

101 Saul et al. 2014, p. 645.

102 *Ibid.*

economic rights. Nevertheless, it is worth highlighting a few more examples, because they bring to the table some new illustrations of what can be considered a right's most essential aspects, or instead resemble – regardless of the different character of the rights – the minimum cores identified with regard to housing, health and social security.

Some years after General Comments Nos. 4 and 7 on the right to housing were adopted, the first explicit references to what were introduced as core obligations in General Comment No. 3 were made. In General Comment No. 12 (1999) on the *right to adequate food* (Article 11 ICESCR), the Committee stated that '[t]he right to adequate food will have to be realized progressively. However, states have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters'.[103] Under the heading of 'Adequacy and sustainability of food availability and access' the Comment points states at the core content of the right to food, which implies:

> 'The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;
> The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.'[104]

Besides this, already in General Comment No. 3 it was noted that 'a State party in which any significant number of individuals is deprived of essential foodstuffs … is, prima facie, failing to discharge its obligations under the Covenant'.[105] This means that the Committee sees 'access to essential foodstuffs' as belonging to the minimum core content. According to Künnemann, '[t]his coincides with the extraordinary emphasis placed on "the fundamental right to freedom from hunger" in Article 11 of the Covenant, showing that the core content of the human right to adequate food includes freedom from hunger as its baseline and minimum core content'.[106]

With regard to the *right to education* (Article 13 of the Covenant) the Committee has provided a number of very concrete minimum requirements. In General Comment No. 13 it emphasised a state's core obligations

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103 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999 (General Comment No. 12), para. 6.

104 *Ibid.*, para. 8.

105 *Ibid.*, para. 10.

106 Künnemann 2002, p. 171. See also CESCR, General Comment No. 12, para. 14: 'Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.'

> 'to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; … to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" (art. 13 (3) and (4)).'[107]

It is in line with the immediate character of Article 2(2) of the ICESCR that non-discrimination is regarded a core obligation. To explain the content of the core obligation to 'provide primary education for all', the CESCR further had regard to Article 13(2)(a) that clarifies that this education should be 'compulsory' and 'free'.[108] The free choice of education in this light could be characterised as a negative core element of the right to education, as it requires the state to refrain from interfering with the choice parents make in terms of education for their children. In regard to this obligation, however, making reference to international human rights law and views of the Human Rights Committee, Coomans has stated that it does not seem to include an obligation for the state to financially support private education and ensure that parents really have a choice.[109] At the same time, when states provide for assistance to private schools, this should be done in a non-discriminatory manner.

Another core obligation the CESCR mentioned in Comment No. 13 is the duty to 'ensure that education conforms to the objectives set out in article 13 (1)'.[110] In this article it is stated that education must be directed towards 'the full development of the human personality and the sense of its dignity' and strengthening 'the respect for human rights and fundamental freedoms'. Moreover, education should ensure effective participation in a free society and 'promote understanding, tolerance and friendship among all nations and all racial ethnic or religious groups'.[111] These agreed-upon aims can form the starting point for determining what the educational programmes required by the Covenant should look like.[112]

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107 CESCR, General Comment No. 13, para. 57. With regard to the core obligation to provide free primary education for all it can be held that this 'core' already follows from the wording of Article 13 where it holds that '[p]rimary education shall be compulsory and available free to all', which according to Coomans means that this is not subject to progressive realisation (Coomans 2002, p. 222).

108 Moreover, guidance as to the meaning of 'primary education' can be found within, for example, the UNESCO framework. See Coomans 2002, p. 226.

109 *Ibid.*, p. 230.

110 CESCR, General Comment No. 13, para. 57.

111 Art. 13(1) ICESCR.

112 The right to education can thus be characterised as an 'empowerment right' which means that it 'enables a person to experience the benefit of other rights', see Coomans 2002, p. 219, referring to Donnelly and Howard 1988, p. 215.

Finally, General Comment No. 18 (2005) can be noted, which concentrates on the *right to work* of Article 6 ICESCR.[113] The core obligations belonging to this right read as follows:

> '(a) To ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity;
> (b) To avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups;
> (c) To adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers' and workers' organizations. Such an employment strategy and plan of action should target disadvantaged and marginalized individuals and groups in particular and include indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed.'[114]

Indeed, regardless of the different nature of this right, these core obligations are similar to those recognised in relation to the other fields of socio-economic rights protection. In the following section, the various similarities of the different 'cores' are more closely analysed.

5.5 Insights Concerning the Minimum Core

The idea of the minimum core enables the clarification of socio-economic rights' most important content. Alternatively, one could say that it allows for 'narrowing down' the problematic, ill-defined scope of 'full' economic and social rights. It is not easy, however, to determine the minimum core belonging to a right. Nevertheless, the CESCR has succeeded in listing the minimum core obligations that follow from the rights enshrined in the ICESCR. Moving beyond what was outlined in General Comment No. 3, it has spelled out tasks and aims that need to be fulfilled as a matter of priority.

Although some hints were already given in this regard, the present section aims at distilling some more general insights from the various General Comments. It does so, first, by making some remarks on the kinds of minimum core obligations that have been identified (5.5.1). The cores that were illuminated above can be grouped into different categories and as such provide

113 See for the view that the right to work has, also after the adoption of General Comment No. 18 in 2005, remained underdeveloped, Sarkin and Koenig 2011. *Cf.* also Mundlak 2007.

114 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18 (General Comment No. 18), para. 31.

valuable information on the types of things that are considered to belong to the core aspects of socio-economic rights. Secondly, information can be gathered from the various Comments on *how* cores can be identified (5.5.2). Also 'methodologically' speaking, the Comments present some relevant points related to the sources that can be used for determining core aspects.

5.5.1 Categories of Minimum Cores

Having introduced a great range of minimum core obligations that form the essential content of the rights enshrined in the ICESCR, it is interesting to see whether some general conclusions can be reached on what are the kind of issues that are deemed important enough to be included in this core. It must thereby be kept in mind that the ICESCR is a particular document, containing a distinct type of rights norms, and that the minimum core obligations identified are specifically tailored to this context. However, the relative similarity of socio-economic rights issues regardless of the specific legal context, as well as the significant overlap shown by the various minimum cores, suggests that this information can be relevant elsewhere, too.

Before further going into the overlap of the different minimum cores, it must be remarked that they also show particular differences. At least, that is, in terms of the famous 'trichotomy' of duties, namely to 'respect', 'protect' and 'fulfil' socio-economic rights. This tripartite typology was introduced by Eide in 1987, who spoke of different levels of obligations.[115] At the primary level, states must 'respect the freedom of individuals to take the necessary actions and use the necessary resources'.[116] At the secondary and tertiary level states need to protect 'the freedom of action and the use of resources as against other, more assertive or aggressive subjects', and fulfil the expectations of all with regard to the enjoyment of their rights, respectively.[117]

This 'levels perspective' could give the impression that first of all, it is the obligation to respect that needs to be fulfilled.[118] In line with this, it could be expected that minimum core obligations are generally of the 'respect' kind. On the other hand, rights to health, housing, social security etc. have not been recognised merely to protect existing freedoms, but rather to contribute to the improvement of the status quo with regard to the fulfilment of socio-economic

115 See, *e.g.*, the final report on The Right to Adequate Food as a Human Right by Eide as Special Rapporteur E/CN.4/Sub.2/1987/23, 7 July 1987; Eide 1989. Over the years Eide has developed his approach and added the obligation to facilitate, see Eide 2000, p. 111; Eide 2001.

116 Eide 1989, p. 39.

117 *Ibid.*, p. 40.

118 *Cf.* Bilchitz 2007, p. 195. Although this is not undisputed, obligations to respect are generally perceived as being less costly and easier to comply with than the other obligations are. See, *e.g.*, Künnemann 2002, p. 177.

needs.[119] For this reason, it would make sense if socio-economic core rights mainly concern obligations to fulfil socio-economic needs, or at least to protect them.

However, as the examples just given have shown, the minimum cores of the ICESCR rights comprise obligations of all three kinds. Indeed, they concern active duties: to take (targeted) steps, to ensure, to provide, to adopt and implement, and to monitor.[120] At the same time, some of the minimum cores mentioned are of a 'negative' kind. The state must show 'respect' when it comes to the duty to abstain from certain practices in relation to housing,[121] when it comes to the social security schemes that are in place,[122] and in regard to the free choice of education.[123] This goes to show, first, that the tripartite typology – although it can be helpful in analysing the different obligations – cannot be used to determine the content of core rights, and second, that, regardless of the 'typically' positive character of socio-economic rights, ensuring negative obligations in this field can be considered of core importance just as well as ensuring positive guarantees.

Turning to the overlap of core obligations, then, it can be said that this takes two forms: First, there is actual overlap in the sense that the core obligations recognised under one right, sometimes resemble or are covered by what was identified as a core aspect of another right. For example, the right to social security demands access to social security schemes in order to be enable individuals to afford essential health care,[124] while the right to health requires access to health facilities, goods and services.[125] The right to health, in turn, requires as a core obligation access to minimum essential food to ensure freedom from hunger,[126] while the right to food, unsurprisingly, also comes with a core obligation to mitigate and alleviate hunger.[127] As already briefly noted before, this signals that not only socio-economic rights, but in fact also their essential aspects coincide in important ways.

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119 See Künnemann 2002, p. 172: 'The difference between the versions of Article 2 in the two Covenants is not a difference in the rights themselves, but rather, a difference in emphasis. The Covenant on Civil and Political Rights puts more emphasis on the obligations to respect, whereas the Covenant on Economic, Social and Cultural Rights puts more weight on obligations to fulfil. However, civil and political rights must be fulfilled also, and economic, social and cultural rights must be respected.'

120 See, *supra*, S. 5.4: the core obligations of the different rights generally cover at least four of these different kinds of obligations.

121 CESCR, General Comment No. 4, para. 10.

122 CESCR, General Comment No. 19, para. 59(c).

123 CESCR, General Comment No. 13, para. 57.

124 CESCR, General Comment No. 19, para. 59(a).

125 CESCR, General Comment No. 14, para. 43(a).

126 *Ibid.*, para. 43(b).

127 CESCR, General Comment No. 12, para. 6.

Second, besides in content, the different minimum core obligations resemble each other in kind. At least five 'categories' of minimum cores can in this regard be identified. First of all, there is the category of *non-discrimination*. Whatever exactly states do, or provide for in terms of socio-economic rights, they must do so in a non-discriminatory manner. This is considered to be an essential aspect of the various rights. The requirement of non-discrimination, which was recognised as an immediate obligation per se, echoes in the various core obligations in the form of determining where in particular a state should prevent unequal treatment or access.[128] Whether it comes to access to social security, or foodstuffs, or protection against forced evictions, the state should always and *foremost* ensure that rights are conferred on individuals in a way that prevents discrimination.

The second group of core obligations is inherently linked to the first. It concerns the emphasis placed on *disadvantaged and marginalised individuals and groups*.[129] Together with the various minimum cores' recognition of 'basic guarantees', in terms of food, health care, etc., this focal point allows for the conclusion that minimum core obligations generally aim at achieving a basic standard of living conditions for *all* persons alike.[130] *De facto* this means that the state should focus its attention and resources on those vulnerable individuals and groups that cannot assure such a living standard by themselves. Without this kind of core obligations, 'progressive realisation' could result in using the available resources to the benefit of the less marginalised and disadvantaged, thereby neglecting this important goal.

Thirdly, there are the minimum core obligations one could call *strategic*. In the different socio-economic fields states are at the very least required to adopt and implement a strategy and plan of action, to implement schemes and to monitor the extent of the realisation of the right.[131] It can be said that his group of core obligations thereby indicates means that are needed in order to fulfil the more material aims that follow from the various minimum cores and the ICESCR rights in general.

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128 *E.g.*, CESCR, General Comment No. 13, para. 57; CESCR, General Comment No. 14, para. 43(a); United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11 (General Comment No. 15), para. 37(b); CESCR, General Comment No. 18, para. 31(b); CESCR, General Comment No. 19, para. 59(b). See, on the requirement of non-discrimination, also United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20 (General Comment No. 20), especially para. 7.

129 *E.g.*, CESCR, General Comment No. 14, para. 43(a); CESCR, General Comment No. 18, para. 31(a); CESCR, General Comment No. 19, para. 59(b).

130 *Cf.* also the right to an *Existenzminimum*, which was discussed in, *supra*, Ch. 4, S. 4.4.2.

131 *E.g.*, CESCR, General Comment No. 14, para. 43(f); CESCR, General Comment No. 15, para. 37(f)(g)(h); CESCR, General Comment No. 18, para. 31(c); CESCR, General Comment No. 19, para. 59(d)(e)(f).

Fourthly, mention can be made of *procedural* requirements. These are most obviously highlighted in General Comment No. 7,[132] concerning forced evictions, where, although the CESCR does not explicitly speak about 'minimum core obligations', the emphasis placed on the topic allows for the conclusion that procedural safeguards in this field are considered of essential importance. Procedural obligations not so much require a certain end-result, but as with the strategic duties, they are meant to form the means for ensuring equitable, fair outcomes. Indeed, by ensuring a fair procedure to those confronted with interferences with their socio-economic rights, discrimination can be prevented and the needs of vulnerable individuals and groups are more likely to be heard.

Finally, as a kind of 'wrap-up' category, it can be noted that what many core obligations boil down to is the provision of minimum essential levels of the various rights, and hence in fact to requiring a *subsistence minimum*.[133] This remains a relatively vague requirement, for it is a matter of discussion what this exactly entails. However, it does point out something important, namely, that the ICESCR rights are there to foremost ensure an adequate, minimum standard of living for everyone, and that this is what a state's efforts should be directed at.

Thus, regardless of the broad range of obligations the CESCR has recognised, the minimum cores tell a relatively coherent story. This is a story of equality, of minimum guarantees, and of the means for achieving these as well as (eventually) the full realisation of socio-economic rights. Read in that light, the notion of minimum core obligations is likely to be transferable, at least to some degree, to other legal contexts.[134]

5.5.2 Methods of Determining the Minimum Core

The practice of the CESCR differs significantly from that of a court like the ECtHR. Rather than reaching binding conclusions on concrete individual applications, the CESCR in its monitoring capacity deals with more general circumstances in a given state.[135] This might indeed change to some extent once

132 CESCR, General Comment No. 7, para. 15.

133 *E.g.*, CESCR, General Comment No. 14, para. 43(b)(c); CESCR, General Comment No. 15, para. 37(a); CESCR, General Comment No. 19, para. 59(a).

134 See further, *infra*, Ch. 7.

135 Although the minimum core obligations identified in the various General Comments have made a recurrent appearance in this CESCR's Concluding Observations on the reports by States Parties, the way the CESCR 'applies' the various core obligations will therefore not be discussed here. The Concluding Observations concern complex, intertwined, and general country-specific circumstances, *i.e.*, circumstances that do not concern individual applications and individual situations, and are therefore not directly relevant for the current research. Indeed, the insights that could be gained from studying the CESCR's Concluding Observations would not form the kind of inspiration that is sought for.

a practice of considering individual communications has been established on the basis of the Optional Protocol,[136] but for now, there is no 'case law' to look at. For that reason, rather than discussing the CESCR's 'application' of the various minimum cores, it is instead worth highlighting one more aspect related to the different cores' content, which is the way in which the CESCR apparently determines the different minimum cores.

Hereafter, the focus will be on a distinction between 'intrinsic' and 'externally inspired' minimum cores, *i.e.*, between cores determined by looking at the content of the right itself, and cores determined on the basis of 'external' sources such as expert statements or agreement amongst states.[137] In fact these two possibilities can already be read in General Comment No. 3. Speaking of minimum core obligations, the Committee there refers to both the *raison d'être* of the Covenant as well as to states' reports, which could be considered a first indication of the different approaches that can be taken to determining the minimum core.[138] In further exploring these two types of sources, attention is also had to some theoretical and conceptual arguments either supporting or criticising the different ways to go about, so as to present a fair image of their appropriateness and use.

5.5.2.1 Intrinsic Cores

First, the minimum core of a right can be determined by looking at the right itself. The question then is what is the most 'essential' part, or indeed the 'core' of this right. In other words, this approach searches for what Coomans calls

136 Interesting in this regard is the following document: United Nations Committee on Economic, Social and Cultural Rights, An Evaluation of the Obligation to take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant, 10 May 2007, E/C.12/2007/1. In this document it is stated that in considering communications the CESCR will have regard to whether the minimum core content of rights has been guaranteed also in the particular situation (paras. 8 and 10). This implies that under the Optional Protocol, the CESCR might further develop the core content of the relevant rights, by applying it to concrete communications.

137 On the one hand, this distinction can be used as an analytical tool that can be helpful in grouping the different minimum core obligations. More important here, however, is that it shows that there are various, (more or less) workable ways of identifying the minimum core of socio-economic rights. *Cf.* however Bilchitz 2007, p. 185, who presents the two aspects as *reasons* for determining the minimum core, yet does not find them convincing in this regard.

138 More precisely, it firstly refers to the experience gained through the examining of States Parties' reports. This seems to indicate that what the Committee has learned from examining the reports is relevant for what it considers to be the minimum core obligations inherent in the Covenant. A second aspect is the Committee's remark that the Covenant would lose its *raison d'être* if no minimum cores could be established. This can be understood as suggesting that by closely looking at the ICESCR and the respective rights and their purpose, it must be possible to identify those obligations that are essential to the Covenant and thus belong to the minimum core. See, CESCR, General Comment No. 3, para. 10 (*supra*, S. 5.2.3).

'the intrinsic value of each human right', or, the elements 'essential for the very existence of that right as a human right'.[139] Using the same term as the CESCR, Örücü in this regard speaks of the 'unrelinquishable nucleus [that] is the *raison d'être* of the basic legal norm, essential to its definition, and surrounded by the less securely guarded elements'.[140]

It is true that it is often argued that rights do not have such an intrinsic core.[141] Cores of rights are not 'out there' in the sense that when looking closely enough at a particular right, an incontestable essence can be found. It has been argued, however, that attempts at delineating a right's most important aspects can be made with the help of a normative starting point that provides for the necessary focus. Young has explained, for example, that the recognition of a normative core can proceed from a foundational norm or idea on the basis of which certain aspects are considered more important than others. Thus, foundational principles such as survival ('needs'), freedom or dignity ('values') can help pinpoint core elements and at the same time justify why these elements should be given higher priority.[142] The advantage of grounding core obligations explicitly on such principles and ideas is that the minimum core becomes less arbitrary, as a moral reason is directly provided in justification of the weight of the minimum core. The normativity of this approach can thereby form a compelling reason for compliance with core elements.

At the same time, Young points out that the 'normative essence' approach, and accordingly the 'intrinsic core', brings along certain risks. Grounding a core on a particular normative foundation, she argues, can prevent broad acceptance by a great variety of states, other actors, and individuals.[143] By relying on specific background-reasons, the support from those who do not agree on the importance of these reasons is not guaranteed. To substantiate this, Young explains that

> 'the Essence Approach mimics the structure of foundational linear arguments common to rights, which move from the deepest or most basic propositions for the interests underlying rights, through a series of derivative concerns, each one supported by and more concrete than the last. The 'core' of the right is thus its most basic feature, which relies on no other foundations for justification.'[144]

139 Coomans 2002a, pp. 166-167.
140 Örücü 1986, p. 52 [emphasis added].
141 *Cf.* the German debate on the *Wesensgehaltsgarantie* and for example the position of Kaufmann taken therein (*supra*, Ch. 4, S. 4.3.2.2). See also, in the context of the South African debate, *infra*, Ch. 6, S. 6.4.2.3.
142 Young 2008, p. 126ff.
143 *Ibid.*, p. 127, pp. 138-139.
144 *Ibid.*, p. 126 [footnote omitted].

However,

> 'the resemblance between justificatory reasoning and the Essence approach is a strained one, because the implication of the a 'minimum' core can narrow the range of foundations, rather than enlarge them. And it is precisely this minimalism that upsets the foundational support, so that the base point of the right is also its narrowest. This puts into question the ability of the core to accommodate contrasting normative foundations.'[145]

Indeed, the *minimum* core is a 'narrow' concept, which is said to decrease its chances of being acceptable from different normative perspectives. Young exemplifies this by presenting the case of a core derived from the idea that economic and social rights should first and foremost promote survival, and of a core that is grounded on the value of human flourishing. These two accounts would 'lead in very different directions, thwarting efforts at giving a certain, determinate meaning to the minimum core'.[146] Whereas the former justification would focus on the right to life and the provision of basic needs as belonging to the essence of socio-economic rights, the latter would stress such notions as dignity, equality and freedom. Of course, a dignity-based approach seems to demand something else than 'minimum nutritional requirements', or some basic form of shelter in order to be protected against the elements. Being entirely dependent on (minimum) state support arguably does not correspond with living a dignified life in freedom. However, it can be asked whether the different underlying justifications truly point in 'very different directions', or that, rather than in kind, the different cores they suggest in fact merely differ in degree.[147] The hardest thing about identifying a normative minimum core, it can be argued, is deciding on 'how far' it should go. Most likely those who think a minimum core must be based on the idea of biological survival, as well as those who consider living a human life to be the guiding value, will reason that the core of a right to housing includes that nobody has to sleep on the streets. However, from the perspective of biological survival a roof that protects against the elements might suffice, whereas 'living a human life' might call for facilities such as sewage and electricity to also be included in what should minimally be arranged for. Does the minimum core of the right to food only entail the provision of a package

145 *Ibid.*, p. 127.

146 *Ibid.*, p. 127. And further: 'Although only two theories are suggested here, it follows that the "core" of the right, defined according to other political theories – from liberalism to communitarianism to market socialism – proliferates in content and scope.' *Cf.* also, pp. 138-139.

147 Interestingly, in later work Young holds that 'interpreting the minimum of economic and social rights is compatible with ethical pluralism' (Young 2012, p. 66). Quoting Ignatieff (2001, p. 56), she states that 'people from different cultures may continue to disagree about what is good, but nevertheless agree about what is insufferably, unarguably wrong'. This seems to suggest that she nevertheless sees possibilities for overlapping, normative cores.

of calories, or does it require more, for example the possibility to independently grow or buy food not just for immediate but also for long terms purposes? Indeed, what the understanding of the 'intrinsic core' of rights reveals is that such cores are prone to point in the same direction, but that there will be a difference of degree in their inclusiveness.

To agree, then, on a particular level of inclusiveness, what might be needed is some kind of 'incompletely theorised agreement'. This idea of Sunstein holds that even when people cannot agree on theories, they can still agree on practices, or outcomes.[148] When (disputes on) the underlying normative theories are left for what they are, *i.e.*, without necessarily abandoning these theoretical starting points, a particular answer to the question what can be considered the intrinsic essence of a socio-economic right might be broadly accepted. Alternatively, this acceptance could concern the practice of a body like the CESCR, when it responds to the need of clarifying the content of ICESCR rights by giving a particular definition of their core aspects.[149]

Coming back to the CESCR, indeed, it becomes apparent that what it considers the raison d'être of the Covenant, is related to the provision of 'essential foodstuffs, … essential primary health care, … basic shelter and housing, … [and] the most basic forms of education'.[150] In the General Comments related to the particular rights it moreover often emphasises that there must be access to, *e.g.*, a minimum essential level of benefits, minimum essential food, and basic shelter, housing, and sanitation.[151] Indeed, these core elements, which seemingly are distilled from the different rights themselves, seem to comply with a 'basic needs' paradigm,[152] albeit their 'degree of inclusiveness' is arguably relatively high as they demand more than what is needed for mere survival. Important, however, is that the CESCR does not provide a specific normative justification for these core obligations. Nevertheless, or perhaps because of that, the focus on basic, minimum provisions in the context of socio-

148 See, *e.g.*, Sunstein 1995; Sunstein 2007.

149 According to Sunstein, '[w]hen the convergence on particular outcomes is incompletely theorized, it is because the relevant actors are clear on the result without being clear, either in their own minds or on paper, on the most general theory that accounts for it' (1995, p. 1737).

150 CESCR, General Comment No. 3, para. 10.

151 *E.g.*, CESCR, General Comment No. 14, para. 43(a)(b)(c); CESCR, General Comment No. 15, para. 37(a); CESCR, General Comment No. 19, para. 59(a).

152 See, however, the Comment on the right to work, where it is stated that there is a minimum core obligation to 'ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them *to live a life of dignity*' (CESCR, General Comment No. 18, para. 31(a)). This can however be explained by the particular nature of the right to work.

economic rights seems defensible.[153] Indeed, from whatever theoretical starting point one looks at it, the fact that *intrinsically* these rights must entail *at least* – and that is what *minimum* core protection is about – the basics mentioned, can hardly be contested.[154]

5.5.2.2 Externally Inspired Cores

A second approach to determining minimum core obligations that can be inferred from the CESCR's General Comments does not merely rely on the intrinsic characteristics of the right itself. Rather, what according to this approach is considered important for deciding on a right's essential elements are 'external' sources. One such external source could for example be consensus amongst States Parties on the socio-economic guarantees that should at minimum be provided, or an expert organisation's determination of certain basic standards.

A clear example is provided by the Committee's Comment on the right to the highest attainable standard of health. There, it is stated that that the core obligations related to this right include the obligation '[t]o provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs'.[155] Indeed, by referring to this WHO standard, the CESCR laid down a concrete core obligation based on external information. Also in other Comments, references can be found to international standards as well as state practice. The mention that is made of States Parties reports in General Comment No. 3 in this regard only is a first example.[156] Also in clarifying the right to adequate housing, the CESCR noted that it has been able to accumulate a large amount of data on this topic. More particularly, it is held that

153 Different from civil and political rights (where it is hard to say that one needs at least 'some' freedom of religion or freedom of speech), it can be argued that for most socio-economic rights there is a 'minimum' that can be provided (*e.g.*, some (enough) food, some shelter or housing, and some basic form of health care, education and social security). *Cf.* Bilchitz 2007, p. 187ff. (distinguishing two thresholds of interests). See also Fredman 2008, p. 86, who states that '[t]he minimum core refers to the duty to do everything possible to optimize the basic right of survival of the most destitute and advanced in society, because there is very little that can take priority over the basic right of survival'.

154 *Cf.* also the German example of the *Wesensgehaltsgarantie*, which is grounded upon the idea that even if there are limitations, it cannot be the case that nothing of a right remains. See, *supra*, Ch. 4, and especially S. 4.2.1.

155 CESCR, General Comment No. 14, para. 43(d). Note however that this core obligation can also be regarded an intrinsic one ('provide essential drugs') that is further determined with reference to an authoritative standard. This shows that the different approaches can indeed complement one another.

156 CESCR, General Comment No. 3: 'On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports …' (para. 10).

> 'the Committee and its predecessors have examined 75 reports dealing with the right to adequate housing. The Committee has also devoted a day of general discussion to the issue at each of its third and fourth sessions. In addition, the Committee has taken careful note of information generated by the International Year of Shelter for the Homeless (1987) including the Global Strategy for Shelter to the Year 2000 adopted by the General Assembly in its resolution 42/191 of 11 December 1987. The Committee has also reviewed relevant reports and other documentation of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.'[157]

Also, before enumerating the core obligations related to the right to health, the CESCR explicitly referred to the Programme of Action of the International Conference on Population and Development and the Alma-Ata Declaration.[158] Many more of such examples can be given,[159] and it can thus be held that either more directly (in the wording of the core obligation) or more indirectly, the CESCR places great weight upon external sources.

In her illuminating article on the minimum core, Young speaks of a similar approach that is characterised by broad agreement. According to this 'minimum consensus' approach, emphasis is placed on consensus that already has been established.[160] Looking from this perspective, she holds that '[t]he minimum core content is the right's agreed-upon nucleus, whereas elements outside core translate to the plurality of meanings and disagreement surrounding the right'.[161] Minimum consensus is presented as a 'wider agreement',[162] a 'synthesis of jurisprudence',[163] or as that what states have been doing so far.[164] In this way questions of normative content can be avoided. In the words of Young,

> 'the Consensus Approach … explicitly addresses two central challenges to the Essence Approach: that resolving disagreement by an abstract, overlapping con-

157 CESCR, General Comment No. 4, para. 2 [footnotes omitted]. *Cf.* also Leckie 2001, p. 155.
158 CESCR, General Comment No. 14, para 43.
159 *Cf.* CESCR, General Comment No. 3, para. 12, where the CESCR holds that its approach is supported by the analysis prepared by UNICEF entitled 'Adjustment with a human face: protecting the vulnerable and promoting growth', the analysis by UNDP in its *Human Development Report 1990*, and the analysis by the World Bank in the *World Development Report 1990*.
160 Young 2008, p. 140ff.
161 *Ibid.*, p. 140. *Cf.* Hart's distinction between 'a core of certainty and a penumbera of doubt' (Hart 1994, p. 123).
162 *Ibid.*, referring to Russell 2002, p. 11 ('There now exists wider agreement on the core elements of these rights').
163 Leckie 2001, p. 155.
164 See again CESCR General Comment No. 3, para. 10, where the Committee refers to the extensive experience it gained and the examining of States parties' reports in relation to the recognition of minimum cores.

> sensus of reasonable political theories does not resolve the problems of representation and voice, and that even broad ethical agreements may not resonate enough with social facts to constitute law.'[165]

Two things are made clear here: First, an agreed-upon understanding of the minimum core allows for the 'voice' of the various (state) actors to be included. This is of great importance especially in a complex political and international setting like that of the ICESCR. It also allies well with what Alston wrote in the 1990s on the definition of the various economic and social rights norms, namely that: '[t]he approaches adopted by States themselves in their internal arrangements … will shed light upon the norms, while the dialogue between the State and the Committee will contribute further to deepening the understanding'.[166] An approach to the minimum core that explicitly takes notice of internal arrangements can also mitigate concerns about too much international interference with states' socio-economic policies. For that reason, at least in a context like that of the ICESCR, it might be preferred over a purely normatively determined core. Secondly, the inclusion of social facts resonates the 'positivist' character of the consensus-based minimum core. Factual situations are looked at, with a special eye to legal facts in the form of constitutions, laws, and case law: 'Through comparative analysis of sociolegal equivalents, a converging set of principles regarding socioeconomic protection is empirically "uncovered" rather than deductively "discovered".'[167]

All this, however, does not mean that a 'consensus' minimum core approach is not normative at all. Consensus itself is a value that can be debated or put into question, just like the value of freedom or equality, for example.[168] Although the concept of consensus fits in nicely with international legal thinking, there also exists a tension with the very idea of fundamental rights. As was explicated in Chapter 3, where the distinction between the interpretation and application of rights was discussed, fundamental rights serve to protect minorities and they should therefore not be made dependent on what 'the majority' considers to belong to a right in the first place.[169] A counter-argument to this could be that, especially in a multi-level legal context, the interpretation of economic and social rights may in fact, to some extent, take state concerns into account.[170] Particularly when the question is concerned of what should be done first, *i.e.*, where the emphasis should be placed and

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165 Young 2008, p. 141 [footnote omitted].
166 Alston 1992, p. 491.
167 Young 2008, p. 142.
168 *Ibid.*, p. 144.
169 See, *supra*, Ch. 3, especially S. 3.3.3. *Cf.* also the debate on the use of a consensus interpretation in the context of the ECtHR (*supra*, Ch. 2, S. 2.5.3.3 and Ch. 3, S. 3.3.1. and 3.3.3), and see for a critical stance therein, *e.g.*, Benvenisti 1999, pp. 850-853.
170 See, *supra*, Ch. 3, S. 3.3.3, where it is argued that interpretation of especially socio-economic and positive duties cannot always be entirely independent of state concerns.

the budget should be spent on, paying some degree of 'deference' to what is being considered as important by the States Parties may seem sensible.

Even when this fundamental point is sufficiently addressed, however, there are still some more practical concerns. For example: whose consensus exactly should be relied on? Consensus can be looked for in the judicial realm, or in the various states' laws or (legal) practices, all options having their pros and cons.[171] If different sources are used, what weight should be attached to either of these? It can also be asked whether consensus really should mean '100 percent agreement'. Especially in an international setting this often is hard to achieve. If an agreed-upon solution is found such agreement is often informed by compromise rather than reason.[172] Indeed, also when account is had to (international) expert bodies statements or standards, the state support underlying these is often of an indirect and 'incomplete' character.

Because of these difficulties with the concept of 'consensus' in determining minimum cores, it might also be an option to stick to the idea of 'external inspiration'. Indeed, as was shown by the examples given from the CESCR's practice, what this body looks at is not so much the extent to which all relevant stakeholders are actually in agreement. Rather, it draws inspiration from their practices as indicated in their reports as a means for coming to an appropriate definition of core obligations. Importantly, moreover, not only state practices but also the standards set by expert bodies and institutions form a major source. From time to time these can indeed be said to reflect democratic preferences States Parties have agreed upon, sometimes they are also nothing more than, indeed, expert opinions. However, especially when technical socio-economic topics (like housing and education) are concerned, expertise might be more than welcome.

Finally, then, one more point of criticism of an externally inspired (or 'consensus') approach must be considered. The danger of an approach to determining the minimum core that relies on what is 'already there' can be that it only legitimates the 'lowest common denominator'. Young notes that this is a problem especially in the field of economic and social fundamental rights, as these still need further development. Such development is likely to be obstructed by relying on consensus because in many countries a decent socio-economic standard is still lacking.[173] First of all, however, especially when use is also made of expert opinions rather than (just) state concerns, chances that the essential content of a right turns out too little ambitious are relatively small. After all, standards set by expert bodies may entail desirable

171 Young 2008, p. 148. Judicial consensus might for example be more reasoned, whereas national lawmakers generally outline a more democratically legitimate outlook. Consensus among experts might be of great value, but lacks the democratic component.

172 *Ibid.*, p. 149.

173 *Ibid.*, pp. 147-148.

aims rather than (low) realist expectations. At the same time, in the light of what was already said on the relation between international instruments and national decision-making, some 'modesty' will not harm the furtherance of economic and social protection at the supranational level.

In conclusion, it can be said that combined with a sense of justice and a degree of common sense and political sensitivity,[174] 'external inspiration' can be of great importance in identifying adequate minimum cores that are grounded in existing practice and authoritative statements.

5.6 Conclusion

This chapter has introduced the notion of minimum core obligations. It has done so by means of a discussion of the ICESCR and the General Comments of the CESCR. What has become clear is that the CESCR has recognised that the various rights enumerated in the ICESCR imply a number of core obligations, *i.e.*, there are certain aspects of these rights that need to be guaranteed as a matter of priority.

It is important to recall that the development of the notion of the minimum core can be traced back to a particular problem. Besides the general vagueness of economic and social rights norms, the difficulty that arose in the context of the ICESCR rights was that the requirement of 'progressive realisation' in the light of the available resources (Article 2(1) ICESCR) hindered the conceptualisation as well as the monitoring of the ICESCR rights. States could claim a lack of resources for failing to comply with a particular aspect of an ICESCR right, which could make the requirement of progressive realisation a merely empty one. In order to address this problem, in General Comment No. 3 it was recognised that there are not only certain immediate obligations following from the Covenant, but that every right in fact entails certain minimum core obligations. At least minimum essential levels of the various socio-economic rights need to be provided, and if a state fails to do so, it *prima facie* violates the Covenant.

It was argued in this chapter that these minimum core obligations in fact narrow down the problematically wide scope of economic and social rights. They point out those aspects that need to be complied with in any case, thereby prioritising certain concrete aims and allowing for meaningful monitoring on the basis of the ICESCR.

Attention was also had to the content of the minimum cores. Although it is generally considered hard to determine a right's essence, the CESCR has nevertheless defined a long list of minimum core obligations belonging to, *e.g.*, the right to adequate housing, the right to the highest attainable standard

174 One can then speak of a 'reflective equilibrium between natural and positive law', see *ibid.*, p. 147, referring to Waldron 2006a, p. 136.

of health, and the right to social security. By analysing these, this chapter has made clear that the different minimum cores overlap to a significant extent. They generally require non-discrimination and focus on disadvantaged and marginalised individuals and groups. Moreover, they require strategies, plans of action and monitoring, as well as procedural safeguards. Together the different minimum cores tell a relatively coherent story of providing for minimum socio-economic guarantees for all, and they offer a strategic means for working towards full realisation of socio-economic rights.

Besides these insights into the content of the minimum core, what also can be gained from the example set by the CESCR are insights into *how* minimum cores can be determined. What can be inferred from the Committee's practice and from the relevant scholarly commentaries is that there are (at least) two ways in which this difficult task can be approached. First, one can look for the intrinsic essence of a right, or its 'raison d'être', whether or not with the help of a particular normative starting point like the importance of 'survival' or 'basic needs'. Secondly, inspiration can be found in other sources than the right itself – for determining the core of a right account can be taken of states' experiences as well as expert opinions on what is considered of the utmost importance for improving the socio-economic standard.

Altogether, thus, this chapter has shown how the idea of core rights can be used not only to ensure that limitations of a right leave intact a right's essence, but also to determine the concrete (essential) scope of rights' guarantees in the first place. As a way of giving meaningful content to broadly stated economic and social rights, the recognition of minimum cores thereby forms an interesting feature of this particular field of fundamental rights protection. Moreover, also the insights presented on the concrete content of and the methods for determining the minimum core can form a source of inspiration for other legal contexts that deal with economic and social rights issues, too.

6 Minimum Cores and Economic and Social Rights Adjudication in South Africa

6.1 INTRODUCTION

The concept of the minimum core as it has been introduced and developed by the CESCR and as it has been analysed in Chapter 5 plays a role not only in the context of the ICESCR. The South African experience with economic and social rights protection provides an additional example of the (potential) use of the minimum core. This example does not merely corroborate what was said in the previous chapter, but adds to this in some interesting respects. In the context of the ICESCR, the minimum cores that have been defined do not provide for concrete information on individual legal positions. This has to do with the fact that, although this might change with the Optional Protocol,[1] besides the Concluding Observations of the CESCR there is no such thing as an elaborate body of case law in which the implications of minimum core obligations have been carefully fleshed out. Hence, the example of the ICESCR leaves open the question what exactly the effect of the minimum core can be in terms of subjective entitlements, and fails to provide information on the role of courts and case-based adjudication in relation to the notion of core rights protection.[2] The South African example makes up for this. The constitution of South Africa is famous for enumerating individual socio-economic rights that have been rendered explicitly justiciable. Courts are given 'the power to interpret these rights and to resolve disputes on their basis'.[3] Because of this, and because the development of this competence has gone hand in hand with a lively debate on the use of minimum core rights, the South African experience is particularly valuable for the purposes of this study.

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1 See, United Nations General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution/adopted by the General Assembly, 5 March 2009, A/RES/63/117, which entered into force in May 2013, as well as United Nations Committee on Economic, Social and Cultural Rights, An Evaluation of the Obligation to take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant, 10 May 2007, E/C.12/2007/1 (indicating the potential role of the minimum core once communications are considered under the new complaints procedure).

2 Some insights on the role of courts with regard to the provision of minimum, 'core' guarantees have however already been presented in, *supra*, Ch. 4, S. 4.2.2.

3 Brand 2006, p. 208; see S. 167, 169, and 172 of the South African Constitution. See also S. 38: 'Anyone listed in this Section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. …'

In order to explore the debate on core rights protection, including the stance South Africa's Constitutional Court in this regard has taken, this chapter will first introduce the 1996 constitution of South Africa and its so-called transformative potential (Section 6.2). After that, in Section 6.3 a closer look is had at the adjudication of economic and social rights cases and the approaches used therein. This section will pay particular attention to some early landmark cases and the Constitutional Court's dilemma of having to choose between reasonableness review and core rights adjudication. Section 6.4 more concretely deals with the (academic) debate that has followed from this. It presents the arguments for and against the use of minimum core rights protection in the adjudication of socio-economic rights. Thereby, attention will also be given to overlapping debates concerning the role of the judiciary in vindicating economic and social rights and related topics. Section 6.5 delves deeper into some proposals made for how the Constitutional Court should (better) deal with the adjudication of socio-economic Interestingly, these shed light on how to overcome the dichotomy between reasonableness review and core rights protection, and thereby on the potential that lies in a 'less rigid' minimum core approach. In Section 6.6 some conclusions are presented.

6.2 The 'Transformative' Constitution of South Africa

In the context of a transition from a system of parliamentary sovereignty – through which the *apartheid* system had been enacted – to a constitutional democracy, in 1993 an interim constitution was adopted in post-*apartheid* South Africa that formed the basis for the first democratic elections to be held in 1994.[4] The newly elected houses of parliament gathered in a Constitutional Assembly to draft the 1996 Constitution of South Africa (Constitution), which eventually entered into force on 4 February 1997.[5]

During the negotiations on the drafting of the Constitution, a vigorous debate took place on whether or not economic and social rights had to be included.[6] The aim of the Constitution was to facilitate the 'transformation' of South African society, including 'the dismantling of racist and sexist laws and institutions, redressing their legacy, healing the divisions of the past and

4 Constitution of the Republic of South Africa (Act no. 200, 1993).

5 The Constitution of the Republic of South Africa (Act no. 108, 1996).

6 See, *e.g.*, Haysom 1992 (arguing that that a constitutional democracy requires both civil and political and socio-economic rights as a condition for its existence and survival); Mureinik 1992 (emphasising that there is no difference between first and second generation rights that forecloses constitutional review of the latter, proposing a specific mode of review for 'sincerity' and 'rationality'); Davis 1992 (who later became a defender of socio-economic rights but here held that '[t]o overemphasize the importance of rights by introducing a battery of specific social and economic demands in a constitution is to place far too much power in the hands of the judiciary' (p. 489)).

building an new society committed to social justice and the improvement in the quality of people's lives'.[7] In the light of this aim, considerable support was given to the idea of including at least some socio-economic rights. Most political parties agreed on this idea and civil society organisations were clearly in favour of incorporating fully justiciable economic and social rights norms, too.[8] It was because of the unique situation the country found itself in that many considered 'the argument for socio-economic rights irresistible, in large part because [they] seemed an indispensable way of expressing a commitment to overcome the legacy of apartheid'.[9] Nevertheless, objections were raised as well. It was held in particular that the inclusion of socio-economic rights was in breach of the doctrine of separation of powers and the budgetary and policymaking freedoms of the non-judicial branches, and also that these rights were essentially non-justiciable.[10]

In the interim constitution, 34 principles were enumerated with which the Constitution had to be in compliance in order to be validly enacted. The Constitutional Court had to certify that this was the case, and when it was asked to judge on the first draft of the new Constitution, it explicitly responded to the concerns related to the inclusion of socio-economic rights. It held with regard to the separation of powers objection that '[i]t cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers'.[11] With regard to the second matter, the Constitutional Court noted that economic and social rights were 'at least to some extent, justiciable',[12] leaving nothing standing in the way of their incorporation, which was what eventually happened.[13]

It is interesting to see what economic and social rights exactly were taken up in the 1996 Constitution. Section 26, first of all, covers the right to 'access to adequate housing' and reads as follows:

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7 Liebenberg 2008, p. 76 [footnote omitted].

8 *Ibid*. For example, '[w]omen's rights advocates … supported the constitutional protection of socio-economic rights on the basis that it would advance substantial gender equality in South Africa'. *Cf.* Liebenberg 1995, pp. 79-96.

9 Sunstein 2001, p. 224.

10 See, *e.g.*, Liebenberg 2008, p. 77; O'Connell 2012, pp. 50-51.

11 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* (First Certification judgment) 1996 (4) SA 744 (CC), para. 77.

12 *Ibid*., para 78.

13 After having been sent back to the General Assembly once, the Constitutional Court subsequently approved of the revised Constitution, see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* (Second Certification judgment) 1997 (2) SA 97 (CC).

'1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

Section 27 deals with health care, food, water and social security:

'1. Everyone has the right to have access to
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.'

Important to note is that both provisions contain 'internal limitations'.[14] The second paragraphs of the respective sections indicate that the different rights should be realised progressively, while taking account of the available resources. In this way, it was acknowledged that complete, immediate fulfilment could not be expected.[15]

Next to the Sections 26 and 27, Sections 28,[16] 29,[17] and 35(2)(e)[18] can

14 *Cf.* De Vos 1997, p. 92ff.

15 Note that rather than the general limitation clause of Article 2(1) ICESCR, the qualifying clauses here are linked to particular (and not all) rights. According to De Vos (1997, p. 95) 'the nature and scope of the internal limitations clause will be of utmost importance in litigation surrounding the qualified social and economic rights'. He points at the Limburg Principles and General Comment No. 3 (*infra*, Ch. 5) as being of particular assistance in understanding the meaning of the qualifying clause.

16 S. 28 (Children) of the Constitution reads as follows: '1. Every child has the right (a) to a name and a nationality from birth; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f), not to be required or permitted to perform work or provide services that (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to (i) kept separately from detained persons over the age of lS years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age; (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
2. A child's best interests are of paramount importance in every matter concerning the child.
3. In this S. "child" means a person under the age of 18 years.'

be mentioned, covering children's rights, educational rights, and the socio-economic rights of detained prisoners, respectively.[19] The right to education contains, amongst other things, 'the right … to further education, which the state, through reasonable measures, must make progressively available and accessible'.[20] Except for this clause, however, these rights do not contain internal limitations. However, Section 36 of the Constitution provides for what can be called a 'general limitation clause'.[21] This section reads as follows:

> '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
> *(a)* the nature of the right;
> *(b)* the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> *(e)* less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

In part because of the inclusion of explicit economic and social rights norms the South African Constitution is considered the world's leading example of a 'transformative constitution', *i.e.*, a constitution that actively contributes to bringing about changes in society.[22] As already follows from the Preamble,

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17 S. 29 (Education) of the Constitution reads as follows: 'l. Everyone has the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible. 2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices. 3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that (a) do not discriminate on the basis of race; (b) are registered with the state; and (c) maintain standards that are not inferior to standards at comparable public educational institutions. 4. Subsection 3. does not preclude state subsidies for independent educational institutions.'

18 S. 35(2)(e) holds that '[e]veryone who is detained, including every sentenced prisoner, has the right … to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'.

19 Moreover, in S. 24 rights related to the environment are taken up.

20 S. 29(1)(b).

21 See, *supra*, Ch. 3, S. 3.2.1.

22 Sunstein 2001, p. 224. In the words of Davis (1992, p. 196) 'the text [of the Constitution] should be read as a social democratic narrative in which, in the words of the preamble, the Constitution seeks to heal the divisions of our past and lay the foundations for a democratic and open society'. See also Klare 1998; Sunstein 2001a, p. 125; Liebenberg 2008,

the focus of the Constitution lies on social justice and human rights. It explicitly refers to 'the injustices of our past' and acknowledges that the Constitution aims to improve 'the quality of life of all citizens and free the potential of each person'.[23] The transformative character of the Constitution places a particular onus on the judiciary, vesting in it the power to adjudicate (socio-economic) fundamental rights matters and thereby contribute to the country's development.[24] In the following, attention is given to some of South Africa's most famous socio-economic rights cases, in order to show whether and in what way the Constitutional Court has used this transformative potential.

6.3 Economic and Social Rights Adjudication under the South African Constitution

Although not all of the economic and social rights enshrined in the South African Constitution are subject to the requirement of progressive realisation, the different rights can generally be limited. Moreover, their exact interpretation and the role of the courts therein must be understood in the light of the unfortunate socio-economic situation of many South Africans and the transformative nature of this Constitution. For the purposes of this chapter it is important to illustrate how the South African Constitutional Court has perceived its task of reviewing economic and social rights. This section does so by presenting some of the first landmark cases (6.3.1) and by introducing the dilemma of core rights protection versus reasonableness review (6.2.3).

6.3.1 Some First Landmark Cases

Shortly after the enactment of the new constitution the South African Constitutional Court had to decide on the case of *Soobramoney v. Minister of Health, KwaZula-Natal*.[25] The applicant, Mr Soobramoney, suffered from irreversible kidney failure but was not admitted to a dialysis programme as he did not qualify under the terms of the hospital's policy. Lacking the money he needed

pp. 75-76. But see Roux 2002, pp. 41-44 (referring to Sunstein's distinction between 'preservative' and 'transformative' constitutions, arguing that these rather form opposite ends of a continuum and showing some pitfalls of this characterisation).

23 Preamble to the Constitution of the Republic of South Africa.

24 O'Connell 2012, p. 54. See also Moseneke (2002, p. 316, who notes that the 'constitutional design of conferring vast powers of judicial review to the courts becomes optimal only if the courts are true to the constitutional mandate … in their work, courts should search for substantive justice which is to be inferred from the foundational values of the Constitution. After all, that is the injunction of the Constitution – transformation'. *Cf.* also Langa 2003, p. 671-672; Budlender 2007, p. 9; Scott 1999a, p. 4; Liebenberg 2010, Ch. 2.

25 Soobramoney v. Minister of Health, KwaZula-Natal, 1997 (12) BCLR 1696 (CC) (*Soobramoney*).

to go to a private clinic, the refusal of treatment in a public hospital meant that he was going to die. The applicant relied on Section 11 (right to life) and Section 27(3) (the right to emergency medical treatment) of the South African Constitution, seeking a positive order to provide him with ongoing treatment and admit him to the renal unit of the hospital. The Constitutional Court however did not grant him such order. If it would decide in favour of Soobramoney and thereby in favour of numerous others in a similar position, so the Court argued, this would have unbearable consequences for the health budget. It would be to the detriment of other people's care and other needs in general.[26] Overall, the Court applied a deferential method of review in this case, stating that 'a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.[27]

Since hopes had risen high with regard to the Constitutional Court's new, transformative role in the context of economic and social rights protection, legal scholars initially received the *Soobramoney* judgment as an anti-climax.[28] However, as Scott and Alston noted, the judgment in *Soobramoney* turned out to be a first careful step into this new field rather than a predictor of a forever reluctant approach to socio-economic matters.[29] In the following landmark case the Court did find a violation of a socio-economic right. In *Government of the Republic of South Africa v. Grootboom and Others*[30] the question was whether the state's housing program was in accordance with Section 26 of the Constitution, which guarantees the right to access to adequate housing. Mrs Grootboom and the other applicants had for a long time lived in shacks on a recognised settlement called Wallecedence.[31] The living conditions were

26 *Ibid.*, para. 28. *Cf.* Fuller 1978, p. 371ff., who describes the problem of 'polycentricity in adjudication' of which this is a typical example. See also Davis 1992, pp. 477-478. As Scott and Alston 2000, pp. 252-253, note with regard to the *Soobramoney* judgment: 'The individual is quickly sacrificed to an amorphous general good on this kind of reasoning which, if taken all the way, would preclude virtually any adjudication of a claim to resources as enjoying a constitutional priority over other claims'.

27 *Soobramoney*, para. 29. See, *e.g.*, Moellendorf 1998, pp. 327-333; Fredman 2008, p. 116 (characterising the Court's test as a 'rationality test'); Mantouvalou, in Gearty and Mantouvalou 2011, pp. 144-145 (referring to the Court's review as reasonableness review with regard to the allocation of resources).

28 See, *e.g.*, O'Connell 2012, p. 56, stating that 'the Court in *Soobramoney* appeared to back-pedal somewhat from the robust role it intimated the courts could play with respect to resource allocation in socio-economic rights cases [referring to the First Certification judgment], to a more restrained and deferential approach'. See also Moellendorf 1998, p. 327, pointing at the 'available resources' criterion and emphasising that if applied as in this case the future of socio-economic rights seems problematic.

29 Scott and Alston 2000, p. 241.

30 Government of the Republic of South Africa v. Grootboom & Others 2001 (1) SA 46 (CC) (*Grootboom*).

31 *Ibid.*, para. 55.

'intolerable'[32] since there was no water or sewage, and hardly any electricity.[33] Some applicants had applied for subsidised low cost housing, but they had been on a waiting list for seven years.[34] The unbearable conditions finally made the applicants leave Wallecedence and move to private land, which they occupied unlawfully and from which they were subsequently evicted for that reason.[35] Because they had nowhere else to go they asked the Constitutional Court for an order that would direct the state to provide them with 'adequate basic temporary shelter or housing … pending their obtaining permanent accommodation'.[36] The Court did not grant such an order because Section 26 did not entitle the applicants to immediate housing or shelter,[37] but it did find that the state's housing program was unconstitutional. The reason for this was that the program did not sufficiently accommodate any short-term housing needs of vulnerable groups. According to the Court '[a] program that excludes a significant segment of society cannot be said to be reasonable'.[38]

In *Grootboom*, 'the Court laid the foundations for its future adjudication of socio-economic rights'.[39] Compared to *Soobramoney*, the Court articulated a more nuanced approach characterised by 'reasonableness review'.[40] It asked 'whether the measures taken by the state to realise the right afforded by section 26 are reasonable'.[41] Yet while some applauded the outcome of Grooboom,[42] as well as the promise of the 'administrative law approach' it signalled,[43] others regretted the fact that the Court had opted for a reasonableness test.[44] Instead of this test, the latter favoured an alternative approach that had been suggested to the Constitutional Court, namely a stricter standard inspired by the minimum core approach of the CESCR.

32 *Ibid.*, para. 53.
33 *Ibid.*, para. 55.
34 *Ibid.*
35 *Ibid.*, para. 53.
36 *Ibid.*, para. 57.
37 *Ibid.*, para. 86.
38 *Ibid.*, para. 43.
39 Wesson 2004, p. 285.
40 See, *e.g.*, O'Connell 2012, p. 57.
41 *Grootboom*, para. 33. *Cf.* also para. 41.
42 *Cf.* Liebenberg 2001; De Vos 2001.
43 Sunstein 2001a, p. 123, pp. 130-132, who holds that in *Grootboom*, the Court avoided two unappealing courses, namely, full enforceability and nonjusticiability, by opting for the 'only alternative', namely, 'an approach to public law that is generally unfamiliar in constitutional law that is the ordinary material of administrative law, governing judicial control of administrative agencies: a requirement of reasoned judgment, including reasonable priority-setting' (p. 130). See for a direct response to Sunstein Roux 2002.
44 See, *e.g.*, Bilchitz 2007, p. 139ff.; Pieterse 2006, p.475; Roux 2002.

6.3.2 A Minimum Core Approach or Reasonableness Review?

In *Grootboom*, *amici curiae* had invited the Court to give content to the right at stake by identifying the 'core' of the obligations it imposed on the state.[45] Under the heading 'The content of the positive obligations imposed by social and economic rights' they suggested that the Court, in line with the CESCR, determine and make explicit a concrete, immediate entitlement:

> 'The "core" provides a level of minimum compliance, to which resources have to be devoted as a matter of priority. This duty clearly has to be balanced with the obligation to put into operation programmes aimed at full realisation of the right, and to move progressively towards full realisation.'[46]

The *amici* contended that this did not imply that only the 'core' could be enforced before a court.[47] Rather, they wanted to convince the Constitutional Court that in order to provide genuine protection, there had to be an obligation 'to provide for the core of immediate absolutely basic human needs – which will result in special attention being given to the most vulnerable and those living in most unfavourable conditions'.[48]

However, the Court was not willing to come up with a 'minimum core' definition of what Article 26 requires. It held that such a definition would be problematic, as needs and opportunities of different individuals may vary significantly.[49] Whereas '[t]he committee [the CESCR] developed the concept of minimum core over many years of examining reports by reporting states', the South African Constitutional Court claimed it did not have sufficient information to do the same.[50] Explaining why reasonableness review was the preferred way of approaching socio-economic rights claims, Justice Yacoob noted that

> '[t]he precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range

45 *Grootboom,* Heads of the argument on behalf of the amici curiae.
46 *Ibid.*, para. 27.
47 *Ibid*.
48 *Ibid.*, para. 29. According to Liebenberg '[t]he amici thus located the minimum core obligation at one end of a continuum of positive obligations imposed on the State …'. See Liebenberg 2010, p. 149.
49 *Grootboom*, para. 33.
50 *Ibid.*, para. 32.

> of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.'[51]

This statement suggests that it is relatively easy for the government to convince the Court with the argument that it decided in favour of other priorities or simply had no sufficient resources (left). Indeed, reasonableness review on its face leaves prioritisation to the state;[52] after all, it does not ask what better choices could have been made, but merely if the government policy is reasonable.[53] In *Grootboom*, the government was directed to making 'reasonable provision within its available resources for people … with no access to land, no roof over their heads, and who were living in intolerable situations'.[54] The Constitutional Court did not require it, however, to make provision for these groups as a matter of priority, before spending its resources elsewhere. Hence, any 'reasonable' inclusion of these groups would seemingly be in compliance with the Constitution, whether or not this would be effective.[55]

That the Constitutional Court shows quite some deference to government spending also follows from *Minister of Health & Others v. Treatment Action Campaign & Others* (*TAC*), in which it consolidated its reasonableness approach.[56] It held there that 'determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets'.[57] The case concerned the government's refusal to provide Nevirapine to HIV positive pregnant women.[58] Because the efficacy and possible side effects of the drug were being carefully monitored, Nevirapine was only

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51 *Ibid.*, para. 41.

52 But see Sunstein 2001a, p. 127, writing about *Grootboom* that '[w]hat is most striking about this ruling is the distinctive and novel approach to socio-economic rights, requiring not shelter for everyone, but sensible priority-setting, with particular attention to the plight of those with the greatest need'. However, Roux seems to indicate correctly that this statement relies on a very broad understanding of priority (dealing with 'the relative importance that the state accords to competing social needs') rather than 'priority' more narrowly understood ('the temporal order in which government chooses to meet competing social needs'). He shows that what the Court does in *Grootboom*, is merely pointing out that certain interests and groups deserve special attention, but not necessarily priority in time. This means that the government, as long as it at least is devoting some special attention to vulnerable groups, will usually pass the test, even when the interests of these groups are thereby not really effectively protected (pp. 46-47).

53 See, *e.g.*, Liebenberg 2008, pp. 83-87; Liebenberg 2010, pp. 151-157.

54 *Grootboom*, para. 99.

55 *Cf.* Roux 2002, p. 47.

56 Minister of Health & Others v. Treatment Action Campaign & Others 2001 (5) SA 721 (CC) (*TAC*).

57 *Ibid.*, para. 38.

58 Nevirapine is an antiretroviral drug of which a tablet has to be given to mothers at the onset of labour, and a few drops to a just-born baby, in order to prevent mother-child transmission of HIV.

available at designated test sites. This limitation was held to be unreasonable and for that reason unconstitutional. In the Court's view, the cost implications of providing the drug were negligible and there was no serious doubt about the safety of Nevirapine. The Court therefore ordered to remove any restrictions on the availability of Nevirapine and instructed the government to dispense it.[59]

Notwithstanding the fact that, just like in *Grootboom*, the Court's approach did allow for finding a violation, the *TAC* judgment has been criticised for not giving content to what it was in fact all about, namely the right to health care enshrined in Article 27(1)(a).[60] Again *amici curiae* had argued in favour of the identification of a minimum core, but the Court expressly rejected this suggestion, holding that 'it is impossible to give everyone access even to a core service immediately. All that is possible and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights … on a progressive basis'.[61] In line with this, it reasoned that

> '[i]t should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards call for … The Constitution contemplates rather a restrained and focused role for the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.'[62]

In the years after *Soobramoney*, *Grootboom*, and *TAC*, the Court has shown that, from time to time, it is willing to take a less distant stance towards the government. In *Khosa and Mahlaule v. Minister for Social Development*, for example, the Court rejected the government's 'resource defense' regarding the exclusion of social welfare grants to non-South African citizens and linked the overarching concepts of dignity and equality to the socio-economic rights at stake.[63] However, in doing so it did not alter its earlier conclusion that there was no reason to determine minimum cores. Rather than communicating clear, basic

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59 *TAC*, para. 135.

60 According to Bilchitz 2003, p. 8: 'No doubt the task of specifying the content of this right is a difficult matter, and the Court should not attempt to provide in one case a final and exhaustive definition of what is included therein. What could have been expected, however, was some further specification of the obligations imposed by the right in relation to this particular case.' In this context, Bilchitz explicitly refers to the ICESCR and the General Comments of the CESCR.

61 *TAC*, para. 35.

62 *Ibid.*, paras. 37-38.

63 Khosa v. Minister of Social Development, 2004 (6) BCLR 569 (CC). *Cf.* also Rail commuters Action Group v. Transnet Ltd., 2005 (4) BCLR 301 (CC) (where the Court held that 'an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided' (para. 88)). See O'Connell 2012, p. 62ff.

obligations, thereby aiming at the transformation of state conduct, the reasonableness standard remained and still is the hallmark of its overall restrained review.[64]

6.4 The Debate on the Use of the Minimum Core

Against the backdrop of the expectations regarding the transformative Constitution and the Constitutional Court's role, it is not surprising that the first landmark cases and the stance the Constitutional Court has taken therein have been the source of considerable debate. The different judgments have been analysed thoroughly in numerous articles and publications.[65] It is clear from these that some commentators were and are still unwilling to agree with the fundamental choices the Court has made. Indeed, one vigorous point of discussion has remained whether the Constitutional Court should have opted for a minimum core approach rather than for reasonableness review. In this section, the various arguments for and against the definition of minimum cores will be presented, starting with the arguments in favour of a minimum core approach, and then moving to those positions that signal a more sceptical outlook.

6.4.1 The Case for the Minimum Core

The Court's explicit choice for reasonableness has been criticised for various reasons. Several scholars have thereby tried to show the usefulness or even the necessity of a minimum core approach. Their arguments are both structural and content-oriented, *i.e.*, the critics deal with more technical aspects as well as try to make a convincing case that the rejection of core obligations fails to

64 See, *e.g.*, O'Connell 2012, pp. 76-77. *Cf.* also the comment made by Fredman 2008, p. 114, on the way the Court perceives its 'transformative task': 'While [the Court's] … mandate to adjudicate on positive duties is more explicit than most courts, its political positioning has had an important impact on its self-perception. Specially constituted to constitute a complete break with the abuses of the past, the Court at its inception was composed of judges who were committed to the transformational agenda. It is wrong, however, to assume that these are necessarily the ingredients of an activist court.' Also the case of Mazibuko and others v. City of Johannesburg, 2010 (4) SA 1 (CC) is often mentioned as a prominent, more recent example of the Court's reasonableness approach (and the shortcomings thereof). According to Bilchitz 2014a, p. 727, it exemplifies the fact that '[t]he underlying rationale behind the reasonableness approach appears to be that it requires the government to provide justifications for its actions'. It was held in this case that 'social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights' (para. 59). In doing so, however, the Court failed to identify a (minimum core) standard, as it did not clarify what the right to 'sufficient water' entails. See for this point, *e.g.*, Bilchitz 2011, p. 554; *infra*, S. 6.4.1.2.

65 See, for a thorough analysis of several of the most important cases, Bilchitz 2007, Ch. 6.

do justice to the primary interests of the needy. Three (interrelated) aspects of their position will be highlighted here: the argument that reasonableness review does not align with the bifurcated structure of rights, the alleged need to give content to a right in order to have a standard to test against, and the statement that some socio-economic guarantees have more relative importance than others.

6.4.1.1 The 'Two-Stage' Argument

First, authors who see the benefits of recognising a minimum core argue that the Constitutional Court's reasonableness review places too strong an emphasis on the conduct or omissions an applicant complains about. They argue that it is problematic that, before even having elaborated upon what exactly is protected by Sections 26(1) and 27(1), the Court's attention immediately shifts to Sections 26(2) and 27(2) and the measures taken or not taken by the government. The Court hence does not respect the traditional two-stage approach to fundamental rights adjudication.[66] In Chapter 3 it was explained why, from a theoretical as well as a practical perspective, such a distinction between the interpretation of a right and its application is worth making.[67] This not only helps to clarify whether or not a court has jurisdiction over a case, it also allows for determining the meaning of a right at least to some extent independent from state concerns and 'majoritarian' considerations. It shows what a right *prima facie* entails and thereby when it is interfered with. Speaking of the South African case law, Liebenberg in this regard holds that

> '[t]he two-stage approach entails an initial principled focus on the nature and scope of the relevant right and whether the impugned legislation or conduct infringes the right. Thereafter the burden is placed on the respondent to establish that limitations to the right are reasonable and justifiable according to the stringent requirements of the general limitations clause (s 36).'[68]

Since the 'initial principled focus' is lacking, what is left, in Liebenberg's view, is a disproportionate focus on the state's justificatory arguments.[69] She regards this as problematic, because it fails to show that, given the individual interest at stake, the burden of proof may have needed to be shifted to the government.[70] Indeed, proponents of a minimum core strategy in the South African

66 Liebenberg 2010, p. 141.
67 *Cf.*, *supra*, Ch. 3, S. 3.2.1.
68 Liebenberg 2010, p. 141.
69 *Ibid.*, p. 146.
70 Moreover, Liebenberg speaks of the Constitutional Court's reasoning as having a 'distinctively utilitarian flavour' where it states that '[t]he State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs

case law argue that the Court's reasonableness approach fails to have sufficient regard to the actual right at stake.[71] Bilchitz, for example, who is one of the most prominent defenders of the minimum core, remarks with regard to the Court's approach in the *TAC* case that '[t]his approach is guilty of failing to integrate ss 27(2) and 27(1): it focuses the whole enquiry on s 27(2) without providing a role for s 27(1)'.[72] By doing so, it 'deflects the focus of constitutional enquiry from the urgent interests at stake … and allows these to be overshadowed by a general balancing of multiple considerations'.[73]

Thus, in the view of the Court's critics, a more appropriate approach would involve making sure that the attention is not only focused on the justification-side, but also on what (essential) interests, principles and obligations are actually at stake. This entails that, rather than relying on the broadly phrased socio-economic rights norm the full fulfilment of which is subject to the requirement of progressive realisation, the Court should clarify what concrete right is at stake and how important this right is. Doing so could ensure that proper weight is given to the interests of the applicant(s), rather than only to the arguments made by the government, which indeed can often rely on resource constraints as a reason for not meeting certain needs.[74]

6.4.1.2 The Standard Setting Argument

Having stressed the importance of the content of the right at stake, Bilchitz continues to explain the role that could be attributed to the minimum core in this regard. He does not agree with the first and second *amici* in *TAC* that what the Court had done wrong in the prior cases was ignoring that two causes of action could follow from Section 27.[75] They held that the first paragraph (stating a right to access to health care services, sufficient food and water and social security) stated a free-standing individual right that contained a minimum core that could be requested immediately. The second paragraph,

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of particular individuals within society' (*Soobramoney*, para. 31). This makes that it does not do justice to the right at stake.

71 See, *e.g.*, Liebenberg 2010, p. 139. With regard to *Soobramoney* (paras. 21-33) Liebenberg there notes that 'after having determined that the appellant's claim falls to be decided in terms of ss 27(1) and (2), the court proceeds immediately to discuss the budgetary limitations and polycentric implications of the appellant's claim'.

72 Bilchitz 2003, p. 9; Bilchitz 2007, p. 159.

73 Bilchitz 2007, p. 176. According to Pieterse 2004, pp. 410-411, '[w]hen [a reasonableness analysis is] used simultaneously to indicate the content of socio-economic obligations and to determine compliance with these obligations, the reasonableness standards will arguably be unable to balance the needs for vigilance and deference'.

74 Liebenberg (2010), in her proposal for improving the reasonableness test, seems to attach a lot of importance to this. Nevertheless, although she thinks content should be given to socio-economic rights, she would avoid determining rigid minimum cores. See, further, *infra*, S. 6.5.1.

75 Bilchitz 2003, pp. 5-6; Bilchitz 2007, p. 156.

holding that reasonable legislative and other measures must be taken to progressively achieve these rights, within the available resources, would, according to the *amici*, have to be read as separately conferring positive obligations on the state.[76] The Court was right, according to Bilchitz, to hold that rather than being independent from one another, both paragraphs of the rights' norm are intrinsically linked. However, claiming that the obligations in the second paragraph of Sections 26 and 27 are related to the rights in 26(1) and 27(1) implies that measures the state adopts must be assessed *in the light of these rights*.[77] In order for a court to do so, it cannot suffice to merely take as a starting point the rights norms as they are stated. Further content necessarily has to be given to the different norms, because the requirement of progressive realisation implies that they do not need to be fulfilled to their fullest extent immediately. Thus, for they do not provide clarity as to what a socio-economic right at a given point in time in fact requires, the rights as they are laid down in 26(1) and 27(1) as such cannot provide a standard against which the reasonableness of the measures taken by the government can be tested.[78]

The only way to have an end in mind against which the measures taken under the second paragraph can be reviewed is, according to Bilchitz, the recognition of certain aspects of socio-economic rights as containing immediate, core obligations.[79] Whether it was reasonable for the government to refrain from enacting a housing program for those most in need, for example, would be difficult to evaluate if it is unclear whether this aspect of the right to housing is something that should reasonably be required as a matter of priority or whether it is something that can just as well be done 'progressively', *i.e.*, later. Lacking clarity on the core and non-core content of a right would make reasonableness 'stand in for whatever the Court regards as desirable features of state policy'.[80] Moreover, it would leave the other branches of government with an amorphous standard with which to judge their own conduct.[81]

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76 Amicus Brief *TAC*, para. 14.

77 Bilchitz 2003, p. 10. See also Bilchitz 2007, pp. 156-157.

78 *Cf.* also Sunstein 2001a, p. 132. Although Sunstein applauds the reasonableness approach of the Court in the case of *Grootboom*, he does admit that it 'leaves many issues unresolved. Suppose that the government ensured a certain level of funding for a program of emergency relief; suppose too that the specified level is challenged as insufficient. The Court's decision suggests that whatever amount allocated must be shown to be "reasonable"; but what are the standards to be used in resolving a dispute about that issue?'.

79 See, on Bilchitz' account, further, *infra*, S. 6.5.2.

80 Bilchitz 2003, p. 10: 'The problem with this approach is that it lacks a principled basis upon which to found decisions in socio-economic rights cases.' Or at least, a reasonableness approach is deficient as 'it deflects the focus of the constitutional enquiry from the interest at stake … and allows these to be overshadowed by a general balancing of multiple considerations'. Instead, '[t]he contextual nature of a determination of reasonableness requires certain a-contextual standards or principles to determine how it is to be applied in particular cases' (Bilchitz 2007, p. 161).

81 Bilchitz 2003, p. 10; Bilchitz 2007, p. 162.

Indeed, these points, which relate to the inability of judging state conduct or a lack thereof, very much resemble the reasons for why the minimum core was introduced in the context of the ICESCR.[82]

The Court left open the possibility of regarding the minimum core as possibly being relevant to its reasonableness review.[83] According to Bilchitz, however, the minimum core should not be viewed as a mere consideration related to this test. Rather, in his view it provides for the necessary standard with the help of which reasonableness review becomes possible in the first place. It provides clarity for states as well as individuals, but, no less important, also helps a court to 'provide clear reasons for its involvement in these cases, and a clear statement of the important interests involved which would demarcate the scope of its own decision-making powers'.[84] A clear standard bounds the leeway of the courts, ensuring they do not overstep their legitimate role.

6.4.1.3 The Urgency Argument

Next to the argument that a minimum core approach would provide essential information about concrete entitlements and obligations, thereby defining an indispensable touchstone for the Court, there is more that legal scholars have asserted in favour of the minimum core. A definition of the core of a right does not merely highlight *certain* aspects of a right that can be considered concrete entitlements – it emphasises the *most important* aspects. A minimum core approach recognises that certain interests related to socio-economic goods are more urgent than others, and hence require to be prioritised.[85] Therefore there seems to be good reason for using a core rights-based approach 'when there are interests protected by a right that differ in their degree of importance for human beings'.[86] In the words of Liebenberg

> 'the meeting of minimum core obligations should enjoy prioritized consideration in social policymaking and in the judicial enforcement of these rights, *due to the urgency of the interests they protect*. Without the meeting of the minimum essential

82 See, *supra*, Ch. 5, S. 5.2.2 and 5.3 in particular.
83 *TAC*, para. 34.
84 Bilchitz 2003, p. 10. But see, for the argument that the minimum core instead confers too much power on the courts, *infra*, S. 6.4.2.
85 Bilchitz 2003, pp. 11-12: referring to the approach developed by the CESCR he notes that 'the recognition of a minimum core of social and economic rights that must be realized without delay attempts to take account of the fact that certain interests are of greater relative importance and require a higher degree of protection than other interests'. *Cf.* Bilchitz 2007, p. 187ff., on 'two thresholds of interests'. See further, *infra*, S. 6.5.2. *Cf.* also Scott and Alston 2000, pp. 250-251.
86 Bilchitz 2003, p. 14; Bilchitz 2007, p.190.

> needs which people require to survive, the State's obligation to progressively achieve the full realization of the rights becomes meaningless.'[87]

The Court held in *TAC* that Section 27(1) 'does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2)'.[88] According to Bilchitz, this does however not necessarily imply a rejection of a minimum core approach, as the minimum core 'merely requires an understanding that one right can involve different levels of provision; the state can be obligated to provide a minimum threshold of a right whilst having to increase its level of provision progressively over time'.[89] It is hence the different degrees of importance that aspects of a right entail, that makes differentiation amongst these and singling out core aspects an important task. In the view of its proponents, a minimum core approach can direct resources to where they are most needed, based on the purpose behind the protection of socio-economic rights. Thereby, it ensures that the notion of progressive realisation does not exempt the state from immediately – or at least as a matter of priority – protecting its population's most basic interests.[90]

Altogether, the points raised in favour of the minimum core approach suggest that the South African Constitutional Court, by failing to recognise a minimum core, is not using to the fullest extent possible the Constitution's (transformative) potential for the realisation of socio-economic rights. It fails to give (more precise) content to the rights enshrined in the Constitution, thereby attributing insufficient attention to the interests at stake and instead overly focusing on the reasons and interests put forward by the government. Also, in the view of the proponents of a core rights approach, the Court's avoidance of the core content question leaves its reasonableness test rather subjective and makes that it does not sufficiently recognise the relative importance of some (urgent) aspects of socio-economic rights over others.

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87 Liebenberg 2010, p. 164 [emphasis added].

88 *TAC*, para. 39.

89 Bilchitz 2003, p. 13.

90 *Ibid.*, p. 12; Bilchitz 2007, pp. 193-194, giving the example of the progressive realisation of the right to housing as involving two components: '[T]he first component is a "minimum core obligation" to realize the levels of housing required to meet the minimal interest … ; the second component is a duty on the state to take steps to improve the adequacy of the housing in accordance with the standards … developed. In other words, progressive realization means the movement from the realization of the minimal interest in housing to the maximal interest. … It does not mean that some receive housing now, and others receive it later; rather, it means that each is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time. Such an interpretation makes sense of the idea that the socio-economic rights enshrined in the Constitution have an aspirational dimension but, like other rights, provide strong protection for certain urgent interests.'

6.4.2 Arguments Against the Minimum Core

Regardless of the arguments made by the proponents of core rights, and more particularly by the *amici curiae*, the South African Constitutional Court has consciously and expressly rejected the minimum core doctrine. It did do so because, in its view, needs are too diverse to establish a fixed core.[91] Moreover, it considered that it lacks the necessary information to define such a core,[92] and that Sections 26 and 27 of the Constitution do not give rights to self-standing obligations.[93] To this list of arguments against a core rights approach can be added the Court's pragmatic objection that minimum cores would impose unrealistic demands upon governments since it is 'impossible to give everyone access even to a 'core' service immediately'.[94]

Various academics have tuned in with this criticism, often (implicitly) arguing for the Court's alternative, reasonableness-based approach.[95] The arguments they thereby make can be roughly divided into three groups. The first and second sets of criticism are closely linked: they cover 'institutionalist' arguments focusing on the separation of powers and (constitutional) dialogue, respectively. The third group of arguments deal with the overarching problem of the impossibility of determining the content of the minimum core.

6.4.2.1 The Separation of Powers Argument

The criticism related to the idea of separation of powers suggests that by identifying a minimum core, a court can easily transgress the boundaries of its legitimate task. Referring to the Constitutional Court's deferential mode of review, Kende argues that 'the Court's circumspection avoids an escalation of separation of powers and other tensions'.[96] Would the Court engage in defining and enforcing core rights, his argument continues, it might usurp the policy-making tasks of the government.[97] Courts are thought to be institutionally ill-equipped to make the enquiries necessary for determining enforceable minimum standards. Instead, they should merely check for reasonableness, as doing so enables the 'judicial, legislative and executive functions [to] achieve appropriate constitutional balance'.[98] Especially in South Africa this 'constitutional balance' is considered a contentious issue, as the country's institutions

91 *Grootboom*, paras. 32-22.
92 *Ibid.*, para. 31.
93 *Ibid.*, para. 95; *TAC*, para. 32.
94 *TAC*, para. 35.
95 See, *e.g.*, Sachs 2003; Nolette 2003, pp. 116-118; Kende 2003, p. 153; Kende 2004; Wesson 2004; Porter 2005, pp. 48-55; Steinberg 2006; Lehmann 2006.
96 Kende 2004, p. 618.
97 See on this argument Liebenberg 2010, p. 165.
98 *TAC*, para. 38.

of constitutionalism and judicial review are still quite young.[99] The Court's authority and the acceptance of its judgments is rooted 'as much in its ability to insinuate itself institutionally in conflicts over the separation and distribution of powers as it does in its defence of rights'.[100] Judicial activism in this regard should be avoided and, rather than defining minimum guarantees and thereby determining strict and general standards, mere review of the reasonableness of an act or omission and case-based review of individual circumstances would seem the proper way of going about.[101] Indeed, this is true especially because it is socio-economic, positive requirements that are at stake. In the field of social policy, it is necessary to make complicated, multi-faceted decisions. Generally, it is for the democratically elected bodies to make an informed choice on what is to be done (first), and where to spend the money available, rather than for a court.

6.4.2.2 The Dialogue Argument

The second, related branch of 'institutionalist' criticism must be viewed in the light of the debate on the virtues of institutional dialogue.[102] Whereas the separation of powers argument focuses on a meaningful separation between the tasks of the different powers, this argument concerns the ideal of cooperation between them. The idea of constitutional dialogue has become well known in particular in the Anglo-Saxon scholarly legal debate, yet also in the field of socio-economic rights it has received some attention.[103] Dixon, for example, has recognised the important role of courts in helping to improve socio-economic rights by pointing out 'blind spots' and omissions to the legislature.[104] In her view, it is for the legislature to respond to such findings.

In the dialogue argument, the minimum core idea represents an 'intrusive rule-based' approach.[105] It aims at defining an essence for economic and social rights that is incontestable, and as such it blocks any form of conversation between the legislator and the judiciary. Dixon's account of dialogue also highlights the inherent 'risk of reverse burdens of inertia that that can arise when courts assume too strong a role'.[106] In fact she thereby raises the question what is left of a 'dialogue' when a court determines an inflexible minimum

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99 See, *e.g.*, Steinberg 2006, p. 274; Fredman 2008, p. 114 (arguing that the Court has been 'acutely aware of its position relative to the newly democratic State' and that its 'transformative task' not automatically led to activism).

100 Klug 1997, p. 206.

101 *Cf.* Kende 2004. See also O'Connell 2012, for a broader discussion on socio-economic rights and the separation of powers argument.

102 See in particular Dixon 2007; Steinberg 2006. *Cf.* also Liebenberg, as discussed in, *infra*, S. 6.5.1.

103 See, *e.g.*, Scott 1999; Steinberg 2006; Dixon 2007.

104 Dixon 2007, pp. 404-405.

105 Steinberg 2006, p. 274.

106 Dixon 2007, p. 407.

core. When it decides that a right to housing first and foremost requires that immediate housing be provided to vulnerable groups lacking appropriate shelter, there is no longer or only very little room left for the government to decide on how it can best work towards full realisation of this right. It may for example have preferred to focus on long-term programmes it considers more structurally relevant to this goal than dedicating its budget to immediate relief for specific groups, yet the definition of core rights then prevents it from doing so.

Thus, according to its opponents, the minimum core approach tends to promote closure in the broader process of developing the content of socio-economic rights.[107] It gives the final say to the courts, whilst a continuing discussion could provide for better outcomes, both in terms of institutional cooperation and effective protection. However, it is interesting to note the distinction Dixon makes between 'relying on a truly cosmopolitan, or international understanding of the minimum core', and 'borrowing the conceptual apparatus of the minimum core as an independent basis for interpreting sections 26 and 27 of the South African Constitution at the domestic level'.[108] The former approach according to Dixon would mean making use of the minimum cores identified by the CESCR that are said to be based on an overlapping consensus among states.[109] From a dialogic perspective, she holds, such an approach does not create many difficulties. Indeed, because of the CESCR's openness to what states apparently consider to be important, it signals cooperation rather than that it forecloses it. Also in the South African context it could hence be justified if the Court would presumptively respect the 'cosmopolitan' understanding of the minimum core as identified by the CESCR.

In fact, it is only the second type of approach that according to Dixon would cause problems. This would mean that the South African Constitutional Court would use the abstract concept of the minimum core merely to give content to this core in a subjective manner. In that way it would unilaterally develop a domesticated understanding of the most important aspects inherent in economic and social rights, creating obligations that presumably have to be enforced in every thinkable case.[110] According to Dixon, for the Constitutional Court to develop such an understanding tailored to the South-African context, it would necessarily have to ignore the scope of existing (or future) disagreement.[111] Thereby it would curtail broader social dialogue about the

107 See, *e.g.*, Liebenberg 2010, pp. 167-168. *Cf.* also Young 2008, pp. 138-140 (speaking of the 'normative essence approach'), see, *supra*, Ch. 5, S. 5.5.2.1.
108 Dixon 2007, pp. 415-416.
109 See, *supra*, Ch. 5, S. 5.5.2.2 ('externally inspired cores').
110 Dixon 2007, p. 416.
111 *Ibid.*, p. 417.

nature and prioritisation of, as well as the values underpinning socio-economic rights.

Thus, from this line of reasoning it follows that it is not necessarily the identification of core aspects as such that makes that dialogic scholars are sceptical towards the minimum core. Only when this is done unilaterally by a court, without having regard to consensus and disagreement, and with the effect of pinning down inflexible minimum standards, problems arise.

6.4.2.3 The Indeterminable Content Argument

For many scholars, what lies behind their argument that it is not for the Constitutional Court to subjectively define a minimum core, is the assumption that it is difficult, if not impossible to define such a core.[112] Indeed, most opponents of a minimum core approach are supporters of the 'indeterminable content' argument, which seems to start from the idea that in the South African context, it would be the Court that would unilaterally determine what minimum cores entail.[113] The thread that runs through this argument is that courts have no 'objective', 'external' sources that can help them determine an appropriate minimum core. Especially in the field of socio-economic rights the judicial leeway that results from this is considered undesirable – if subjective socio-economic 'policy choices' are to be made, this should rather be done by the other branches.[114] Courts should refrain from determining what they cannot determine, and avoid the minimum core.

In Chapters 4 and 5, it already became clear that it is indeed difficult to find the 'unrelinquishable nucleus [that] is the raison d'être of the basic legal norm, essential to its definition, and surrounded by the less securely guarded elements'.[115] Often, a normative approach towards defining the minimum core is based on a single metric. This can be the idea of basic needs or biological survival, the notion of freedom or that of the inviolability/sanctity of human life. Liebenberg notes that this type of principle unavoidably leads to the definition of minimum cores that are either over-, or underinclusive.[116] It can be argued, for example, that the most essential aspect of the right to access to housing is fulfilled once someone is not sleeping on the streets. Yet in some contexts this may be unnecessarily minimalistic as it is feasible to demand more. On the other hand, for example in the case of the right to health,

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112 As Lehmann 2006, p. 185, asks: 'But on what basis are interests to be ranked? How should "urgent" interests be distinguished from less-urgent interests?'

113 See, *e.g.*, Dixon 2007, p. 416.

114 *Cf.* also Fredman 2008, p. 71: 'The claim that positive duties are indeterminate is generally used to support the argument that judicial resolution is inappropriate. … Judges, on this view, have no greater capacity for resolving disputes based on indeterminate standards than anyone else.'

115 Örücü 1986, p. 52. See, *supra*, Ch. 5, S. 5.5.2.2.

116 Liebenberg 2010, p. 168.

a survival-based core might require the provision of expensive, tertiary health care, even where this is – also for budgetary reasons – impossible. Moreover, no matter what definition of a minimum core is decided upon, it necessarily will overlook other needs and interests.[117] Guaranteeing a minimum core can be to the detriment of rights of others that might seem less crucial if looked at in isolation or from a single point of view, but that can in fact be just as important.[118] If a minimum core doctrine would be relied upon at all, therefore, the core should be determined having regard to the particular context, *i.e.*, in a case-by-case fashion.[119]

In conclusion, the arguments put forward by the opponents of the use of a minimum core approach signal the concern that this would entail too conclusive a role for the courts. Especially also because it is considered impossible to objectively identify the minimum core of a right, it would be undesirable to expect courts to engage in this task. Reasonableness review, the arguments seem to suggest, instead confers upon the courts a more suitable exercise of power, that allows for enough context-sensitivity while leaving a greater role for the other branches.

6.5 Moving Beyond a Reasonableness/Minimum Core Dichotomy

The arguments set out in the previous section confirm that a reasonableness test is generally perceived of as a more flexible instrument compared to a minimum core approach. However, those who are attracted to the idea of the minimum core refer to the risk that this flexibility is used in a way that leaves prioritisation to the government and in fact hardly allows room for reviewing budgetary preferences. Reasonableness review is considered to focus almost entirely on the arguments advanced by the government, giving them *a priori* validity, and reducing the task of the court to rejecting what is 'manifestly unreasonable'. Opponents of the minimum core, on the other hand, usually start from the idea that a normative core is rigid and everlasting, that not complying with it would automatically result in a violation of the Constitution, and that establishing the core of rights is problematic as this can only be done in a subjective and non-dialogic manner. In particular, identifying a minimum core would mean that every individual obtains an immediately enforceable

117 *Ibid.*, pp. 169-170. *Cf.* also Liebenberg and Goldblatt 2007, pp. 339-341 (addressing the interrelatedness between socio-economic deprivation and status-based forms of discrimination).

118 Liebenberg 2010, p. 170, gives the following example: '[T]he provision of various forms of specially adapted housing and social services to people with disabilities may not be necessary for their survival, but is nonetheless crucial for their ability to participate as equals in society.'

119 *Cf.* Brand 2002, p. 101ff. See also Liebenberg 2010, *infra*, S. 6.5.2.

claim against the government to obtain without delay his or her core rights, *e.g.*, basic health care, shelter, etc. Understood in this way, the minimum core is seen to confer too much power on the courts, blocking a pluralistic, ongoing socio-economic rights debate. Moreover, the obligations following from the recognition of core rights would most likely be impossible to comply with.

It has become clear that the South African discussion on the adjudication of economic and social rights is everything but limited to technical controversies over abstract notions such as 'reasonableness' and 'minimum cores'. The arguments made relate to broader discussions and ideas on the separation of powers and the legitimate role of courts. However, the debate in South Africa is also a pragmatic one, in which the aim of creating meaningful protection in the post-*apartheid* era forms an important starting point. Whereas those who argue in favour of the use of a minimum core mostly do so out of unease with the deference currently shown in the case law of the South African Constitutional Court, those who do not wish the Court to turn to definitions of the minimum core equally perceive the problem of a Court that often does not succeed in fulfilling its transformative promise. In the light of the shared aim of improving South Africa's socio-economic standard, it may be expected that not all minimum core supporters necessarily are against (any form of) reasonableness review. At the same time, those who believe reasonableness is the most appropriate approach may see some room for a notion of core rights protection, as long as it improves this approach.

This final section aims to move beyond the separate arguments and presents two relatively recent, more comprehensive outlooks on what the role of the South-African courts in adjudicating socio-economic norms should look like. What these interestingly underline, is that the reasonableness versus core rights dilemma that has featured in this context need not be perceived as a matter of either/or. By approaching both reasonableness review and core rights protection from a slightly different angle, *i.e.*, by moving beyond narrow perceptions of overly flexible or rather absolute and strict tests, it becomes clear that there are in fact some intermediate options that are worth exploring. After illuminating Liebenberg's proposal to take reasonableness to a different level, Bilchitz' response to her account, as well as his own preferred view of a less rigid minimum core approach, will be discussed.

6.5.2 Liebenberg: Substantive Reasonableness Review

Over the years, Liebenberg has been one of the most active contributors to the debate on the development of South Africa's socio-economic rights protection, and the case law in particular. In her 2010 book *Socio-Economic Rights. Adjudication Under a Transformative Constitution* she provides a full account of her understanding of socio-economic rights in South Africa and the ways these should be dealt with. As the title shows, her account explicitly takes as

a starting point the transformative nature and potential of the constitution. However, she does not primarily rely on the role of courts in analysing the possibilities for realising this potential. Rather, one of the main ideas underlying her preferred approach is that of 'democratic deliberation in the ongoing processes of transforming the current status quo'.[120] For the judicial role she envisages this implies that 'closure', in the sense of bringing an end to this deliberation, must be avoided. In other words, even when judicial conclusions are reached, some room for dialogue should always remain.

Liebenberg's proposal for improving socio-economic rights adjudication in South Africa takes as the starting point the Constitutional Court's 'flexible' reasonableness test.[121] In Liebenberg's view, this test is an appropriate one as it places on the government the burden to explain that the measures it has taken were reasonable. As a result, it 'avoids closure and creates the ongoing possibility of challenging various forms of socio-economic deprivations in a wide range of different contexts'.[122] Nevertheless, Liebenberg admits that reasonableness review can be problematic, too, namely when it 'conflates the two-stage approach to constitutional analysis'.[123] The test as applied by the South African Constitutional Court tends to focus solely on the possible justifications for the infringement and fails to give clear content to the right at stake. In her view, 'until some understanding is developed of the content of the right, the assessment of whether the measures adopted by the state are reasonably capable of facilitating its realization takes place in a normative vacuum'.[124]

According to Liebenberg, however, the solution to this problem lies not so much in encouraging the Court to define minimum core obligations. Aiming at preserving openness, she asks how the model of reasonableness review 'can be developed so as to ensure a more substantive engagement with the purposes and underlying values of socio-economic rights'.[125] In her opinion, courts should more generally be required 'to make a conscious effort to develop the normative content of the various socio-economic rights'.[126] This engagement with content would preserve the two-stage approach and prevent reasonableness review from degenerating into an overly marginal or unprincipled method of review.[127]

120 Liebenberg 2010, p. 29.
121 *Cf.* Brand 2006, p. 227, who holds that 'the Court varies the intensity of its review and the intrusiveness of its remedies from case to case based on its perception of how acutely or not its institutional capacity and democratic illegitimacy constrain it'.
122 Liebenberg 2010, pp. 173-174.
123 *Ibid.*, p. 175. See, *supra*, S. 6.4.1.1 and 6.4.1.2.
124 Liebenberg 2010, p. 176, referring to Bilchitz 2007, p. 143.
125 *Ibid.*, p. 179.
126 *Ibid.*, p. 180.
127 *Ibid.*, p. 183.

In line with this, Liebenberg rejects a strict minimum core approach not only because it might lead to 'closure', but also because it is inappropriately based on a single metric[128] and cannot respond to the facts of the case at hand.[129] Next to the importance of dialogue, underlying her approach is the importance of context as well as value pluralism. The task of developing the normative content of rights, in her view, 'should be approached by considering the purposes and values which the rights seek to promote in the light of their historical and current socio-economic content'.[130] Nevertheless, Liebenberg sees a small role for the minimum core doctrine in determining the burden of justification that lies on the state, as well as in its potential of directing priority attention to people's basic needs.[131] Thus, she seems to argue in favour of a minimum core that cannot be equalled to the content of a right, thereby forming a standard capable of determining the outcome of a case, but rather is one of the factors that colours the reasonableness test.[132] The fact that a 'core right' is at stake should be one of the considerations relevant in determining whether the governments' conduct was reasonable, rather than a decisive standard that, when failed to comply with, results in a finding of a violation. Important is that this minimum core in her view should not be determined on the basis of a single normative starting point. Instead, the enquiry of what it entails

> 'should be primarily guided by a context-sensitive assessment of the impact of the deprivation on the particular group. In assessing the severity of the impact, the courts should consider the implications of the lack of access to the resource or service in question for other intersecting rights and values such as the rights to life, freedom and security of the person, equality and human dignity. This accords with an interpretive approach which embraces the interdependence between various constitutional rights and values.'[133]

Thus, as long there is no conclusive prioritisation of some aspects of a right over others, and the minimum core is grounded on a variety of important

128 See, *supra*, S. 6.4.2.3.
129 See, for her various critical points, Liebenberg 2010, pp. 163-173.
130 *Ibid.*, p. 180.
131 *Ibid.*, pp. 184-185.
132 *Ibid.*, p. 173: '[T]he minimum core concept need not be located within a rigid, two-tier approach to the adjudication of socio-economic rights but can (…) play an important role in the evaluation of the reasonableness of the State's measures in realising socio-economic rights.' And at p. 184: 'The valuable contribution of the concept of minimum core obligations … should be incorporated in the reasonableness analysis by placing a particularly heavy burden of justification on the State in circumstances where a person or group lacks access to a basic socio-economic service or resource corresponding to the rights in ss 26 and 27.'
133 *Ibid.*, p. 185. *Cf.* also p. 173.

values, thereby being somewhat 'relative'[134] or at least context-sensitive, Liebenberg does not completely oppose the idea of the minimum core. A reviewer of her book has held in this regard that

> 'Liebenberg's advocacy of having a more substantive minimum interpretation that will actually address the socio-economic situation of the most marginalized seems at odds with her opposition to attempts to define progressively and expansively the minimum core for many of the substantive rights. As jurisprudence continues to develop both domestically and internationally (the imminent coming into force of the complaints mechanism to the International Covenant on Economic, Social and Cultural Rights could make a significant difference to our understanding of the minimum core) one senses that the anti-minimum core arguments will be less persuasive over time.'[135]

Indeed, Liebenberg's cautious 'inclusion' of the minimum core in 'substantive reasonableness review' can be seen as clearing the way for a more comprehensive role for this notion in giving content to the right at stake, albeit in a different manner than envisaged by many proponents of the minimum core approach.

6.5.3 Bilchitz: Necessary but Less Rigid Minimum Cores

Although Liebenberg's reasonableness approach already comes close to an invitation to the Court to recognise a minimum core of the substantive rights laid down in the Constitution, acknowledging that such a core can play a part in reasonableness review is still something else than supporting the acceptance of minimum cores as a self-standing instrument for defining the content of the right at the first stage of fundamental rights review. Bilchitz is supporting the latter idea, but his 'more fully developed' minimum core approach is more nuanced than the understanding which opponents of the concept – including the South African Constitutional Court – generally rely on, and is therefore worth having a closer look at.

Before doing so, however, a remark may be made with regard to Bilchitz' response to the approach proposed by Liebenberg. In brief, what Bilchitz holds against Liebenberg's approach is that 'one cannot have it both ways': in his view Liebenberg wants substantive content *and* flexibility, but he argues that 'the more content that is given to a right by a court, the less it remains open for contestation and determination in the future; the more open it remains, the less content it has and the less it provides individuals and communities

134 *Cf.* the 'relative' understanding of the *Wesensgehaltgarantie*, which implies that a core can only be determined in the light of the circumstances of a specific case. See, *supra*, Ch. 4, S. 4.3.2.2.

135 Byrne 2012, p. 185.

with the concrete entitlements to enforce in the future'.[136] Fixed content, according to Bilchitz, is not something one should worry about. Rather, 'it is the very stuff of law that makes rights meaningful'.[137]

Indeed, Bilchitz' own proposal for an adjudicatory approach, as most elaborately laid out in his *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007), does not shy away from fixed content. What he tries to show, moreover, is that a robust statement on what the content of a right is, in the form of the recognition of a minimum core, is indispensible for the proper adjudication of the socio-economic rights enshrined in South Africa's Constitution. It was already indicated that Bilchitz criticises the Court's failure to give content to the rights the Constitution protects by focusing on the requirement of reasonableness in the light of the constitutionally mandated ends.[138] These ends, in his view, 'cannot themselves be determined by the reasonableness enquiry and, thus, the approach on its own fails to generate any useful conclusions'.[139] Rather than reasoning purely on a case-by-case basis, moreover, 'it will be necessary for … [a court] to provide a certain amount of general content to a right that will enable it to reach the decision it does in that case. For it may be questioned how decisions are to be made in a particular context without some general principles to guide the decision-making'.[140]

In determining the general, principled content of rights, Bilchitz considers it important to take account of the 'different levels of individual need'.[141] More concretely, he distinguishes two thresholds of interests. Referring also to the CESCR's approach, the first is said to be

> 'the most urgent interest in being free from general threats to one's survival. This interest is of greatest urgency, as the inability to survive wipes out all possibility for realizing the sources of value in the life of a being. I shall refer to this in what follows as *the first threshold of provision or the minimum core*. In this context, the threshold would amount to having at least minimal shelter from the elements such that one's health and thus one's ability to survive are not compromised.'[142]

136 Bilchitz 2011, p. 549.
137 *Ibid.*, p. 550.
138 See, *supra*, S. 6.4.1.2.
139 Bilchitz 2007, p. 160.
140 *Ibid*. Indeed, even a contextual determination of reasonableness presupposes some a-contextual standards. Moreover, this clarifies the scope of a court's decision-making powers as well as the state's obligations (pp. 161-162).
141 *Ibid.*, Ch. 1, but see also p. 180: 'The theory I have proposed distinguishes between interests with differing levels of urgency and provides a principled understanding of how to determine two different thresholds of need. As such, the process of determining the content of these rights can be sensitive to the differing positions of individuals in a society, and the obligations of the state can vary accordingly'.
142 *Ibid.*, p. 187 [emphasis added].

This is however not all that is protected by the relevant rights. As the aim of the South African Constitution is to '[i]mprove the quality of life for all citizens and free the potential of each person',[143] the eventual goal is to meet also the second threshold, which is to allow people to not only survive but to flourish and achieve their goals.[144] Importantly, '[w]hilst the realization of the maximal second interest is a medium- to long-term goal, the urgency of the first interest strongly justifies an unconditional obligation to realize it as a matter of priority'.[145] Indeed, it cannot make sense to hold that there is an obligation to meet the second threshold, but not the first, as in order to reach the second level the realisation of the first is presupposed.[146]

The determination of a core rights standard through these two thresholds in Bilchitz' view is helpful in the context of 'progressive realisation', *i.e.*, when there is a lack of a general standard or full compliance with such a standard cannot be expected immediately. By addressing urgent matters first, the right to progressively achieve certain bigger aims can actually become a right of 'everyone'.[147]

In his book, Bilchitz engages with many of the critics of the minimum core rights approach. He for example explaines that the minimum core is not so context-dependent as is often argued, as the 'common human interests' that exist in different situations are, indeed, the same.[148] Most interestingly, however, in response to (possible) criticism Bilchitz underlines that the minimum core *need not be rigid and absolutist*.[149] Indeed, this rigidity and absoluteness is often seen as one of the most problematic features of cores of rights, as it simply is 'impossible to given everyone access even to a "core" service immediately'.[150] Bilchitz rebuts this criticism by stating, firstly, that 'priority' in his account does not mean 'lexical priority' in the sense that all efforts and sources must be spent on complying with minimum core rights, before attention can be had to further realisation: 'Such a policy would be short-sighted and fail to invest in any long-term solutions for the situations that

143 See the Preamble to the Constitution of the Republic of South Africa.

144 Bilchitz 2007, p. 188. In the context of housing, for example, this implies that more is provided than basic shelter, or protection against the elements.

145 *Ibid.*, p. 189.

146 *Ibid*. When basic needs are not met, some people will not survive and their right to a more inclusive level of protection will then be meaningless.

147 *Ibid.*, p. 193.

148 *Ibid.*, pp. 200-202, responding to Brand 2002. Although the exact obligations and measures needed to fulfil these interests might differ from situation to situation, this is not the same for the aim to, for example, ensure that someone has access to a minimum essential level of food.

149 As the determination of the core is a matter of 'content', the role of the available resources also applies to the core. Lacking this internal limitation, it can be said that 'the general limitations clause (S. 36(1)) could also be used for this purpose' (Bilchitz 2007, p. 214).

150 *TAC*, para. 35.

people find themselves in'.[151] Rather, cores should obtain 'weighed priority', which relates to the fact that 'those interests which have priority are those which we have particularly strong reasons to value and which require strong countervailing considerations to outweigh them'.[152] A justification for not realising the minimum core could for example be that such realisation would be impossible in the light of the scarcity of resources. Also when this requires a disproportionately vast amount of resources, does not leave at least some room for reaching the higher threshold that allows individuals to 'realize their aims and achieve positive experiences', or prevents the realisation of other rights' cores, not meeting core obligations can be jusitified.[153]

To those who are not convinced that it makes sense to define as individual rights standards that simply cannot always be met, Bilchitz responds that, rather than including resource and other considerations in the determination of the content of constitutional rights – which would be the alternative – it is important to state *conditional* rights. 'Independent' minimum core rights must be recognised, Bilchitz argues, for otherwise 'the failure to meet basic needs under conditions of scarcity does not violate any claim people have'.[154] In other words, '[p]eople have rights by virtue of being creatures of a certain type with certain interests and not by virtue of having control over a certain quantity of resources'.[155] Indeed, the identification of minimum core entitlements can steer government behaviour in the desired direction,[156] while it does not imply that as soon as a minimum threshold is not yet reached, there is a breach of the Constitution. As Bilchitz already noted in 2003, the minimum core should be rigid in one respect only: It should be strict to the extent that it recognises that 'it is simply unacceptable for any human being to live without sufficient resources to maintain their survival'.[157] Otherwise, it can indeed be said to be a heavy-weighing, yet *prima facie* requirement.

In conclusion, it can be said that both Liebenberg and Bilchitz try to bridge the gap between reasonableness and minimum core protection. Whereas Liebenberg starts from the former, yet includes a small role for the minimum core, Bilchitz gives content to socio-economic rights with the help of the minimum core, while sometimes allowing for justifiable interferences due to considerations of resources or, indeed, reasonableness. Using terms that have come up earlier in this book, Liebenberg's core rights notion can be described as somewhat 'relative', in that it takes into account the specific context of a

151 Bilchitz 2007, p. 210.
152 *Ibid.*, p. 211
153 *Ibid.*, p. 212.
154 *Ibid.*, p. 217; Bilchitz 2003, pp. 19-20, and p. 22: 'Scarcity thus conditions the extent to which the right can be realised but does not qualify the actual content of the right itself'.
155 Bilchitz 2003, p. 20.
156 *Ibid.*, p. 219.
157 *Ibid.*, p. 15.

case, whereas in Bilchitz' view only *the protection offered* by the core (rather than the core itself)[158] is relative, as it allows for some exceptions. In pointing out the possibility of 'less rigid' cores, which are still necessary for they recognise basic individual needs, Bilchitz has shown an important alternative. His minimum core approach is capable indeed of providing for something to hold on to, without becoming too rigid. It thus can ensure the development of socio-economic fundamental rights protection and guide courts in dealing with these rights, while recognising that even core obligations cannot always be fulfilled immediately.[159]

6.4 Conclusion

Having ended this chapter with a discussion of the potential of the idea of a less strict minimum core, it is worth summarising some of the main findings. What did a discussion of the South African debate on the advantages and disadvantages of the use of a minimum core add to the insights gained in the previous chapter?

Presenting the idea of the minimum core as developed by the CESCR, the focus of the previous chapter lay on the monitoring of economic and social rights developments. It there became clear that when broad socio-economic rights that have to be realised progressively form the starting point for examining state compliance, the identification of minimum cores can work in a 'scope-limiting' way. It can ensure that (too) broad demands that cannot immediately be fulfilled entirely are turned into more clear-cut expectations. The South African debate presented in the current chapter focuses on the issue of the minimum core in a different manner. Economic and social rights are explicitly laid down in the South African Constitution and the South African Constitutional Court has the power to review the issues raised in regard to these rights. It was shown that over the years it has decided several landmark cases on housing, health care, etc. However, from the outset the Court's approach has been a quite deferential one that, according at least to some critics, is not capable of fulfilling the Court's transformative potential. As an alternative, scholars have suggested the Court should use a minimum core approach, inspired by the CESCR. Up until today, the Court has been unwilling to do so and even has expressly rejected such an approach. It has indicated that it lacks the information necessary for defining core rights, and moreover it has

158 Indeed, the core itself is 'absolute' because it is determined apart from the circumstances of a specific case.

159 According to Bilchitz himself: '[T]he modified minimum core approach that I advocate offers a well-motivated, robust, and useful analytical framework for interpreting socio-economic rights. Most importantly, it can also serve to realize the important ethical purposes that lie behind the recognition of such rights: ensuring that each person is able to have access to the necessary prerequisites for living a life of value' (2007, p. 179).

emphasised that that even minimum core obligations cannot be met immediately. This express rejection of core rights has sparked a highly interesting (scholarly) debate on the minimum core and its possibilities and limitations in the context of the fundamental rights adjudication.

Several arguments were presented in this chapter that have been brought to the fore in the debate taking place between those favouring a reasonableness test – including, indeed, the South African constitutional Court –, and those who believe in the added value of a minimum core approach. Supporters of the minimum core hold that only the identification of such a core will ensure that enough weight is given to the right at stake as opposed to the government's justifications. Before reviewing these, they argue, it is important to look at the individual interest at stake. Only when doing so a standard can be identified against which the action or omission of the government can be tested for its reasonableness. Also, identifying the most important aspects of socio-economic rights recognises the fact that some things – *e.g.*, the fulfilment of basic needs – are more important than others, and can thereby increase the protection of those most seriously in need.

Opponents of the idea of the minimum core claim that when a court identifies such a core, this interferes with the separation of powers. They stress that identifying immediate and strict obligations would give too much power to the courts. In addition, this would have a 'blocking' effect as after the identification of a minimum core, no room would be left for a further discussion of a right's content and development. Especially in light of the fact that a minimum core is in fact 'indeterminable' and necessarily subjective, this would not be desirable.

It also has become clear, however, that the reasonableness versus core rights controversy in fact needs not be an either/or debate. It can be said that the arguments that are generally put forward are based on a 'too flexible' understanding of reasonableness, and a 'too strict' understanding of the minimum core. When letting go of the different assumptions, several middle ways become apparent. Liebenberg, for example, has suggested improving the Court's reasonableness review with the help of the substantive content of rights. She argues that, although a context-sensitive core of rights should not be a decisive factor in socio-economic rights adjudication, it can play the valuable role of attaching weight to the right at stake. Bilchitz, on the other hand, submits that a core of a right should be understood as a clear priority-setting standard, based on the fact that there are basic urgent needs, next to a second 'threshold of interests'. He also recognises, however, that there may be valid reasons and resource constraints that bar the government from fulfilling core rights immediately. Nevertheless, even when minimum cores cannot be guaranteed instantaneously, their recognition can further the development of socio-economic rights standards because they make clear what deserves priority, and in case resources becomes available, what these should be used for. Bilchitz' account thus forms an argument for determining independent,

prima facie core rights, that underline the importance of the interests of those most in need, yet do not require overly rigid or absolute protection. Regardless of South Africa's distinct history and problems, this argument, indeed, may be of relevance to the protection of socio-economic rights more generally.

PART III

Core Rights and the ECtHR

7 Developing a Core Rights Perspective for the ECtHR

7.1 INTRODUCTION

In Chapters 4, 5, and 6, different core rights doctrines have been introduced and discussed. First, the discussion has focussed on the German *Wesensgehaltsgarantie*, a classic example of the idea of core rights protection as placing a limit on limitations in order to ensure that fundamental rights guarantees cannot run empty.[1] After that, core rights debates were introduced that more specifically related to the field of socio-economic rights protection. Attention was given to the rights laid down in the International Covenant of Economic, Social and Cultural Rights (ICESCR) and the recognition by the Committee on Economic, Social and Cultural Rights (CESCR) of minimum core obligations on the basis thereof.[2] Finally, the debate on the appropriate role of the concept of core rights in the adjudication of economic and social rights under the South African Constitution was analysed.[3]

The different chapters by no means have given an exhaustive overview of today's theory and practice related to the notion of core rights.[4] They have, however, served to capture the most significant features thereof. When it comes to the idea of core rights as an instrument for narrowing down the room for limitations of fundamental rights, the German doctrine provides an especially elaborate example. Regardless of its limited practical meaning, Article 19(2) GG has encouraged numerous legal writers to reflect on the *Wesen* of fundamental rights and the different roles this concept can or should play in the adjudicative process. Moreover, apart from the *Wesensgehaltsgarantie*, in Chapter 4 the example of the constitutional right to an *Existenzminimum* has provided valuable insights into the protection of absolute minimum guarantees that can be valid beyond the German context, too.

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1 See, *supra*, Ch. 4.
2 See, *supra*, Ch. 5.
3 See, *supra*, Ch. 6.
4 In various modern constitutions a reference to 'core rights protection' can be found. A few examples are the Constitution of Colombia of 1991, Art. 334 (' … In no case shall the essential core of a right be affected.'), the Constitution of Kenya of 2010, Art. 24(2)(c) ('… a provision in legislation limiting a right or fundamental freedom … shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.'), and the Constitution of Angola of 2011, Art. 236(b) ('Alterations to the Constitution must respect … [e]ssential core rights, freedoms, and guarantees.').

The concept of minimum cores or minimum core obligations at the UN level, in relation to the ICESCR, has also proven interesting. In Chapter 5, the genesis of the idea of core rights in the context of fundamental economic and social rights was introduced. This chapter presented various reflections on the use of cores for making broad rights norms more concrete and approachable, by focusing on the most urgent guarantees. At the same time it has highlighted some building blocks for identifying the content of such cores related to both their concrete substance and the ways in which core rights can be determined. The outline of the South African debate in Chapter 6 concretised in more technical terms the potential and pitfalls of socio-economic core rights for the judicial process. From the desirability of a reasonableness test to the perceived need for a clear determination of the content of the different socio-economic rights, the intriguing debate on the potential role of core rights in relation to the 'transformative' task of South Africa's Constitutional Court offered various arguments for and against embracing such a role. Indeed, regardless of the fact that other core rights doctrines could have (additionally) been presented, the ones illuminated in the previous chapters serve well to demonstrate what the idea of core rights protection is, or at least what it can be about.

As such, the doctrines discussed have presented the starting points for eventually transposing the concept of core rights to the Strasbourg context. While aiming at doing so, this chapter moves beyond the contextualised, separate doctrines in two respects. First, it merges the various insights in order to create an overall picture of the diverse possibilities of core rights protection. In presenting this overview, the insights derived from Chapters 4 to 6 will be confronted with what has been said in Chapter 3 on the stages of fundamental rights adjudication. Besides presenting a 'catalogue' of core rights options, one of the main topics that will be addressed is how the idea of core rights protection can be relevant at the different stages that have been identified. Secondly, this chapter moves away from the German, international, and South African debates in the sense that it is directed towards providing concrete starting points for the ECHR context. In keeping with the aim of this book, the outlook that follows concerns the possibilities of core rights protection that are relevant for the ECtHR, and more particularly for the protection of economic and social interests under the 'classic' norms enshrined in the Convention. It was explained in Chapter 2 of this book that offering such protection is important, though not entirely uncontroversial. The Court's reasoning in cases related to health, housing, social benefits, etc. has been criticised for being unprincipled and hence inadequate for fulfilling this court's complex task of providing effective individual protection, showing appropriate deference to state authorities, *and* providing sufficient guidance as to what the ECHR rights standards entail. It is against the backdrop of the Court's need to deal with

this complex task in a better way that the current chapter aims at developing a 'core rights perspective' tailored to the ECtHR.

The chapter consists of three main parts. First, in Section 7.2 some general insights are distilled from the different core rights doctrines. The depiction of various 'facts and fables' related to core rights protection aims at creating a more sophisticated and workable image of this notion in theory and in practice. Secondly, the various insights on core rights will be linked to the ECtHR and its delicate task of providing effective and transparent fundamental rights protection while leaving room for the (democratic) decisions of the Member States (Section 7.3). Attention is given to the preferred type of core rights protection for the Strasbourg context as well as to the ways in which the ECtHR could determine core aspects. Finally, in Section 7.4, an outline is provided of a concrete (minimum) core rights approach for the ECtHR. Adding the notion of core rights to the ideas of effectiveness and indivisibility that were presented in Chapter 2, a perspective is presented that may improve the Court's reasoning and allow for moving towards a more principled approach to the protection of socio-economic interests.

7.2 Facts and Fables: General Insights into the Notion of Core Rights

Several persistent perceptions of core rights, minimum cores, and minimum core obligations determine the dominant image of core rights protection. One of the most important of these is the idea that core rights are absolute. Cores are often thought of as being decisive for the outcome of a case in the sense that interfering with a core automatically results in a breach of the relevant fundamental right. Also, it is often assumed that core rights need to be determined in the abstract and are everlasting. Partly because of these presumptions, determining core rights is perceived as an extremely difficult or even impossible task. When left to a court, moreover, the determination of core rights may be said to confer too much power on the judiciary. Combined with a perception that core rights protection generally directs the focus towards a restricted number of important guarantees, thereby ignoring other potential areas of protection, this easily leads to the conclusion that the use of a core rights approach can better be avoided.

However, the different assumptions and perceptions mostly only partly coincide with reality or at least lack depth or nuance. Of course, the German doctrine shows that core rights can be considered to serve as a '*Schranken-Schranke*' ('limit to limitations') in an absolute way.[5] Moreover, generally applicable core rights have been determined by, for example, the UN Committee

5 See, for this depiction of the German *Wesensgehaltsgarantie*, Dreier, in Dreier 2013, Vorb., no. 144, Art. 19 II, no. 7; Stern 1994, Bd. III/2, p. 865.

on Economic, Social and Cultural Rights in its General Comments.[6] Yet this means neither that the cores that are identified necessarily present unassailable truths with regard to the meaning and importance of specific rights, nor that exceptions or alterations over time are always precluded. Similarly, the fact that it may be up to a court (or other non-democratic body) to identify and apply core rights, does not in itself justify the conclusion that it thereby necessarily oversteps the boundaries of its competences.

If the insights gained from the doctrines presented in the previous chapters are combined, it appears that the 'truth' with regard to core rights protection is more refined, and perhaps also more promising, than is often thought. Some deeply ingrained ideas on the concept of core rights turn out to be mere fictions, while other perceptions can be confronted with alternative understandings that seem less inherently problematic. If one is willing to move beyond a narrow understanding of what rights' cores are and what they can be used for, a richer picture emerges that enables for actual and informed deliberation on the possible added value of this notion for legal contexts like that of the ECtHR.

This section therefore aims to describe and contest various common understandings of core rights that can potentially stand in the way of a meaningful development of this concept for the Strasbourg context. More precisely, it addresses the idea that core rights are fixed and absolutely protected (7.2.1), that the notion of cores can only be helpful at the application stage (7.2.2), that cores are indeterminable (7.2.3), that they minimise rights' potential (7.2.4), and that they confer too much power on the courts (7.2.5). Finally, referring back to the previous chapters and the insights presented there, it is emphasised that the notion of core rights is inherent in the idea of fundamental rights protection (7.2.6), and thereby the path is cleared for incorporating this notion in a more concrete way in the Strasbourg practice.

7.2.1 From Absolute-Absolute to Relative-Relative Core Rights

Statements about core rights are often regarded as absolute, situation-independent statements as to what is and what is not allowed in terms of limitation of fundamental rights. Once the 'core' or 'essence' of a fundamental right is interfered with, this interference is perceived as incompatible with the constitution or treaty enshrining the right.[7] It makes sense, at least at first glance, to treat requirements that are considered 'essential' as absolutes that leave no

6 See the General Comments on the various ICESCR rights, in which cores are stated that are applicable to all States Parties. *Supra*, Ch. 5, S. 5.4.

7 *Cf.* the example of Art. 19(2) GG (*Wesensgehaltsgarantie*): when the *Wesen* of a right is interfered with the law or act concerned is unconstitutional, and must be regarded as null and void (*e.g.*, Dreier, in Dreier 2013, Art. 19 II, no. 19).

room for reasonable or proportional exceptions, because their importance so requires.

If there is one reason for jettisoning the concept of the minimum core, however, then it is the perception of cores of rights as being, by definition, absolutes. When understood as inflexible rules predetermining the outcome of fundamental rights cases in which a core has been interfered with, a core rights approach can indeed be problematic. First, there is the issue of conflicting core rights. It is difficult to conceive of absolute core rights protection when it is considered that core aspects of one right can come into conflict with the core of another right. If both these cores are absolute, obviously no rational solution to such a conflict can be found. Secondly, the absolute protection of essential aspects of rights seems unrealistic when practical possibilities are considered. This holds true especially in the context of positive and/or socio-economic obligations. After all, it is fair to say that resources and means will not always suffice to guarantee even individuals' most basic needs and rights. And thirdly, underlying the distrust of absolute cores is the fact that it is profoundly difficult to identify the core of a right. This seems especially problematic when this core is considered absolute, because this implies that it will prevail over any thinkable and future conflicting interest. Indeed, the difficulties inherent in determining core rights tend to become more obvious when the impact thereof is so decisive yet also unpredictable.

The problems related to absolute cores can be reason for avoiding the idea of core rights protection altogether. This is what the opponents of core rights protection in the South African debate, as well as the South African Constitutional Court itself, have generally favoured.[8] In the German context, however, this solution less easily can be opted for, since a norm protecting the core (*das Wesen*) of a right has explicitly been taken up in Article 19(2) of the *Grundgesetz*. This provision cannot simply be ignored, and for that reason in German constitutional law alternative understandings of core rights protection have been suggested. On the one hand, there are those who have proposed an 'objective' reading of the *Wesensgehaltsgarantie*. Such a reading, rather than guaranteeing subjective, individual guarantees, implies that Article 19(2) ensures that the core of every fundamental right is preserved for society in general.[9] This means that whereas in an individual case a right can be limited

8 In the case of *Grootboom* (Government of the Republic of South Africa v. Grootboom & Others 2001 (1) SA 46 (CC) (S. Afr.), the South African Constitutional Court amongst other things held that it lacks the necessary information to determine minimum cores and that needs diverge to such extent that no core entitlements follow from the Constitution (paras. 32-22). In *TAC* (Minister of Health & Others v. Treatment Action Campaign & Others 2001 (5) SA 721 (CC)) it held that it is 'impossible to give everyone access even to a 'core' service immediately' (para. 35). According to Young, the concept of the core is being jettisoned even by those who are otherwise committed to the economic and social rights framework (Young 2008, pp. 115-116).

9 *Cf.* Drews 2005, pp. 77-82, and see, *supra*, Ch. 4, S. 4.3.1.1.

to such extent that nothing remains, for example in the case of a conflict with other very important interests, the norm as such always needs to remain meaningful beyond the subjective situation. On the other hand, an option has been suggested that avoids the complexities of absolute cores in a more fundamental manner, namely an understanding of rights' cores that is 'relative' in the sense that what belongs to the *Wesen* of a right can only follow from the particularities of a specific case.[10] According to this understanding, the core of a right can become visible only by means of the outcome of a balancing test – when it turns out that a measure was proportional, the core of the right at stake was not interfered with.

It can be asked, however, whether it is necessary to either ignore the idea of core rights entirely, or resort to an objective or purely circumstantial understanding of rights' cores in order to overcome the downsides of absolute core protection.[11] It is contended here, on the basis of the insights gained from the doctrines presented in the previous chapters, that this is not the case.[12] When listing the different core rights approaches that were discussed, it becomes clear that there are more options than the strictly absolute and the 'case-dependent' relative one. In fact, what becomes apparent is that there are two kinds of absolute cores, as well as two kinds of relative ones, that together result in a 'catalogue' of understandings of core rights containing no less than four different possibilities.[13]

In order to clarify this, it must be understood that 'absolute' can refer to absoluteness as regards the *content* of the core, *i.e.*, to the definition of a core that is independent from the circumstances of a particular case, as well as absoluteness of the *protection* that is being offered, which implies that when the core of a right is touched upon, this automatically means that the relevant rights norm is violated. 'Relative' core rights protection, in turn, can mean either that the *core itself* is relative, because it can only be determined in the context of the specific case at hand, or that it is *protected* in a relative manner, meaning that there is some room for justifying an interference with the core of a right.

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10 *Cf. ibid.*, pp. 66-75. Amongst the supporters of this theory are Häberle (1983), Alexy (2002) and Borowski (2007). See, for the various 'relative theories', *supra*, Ch. 4, S. 4.3.2.2.

11 *Cf.* Young's discussion on cores as being either 'rules' or 'standards'. This distinction is very insightful, yet it does suggest that one should choose between either a very strict, absolute core, or, instead, a 'moveable, changeable, core', dependent on balancing (Young 2012, pp. 86-87).

12 With regard to the German example, however, things are more complicated as the 'absolute' phrasing of the *Wesensgehaltsgarantie* precludes certain alternative core rights understandings.

13 *Cf.* also Drews 2005, who comes up with an even greater number of core rights options. However, these are specifically tailored to the German debate on the *Wesensgehaltsgarantie* and the issues highlighted therein (*e.g.*, objective v. subjective protection, absolute v. relative protection). *Supra*, Ch. 4, especially S. 4.3.

The four options for a core rights approach that follow from these distinctions can be illustrated by the different core rights doctrines presented in the previous chapters, or more precisely, by the different preferred understandings of core rights protection that have featured therein. The absolute-absolute and absolute-relative understandings, as well as the relative-absolute and the relative-relative ones, all have appeared somewhere in the discussion of the German, international and South African examples. Thus, the study of core rights options conducted in the previous part of this book, can lead to the following classification:

		Protection	
		a. Absolute	b. Relative
Content	1. Absolute	*1.a Absolute-Absolute* *Wesensgehaltsgarantie* 'Absolute theory' *Existenzminimum* Constitutional Court of South Africa	*1.b Absolute-Relative* ICESCR (CESCR) Bilchitz (South Africa)
	2. Relative	*2.a Relative-Absolute* *Wesensgehaltsgarantie* 'Relative theory' (*Existenzminimum*)	*2.b Relative-Relative* Liebenberg (South Africa)

1.a: The absolute-absolute understanding of the concept of the core is the conception that is most commonly adhered to. It is the idea that cores of rights are determined independently from the particular facts of a case while being absolutely protected. This understanding is apparent in the German debate on Article 19(2) GG (the *Wesensgehaltsgarantie*). Because this norm states that '*In no case* may the core content of a constitutional right be infringed', relative protection seems precluded. Those who moreover consider the content of cores to be something absolute, start from the idea that there are certain, case-independent aspects of fundamental rights that are so important that they cannot

be interfered with.[14] The concrete definition of these aspects, also in the German debate, is however often left open.[15]

The German right to an *Existenzminimum* (subsistence minimum) also may be considered a kind of absolute-absolute core right. The *Bundesverfassungsgericht* has indicated what this minimum guarantee at all times should amount to, whereas – because it is inferred from the absolute protection of human dignity – not living up to this automatically results in a violation of the German Constitution.[16] Finally, in the debate on economic and social rights protection in South Africa, most authors who argue against the incorporation of minimum cores in the South African courts' adjudicative practice, use arguments against absolute-absolute cores – holding that these cannot be objectively determined and moreover cannot be met in practice.[17] Also the Constitutional Court in South Africa has concluded against using core rights, on the basis of what seems to be the same 'strict' understanding.[18]

1.b: Absolute-relative cores may appear to be not that different from their absolute-absolute counterparts. Nevertheless, the difference between both types is of great importance. 'Absolute-relative' means that the content of a core is something absolute, or general. What belongs to this core is determined on the basis of the rights norm itself, or with the help of consensus or expert interpretations of what belongs to the most essential aspects of the right concerned. In any case, the core content is independent from the circumstances that characterise a specific case or issue. The *protection* of this core, instead, *is* to some extent dependent on these circumstances, which means that in certain instances an interference with an essential aspect of a right can be justified. This option thereby acknowledges that resource constraints or other very weighty considerations can stand in the way of securing even the very core of a right, without this implying that the content of the core itself cannot be determined except for in the light of these constraints.

A first example from the previous chapters is the minimum core approach as it has been developed by the CESCR in relation to economic and social rights.[19] Although minimum cores are introduced in the various General

14 See, on the absolute theory, Drews 2005, pp. 62-66, and, *supra*, Ch. 4, S. 4.3.2.1.

15 Some suggestions for determining absolute cores, however, were made by Herbert (1985), who amongst other things referred to the character and function of fundamental rights, human dignity and comparative insights. Also interesting in this regard is the 'absolute-dynamic' understanding of core rights in Germany. According to this understanding, there is room for alteration of the core over time. Arguably, this mitigates that problem of determining 'absolute' core content (*supra*, Ch. 4, S. 4.3.2.1.).

16 *Cf.* the absolute guarantee of the *Menschenwürde* of Art. 1(1) GG (in combination with the *Sozialstaatsprinzip* of Art. 20(1) GG). See, *supra*, Ch. 4, S. 4.4.2.1.

17 *Supra*, Ch. 6, S. 6.4.2.

18 Indeed, it has held that recognising minimum cores would be unrealistic as it is 'impossible to give everyone access even to a "core" service immediately' (*TAC*, para. 35).

19 *Supra*, Ch. 5, S. 5.3.2 and 5.4.

Comments as very important guarantees states should do all they can to comply with, in the end the CESCR has accepted that non-compliance with a minimum core 'only' results in a *prima facie* violation of the ICESCR. It implies a heavy burden of justification, and it is up to the state to prove that all resources have in fact been spent on at least meeting minimum core obligations. Yet it is not imperative that a failure to fulfil core rights leads to a breach of the ICESCR.[20]

Bilchitz' contribution to the South African debate can also be placed in the 'absolute-relative' category.[21] He argues for a 'less rigid' minimum core that allows for limited exceptions.[22] According to Bilchitz, the minimum core should be rigid in one respect only, namely to the extent that 'it is simply unacceptable for any human being to live without sufficient resources to maintain their survival'.[23] It is important to state core rights independent from resource and other state concerns, because otherwise 'the failure to meet basic needs under conditions of scarcity does not violate any claim people have'.[24] Core rights claims are thus a matter of content per se, while countervailing concerns can constrict their eventual manifestation. The advantage of recognising such absolute-relative cores in this view is that it offers clarity on what should be strived for in terms of rights protection. Absolute-relative cores provide for norms that guide the adjudicational practice, indicating rights that should obtain weighed priority and are thus more difficult to be outbalanced by other interests.

2.a: A relative-absolute understanding of rights' cores at first glance appears to be impossible. How can something the content of which is not clearly determined on forehand, be absolutely protected? Indeed, it is the gist of the relative-absolute perception of core rights that what exactly these rights entail cannot be determined *a priori* and in an absolute manner. Instead, the content of core rights needs to be defined in a contextual manner. At the same time, the protection afforded is absolute in the sense that interferences with the core

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20 According to the CESCR's General Comment No. 3, 'a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant … In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations' (para. 10).

21 *E.g.*, Bilchitz 2003; Bilchitz 2007. See, *supra*, Ch. 6, S. 6.5.2.

22 Bilchitz 2007, p. 212. These exceptions relate to scarcity of resources, but also recognise that when the fulfilment of a core requires a disproportionally vast amount of resources, or blocks or leaves no room for the realisation of other rights and aims, not meeting core obligations can be justified.

23 Bilchitz 2003, p. 15.

24 Bilchitz 2007, p. 217.

of a right are intolerable. In order to make this work, it needs to be accepted that the core of a right can only become apparent by looking at a concrete interference. When an interference is considered to be justified, given the circumstances of a case, this means that the core has not been interfered with. In turn, when a violation is found, this could imply that the absolutely protected core has been touched upon.

The clearest example of this understanding is the protection offered by the German *Wesensgehaltsgarantie* as explained by those who support the 'relative theory'.[25] Supporters of this theory hold that in fact the core of a right is determined on the basis of a proportionality analysis, or balancing test, allowing for taking into account specific facts and circumstances. This approach is in keeping with Alexy's optimisation thesis, which holds that it is necessary to conduct a balancing test for outlining the optimal manifestation of rights given the concrete legal and factual possibilities.[26] Indeed, according to some 'relativists', core rights can only appear when *prima facie* rights are turned into eventual entitlements.[27] Others, however, do not seem to distinguish between the right in itself and the right as limited, but hold that rights – just like their cores – are always carved out (by the government) in the light of all relevant factors.[28]

Next to the *Wesensgehaltsgarantie* the right to an *Existenzminimum* could, instead of as an absolute-absolute guarantee, also be understood as a relative-absolute one, albeit in a somewhat different way. Since the right to a subsistence minimum as it has been formulated by the *Bundesverfassungsgericht*, namely in a qualitative manner,[29] leaves room for further (quantitative) interpretation by the legislator, it has been held that this right is 'seiner Natur nach relativ' ('by nature relative').[30] Nevertheless, it is clear that once the *Bundesverfassungsgericht* holds that the right has not been complied with, this means that the Constitution has been violated. However, the idea that the *content* of the minimum subsistence requirement is relative may be considered

25 *Supra*, Ch. 4, S. 4.3.2.2. It was already indicated that relative *protection* is not an option when it comes to Art. 19(2) GG, because this provision 'in keinem Falle' ('in no case') allows for an interference with the core of a right.

26 Alexy 2002.

27 *E.g.*, *ibid.*; Borowski 2007.

28 *E.g.*, Häberle 1983. This understanding, indeed, conflicts with the idea that a distinction must be made between the stages of interpretation and application (see, *supra*, Ch. 3, S. 3.2.1).

29 See BVerfGE 125, 175, 1 BvL 1/09 of 9 February 2010 (*Hartz IV*) and BVerfGE 132, 134, 1 BvL 10/10, of 18 July 2012 (*Asylum Seekers Benefits*). This right 'guarantees the whole subsistence minimum by a uniform fundamental rights guarantee which encompasses both the physical existence of the individual, that is food, clothing, household goods, housing, heating, hygiene and health …, and ensuring the possibility to maintain inter-human relationships and a minimum of participation in social, cultural and political life' (*Hartz IV*, para. 135).

30 Seiler 2011, p. 504. *Cf.*, *supra*, Ch. 4, S. 4.4.2.2.

not entirely convincing. The *Bundesverfassungsgericht* has after all set important parameters for what it entails,[31] and it moreover seems natural that rights statements leave some room for further interpretation. Thereby, however, the example of the right to an *Existenzminimum* shows that somewhat abstract core standards that are not defined in detail can have a 'guiding' role in the sense of providing a concrete starting point for the adjudication of specific cases.

2.b: Finally, there is an understanding of core rights that can be termed 'relative-relative'. Looking at this term, it can be asked what is left of the more pronounced protection when both the content and the protection of core rights are not absolute. It is true that when the content of a core can only follow from the circumstances of a case, and this core moreover allows for justifiable interferences, the notion of core rights protection *de facto* becomes meaningless.

However, Liebenberg's proposal for improving the reasonableness test of the South African Constitutional Court signals that understanding core rights in a relative-relative way can have some added value in structuring a court's test, albeit this added value is admittedly limited.[32] Liebenberg seemingly argues that minimum cores could play a role in reasonableness review, though not as a general standard determining the content of a right that ought to be protected.[33] Instead, what constitutes the core of a right needs to be determined on the basis of the multiplicity of 'intersectional' aspects that together determine the individual interest concerned.[34] Because these aspects differ from case to case, so must cores, which means they are relative in nature. Furthermore, since cores alone cannot be decisive for whether an interference or omission was reasonable or not, but rather constitute one amongst various factors that need to be taken into account, 'individualised' cores cannot be said to be absolutely protected. They do, however, play a role in the test that is applied and they may influence its outcome. It can be said that Liebenberg's view, thereby, aims at distinguishing levels of interferences and omissions, on the basis of which certain choices in the adjudicational process can be made. This can be helpful, indeed, to ascertain a more transparent test, yet it does not provide for a standard that can be applied in other cases as well.

Thus, core rights need not necessarily be indicators of clearly and independently outlined areas in which limitations are under no conditions allowed. Next to what is here termed the 'absolute-absolute' understanding of core rights,

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31 These parameters take the shape of 'procedural' requirements, rather than quantitative ones, thereby acknowledging the fact that it is not for the courts to determine the eventual subsistence minimum, whereas they can nevertheless phrase clear requirements (*supra*, Ch. 4, S. 4.4.2.2).

32 See, *supra*, Ch. 6, S. 6.5.1. Since Liebenberg does not want to give 'fixed content' to rights, her approach arguably fails to provide a more general standard. *Cf.* Bilchitz 2011.

33 Liebenberg 2010, pp. 184-185.

34 *Ibid.*, p. 185.

at least three alternative conceptualisations can be identified. These are less fully absolute in the sense that the content of cores and/or the protection they offer is relative, *i.e.*, either their definition is case-dependent or they may leave room for justifications, or both. In Section 7.3.1 it will be further elaborated what these different possibilities mean for the practice of the ECtHR and importantly, which core rights option appears most promising given the aims of the inquiry that is central to this book.

7.2.2 Core Rights and the Stages of Fundamental Rights Adjudication

In Chapter 3 of this book, a distinction was made between the stage of interpretation and the stage of application, *i.e.*, between determining the scope of a right and reviewing the limitation of a right.[35] Also a third task was outlined, namely the determination of the intensity of review (or margin of appreciation).[36] A second 'fable' that needs to be discussed here is the idea that core rights are primarily, or even exclusively relevant at the application stage. Viewing the process of rights adjudication as being framed by the stages distinguished in chapter 3, it is frequently assumed that the main function of core rights is to help determine whether the reasons adduced suffice for justifying an interference with a particular right.

Most clearly, this view is expressed by the German *Wesensgehaltsgarantie*. The genesis of Article 19(2) GG, which holds that the *Wesen* of a right cannot be interfered with, signals that the original aim of this provision is to prevent rights from being limited by the legislator to the extent that practically nothing would remain.[37] In line with this, the *Wesensgehaltsgarantie* is generally termed a '*Schranken-Schranke*', a 'limit to limitations'. At least according to the absolute theory (more precisely, the 'absolute-absolute' understanding of the *Wesen* of rights), this works as follows. First, there is the *prima facie* right, which is being limited. In order to review whether a particular limitation is justified under the Constitution, one of the relevant questions is then whether or not the core of the right (its *Wesen*) has been interfered with. In other words, in applying the right, the core or non-core character of the interest at stake becomes important.[38] If it is the core that is interfered with, it follows that the interfering act or law is null and void.

As was explained in Chapter 3, and especially in Section 3.4.2, at the application stage *ad hoc* balancing of competing interests as well as more principled or 'categorical' rights review is thinkable. Generally, using a notion

35 See, in particular, *supra*, Ch. 3, S. 3.2.1.
36 *Supra*, Ch. 3, S. 3.2.2 and 3.5.
37 *Supra*, Ch. 4, S. 4.2.1.
38 If it is concluded that a core right is at stake, the requirement of proportionality does not apply. See, *e.g.*, Dreier, in Dreier 2013, Art. 19 II, no. 16.

of core rights for reviewing the justification that has been adduced implies a more rule-based form of review.[39] When the interest to which a claim pertains falls within the category of (case-independent) core rights, it will probably be dealt with differently than when it is of a non-core kind. For example, if the core of a right is at stake, the different sub-tests of proportionality review – like the requirements of a legitimate aim or 'necessity' – may be harder to pass.[40] According to the absolute theory, as soon as a limitation touches upon a core, the case is thereby even decided, since a balancing act is then prevented.[41]

The question is nevertheless whether core rights, however understood, can *only* be important for or helpful in the stage of application. Indeed, it can be argued that a function can be envisaged for core rights also when the determination of the scope and the determination of the intensity of review are concerned. At least with regard to the task of determining the intensity of the test, such a claim can easily be made. After all, as was explained in Chapter 3, rather than forming a separate stage, this task in fact concerns a sub-part of the application stage.[42] It was established previously that the intensity of the review can be determined either in a more categorical way, relying on distinct 'levels' of scrutiny, or in a more flexible and gradual manner.[43] Moreover, this can be done either by taking into account all relevant factors of the case, or with a particular focus on the seriousness of the interference with the individual interest at stake.[44] In any case, though arguably mostly in the context of a more categorical or individual interest-based approach,[45] core rights notions can play an important role in this determination.

Looking at the different core rights approaches discussed, Liebenberg's hints for including a core rights notion in the South African courts' reasonableness test can serve as a good example of how this notion could affect the strictness of the test.[46] Even though she does not see cores as general standards providing for absolute protection, her 'relative-relative' understanding can be said to add to the review process in the sense that, when a core of a right is at stake, this may have particular consequences for the intensity of the review. More particularly, the core rights notion 'can be incorporated in

39 *Cf.* Von Bernstorff 2014, pp. 83-84.
40 *Cf.* Barak 2012, p. 531ff., who holds that the preferred approach should be dependent on the distinction between 'fundamental' or 'high level' rights and other rights.
41 Indeed, this understanding of core rights protection is the most 'categorical' as regardless of the (other) interests involved, limiting a predetermined core equals a violation.
42 *Supra*, Ch. 3, S. 3.2.2.
43 *Supra*, Ch. 3, S. 3.5.1.
44 *Supra*, Ch. 3, S. 3.5.2.
45 *I.e.*, when the core character of the individual interest concerned is decisive for the intensity of review.
46 Supra, Ch. 6, S. 6.5.1. See Liebenberg 2010, and in particular pp. 184-185.

the reasonableness analysis by placing a particularly heavy burden of justification on the state in circumstances where a person or group lacks access to a basic socio-economic service or resource corresponding to the rights in ss 26 and 27'.[47] Such a core rights approach to determining the strictness of the test seems to be a relatively 'categorical' one. It relies on clearer levels of intensity, or, at least, on a clearly stricter level as soon as the core of a right is at stake. Indeed, rather than varying 'according to the circumstances, subject matter and background',[48] relying on core rights for deciding on the intensity of the review implies that it is the individual interest that is taken as the starting point.

Besides in helping to determine the intensity of the test, the notion of core rights may also play a role at the interpretation stage. At this stage the scope of the relevant right is determined by asking whether the individual interest complained about is covered by the fundamental rights norm that is invoked. Only when this is the case a court will proceed to reviewing the limitation in the light of the relevant fundamental right.[49] It was indicated in Chapter 3 that the determination of scope is foremost a matter of interpretation: with the help of interpretative methods and principles a court develops the *prima facie* content of the right.[50] Moreover, what can play a role in interpreting a right is a preference for either a wide scope or rather a narrow one. The latter may bar certain matters from being reviewed by a fundamental rights adjudicator like the Strasbourg Court, while the former may lead to the proliferation of the category of 'fundamental rights' and, concomitantly, enlarge the 'playing field' or jurisdiction of a court.[51]

What is meant by the use of core rights at this stage of interpretation is not so much that after an individual interest has been considered to fall within the scope of a right the core or non-core character of this interest is determined. Especially when general, absolutely defined cores are considered, the question whether in the case at hand the core of a right is concerned, may be perceived as an obvious part of the interpretation of the relevant right. However, what follows from the core rights doctrines presented in the previous chapters is that cores can also be used for determining the scope of a right, *i.e.*, for determining whether (for adjudicational purposes) a particular interest is covered

47 Liebenberg 2010, p. 184 [footnote omitted].
48 Which is the generally considered to be the case with the ECtHR's margin of appreciation, see, *e.g.*, *Petrovic v. Austria*, ECtHR 27 March 1990, appl. no. 20458/92, para. 38. See also, *supra*, Ch. 3, S. 3.5.2.
49 See, on this stage, *supra*, Ch. 3, S. 3.3.
50 *Supra*, Ch. 3, S. 3.3.1.
51 *Supra*, Ch. 3, S. 3.3.2.

by a rights norm in the first place.[52] It has become clear that the idea of core rights, or, the idea that within the potential reach of a right different aspects can be distinguished some of which are weightier than others, can lead to a clearer definition of justiciable rights.

In this regard the practice of the CESCR should be recalled. Tasked with monitoring state compliance with the rights enshrined in the ICESCR, this Committee was confronted with a lack of a clear definition of these rights. First of all, the ICESCR contains broadly stated economic and social rights that, secondly, need not be complied with in their entirety immediately, but according to the requirement of progressive realisation. The rights norms as they are stated in the Covenant, thus, turned out to provide insufficient starting points for supervising states' compliance. To concretise the requirements stemming from the Covenant, the CESCR recognised that it contains certain immediate obligations, and, moreover, that 'minimum essential levels' of the different socio-economic rights need to be provided in order for states to comply with their duties under the ICESCR.[53] These minimum cores, as was explained in Chapter 5, thereby more or less 'narrow down' the problematic (potential) scope of broad socio-economic rights that need not be complied with entirely in the first place.[54] Thus, the idea that rights have core aspects – that are more important than other, 'peripheral' issues that could be covered by the same right – has been used to clarify the scope of ICESCR rights and obligations. Although the objective of the ICESCR still is that states guarantee each right to its full extent, which means that also the non-core aspects remain of great importance, with the definition of core obligations it has become clear for states where they need to focus on first. In line with this, as Young argues, minimum cores can be used as 'the appropriate vehicle for courts' to help set certain priorities and delineate the states' obligations.[55] This has been confirmed by the Committee where it suggests that incorporation of the ICESCR in national legal orders 'enables courts to adjudicate violations of the right

52 See, *e.g.*, Koch 2009, p. 288, speaking of 'a minimum core approach to justiciability'. According to Porter 2005, p. 52, 'a minimum core approach to justiciability tends to divorce rights claims from individual circumstances and unique interests that may be at stake. It shifts the focus of a claim from the particular relationship between a rights claiming community and government to a more abstract debate about quantifiable universal entitlements and minimum obligations of governments to all citizens, in which a court is understandably reluctant to engage'. However, it was already indicated that a core rights notion (also at the interpretation stage) need not be understood as absolute and strict. Moreover, as is further argued in, *infra*, S. 7.3 and 7.4, when the protection of socio-economic rights under classic rights norms is concerned, there may nevertheless be reason to draw clear lines.

53 On the immediate requirements and core obligations following from the ICESCR see, *supra*, Ch. 5, S. 5.3 and 5.4.

54 *Supra*, Ch. 5, S. 5.3.2.

55 Young 2012, p. 79.

to health [or housing, or social security], *or at least its core obligations*, by direct reference to the Covenant'.[56]

Bilchitz' proposal for core rights protection can be seen in a similar light.[57] He distinguishes between two thresholds of interests, the first being the most urgent and covering basic needs, and the second focussing on the possibility to achieve one's goals and on individual flourishing.[58] Given this distinction, he holds that priority should be given to meeting basic needs, which can be achieved by identifying minimum core rights. Entitlements to basic rights make for a strong case in court, since these are what the economic and social rights enshrined in the South African Constitution are first and foremost about. When it is asked whether someone has a justiciable claim under these rights, *i.e.*, whether his interest falls within the scope of the relevant right(s), the fact that his interest is a 'core' one will trigger an affirmative answer. In this way, the concept of core rights can help to shape the scope of economic and social rights, before reviewing whether or not the Constitution has been violated.

The 'core scope' of a right, *i.e.*, the scope that has been determined on the basis of the idea of core rights, arguably is a 'narrow' one.[59] It can marginalise or even block other claims that involve less urgent matters. It thereby circumscribes the jurisdiction of a court: rather than reviewing every omission or interference with a socio-economic interest, a scope that is inspired by the idea of core rights directs a court's efforts towards essential issues, leaving other issues to be determined by the other branches. As such, indeed, the use of core rights can also be perceived as a recognition of the fact that in distributing rights and freedoms, the role of the judiciary necessarily is a limited one.

In sum, it is clear from the comparative chapters that the notion of core rights can do more than just informing the application stage by placing a limit on limitations. Looking closely at the different understandings of core rights as they were summed up in Section 7.2.1, it has been demonstrated that cores can also be important for determining the intensity of review as well as for determining the scope of a fundamental right. Especially this latter point leads to valuable insights, in the sense that when a court has to demarcate the scope of broadly phrased rights, the notion of core rights could be helpful in fulfilling this task.

56 CESCR, General Comment No. 14, para. 60 [emphasis added].
57 *E.g.* Bilchitz 2007, Ch. 6.
58 *Ibid.*, p. 180, 187ff.
59 *Supra*, Ch. 3, S. 3.3.2.

7.2.3 'Indeterminable' but workable

Sceptical attitudes towards the idea of core rights protection are often grounded on the belief that the core of a right is indeterminable. German legal writers, for example, have eloquently argued that the *Wesensgehaltsgarantie* really adds nothing to the requirement of proportionality. They find that the *Wesen* of a right, at least when seen apart from the specific circumstances of a fundamental rights issue, is empty or non-existing.[60] In the South African debate, the argument that minimum cores are indeterminable also plays a prominent role. It is argued that fundamental rights do not have a core that is 'out there', in the sense that there is no essential element that can be distilled from a right that cannot somehow be contested or repudiated. Cores, then, only exist by virtue of subjective interpretations, and hence it is better not to identify them in the first place.[61]

It must be admitted that, largely, the critics are right. It seems impossible to know or find out what the essence of a fundamental right really is. This is true, in particular, when what is sought after is an unassailable, irrefutable truth, since clearly there appear to be no objective cores that are immune to contestation.[62] In the same vein, it is obvious that completely objective criteria for identifying the essential aspects of a right cannot be found either. Moreover, what can be added to this is that there does not always seem to be a concrete need for identifying core rights. It can be inferred from the discussion presented in Chapter 4 that, at least in Germany, the well-structured proportionality test used there is generally assumed to ensure that fundamental rights cases are dealt with in an appropriate manner.[63] The idea of core rights is perceived as being merely declaratory,[64] and there does not actually appear to be a want for determining the *Wesen* of each and every right so that it can function as an actual substantive rule guiding the judicial process. Thus, given the difficulties related to the very determination of rights' cores and especially when their added value is perceived as limited or even non-existent, it can be argued that using a core rights doctrine does not make much sense.

It is submitted here, however, that not in all legal contexts the 'indeterminacy' of core rights is reason for jettisoning the concept altogether. First of all, when the content of core rights or the protection they offer is understood in a relative manner, the issue of the determination of the core becomes somewhat less critical. When the actual content of a core can be altered or developed

60 *E.g.* Kaufmann 1984, who holds that the search for a substantive *Wesensgehalt* is 'sinnlos' (p. 391). When it comes to a limitation of a right, there is nothing left that is a 'measurable' *Wesen* of a right (p. 392).

61 *Supra*, Ch. 6, S. 6.4.3.2.

62 *Cf.* Von Bernstorff 2014, p. 83.

63 See, in particular, *supra*, Ch. 4, S. 4.4.1. However, especially lately, the ('balancing') practice of the Court has also been criticised. See, *e.g.*, Jestaedt et al. 2011.

64 *Cf.* Häberle 1983, p. 234.

over time, when the acceptance of a core right does not have any consequences beyond the case at hand, or when an interference with a core of a right does not automatically lead to finding a breach of this right, it may be less problematic that there is an element of subjectivity involved in the determination of such a core.

For concluding that determining flexible and/or non-decisive cores is to be preferred over not making use of core rights protection at all, however, something more seems needed. Arguably, regardless of its setbacks, it can be worth using the concept of core rights in practice when the advantages thereof outweigh the possible downsides. The potential value of the notion can be derived in particular from the practice of the CESCR. In the context of the ICESCR, the notion of minimum cores – besides being grounded on a theoretical understanding of rights as containing essential elements – evolved from the need to solve a concrete practical problem. Where the requirement of progressive realisation of the economic and social fundamental rights laid down in the ICESCR leaves unanswered the question of what needs to be achieved with priority, the notion of core rights was introduced as the missing piece of the puzzle.[65] It served the practical purpose of enabling the CESCR to monitor whether states used their available resources on progressively realising the rights enshrined in the ICESCR, by concentrating on certain very important guarantees.[66] Thus, even though the cores that where identified in the context of international economic and social rights norms are perhaps not unassailable, they, at the least, serve the aim of clarifying the immediate content of these broadly stated rights, thereby increasing their workability and thus having added value.

Moreover, besides the fact that the use of core rights can serve practical purposes, it is also true that the (potential) disagreement on their content must not be overstated. Learning from Sunstein's 'incompletely theorized agreements'[67] and the notion of overlapping consensus,[68] there is no *a priori* reason to exaggerate the extent to which people are likely to disagree on cores of rights. It can be said that 'people from different cultures may continue to disagree about what is good, but nevertheless agree about what is insufferably, unarguably wrong'.[69] Hence, that what people think should *minimally* be protected by fundamental rights norms can be the same, regardless of the

65 *Supra*, Ch. 5, S. 5.3.
66 *Cf.* CESCR, General Comment No. 3, para. 10, and the other General Comments dealing with particular economic and social rights (*supra*, Ch. 5, S. 5.4).
67 *E.g.* Sunstein 1995, Sunstein 2007.
68 Rawls 1971 (1999); Rawls 1993.
69 Ignatieff 2001, p. 56. See also Young 2012, p. 66.

different, subjective points of view that may have informed this opinion.[70] For example, the necessity of a roof over one's head as well as access to basic social assistance will be understood by a majority as very important, if not the most essential aspects of the right to housing and the right to social security, respectively. This holds true regardless of the different possible arguments and reasons people would adduce as grounds for finding these rights important.

When courts are tasked with determining what belongs to the core aspects of a right, it is likely that this existing 'consensus' is explicitly taken into account.[71] It is true, however, that there can then still be doubt as regards the exact *degree* of protection a minimum core should entail. Whereas the *focus* of the core might be relatively unequivocal, in other words, it can still be a matter of controversy what 'basic' housing or social security precisely entails and how inclusive this notion should be. An example of how to deal with this issue may be the *Bundesverfassungsgericht*'s interpretation of the right to an *Existenzminimum*.[72] Phrasing this 'minimum right' in relatively abstract, non-quantifiable terms, the *Bundesverfassungsgericht* has left some room for the legislator to determine the exact and concrete content of the subsistence minimum and the way in which it is provided. It moreover concretised the right to an *Existenzminimum* with the help of more or less neutral, procedural guarantees, and has thereby found an acceptable way of pronouncing an important right that would otherwise not be taken as serious.[73]

Thus, when this can help in generating the necessary content of rights and enables courts to ensure that rights are at least 'minimally' complied with, the identification of core rights might be beneficial even given their 'indeterminable' character. Be it for their relative features, or because of the room they leave for further interpretation, the previous chapters have shown that an approach to core rights protection can be identified that works, without being constantly contested.

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70 Indeed, especially in the context of socio-economic guarantees it can be possible to determine 'minimum levels' thereof; whereas it is hard to give someone some, or 'enough', or 'the necessary', freedom of speech, this is different for rights to food or shelter – in the context of which it can be said that some basics need to be provided.

71 See, *supra*, Ch. 5, S. 5.5.2.2. Also in the context of the ECtHR, it can be said that comparative interpretation forms a hallmark of this Court's practice. See, *supra*, Ch. 2, S. 2.5.3.3, and Ch. 3, S. 3.3.1.

72 *Supra*, Ch. 4, S. 4.4.2.

73 *Supra*, Ch. 4, S. 4.4.2.2.

7.2.4 The Maximising Potential of the 'Minimum' Core

Not in the least because of the terminology employed in the field of economic and social fundamental rights, the use of core rights is frequently perceived as constricting the protection these rights can provide. It has become clear in Chapters 5 and 6 that especially when socio-economic norms are concerned, core rights protection is related to the provision of a *minimum* standard. However, also in a more classic rights context where core protection aims at restricting interferences with fundamental freedoms, only particularly fundamental aspects of a right obtain 'extra' protection. It is no wonder, then, that the recognition of cores is sometimes conceived of as limiting the potential of fundamental rights. By identifying and emphasising certain basic guarantees there can be a risk of lowering expectations, and perhaps even of lowering efforts. When core guarantees are for example defined on the basis of consensus amongst states with regard to what should be regarded as essential in terms of (economic and social) rights, they may seem to entail nothing more than a 'lowest common denominator'. And when attention for the core casts a shadow over the more peripheral aspects of a right, minimum core protection may end up being all that can be expected.[74]

There is, however, a brighter side to minimal nature of the core. As Young argues,

> 'the interpretation of minima is not addressed to the great aspirations of an ideal system of justice, but rather to the most basic interests common to the experience of being human, and how they might be expressed as rights. By paying attention to such constraints, a 'minimalist' rights strategy implies that maximum gain to rights is sometimes achieved by minimizing goals.'[75]

Thus, a focus on, and extra protection for certain aspects of rights can have the effect that efforts are being directed to where they are needed most. The examples presented illustrate this: the aims of the minimum core obligations inferred from the ICESCR and the core rights suggested in the context of the South African Constitution, as well as the reasons for introducing a *Wesensgehaltsgarantie* in the German *Grundgesetz* of 1949, signal that 'minimising' protection was far from what was desired. Instead, what forms the reason for

74 See for this point and related criticisms (with further references), *e.g.*, Young 2012, pp. 69-71. For the argument that the core directs the attention only to the performance of developing states, see, Craven 1995, pp. 143-144, p. 152.

75 Young 2012, p. 66. According to Young, 'the concept of the minimum core seeks to avoid deontological excess. The focus on a minimum core trades rights inflation for rights ambition, channelling the attention of advocates towards the severest cases of material deprivation and treating these as violations by states towards their own citizens or even to those individuals outside their territorial reach' (pp. 67-68).

opting for core rights protection is the risk that authorities 'empty out' fundamental rights by either interfering with them to such extent that nothing remains, or failing to actively guarantee at least their most basic elements. The idea is that by focusing on core elements, this risk can be overcome.

In fact, whereas phrasing a great variety of interests in terms of fundamental rights can give the impression of an adequate system of rights protection, core rights terminology may express that actual compliance with these rights requires a great deal more. It has been said that minimum core protection 'trades rights inflation for rights ambition'.[76] Rather than aiming high by offering *prima facie* protection to a great variety of interests that might be only tentatively connected to the rights norm concerned, channelling the attention towards more specific guarantees does not only fit a more limited understanding of the role of courts in the socio-economic area,[77] but can also ensure meaningful, actual protection.

7.2.5 Demarcating the Judicial Task

It is often suggested that by pinpointing cores, a court may easily transgress the boundaries of its adjudicative task. By determining essential elements that are meaningful beyond the contours of a single case, courts can seemingly engage in decisions on the general distribution of (social) rights and freedoms, which can be considered problematic from the perspective of separation of powers. Especially because many fundamental rights cases involve political choices, the identification of core aspects can be perceived to allow courts to usurp policymaking tasks belonging to the realm of the government. Indeed, this can be considered problematic especially when positive and/or socio-economic rights are concerned. Although it cannot be said that only these rights bring along costly obligations, choices in the field of economic and social policy are generally politically and ideologically laden and are dependent on budgetary constraints. One may think here of fields like housing, health care or social security, where the means that can be spent on costly measures are scarce. In this context, the judiciary's determination of 'core issues' that deserve priority will easily circumscribe the (democratic) '*Spielraum*' of the other branches.

It is not just the traditional understanding of the separation of powers as such, however, that creates unease with the idea of a court determining (positive and/or socio-economic) cores of rights. Equally important is the concern that judges lack the expertise to make choices amongst the different policy

76 Young 2012, p. 67.

77 This also relates to the idea of 'fundamental rights inflation' – when almost every conflict can be phrased in terms of fundamental rights, it could be argued that a court should foremost stick to the protection of the core of such rights. See further, *infra*, S. 7.2.6.

and budgetary options.[78] Does the immediate requirement to grant access to low cost housing to marginalised groups serve the desired goals better than any long term housing policy directed at the population more generally? And would a core requirement in the field of health care not impede the achievement of health aims more generally, or leave too little room for improvement in the field of housing? It seems plausible to argue that courts do not have the necessary data required to 'calculate' what works best towards the realisation of broader socio-economic rights. What they can do is ask whether a given policy was reasonable, or the measures taken proportional, but they lack the capabilities and competences needed for setting policy priorities. For this reason, too, it is often argued that defining core rights by the judiciary is undesirable.

The problem of courts exercising too much power when they resort to a core rights approach arguably takes different shapes according to the particular type of core rights that is opted for. It was already indicated that a choice for a relative definition of (the protection of) core rights might mitigate the problematic features of this concept. Once cores are determined that are guiding, rather than determinative for the outcome of a rights dispute, they will have a less far-reaching effect on the leeway left for the other branches, and consequently, they will be less contentious. The same goes for defining cores in a rather more malleable or flexible manner, which suggests that reasonable alterations can be made to their scope (also) on the basis of a dialogue with the legislator and the executive.[79] Finally, when the cores that are identified are truly *minimum* cores, focussing on the most basic guarantees and on societal consensus, it seems more difficult to argue that their definition involves a purely subjective choice that could have just as well turned out differently. When the concrete measures that are to be taken are thereby left to the non-judicial actors to decide upon, 'usurpation of powers' may seem to be an overstatement.

Besides, it can also be asked whether it is actually the case that the identification of core guarantees by definition enlarges the power of courts as opposed to the other branches. It is true that the definition and application of cores is generally something to be accomplished by courts in their capacity as fundamental rights adjudicators, which by definition confers on them an

78 The South African Constitutional Court, for example, has held in the case of *Grootboom* (para. 33) that it could only determine minimum cores when 'sufficient information is placed before a court to enable it to determine the minimum core in any given context'. This it considered not to be the case.

79 *Cf.* Liebenberg 2010, p. 167, who holds that '[t]he minimum core concept seeks to establish a normative essence for socio-economic rights which is beyond contestation and debate'. The use of core rights she proposes, instead, 'need not be guided by a single overarching standard such as biological survival. The inquiry should be primarily guided by a context-sensitive assessment of the impact of the deprivation on the particular group' (p. 185).

important and difficult task. Yet, whether they thereby actually obtain *more* – or indeed too much – power, can be questioned. After all, rather than merely increasing its power, a core rights approach in fact also limits and structures a court's competences. First of all, by using a 'core rights perspective' for determining the scope of a right, a court consciously restricts the range of issues it can have the final say on. In the words of Bilchitz, minimum cores could help a court to 'provide clear reasons for its involvement in … [socio-economic] cases, and a clear statement of the important interests involved which would demarcate the scope of its own decision-making powers'.[80] Importantly, indeed, the courts' review in fundamental rights cases subsequently will be guided by this core, which means that once it is held that a core right is at stake, the argumentative leeway of the court will be confined.[81] This is most obviously so when a core is considered to be absolute-absolute, *i.e.*, when it is considered to form a predetermined, substantive limit to government interference or a demand that allows for no exceptions. When there is no room for justified limitations once the core is touched upon, courts have no choice but to conclude that there has been a violation. As such, the 'core rule' binds the court, while simultaneously enhancing the predictability of its case law. But also when cores are perceived as guiding standards rather than as absolute rule-like guarantees, the case remains that a court has to take into account the fact that a core aspect was interfered with and act accordingly. Perceived in an absolute-relative or even in a relative-relative way, an interference with a core can imply that the onus of proof shifts to the state, or, for example, that the justificatory reasons given must be particularly compelling. Although this still leaves room for different outcomes, it can be argued that compared to, for example, a very open balancing test the room for reaching a 'subjective' conclusion is thereby clearly reduced.

It is true that reasonableness or proportionality review also can be conducted in a very structured manner. The main point made here, however, is not so much that no other instruments can be envisaged that play a 'structuring' role, but rather that a core rights approach can be useful in demarcating and guiding the judicial task. In fact, it can be with the help of core rights that a proportionality or reasonableness test is being structured, namely by adding a component that affects the – generally very *ad hoc* – way these tests are being conducted.[82]

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80 Bilchitz 2003, p. 10.

81 Of course, this does not hold true for core rights protection according to the German 'relative theory'. According to this theory, the notion of cores does not have a guiding function. Since it also implies, however, that cores are not (pre)determined, the problem of 'too much power' for the courts does not occur in the first place.

82 *E.g.* Von Bernstorff 2014, especially pp. 83-84. *Cf.* also Liebenberg 2010, pp. 184-185.

Altogether, thus, the use of core rights ensures that a court cannot be overly flexible or activist in the sense that it can review any socio-economic issue without providing reasons for this and bring in and accord weight to interests the way it sees fit. With a guiding core as the starting point, a court's task is channelled in a particular direction. This can be perceived as a disadvantage, as flexibility may after all create room for tailor-made, individual protection. It does mean, however, that it cannot simply be said that a core rights approach only enlarges a court's power, rather than having the possibility to direct and even constrain it, too.

7.2.6 Core Rights as a Notion Inherent in Fundamental Rights Protection

Finally, it is important to stress that guaranteeing core rights can be seen as inherent to the idea of (judicial) fundamental rights protection. Be it in the context of civil and political, or economic and social fundamental rights, the essential aspects of these rights underline what fundamental rights protection is all about.

The picture that has emerged thus far might be somewhat misleading in this regard. Especially in the context of the South African Constitution, but also when it comes to the German *Wesensgehaltsgarantie*, much attention has been devoted to the pros and cons of using core rights as a 'tool' or 'instrument' for improving fundamental rights protection.[83] Also in the context of the ICESCR, minimum cores seem to have been 'created' for the purpose of enhancing compliance with socio-economic rights.[84] Depending on the predominant opinion on the viability and feasibility of core rights, these are sometimes taken 'on board', but can seemingly just as well be left out of the picture entirely. Cores of rights can be perceived as '*überflüssig*' and as having nothing to add, and accordingly, they should give way to other more appropriate ways of dealing with fundamental rights.

However, the genesis of both the *Wesensgehaltsgarantie* and the minimum cores recognised by the CESCR also may suggest a different line of reasoning. At the heart of the *Wesensgehaltsgarantie* lies that idea that it should simply not be possible to empty out fundamental rights entirely. Experience with a legislature that had fundamental rights placed at its free disposal had made clear that this was in fact at odds with the idea of fundamental rights as such.[85] At least certain aspects of constitutional rights have to be inviolable in order to render these rights meaningful. In aiming at the actual protection of the economic and social rights laid down in the ICESCR, moreover, minimum cores have been created not just because it was thought that the focus should

83 See, especially, *supra*, Ch. 6, S. 6.4.
84 *Supra*, Ch. 5, S. 5.3.
85 *Supra*, Ch. 4, S. 4.2.1.

be on a few, more tangible guarantees in this field, but also because of the fundamental understanding that several particular aspects of socio-economic rights are especially urgent and important.[86] The idea that fundamental rights not necessarily trump other interests and can often be limited in a justifiable manner may be generally accepted, but so is the idea that this does not mean that every aspect of these rights can be as easily sacrificed. The government cannot get away with everything when striking a balance between individual and general interests, and simply fade out rights more or less entirely.

Thus, regardless of whether a system of rights protection explicitly features core rights, or 'opts' for or against this notion, the idea of the importance of protecting especially the most essential aspects of rights is generally embraced and even may be seen to lie at the very heart of all systems of fundamental rights protection. From this perspective, core rights protection does not merely form an instrument that can either be used or not, but is in fact something that is woven into the fabric of fundamental rights protection. It entails that some aspects of rights are so important that they deserve more, or even (almost) absolute protection, and for offering this protection a particular core rights norm, *i.e.*, a provision explicitly stating that the core of a right needs to be protected, indeed does not seem necessary.[87]

There is more to substantiate the point that the protection of core rights must be seen as inherent to the idea of fundamental rights. As was discussed in Chapter 3, various authors proclaim that a broad understanding of fundamental rights should be preferred over a narrow one. They claim that *a priori*, a great number of interests deserve to be qualified as fundamental rights, as this creates a forum for justification.[88] Whether these interests deserve eventual protection then depends on the conflicting interests at issue.[89] In this context, in the debate on fundamental or human rights one regularly comes across the term 'proliferation of rights'.[90] This term captures the idea that fundamental rights seem to cover an increasing number of interests, which in the view of some can lead to the 'judicialisation' or 'constitutionalisation'

86 *Cf.* CESCR, General Comment No. 3, para. 10, stating that '[i]f the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être'.

87 *Cf.* Häberle 1983, p.234, who holds that the *Wesensgehaltsgarantie* as enshrined in Art. 19(2) GG 'ist die deklaratorische Sanktion, die zusätzliche und überflüssige Sicherung von Prinzipien, die bereits in der Verfassung zum Ausdruck gelangt sind. Seine Bedeutung erschöpft sich darin, die Prinzipien in spezifischer Weise in einer Formel zusammenzufassen. Auch ohne ausdrückliche Wesensgehaltsgarantie ist der für jedes Grundrecht gesondert zu ermittelnde "Wesensgehalt" von der Verfassung gewährleistet'.

88 See, *e.g.*, Alexy 2002; Kumm 2004; Barak 2012; Möller 2012. See, *supra*, Ch. 3, S. 3.3.2.

89 *Cf.* Alexy 2002, pp. 178-179.

90 In Möller's theory (2012), this is an important element of the 'global model of constitutional rights'. See, in relation to the ECtHR, Gerards 2008, p. 659ff. (*cf.* also Gerards 2012, on the 'prism character of fundamental rights').

of great parts of society.[91] Indeed, the expansion of rights has been described in a somewhat condemnatory way as resulting in 'rights inflation'.[92] Irrespective of what one holds of the development of rights' proliferation, however, what it makes clear is that both in theory and in practice fundamental rights are not, or no longer, guarantees applying only to a limited array of narrowly circumscribed individual freedoms. They can be found in virtually every conflict involving individual interests, and this underlines the possibility of – or even the serious need for – differentiating between one rights claim and the other. In other words, where not all 'fundamental' rights claims can be considered equally important, it makes sense to concentrate on protecting core rights.

7.3 Core Rights and the ECtHR

Chapter 2 of this book has provided an introduction to the role and position of the European Court of Human Rights, as well as some insights into its socio-economic case law and the problematic features thereof. It was explained there that the Court needs to be mindful of the multiple roles it is required to play, especially when entering the sphere of socio-economic rights – which was not traditionally covered by the Convention. Next to fulfilling the important task of ensuring effective individual fundamental rights protection, as a supra-national court the ECtHR is required to show deference to Member States' choices and policies, interfering only there where its subsidiary role requires it to do so. Moreover, the Court also needs to provide for some kind of 'constitutional justice', *i.e.*, it needs to provide well-reasoned and transparent judgments laying down the necessary standards with the help of which Member States can aim at ensuring compliance with the Convention on their own.[93]

Having discussed the different stages of fundamental rights adjudication (Chapter 3) as well as the various core rights doctrines (Chapters 4, 5, and 6), the focus will now shift back to the Strasbourg Court and its particular, multi-dimensional task. Taking the more general lessons that were presented in the previous section as the starting point, the remainder of this chapter aims at linking the potential and possibilities of core rights to the socio-economic protection offered by the Court. This section first elaborates on the different types of core rights that were identified in Section 7.2.1 in order to make an argument as to which particular form(s) of core rights protection would best

91 For the argument that constitutional law has constantly grown over recent decades, see Möller 2012, Ch. 1 (see also p. 107).

92 *Cf.* Möller 2012, p. 3, who holds that '[e]specially in Europe a development has been observed which is sometimes pejoratively called "rights inflation"'. He however uses this term 'in a neutral sense as referring to the increasing protection of relatively trivial interests as (prima facie) rights'.

93 See, on these different roles, *supra*, Ch. 2, S. 2.3.

fit the practice of the ECtHR (7.3.1). After that, some attention will be given as to how the Court could determine the cores that could be of use in the Strasbourg context (7.3.2).

7.3.1 Guiding Cores and Meaningful Protection

In Section 7.2.1 it was demonstrated that core rights do not have to be 'absolute'. Rather than merely underlining that there are relative understandings as well, this section has shown that there is in fact a matrix of core rights understandings, revealing at least four different options. Looking first at their content and then at the way in which this content is protected, absolute-absolute, absolute-relative, relative-absolute, and relative-relative cores can be distinguished. Coming to the ECtHR, the question is whether all of these understandings or rather one or a few of them, would actually fit the practice of this Court.

The kind of core rights approach that is sought after here is an approach that can potentially aid the ECtHR in providing the necessary socio-economic rights while not overstepping the boundaries of its supranational judicial task. In this regard it was argued that it is important for the Court to provide clear guidelines: to distinguish between interpretation and application as well as between individual and general interests, thereby providing information that is useful also beyond the contours of the specific case.[94] When investigating whether and what type of core rights protection would be interesting for the ECtHR, this should be taken as the starting point.

It will be argued in this section that one of the options presented in Section 7.2.1 seems particularly promising for the Strasbourg socio-economic rights protection, namely the idea of absolute-relative core rights. Before explaining why this is the case, it will first be explicated why the other options would be less well-suited or at least less feasible.

First, the relative-absolute understanding of core rights, which is exemplified by the 'relative theory' related to the German *Wesensgehaltsgarantie*, would not add much to the Strasbourg practice. This theory suggests that the requirement that 'in no case may the core content of a right be infringed' cannot but protect 'relative' cores that can only become visible once a proportionality analysis has taken place.[95] It holds that cores cannot be determined *a priori*, but instead depend on all the circumstances of the case. Perceived in this way, cores have hardly any 'guiding' function at all, neither

94 See, for an overview of the criticism on the Court's reasoning in socio-economic cases, *supra*, Ch. 2, S. 2.6.2.

95 See, on this theory, *supra*, Ch. 4, S. 4.3.2.2.

for the case law more generally, nor in the particular case at hand.[96] For that reason, they would not add anything to the Court's adjudicational process in terms of making it more insightful or providing for some general Convention standard. In fact, one could even argue that the ECtHR already, automatically works with what could be called relative-absolute cores. What this requires after all seems to be nothing more than using proportionality review and balancing the various (individual and general) interests. When an interference is considered proportional, then apparently the core of the right invoked was not interfered with. When there has been a breach of the Convention, this might instead imply that the absolutely protected essence of the right was touched upon, although it can be said that the area of 'disproportionality' encompasses more than this 'essence'.[97] Thus, adopting a relative-absolute core rights approach would not require changes in the Court's reasoning, let alone would it lead to better standard setting or more principled balancing or reasoning in general.

A relative-relative core rights approach is characterised by similar defects. The case-dependent character of this type of core rights makes that it can be used in an overly flexible way. Core rights, or rather, the question whether in a given case a core right is at stake, can be determined according to the specific context of a fundamental rights complaint, while also the eventual protection accorded to a core right can vary on a case-by-case basis. For example, where the right to respect for private and family life is concerned the Court can decide whether a specific housing-related complaint involves a core or a non-core individual interest. When the interest is held to be of core importance, this is likely to result in a stricter test, although there still is room for the Court to conclude that there are countervailing reasons which are more weighty and therefore preclude the finding of a violation. This kind of core rights protection is hence 'custom-made' regarding both the content and the protection that is being offered.[98] At the same time, it has little, if any, predictive value and does not develop in more general terms what the Convention does and does not require. Rather than guiding the adjudicative practice, moreover, the use of relative-relative cores can become a mere rhetorical tool whenever the Court is looking for strong reasons for a finding of a breach of the Convention.

Therefore, where the aim is to increase transparency and limit the *ad hoc* character of the Court's case law, core rights the content of which is absolute

96 According to Alexy 2002, p. 196, 'the guarantee of an essential core contained in article 19(2) Basic Law does not contain any further control on the limitability of constitutional rights beyond that already contained in the principle of proportionality'.

97 *I.e.* not every disproportional interference or omission necessarily can be said to have touched upon the core of a right.

98 *Cf.* Liebenberg 2010, pp. 184-185.

and does not depend on the circumstances of the case are more likely to have added value. Absolute-absolute cores, for example, concern general statements on an interference-free sphere or on a minimum level of protection that needs to be provided. However, their absolute protection lays down hard rules to which no exceptions are thinkable, and combined with their 'inflexible' content this is what often makes them be perceived as problematic. For how exactly can it be determined which aspects of rights should *always* prevail and who are judges to have the final say on this? Transposed to the Strasbourg context, the problematic features of an absolute-absolute core rights approach are not getting any less significant, and this holds especially true in relation to the Court's protection of economic and social rights. Would it be feasible for the Court to identify general socio-economic cores as falling within the scope of ECHR rights, to then also provide absolute protection to these core aspects? Starting from the effectiveness and indivisibility paradigms that were introduced in Chapter 2,[99] there may be room for stating in explicit terms the link between Convention norms and certain socio-economic minimum requirements.[100] Even when this implies that only these *core* socio-economic guarantees are *prima facie* covered, however, providing absolute protection to these cores could be perceived as too activist a manifestation of the Court's (limited) powers as opposed to those of the national authorities.[101]

Altogether, the option with the most potential for the practice of the Court would be the idea of absolute-relative core rights protection. This understanding entails that (minimum) core guarantees are identified that cannot change on a case-to-case basis. At the same time, although absolute-relative cores can be considered very weighty in the sense that interferences and omissions are hard to justify, this understanding allows some room for limitations. More concretely, the 'absolute content' part of this core rights notion ensures that clarity is provided to individuals and Member States as to what their rights and duties are, respectively. It ensures that fundamental guarantees are defined (in a general manner), so that they can form the starting point for assessing the proportionality of an interference. At the same time, the 'relative protection' aspect guarantees the flexibility necessary for a Court like the ECtHR to sometimes step back, even if a weighty economic or social guarantee is at stake.

Consequently, starting from potentially very broad ECHR rights that may or may not include a broad range of socio-economic guarantees, it may make sense for the ECtHR to expressly include (only) socio-economic core rights even

99 *Supra*, Ch. 2, S. 2.5.2 and 2.5.3.

100 This will be further explained in, *infra*, S. 7.4.1 (and 7.4.2).

101 It is true that this may be different when the rights norm under which a core socio-economic guarantee is recognised, is an absolute norm like Article 3 ECHR. In that case, indeed, the mere recognition of a core socio-economic aspect as falling within the reach of Article 3 would suggest that it is absolutely protected.

when these are merely 'relatively' protected, because this creates clarity about *prima facie* rights.[102] This would be in line with the importance of a distinction between the scope of a right and its application,[103] and of ensuring that there is an identifiable standard against which the proportionality of an act or omission can be judged.[104] Focusing on core rights would result in a clear, limited, and thereby somewhat 'narrow' interpretation of the scope of ECHR rights, at least where it concerns the socio-economic dimension thereof. This seems defensible given the restricted role and task of the Court in the context of socio-economic rights and is in keeping with the idea that the ECtHR should not become the final arbiter in every issue concerning individual socio-economic interests regardless of whether or not it is of a 'fundamental' kind. As was explained in more detail in Chapter 2, the room for the Court to engage in socio-economic rights protection does not seem unlimited, and criticism has arisen especially as regards cases where applicants attempt to link more peripheral socio-economic claims to the provisions of the Convention. Applying the Convention to such issues would eventually demand choices to be made that a supranational judicial body – and in particular one that has not been explicitly charged with the task to adjudicate social rights complaints – is not well placed to make. Indeed, this seems to be different if the Court would expressly restrict its review to cases concerning essential, 'core' interests.

When it comes to the review stage, an absolute-relative approach also has added value, since it has the advantage of offering solid protection and sound judicial review. After all, the very fact that it is *core* socio-economic interests that are interfered with ensures that justifications will be carefully scrutinised. Although some restrictions are accepted under the absolute-relative approach, these important individual interests thereby obtain the attention they deserve. The approach suggests that rather than focusing on their sensitive, socio-economic nature, and therefore opting for very deferential review, their essential character ensures that they actually stand a chance against countervailing considerations.

The possibilities of using an absolute-relative approach for improving the socio-economic reasoning of the ECtHR will be further explored in Section 7.4. For now, having in mind the aim of providing more principled and well-structured, but also effective socio-economic rights protection suited to the sensitive task of the Court, it suffices to underline that an 'absolute' understanding of core (socio-economic) content, rather than an *ad hoc* one, provides

102 *Cf.* Bilchitz 2003; Bilchitz 2007. It is important to state the content of core rights as this is what their importance demands. Even if this implies that core rights are 'conditional', this at least ensures that the basic claims people have are determined apart from budgetary and other concerns.

103 See, *supra*, Ch. 3, S. 3.2.1.

104 Bilchitz 2007, especially Ch. 6; Bilchitz 2014a (2014b).

most added value. This is especially true when this understanding is combined with strong, yet relative protection that leaves some room for Member States and their interests and decisions at the review stage. Having considered the alternatives available, it seems that this approach would seem the most promising in terms of the definition of clear guiding standards in combination with meaningful socio-economic rights protection.

7.3.2 Determining Cores

When an argument is made for the potential use of (absolute-relative) socio-economic cores in the Strasbourg adjudicative practice, the question of how to determine the core content of rights cannot be circumvented. After all, the use of a core rights perspective depends on the feasibility of the definition of core rights as well as the possibilities for the Court for taking on this definitional task. In Section 7.4, a core rights strategy for the ECtHR will be outlined including concrete suggestions as to the content of the core. However, in order to understand the way in which this content is interpreted there, it is worth bringing back to mind a few approaches as to how core rights can be determined, and translate these to the Strasbourg context.

In Chapters 5 and 6, and most explicitly in Section 5.5.2, roughly two ways were identified of determining what belongs to the core or essence of a particular right.[105] Starting from the question of how the minimum core obligations recognised by the CESCR in its different General Comments have come about, it was argued that they seem either to be inferred from the right itself or from consensus amongst States Parties or other 'external' sources.[106] The former option looks for intrinsic cores, for the raison d'être of rights, or for their 'unrelinquishable nucleus', without which one could no longer speak of that right.[107] Whereas this is indeed a difficult exercise, at least in the context of socio-economic rights it generally has led to a focus on minimum essential levels of these rights. For example, a right to housing at minimum requires individuals to be protected against the elements by means of basic shelter. A more inclusive minimum would entail access to basic housing, including adequate facilities like sanitation, energy for cooking, etc. In regard to the right to social security, it can be said that the raison d'être of such a right is to ensure at least a subsistence minimum, *i.e.*, the means necessary for acquiring essential health care, food, education etc. Although the inclusiveness of the minimum core can be a matter of discussion, the direction in which

105 See however also, *supra*, Ch. 4, S. 4.3.2.1, where it was considered that the content of the *Wesen* of a right can also follow from the right itself or rather from 'comparative' insights.
106 *Supra*, Ch. 5, S. 5.5.2.1 and 5.5.2.2, respectively.
107 *Supra*, Ch. 5, S. 5.5.2.1.

it points is clear – basic provisions form the very essence of socio-economic rights while without these there is nothing to build a higher level of socio-economic protection upon.[108]

'Comparative' or 'external' information, on the other hand, comes into play when the right itself does not pinpoint a certain minimum, or when other insights and experiences are considered relevant for the definition of (additional) cores.[109] External inspiration clearly played a role in the definition of minimum core obligations under the ICESCR, both more generally and in a very concrete manner.[110] Interesting in this regard, moreover, was the discussion on the pros and cons of including a core rights notion in the adjudication of economic and social rights under the South African Constitution. Opponents of this idea seemed to be somewhat less hesitant when the cores to be recognised would be defined on the basis of consensus. Arguing that it would be impossible for the Constitutional Court to determine minimum cores tailored to the South African situation – as this would be a very subjective exercise that would exclude the other branches from (further) elaborating on the meaning of socio-economic rights – reliance on the cores recognised by the CESCR would be less inherently problematic.[111] This would include, so to say, a kind of broader agreement also amongst non-judicial bodies and branches.

'Consensus' must not be taken too literally in this context. Indeed, complete agreement by all stakeholders on detailed core obligations seems practically impossible. Rather, general agreement on core issues as it can be inferred from state practices but also from authoritative documents might be a more feasible source of inspiration. Next to that, especially in the context of socio-economic protection, an important source can be expert information. Specialised bodies with extensive knowledge that is supported by statistical data on for example health care and educational issues may be able to provide for hints as to where the core of a right can be located.

For the ECtHR, it is difficult to say which of the two approaches should be favoured. Just like in other legal contexts, both have their less attractive sides and neither seems ideal in the sense of pinpointing cores that are entirely beyond contestation. In fact, however, there is no reason why an actual choice must be made, as, seen in combination, both the intrinsic approach as well

108 *Cf.* Bilchitz 2007, p. 187, who refers to different levels of individual need, the first of which is said to be 'the most urgent interest in being free form general threats to one's survival. This interest is of greatest urgency, as the inability to survive wipes out all possibility for realizing the sources of value in the life of a being'. See also p. 189.

109 *Supra*, Ch. 5, S. 5.5.2.2.

110 See, *supra*, Ch. 5, S. 5.5.2.2. In various General Comments, the CESCR explicitly refers to the inspiration found in international standards and state practices. For a concrete example, see CESCR, General Comment No. 14, para. 43(d).

111 *Cf.* Dixon 2007, pp. 415-416 (and see, *supra*, Ch. 5, S. 6.4.2.2).

as the consensus approach may provide helpful starting points. First, looking for the raison d'être of fundamental rights means that it is asked why a particular rights norm is there and what is required to ensure that this right is meaningful for those who can rely on it. This implies a kind of teleological approach to interpretation that takes into account a right's objective and purpose and 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society'.[112] In applying such an approach, the ECtHR would look at the rights norms enshrined in the ECHR, and more particularly at the aims and intrinsic values of the different 'civil and political' provisions.[113] When understood, as is the case, as encompassing positive obligations as well, this would for example allow for linking the right to respect for private life (Article 8 ECHR) to the importance of having a place to stay and to find shelter, to have some privacy without constantly being interrupted by others. Another example is the right to life (Article 2 ECHR), which *prima facie* can be said to entail, at minimum, a right not to die in extremely distressed circumstances and hence the provision of at least some basic (medical) help. Nuancing the 'active' connotation of the term 'treatment' moreover, the prohibition of 'inhuman and degrading treatment' as laid down in Article 3 ECHR may be linked to the provision of some basic means of subsistence needed for living a human life. Indeed, rather than being one of many aspects that could potentially be protected by this norm, some subsistence minimum can actually be said to form an essential aspect thereof. In this regard it is also worth recalling what was said about the 'effectiveness thesis' in Chapter 2 of this book.[114] Combining the idea of effectuating ECHR rights with a search for what this essentially demands, it appears to be the case that some socio-economic guarantees are crucial, because without those one cannot even start ensuring the further realisation of the respective rights.[115]

Secondly, also 'consensus' or 'external' cores can provide a valuable starting point for adjudication by the ECtHR. In fact, this approach to determining minimum core rights allows for looking further than the norms enshrined in the Convention itself. The Court could well refer to the essential socio-economic guarantees that have been agreed upon at the national as well as at the international level, and in particular to the core obligations that have been recognised by the CESCR. After all, the ICESCR has been broadly ratified, and regardless of the lack of binding judgments on the basis of the rights it enumerates, these bring along obligations for states, including the States Parties to the ECHR. These are already bound by the core requirements following from

112 *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, ECtHR 7 December 1976, appl. nos. 5095/71, 5920/72 and 5926/72, para. 53.
113 *Cf.* Ch. 2, S. 2.5.2.1.
114 *Supra*, Ch. 2, S. 2.5.2.
115 *Cf.* Bilchitz 2007, p. 189.

the Covenant, and it hence seems unproblematic for the ECtHR to at least give these core requirements some consideration in dealing with cases under the Convention. Such 'consensus interpretation', as was argued already in Chapter 2, fits the interpretative practice of the Strasbourg Court as well as the Court's acknowledgment of the indivisibility of civil and political and economic and social rights.[116] What the idea of 'externally inspired cores' adds to this is that rather than taking into account 'everything' that has been agreed upon in relation to economic and social rights, the Court's attention is directed towards the core aspects thereof. It suggests a take on indivisibility, thus, that instead of merely finding broad general inspiration for the interpretation and application of the rights enshrined in the Convention, entails a more limited focus on minimum essential levels and other core requirements, while incorporating these in a more transparent and robust manner.

Thus, while aiming at outlining the content of the socio-economic core rights that could play a role in the context of the Convention, the Court can look at the rights enshrined in the Convention and what these are about, as well as at 'external' norms and core guarantees that can serve as a source of inspiration for what minimum of protection could be provided under the ECHR. It will be shown in the next section that on the basis of this, it seems possible indeed to come up with a core strategy that provides for clarity on what *prima facie* socio-economic rights the Convention can guarantee.

7.4 Effectiveness, Indivisibility, and Core Rights Protection

It was argued that especially the idea of absolute-relative core rights protection could aid the Court in fulfilling its different tasks when protecting socio-economic interests under the Convention. Besides that, several methods of determining core rights that could be applied by the ECtHR were outlined. It can be said that with the help of the ideas of intrinsic and externally inspired cores it is eventually up to the Court, as the final interpreter of the Convention and the body in charge of applying the ECHR rights to the cases that come to Strasbourg, to determine what exactly socio-economic core rights protection should entail. At the same time, on the basis of the inspiration drawn from the different core rights doctrines, in combination with what was argued in regard to the Strasbourg adjudicative context, a more detailed picture of a 'core rights perspective' for the ECtHR already may be provided. This section takes the analysis presented thus far one step further by providing some more clarity

116 Indeed, the 'indivisibility thesis' as it was outlined in, *supra*, Ch. 2, S. 2.5.3, in fact starts from the idea of 'consensus', or at least, 'external inspiration'. It was said to be related to the Court's 'comparative', 'common ground', or 'consensus method of interpretation' (S. 2.5.3.3).

on the content of the core socio-economic rights that seem feasible in the Strasbourg context, as well as by explaining the role these cores could play at the different adjudicative stages. The aim thereby is to outline an actual, workable strategy for the ECtHR that not only does do justice to the idea that certain core aspects of rights can be considered more important than others and therefore require extra protection, but also fits the multidimensional task of this Court and the traditionally civil and political character of the rights it is protecting.

An important starting point for the strategy presented here is formed by the ideas of 'effectiveness' and 'indivisibility' that were introduced in Chapter 2.[117] There, it was argued that the economic and social dimension of the ECHR can be explained by the aim of effectuating the rights enumerated in the ECHR, as well as by the idea of the indivisibility of fundamental rights, which implies that socio-economic rights are expressly taken into account in interpreting other fundamental rights norms. It was also held there that whereas both theses not only explain but also justify the Court's engagement with socio-economic issues, they fail to provide sufficient guidance for dealing with cases of this kind.[118] However, taking 'effectiveness' and 'indivisibility' as the starting point, *while adding the idea of core rights protection* as it was elaborated in the previous sections, a possible course of reasoning might emerge that could help to improve the Court's practice. The strategy outlined in this section hence aims at combining the two different rationales with core rights-inspired ways to go about. By doing so, a more principled approach to complex socio-economic matters may be shown to be within the Court's reach.

In the following, it is first argued that core socio-economic rights, or, more precisely, minimum essential levels of these rights, can add to the interpretation of the Convention in the sense that these aspects of socio-economic rights can be reasonably included in the scope of several ECHR rights (7.4.1). Thereafter, it is contended that although this provides for a clear and delineated approach, guaranteeing such 'minimum essential levels' does not provide for a *sufficient* level of *prima facie* protection of socio-economic interests under the Convention. Rather, it is desirable to supplement the idea of minimum levels with several further 'core indicators', *i.e.*, indicators of when – even if a case does not concern minimum socio-economic levels – a socio-economic complaint can be considered important enough to be reviewed under the Convention (7.4.2). Arguably, this can be the case when a complaint concerns discrimination or when vulnerable individuals or groups are involved. Finally, attention is given to the way in which the (core) socio-economic interests that should *prima facie* be covered by the ECHR eventually can be protected, taking into account the 'absolute-relative' approach to core rights protection that has been advocated

117 See, *supra*, Ch. 2, S. 2.5.2 and 2.5.3, respectively.
118 *Supra*, Ch. 2, S. 2.6.

here (7.4.3). It is argued that this can be done, for example, with the help of procedural standards, and it is shown what role is thereby left for the margin of appreciation.

7.4.1 A Right to Minimum Essential Levels of Socio-Economic Rights under the ECHR

The notion of 'absolute-relative' core rights, which was considered to be the most promising of the different core rights approaches for the protection of socio-economic interests under the Convention, demands foremost that the adjudicative process is guided by 'case-independent' cores. In this regard, it can be argued that in interpreting the Convention rights, core rights to minimum essential levels of economic and social rights can be considered to form the starting point for deciding whether or not socio-economic complaints should be dealt with under the Convention. After all, it was held that while it is not easy to provide a definition of 'indeterminable' cores, at least in the context of socio-economic protection it seems clear that the provision of minimum levels of socio-economic rights should be included therein. In line with this, although it is hard to draw a line around the *prima facie* socio-economic protection of the Convention, the idea of minimum levels can pinpoint where the legitimate role of the ECtHR in this field starts, and where it might end. In this regard it must be kept in mind that of course socio-economic issues such as those concerning 'fair trial' (Article 6) or the respect for the home (Article 8) may naturally be covered by the Convention. Besides that, however, the fulfilment of minimum essential levels of food, health care, housing, social security, and education can be considered a prerequisite for the (further) enjoyment of the rights enshrined in the ECHR. When such minimum levels are absent, many of these rights become meaningless. For example, for the enjoyment of private or family life, but also for using one's freedom of speech or right to vote, basic levels of nutrition, shelter and education are required.[119] More concretely, being devoid of food or basic health care can amount to inhuman treatment (Article 3) or have a serious impact on someone's private life (Article 8), while a revocation of basic social assistance (minimum means of subsistence) may (also) be seen to concern proprietary interests protected under Article 1 P1.

With regard to the core guarantee of 'essential levels' under the Convention, it is notable, first, that this guarantee not only provides negative protection by allowing for review of deprivations of 'existing' basic provisions, but also ensures positive protection by recognising a *prima facie* right to be provided with essential levels of socio-economic rights. Indeed, the right to have the

119 *Cf.*, *e.g.*, Sen 1987, p. 36ff.; Sen 2009, p. 253ff.; Nussbaum 2000, p. 5; Nussbaum 2011; Fredman 2008.

very core of one's socio-economic rights protected is mirrored by the obligation of states to actively engage in ensuring a subsistence minimum by making the necessary budgetary choices and designing the required legislative framework and policy measures.[120] Secondly, especially where it concerns the positive component, it should be stressed that this core requirement is a *minimum* requirement, which means that although states may surely provide for more socio-economic arrangements, this can generally not be required under the Convention. Indeed, although a higher level of provision may be considered desirable in practical terms, given the genesis of the Convention, the wording of the rights it contains, and the competences of the ECtHR, the recognition of positive socio-economic guarantees is everything but self-evident and should thus be limited. What is more, even though the inclusiveness of the minimum to be provided may be a point of discussion,[121] merely stating that 'minimum levels' are required as such would already form an important recognition of the fact that while not every social claim can be reviewed under the Convention this is different when basic needs are concerned.[122] Thirdly, it may be asked why it is suggested here that the Court should start from the idea of minimum socio-economic rights rather than, for example, from the general notion of 'human dignity'. A reason for this could be that, different from human dignity, the notion of 'minimum essential levels of socio-economic rights' allows for clarifying in an explicit manner that (some) guarantees *of a socio-economic character* deserve protection under the Convention. Moreover, although human dignity is considered to be one of the basic principles underlying the Convention, in terms of socio-economic protection it is not an entirely unequivocal requirement. It is difficult to establish what it actually means to speak of a life in dignity, and it is equally difficult to establish to what extent subjective interpretations of a dignified life should thereby be taken into account. Some would consider that living off the state means a not so dignified existence, and would prefer doing with very little as long as they can be self-sufficient and remain independent. Others might however consider that a relatively high standard in terms of food, housing and health care is needed

120 Of course, the exact means by which a subsistence minimum is guaranteed need not be prescribed by the Court.

121 One could argue that given the comparatively high standard of socio-economic protection throughout most European countries, the minimum level the Court could recognise is quite high (see, on the idea of a 'relative minimum threshold', Bilchitz 2014a). However, it is important to recognise that it remains imperative that the standard it sets is truly minimal. This not because nothing 'more' would be possible, but because of the limited role of the supranational Strasbourg court in determining and demanding positive socio-economic state action under the Convention. Indeed, the much encompassing 'minimum standard' set by the German *Bundesverfassungsgericht*, including for example household goods, but also 'the possibility to maintain inter-human relationships and a minimum of participation in social, cultural and political life', seems to be too demanding for an international context like the ECtHR's.

122 *Cf.* the German right to an *Existenzminimum*, discussed in, *supra*, Ch. 4, S. 4.4.2.

for living a dignified life, while caring less about whether they provide this standard by themselves or not. Whereas dignity thus points in different directions, this is less so for the requirement of minimum essential levels.[123] After all, such a requirement directs the focus to the basics, *i.e.*, to a minimum standard of particular rights that individuals can build upon, and hence can be defined more objectively.

It can be concluded from this that an exclusive focus on cases concerning 'minimum essential levels'[124] would result in a meaningful, though fairly limited application of the ECHR in the socio-economic field. It must be asked, therefore, whether the recognition of minimum rights does not only provide a feasible, but also a sufficient starting point for defining the *prima facie* socio-economic protection under the Convention. It will be argued next that this is not the case, and that besides the 'minimum essential levels' requirement, additional 'indicators' should be used for determining in what (other) circumstances the aims of effective and indivisible rights protection call for reviewing a socio-economic case under the Convention.

7.4.2 Additionally: Core Indicators

When answering the scope question, *i.e.*, when deciding whether a socio-economic complaint is covered by the scope of the Convention, the Court should establish whether the issue at stake concerns core socio-economic rights, by examining if there is an interference with minimum essential levels of these rights or if there is a lack of provision of such levels. If this question is answered in the affirmative, there is room for review under the Convention. However, although the minimum essential levels criterion can be said to allow for 'effective' and 'indivisible' protection under the Convention, especially since it also includes positive guarantees, at the same time it would bar the review of a great number of complaints that concern rather peripheral economic and social interests, but might nevertheless require fundamental rights review, too. Arguably, also these cases must be included in the scope of the Convention in a transparent, comprehensible manner that moreover fits the subsidiary position of the Court.

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123 *Cf.*, however, Young 2008, who holds that a dignity-based core points in a different direction than a basic needs core. Arguably, however, it can be said that whereas dignity can entail many things, it in any case incorporates the minimum level requirements that seem to be demanded according to a basic needs approach. See, *supra*, Ch. 5, S. 5.5.2.1. See also the example of the right to an *Existenzminimum*, which is based on the requirement of human dignity and indeed includes the possibility to maintain relationships and participate in society, yet not without also referring to food, clothing, housing, etc. (*supra*, Ch. 4, S. 4.4.2.1).

124 Besides, indeed, the 'traditional', negative protection of the Convention under for example Art. 6 or Art. 8 ECHR.

It is submitted here that also in this regard, the notion of socio-economic core rights provides a helpful point of departure. Especially from Chapter 5, which discussed the ICESCR and the Committee's recognition of minimum core obligations in order to make more workable the monitoring of states' compliance with the Covenant, it followed that socio-economic core rights not necessarily only concern substantive guarantees of (minimum) socio-economic provisions, but instead also entail additional requirements. In particular, in the various General Comments presented in Chapter 5 it has been underlined that states, at minimum, should ensure non-discrimination in the socio-economic field as well as focus their attention on disadvantaged and marginalised individuals and groups. In line with this, also in Strasbourg the fact that a complaint concerns such matters can signal that there is a 'core issue' at stake that should obtain *prima facie* Convention protection, even if the case does not of itself concern a minimum essential level of a socio-economic right. Discussing these 'core indicators' – *i.e.*, 'non-discrimination' and 'vulnerable individuals and groups' – this will be explained in more detail in the following subsections.

7.4.2.1 Non-Discrimination

The prohibition of discrimination forms a crucial guarantee, both in the context of civil rights as well as in relation to social rights. In line with this, the fact that a socio-economic complaint concerns alleged discrimination should be reason to conclude on the applicability of the Convention. In other words, whereas – besides a basic level thereof – broad socio-economic arrangements cannot generally be demanded under the Convention, what always can be requested is that the entitlements a state creates comply with the principle of non-discrimination.

To illustrate this, it is worth recalling the practice of the CESCR. Besides holding that the Covenant's non-discrimination provision is an immediate requirement,[125] the Committee has highlighted with regard to the different economic and social rights that the non-discriminatory provision thereof is a core obligation of states. For example, the Committee has held that states must, as a matter of priority, 'ensure the right of access to health facilities, goods and services on a non-discriminatory basis',[126] as well as 'the right of access to public educational institutions and programmes on a non-discriminatory basis'.[127] Accordingly, as soon as health schemes or public education are available, at least discrimination-free access to such facilities needs to be

125 *Cf.* the Limburg Principles, paras. 22 and 35 ('Article 2 (2) [non-discrimination] calls for immediate application and involves an explicit guarantee on behalf of the States parties. It should, therefore, be made subject to judicial review and other recourse procedures.').
126 CESCR, General Comment No. 14, para. 43(a).
127 CESCR, General Comment No. 13, para. 57.

provided. The core requirement of non-discrimination allows for some variation amongst states: given that they do not all have the means for providing a similar (high) level of socio-economic arrangements, and cannot be required to provide for certain facilities right away, it 'adjusts' to the possibilities in a given country. Yet not only for this reason it is a feasible core requirement. At least as important is that to be treated in a non-discriminatory fashion as such is an essential right, deserving prioritised attention. It is not an 'easy' requirement though, because it is one of the hallmarks of social measures that a distinction is made between different categories of persons who may receive different levels of assistance in accordance with criteria such as need. Also conditions related to someone's place of residence, immigration status, or age can be reason for granting less, or even no assistance at all, but it cannot be said that such differentiation in treatment always amounts to discrimination. Moreover, the non-discriminatory provision of certain entitlements could require that they be extended to groups that would otherwise be excluded, which means that the non-discrimination requirement may demand positive, but also very costly action to be taken.

These objections notwithstanding, protection against discrimination provides a fitting example of what core socio-economic protection under the Convention should entail. It seems to provide a reasonable answer to the need for the Court to respect diversity and subsidiarity, as it remains up to the states to (democratically) decide what kind and what exact level of socio-economic guarantees they want to provide for. At the same time, it ensures a focus on those cases that relate to what lies at the heart of the ECHR, namely the effort to ban discrimination throughout the different areas of society.[128] Thus, even when they do not concern 'minimum essential levels', socio-economic complaints that involve alleged discrimination in principle should allow for review under the Convention.

7.4.2.2 Vulnerable Individuals and Groups

Another indicator suggesting that an essential socio-economic issue is concerned that calls for Convention review is the fact that a complaint concerns the interests of vulnerable individuals or groups. On top of the protection of minimum essential levels of socio-economic rights for all, it can be justified for the Court to have an extra eye for the needs of vulnerable persons. After all, the Convention is there to protect especially the interests of those that cannot stand up for themselves just as well as others. Vulnerable individuals and groups are the most likely ones to lack access to basic goods and a minimum standard of the various socio-economic rights, as well as the possibility to improve their socio-economic situation on their own. Effectuating the

128 *Cf.* the central role of Art. 14 ECHR and the development concerning Protocol No. 12. See, supra, Ch. 2, S. 2.4.2.2 and 2.6.1.

Convention rights in conformity with the rationales of effectiveness and indivisibility may therefore require that cases brought by these persons are assessed by the Court and given particular concern, even when they do not concern 'minimum' economic and social needs.

Again, the practice of the CESCR may serve as a source of inspiration here. In many of its General Comments, the Committee has recognised that for working towards full compliance and ensuring a higher level of socio-economic protection, it is important to start with those whose situation is most in need of improvement and/or who lack the capacity to alter their dire circumstances singlehandedly. Already in the 1991 Comment on the right to housing, the Committee has stated that 'States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration'.[129] Moreover, it has held that especially for 'disadvantaged and marginalised individuals and groups', access to social security systems and schemes and health care facilities needs to be guaranteed.[130] When defining such disadvantaged and marginalised, vulnerable individuals and groups, one could for example think of religious or ethnic minorities, *i.e.*, of groups whose interests do not correspond with the prevalent status quo and who (therefore) need to be protected against majorities.[131] Especially in the socio-economic context, moreover, 'vulnerable' are those whose well-being, including their enjoyment of fundamental rights, to a large extent depends on the state. Asylum seekers lacking any means to facilitate their self-support, or severely disabled persons that have to rely on state arrangements, can be counted amongst those that deserve extra attention, and the same may go for children and the elderly. Thus, core socio-economic rights protection under the Convention could include protection of the economic and social interests of vulnerable individuals and groups. This fits the aims of effectuating the norms enshrined in the Convention and ensuring 'indivisible' protection, while it also allows for a principled focus.

7.4.3 Core Protection

Sections 7.4.1 and 7.4.2 primarily dealt with the interpretation of the Convention in relation to socio-economic complaints. It was argued that when a case concerns basic means of subsistence or 'minimum essential levels' of socio-economic rights, there is a sufficient link with the rights norms laid down in the Convention to allow for review of interferences or omissions of the state.

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129 CESCR, General Comment No. 4, para. 10.

130 CESCR, General Comment No. 18, para 31(a), and CESCR, General Comment No. 14, para. 43(a), respectively.

131 See, for the concept of vulnerability (and the groups identified as such) in relation to the ECtHR, Peroni and Timmer 2013.

Moreover, since exclusively focusing on minimum levels may fail to ensure effective and indivisible fundamental rights protection, several 'core indicators' were mentioned that show when additional Convention guarantees may come into play. Just as important as the interpretation of the ECHR, however, is the way in which the Court eventually deals with the socio-economic complaints it holds admissible and reviews on their merits.

According to the absolute-relative core rights understanding that is taken as the starting point here, after the Court has determined that the Convention applies to a particular complaint, the eventual protection it provides is of a meaningful yet 'relative' kind. This suggests that there is some room for justification of interferences or for omissions to protect core rights to the fullest degree possible. Nevertheless, the core character of the issues concerned clearly demands such a justification to be very weighty and the Court's review accordingly may be of a strict kind. Whereas adding the notion of core rights to the ideas of 'effectiveness' and 'indivisibility' resulted in a somewhat limited, or 'narrow' interpretation, at the stage of application it ensures that socio-economic interests are taken seriously, also when adjudicated under the 'classic' ECHR.

In terms of the implications of a core rights perspective in particular for the review stage, however, this conclusion does not suffice. After all, a main concern expressed in Chapter 2 was that the Court's reasoning currently is often opaque and of a casuistic, unprincipled kind. In the light of this, it is argued here that the notion of core rights can more concretely help to enhance the Court's proportionality review, even when being mindful of the impossibility of prescribing policies and deliberating on choices only a legislator seems capable of making. In this regard, it is suggested in this final section that, next to ensuring a more principled proportionality test, procedural requirements may be set by the Court in order to guarantee core socio-economic aspects of the Convention rights. The discussion of a 'core rights perspective' for the ECtHR is concluded with some remarks on the margin of appreciation.

7.4.3.1 Proportionality, Procedural Requirements, and the Margin of Appreciation

When a case concerning a core socio-economic interest – be it an individual's minimum means of subsistence, the housing needs of a disabled person, or unequal treatment in the provision of health care – is reviewed by the ECtHR, how can the Court approach this task? As was set out in Chapter 3, under most articles of the Convention, it will proceed by means of a proportionality test. At least in theory, such a test entails an examination of whether the interference served a legitimate aim, whether it was suitable and necessary,

and whether it was proportional *stricto sensu*.[132] The emphasis in conducting this test is generally – and in particular when positive protection is demanded[133] – placed on the last aspect, namely on whether there was a 'fair balance' between the rights of the individual and the other interests concerned. It has been shown that this test is often confused and blurry, as 'balancing' the various interests at stake is an *ad hoc* exercise and it is often not clear how much weight is given to an individual right, or why one case has a different outcome compared to another (similar) one.

In this regard, there may be value in differentiating between core and non-core issues. This distinction can form a workable point of departure for reviewing a case in the sense that when a core right or interest is concerned, this offers a normative justification for according particular 'weight' to the position of the individual. This holds true especially when the interference with a core interest is a serious one, *i.e.*, when rather than a temporary and/or limited reduction the provision of minimum means of subsistence is stopped more or less entirely, or when a case concerns minimum needs *and* unequal treatment or particularly vulnerable individuals. Indeed, there may be cases in which the protection or provision of essential guarantees is 'evidently insufficient'.[134] In any case, when there is a serious interference or when aggravating factors are involved, there may be a presumption in favour of the individual, which not only means that the individual's interests are more difficult to be 'outbalanced', but also that the Court can opt for a stricter review of the legitimacy of the aim pursued and the suitability and necessity of the means chosen to realise this aim. Whereas it might be inclined to conduct these tests only in a marginal manner when (costly) socio-economic matters are at stake, core rights protection suggests that in cases where the socio-economic core of rights actually is at stake, there is good reason to be stricter in this regard.

In addition, as follows from the examples presented in the previous chapters, it is possible to concretise relatively abstract minimum socio-economic rights by means of what were called 'neutral' requirements. A more principled approach to the review of socio-economic interests can be considered desirable, yet it seems inappropriate for the Court to come up with concrete policy demands or general, quantified requirements. However, what it can do in order to provide more content to a *prima facie* requirement of 'minimum essential levels', is formulating procedural demands that national authorities have to comply with in order for measures taken to be in compliance with the Convention. The issue of whether a specific measure (or the lack thereof) was disproportionate then may dissolve into the question of whether the procedural

132 See, on (the different sub-tests of) the proportionality test, *supra*, Ch. 3, S. 3.4.2. For an extensive discussion, see Barak 2012.

133 *Cf.* Möller 2012, pp. 179-180.

134 *Cf.* the standard developed by the *Bundesverfassungericht* for the protection of a subsistence minimum (*supra*, Ch. 4, S. 4.4.2.2.).

safeguards available to the applicant were sufficient. Such safeguards may include duties of consultation or (timely) information, but also the actual taking into account in the initial decision-making or judicial procedure of (the essential character of) the interest at stake for the individual. An example would be the emphasis placed by the CESCR in the context of evictions on 'appropriate procedural protection and due process'. This entails amongst other things 'an opportunity for genuine consultation with those affected', adequate and reasonable notice, information, provision of legal remedies, and where possible of legal aid.[135] Another, slightly different example would be the *Bundesverfassungsgericht*'s recognition of 'procedural' demands in order to be able to determine whether the right to a subsistence minimum is complied with.[136] It would be suitable also for the supranational ECtHR, that needs to respect the prerogatives of the Member States while setting standards in regard to the (civil and political) norms of the Convention, to first and foremost demand procedural protection.[137] Procedural review, which indeed need not be substantively 'empty',[138] is in line with the sensitive position of the Court – especially in the socio-economic field – and with the idea of separation of powers more generally.[139]

Altogether, 'core rights protection' according to the perspective outlined here does not suggest that the Court should no longer look at the particular circumstances of a case and rely instead on categorical reasoning only. Neither does it imply that it should prescribe legislative requirements for guaranteeing minimum essential levels of economic and social rights. Rather, it proposes an individual-oriented test that rather than being characterised by an opaque balancing of interests is guided by the core character of the socio-economic interest at stake. For example when translated into procedural requirements, the core importance of the issue concerned allows for concluding in a more transparent manner on when and why a Convention right has been violated. It can form the standard in the light of which the proportionality of an interference or omission can be judged, thereby leading to a more principled approach.

Finally, with regard to the margin of appreciation it follows that in the approach suggested here, the role of this doctrine is a distinctly limited one. Since at the interpretation stage the room for Strasbourg review of socio-economic issues is limited to cases concerning (the provision of) minimum essential levels and those involving alleged discrimination and/or vulnerable individuals and groups, generally granting a wide margin of appreciation does

135 CESCR, General Comment No. 7, para. 15.
136 See, *supra*, Ch. 4, S. 4.4.2.2.
137 Gerards 2012. *Cf.* also Brems 2014.
138 By requiring that the individual situation of the person affected be considered in the decision-making process, the potential social content of this requirement becomes visible.
139 *Cf.* Gerards 2012, p. 197.

not seem appropriate. Instead, regardless of their politically and budgetary sensitive socio-economic character, the core importance of the issues concerned should obtain a prominent role in determining whether a right has been violated. Especially when serious interferences or omissions in the provision of minimum essential levels are concerned, the margin of appreciation left to the state should arguably be non-existent, although in line with the example of the right to an *Existenzminimum* some leeway may be granted to the state in determining *what exactly* such a minimum in quantified terms entails and *how* it is provided for. Also when an issue concerns discrimination or vulnerable individuals *and* the provision of minimum socio-economic guarantees, it cannot be left to the state whether or not such minima are provided for or not. In the case of the provision of additional guarantees to vulnerable groups and individuals, or unequal treatment in regard to such guarantees, however, the state may be granted a margin in deciding on what is provided or on how a distinction is made between certain groups of (potential) recipients. Thus, whereas an approach to fundamental rights adjudication characterised by a very broad, or vague, interpretation of rights may demand reliance on a doctrine like the margin of appreciation in many instances, the focus on *fundamental*, core rights proposed here makes this far less necessary.

7.5 Conclusion

This chapter has, first, summarised the insights that could be gained from the previous chapter on the various core rights doctrines. It was shown that certain persistent perceptions of core rights generally prevent the occurrence of a fair picture of what core rights protection can actually be about. More precisely, cores are often thought to be absolutely guaranteed, impossible to determine and directing efforts towards nothing more than a very minimal level of protection. Moreover, it is often considered that the identification of cores confers too much power on courts, allowing them to decide, in a necessarily subjective manner, on what (socio-economic) guarantees deserve absolute protection at the expense of others. Unsurprisingly, on the basis of these perceptions it is often considered that core rights should not deserve a place in legal reasoning, and that courts can better rely on other instruments for resolving conflicts between general and individual interests. However, the combined insights from the core rights debates outlined in Part II of this book present a different image. In fact the concept of core rights can play a much more nuanced role in legal reasoning than is often considered. Core rights need not be inflexible: both their content as well as the protection they offer can also be of a relative kind. Moreover, cores can play a role not only at the application stage generally, but also in determining the intensity of review and even in demarcating the scope of *prima facie* rights. Rather than merely enhancing the power of courts, core rights also have the potential of structuring

a court's efforts at providing an appropriate answer to rights conflicts involving a great variety of relevant factors. Focussing on the protection of minimum, essential guarantees in fact seems crucial for living up to the promise of (supranational) fundamental rights protection.

After presenting this broader, more nuanced image of core rights protection, an effort was made to develop a 'core rights perspective' tailored to the protection of socio-economic interests by the ECtHR. In order to do so the various lessons that could be learned from Chapters 4-6 (Part II) were combined with what was said in Chapters 2 and 3 (Part I). In particular, attention was given to the role and position of the Court, and the need for principled, effective, and indivisible protection under the Convention that does not encroach on the powers of the state to a too great extent. Against this background it was argued that the Court's practice is likely to benefit most from the notion of 'absolute-relative' core rights. Such core rights are absolute in the sense that they are generally applicable and can guide the adjudication of a particular case, while providing for robust, but 'relative' protection that allows some room for justifications for interferences or omissions on the part of the state. Additionally, it was considered that the ECtHR may determine the content of core rights by making use of a combination of two approaches for doing so, namely an 'intrinsic approach' that looks at what a particular rights norms is essentially about and a consensus approach that pays attention to 'external' information in the form of 'consensus' or expert views on minimum guarantees. Although it must be admitted that even with the help of these methods, determining what are the essential aspects of rights that have to be complied with first and foremost is not an easy task, it was submitted that in the socio-economic sphere core protection aims at the very least at 'minimum' levels of socio-economic provision. In this context, in other words, the direction in which the core points seems relatively unequivocal.

In Section 7.4 then, a concrete, workable outline was presented of how 'absolute-relative' (minimum) cores can be incorporated in the Strasbourg practice at the various stages of adjudication. Given the need for a principled approach and clarity on what the Convention requires in terms of socio-economic protection, the core rights perspective that was developed first of all suggests that in answering the scope question the Court asks whether a case concerns 'minimum essential levels' of socio-economic rights. If this is the case, but also when a socio-economic complaint concerns alleged discrimination and/or the socio-economic needs of vulnerable individuals, it can legitimately be reviewed under the Convention. Indeed, these 'core' economic and social rights issues explicitly deserve the *prima facie* protection of the ECHR as they are intimately connected to what the Convention is about as well as can legitimately be decided upon by the ECtHR. Having determined the *prima facie* scope of the Convention in the socio-economic field, then, the core character of the issues that are being reviewed can form the starting point for guiding the Court's application of the relevant Convention rights. It was proposed that

minimum socio-economic guarantees could be concretised at the application stage by requiring that certain 'procedural' requirements be met. When an issue concerns 'minimum essential levels', moreover, its socio-economic character should not stand in the way of strict review and only leaves a very limited role for the margin of appreciation. Especially in cases that concern non-discrimination and/or the protection of vulnerable individuals, but not the provision of or interferences with minimum levels, some deference should still be granted to the national authorities and the way they want to spend the available budget. However, overall a core rights perspective for the protection of socio-economic interests under the ECHR demands meaningful review of issues that are not trivial and deserve supranational fundamental rights protection.

In order to see how this core rights approach would fit into and could actually improve the Court's current reasoning in socio-economic cases, Part IV of this book turns to a closer examination of the Court's dealing with housing, health and health care, and social security issues thus far.

PART IV

The Socio-Economic Case Law of the ECtHR

8 Housing

8.1 INTRODUCTION

In the previous part of this book a 'core rights perspective' has been outlined for the protection of socio-economic interests under the ECHR. This perspective evolved from insights on the notion of core rights protection in combination with what was said on the role and position of the Court (Chapter 2) and the structure of fundamental rights adjudication (Chapter 3). It presented concrete suggestions for how the Court could deal with complaints related to economic and social rights in a more principled manner. Yet in order to conclude that the notion of core rights would actually have added value, it is necessary to have a closer look at the case law as it stands today. In this part of the book an overview is given of the Court's practice in relation to cases concerning housing, health and health care, and social security. The aim thereby is to see whether the ECtHR provides 'effective' as well as 'indivisible' protection in the respective fields, while not losing sight of its supranational role and providing the necessary guidance by means of transparent and consistent reasoning. Importantly, moreover, it will be seen whether the Court already makes use of the notion of core rights, or whether there would be room for doing so.

This first case law chapter concerns the Court's protection in the field of housing. Housing issues come before the Court in many varieties, and concern for example evictions or the demolition or restitution of houses. Other cases deal with the need for adequate housing, while there are also examples concerning rent levels and conflicts between landlords and tenants. On the one hand, it is natural that the Convention is engaged in the area of housing. Especially in the context of state interferences with an individual's home or house the link with the right to respect for the home (Article 8) or property protection (Article 1 of Protocol No. 1) is readily apparent. On the other hand, the relation with the Convention is less obvious when positive claims to housing are made. When an individual demands adequate housing meeting his specific needs, or alternative housing when he is evicted, the social dimension of the Strasbourg housing case law becomes visible.

For the purposes of this chapter, especially this positive, social dimension is important. It is asked here to what extent the ECtHR offers protection to social housing needs, *i.e.*, to the interests of those not owning a house or lacking the means or possibilities for finding a (suitable or alternative) place to live. It

is in the context of these kinds of issues that the tension between effective and indivisible fundamental rights protection and the necessary leeway to the budgetary and planning policies of the states is most evident. It will be assessed how the Court handles this tension and confronts – or instead tries to avert – the social questions presented to it. In particular, this case law analysis aims to discover if the Court has developed a principled approach to social housing complaints that provides the guidance Member States need in order to deal with this issue in a way that is in compliance with the Convention. In this regard, it is not only the *overtly social* housing complaints that deserve attention. In addition, it is worthwhile to highlight some more classical housing cases, as also these may provide for insights on how a state, according to the Court's interpretation of the Convention, is required to deal with housing needs.

Thus, Chapter 8 aims at presenting an overview of the case law of the Court that either directly or more indirectly involves social housing issues. Section 8.2 starts from the different Convention norms and shows the way(s) in which these link up with the issue of housing. It illustrates the natural connection between for example Article 8 and Article 1 P1 and (negative) housing concerns, but especially also focuses on the more unexpected, social aspects of the Court's protection. Questions to be addressed in this section are: What does effective protection of 'respect for the home' and 'private life' entail? To what extent do property rights protect more than just the interests of those who actually own a place? How can the non-discrimination provision of Article 14 ensure social protection and what has the Court said on housing rights in relation to Article 3 ECHR, the prohibition of inhuman and degrading treatment? It will be examined whether the Court provides for a transparent interpretation of what is and what is not (*prima facie*) protected, and whether it has reviewed the different housing issues in an unambiguous manner. In doing so it also will be analysed whether the ECtHR provides for a certain 'minimum level' of social protection, or whether it would be possible for it to do so.

Subsequently, Section 8.3 zooms in on the issue of Roma housing. Cases concerning this topic have come up regularly in Strasbourg and provide for a fitting example of how the Court has to navigate between precarious social realities and costly policy preferences. What is more, together the Roma housing cases provide an interesting case study of the Court's social role and the development thereof, including the remaining shortcomings. This section in particular aims to illustrate how the Court pays explicit attention to the housing needs of vulnerable groups and does so by recognising procedural requirements. Section 8.4 concludes with some final remarks.

8.2 (SOCIAL) HOUSING INTERESTS AND THE ECHR

In order to illuminate the social dimension of the Court's case law on issues related to housing, this section addresses several developments related to the different Convention articles relevant in this context. It shows the ways in which the different ECHR-provisions allow for a move from more classical, negative protection in the field of housing, to more positive and social protection. First, attention is given to Article 8 and the different aspects thereof (8.2.1). Especially the 'respect for the home' limb of this provision is clearly connected to the topic of housing. Yet whereas the Court could have insisted on limited *prima facie* protection on the basis of this provision, its interpretation of 'home' explicitly creates room for more indivisible Convention protection. Moreover, also the right to respect for private and family life has proven increasingly relevant in the (social) housing sphere. It will be illustrated that there lies great 'social potential' in the Court's recognition of positive obligations in relation to private and family life, even though thus far it has refrained from clarifying what exactly these positive duties entail. Turning to Article 1 P1, it will be shown that this provision mainly protects the interests of those who own a home, yet also here social housing concerns seem to be increasingly taken into account (8.2.2). Also the protection against discrimination deserves attention, and it will be explicated how Article 14 can bring about social effects by demanding that housing assistance is provided in a non-discriminatory manner (8.2.3). Finally, it is worth paying attention to the prohibition of inhuman and degrading treatment enshrined in Article 3 of the Convention (8.2.4). Although the absolute protection offered by this provision at first glance seems to have little to do with social housing concerns, there is interesting case law on the link between both. In fact, it appears that Article 3 provides a kind of minimum protection in the field of housing, although the Court refrains from clearly indicating so.

8.2.1 Article 8 ECHR: Private and Family Life, Home and Housing

In *Chapman v. the United Kingdom*, in 2001, the Grand Chamber held that

> 'Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States

> many persons who have no home. Whether the State provides funds to enable everyone a home is a matter for political not judicial decision.'[1]

Indeed, according to the wording of Article 8 ECHR, this provision grants on the individual only 'a right to *respect for* his home'. To benefit from this right, thus, it appears that one already needs to have a home. When this is the case, protection will be granted against unjustified interferences by the state. Nevertheless, the Convention, and Article 8 in particular, protects more than just the classical, negative aspects of individual housing interests. In this regard it is worth illuminating, first, that the Court has interpreted 'respect for the home' in a broad manner. Second, the recognition of possible positive obligations in relation to the 'private and family life' limb of Article 8 underlines that the social potential of this article is everything but exhausted.

8.2.1.1 Interpreting 'Home' as a Question of Fact

The right to respect for the home (Article 8) would be seriously limited if the Court would only understand as 'home' a legally owned house or apartment that is permanently occupied. Instead of a narrow interpretation, however, the Court has opted for a rather broad reading of this term. The 1986 case of *Gillow v. the United Kingdom* has been important in this regard.[2] The case concerned a family that had built a house on the island of Guernsey. They had lived there for two years until Mr Gillow in 1960 took up employment overseas. When they wanted to return in 1978 they were notified that they could only do so once a license had been granted under the applicable housing law. Eventually, the Gillow family returned to Guernsey in 1979, hoping to

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1 *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95, para. 99. This case will be further discussed in, *infra*, S. 8.3. Similar phrasing has been used in many more (recent) cases. *Cf., e.g.*, *Codona v. the UK*, 7 February 2006 (dec.), appl. no. 485/05 (where the complaint of a Roma person who was offered bricks and mortar accommodation instead of another site for her caravan was held inadmissible, see, *infra*, Sections 9.2.2 and 9.3.1 as well); *Bleyova v. Slovakia*, ECtHR 17 October 2006 (dec.), appl. no. 69353/01 (complaint about the temporary character of the applicant's legal stay in a flat held inadmissible; *Makuc a. O. v. Slovenia*, ECtHR 31 May 2007 (dec.), appl. no. 26828/06, para. 171 (complaint about not having a home held inadmissible); *Velizhanina v. Ukraine*, ECtHR 27 January 2009 (dec.), appl. no. 18639/03 (complaint concerning deprivation of specially protected tenancy held inadmissible); *Yordanova a.O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, para. 130 (yet, 'an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases', see further, *infra*, S. 8.3); *Dukic v. Bosnia and Herzegovina*, ECtHR 19 June 2012, appl. no. 4543/09, para. 40 (complaint about not having been allocated a replacement flat inadmissible; according to the Court, '[t]he interests protected by the notion of a "home" within the meaning of Article 8 include the peaceful enjoyment of one's existing residence'); and *Lazarenko a. O. v. Ukraine,* ECtHR 11 December 2012 (dec.), appl. no. 27427/02, para. 60 (complaint about losing right to occupy a flat after it was not occupied for six months held inadmissible).

2 *Gillow v. the UK*, ECtHR 24 November 1986, appl. no. 9063/80.

receive a long-term license, but their application was rejected. Could 'Whiteknights', as their house was called, be considered their 'home' for the purposes of Article 8 of the Convention? In answering this question, the Court stressed that the applicants

> 'had retained ownership of the house, to which they always intended to return, and had kept their furniture in it … [I]n 1956 the applicants had sold their former home in Lancashire and moved with their family and furniture to Guernsey … Furthermore, the Court is satisfied that they had not established any other home elsewhere in the United Kingdom. Although the applicants had been absent from Guernsey for almost nineteen years, they had in the circumstances retained sufficient continuing links with 'Whiteknights' for it to be considered their "home", for the purposes of Article 8 of the Convention, at the time of the disputed measures.'[3]

The applicants had lost their residence qualifications and due to alterations in the legislation were now required to obtain a license. This, as well as the refusal of the license combined with the eventual institution of criminal proceedings for unlawful occupation, the conviction of Mr Gillow and the imposition of a fine, constituted an interference with the applicants' right to respect for their home.[4]

The *Gillow* reasoning makes clear that for determining the scope of the right to respect for the home the Court takes into account different aspects of the applicants' situation. And although the circumstances in *Gillow* were very particular, it has referred to its interpretation in this case in many of its housing judgments.[5] Noteworthy in this regard is that in *Gillow*, the Court seemingly also attached weight to the legal situation by stressing that the applicants still owned the house and had sold the one they owned before moving to Guernsey.[6] However, this legal component – which arguably underlines the 'classic' character of the issue at stake in *Gillow* – has not turned out to be decisive, in the sense that it has become clear that even when there is no legal link whatsoever, the respect for the home limb of Article 8 can be engaged.

Indeed, in the 2008 case of *McCann v. the United Kingdom* the Court defined the notion of 'home' in explicitly *factual* terms.[7] Mr McCann and his wife had been joint and secure tenants until they divorced and the applicants' ex-wife eventually gave up the tenancy. Mr McCann had continued living in the house although he was no longer legally entitled to do so. The Court stressed that

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3 *Ibid.*, para. 46.
4 *Ibid.*, para. 47.
5 See, for some recent examples, *Zrilic v. Croatia*, ECtHR 3 October 2013, appl. no. 46726/11, para. 57; *Škrtic v. Croatia*, ECtHR 5 December 2013, appl. no. 61982/12, para. 21.
6 *Gillow v. the UK*, ECtHR 24 November 1986, appl. no. 9063/80, para. 46.
7 *McCann v. the UK*, ECtHR 13 May 2008, appl. no. 19009/04, para. 46.

'whether a property is to be classified as a "home" is a *question of fact* and does not depend on the lawfulness of the occupation under domestic law'.[8] This can also be seen in different Roma housing cases. In most of these cases the applicants had resided on a plot of land or site for a significant period of time – and with the intention to stay permanently – without initially establishing their home in a legal manner. Generally, this does not prevent the conclusion that the right to respect for the home is engaged.[9]

What is decisive in the end is the 'the existence of sufficient and continuous links with a specific place'.[10] This link may be met in case of 'temporary stays' or 'frequent absence',[11] or indeed in case of unlawful occupation. When a stay is interrupted *and* illegal, however, it is less likely that the Court nevertheless accepts that the 'sufficient and continuous link' requirement is met.[12]

The question that remains is: what if one does not have a place to stay in the first place? In a case concerning the allocation of a replacement flat in lieu of one that had been destroyed during the war, the Court's answer was that '[t]he interests protected by the notion of a "home" within the meaning of Article 8 include the peaceful enjoyment of one's *existing* residence'.[13] The complaint was declared inadmissible *ratione materiae*,[14] thereby showing that there are limits to the application of Article 8. The Court apparently sticks

8 *Ibid.* [emphasis added]. Therefore, 'the local-authority house which the applicant formerly occupied as a former tenant with his wife and where he lived on his own from November 2001 continued to be his "home", within the meaning of Article 8 § 1, despite the fact that following service by his wife of notice to quit he had no right under domestic law to continue in occupation'.

9 See, for the Court's interpretation of Art. 8 in Roma housing cases, *infra*, S. 8.3.1.

10 *Cf.*, for a recent example, *Lazarenko a. O. v. Ukraine,* ECtHR 11 December 2012 (dec.), appl. no. 27427/02, para. 53, referring to *Propkopovich v. Russia*, ECtHR 18 November 2004, appl. no. 58255/00, para. 36.

11 The Court has held that 'the length of temporary or permanent stays …, frequent absence … or … use on a temporary basis, for the purposes of short-term stays or even keeping belongings in it, do not preclude retention of sufficient continuing links with a particular residential place, which can still be considered 'home' for the purposes of Article 8 of the Convention'. See *Lazarenko a. O. v. Ukraine,* ECtHR 11 December 2012 (dec.), appl. no. 27427/02, para. 53, referring to *McKay-Kopecka v. Poland*, ECtHR 19 September 2006 (dec.), appl. no. 45320/99.

12 *Cf. Yordanova a.O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06 (discussed in, *infra*, S. 8.3.1), where it was argued that some applicants had resided elsewhere for a while. The Court emphasised that they had eventually returned and thus Art. 8 applied. But had they not, or had the period of absence been significant, it is likely that the Court would have concluded differently.

13 *Dukic v. Bosnia and Herzegovina*, ECtHR 19 June 2012, appl. no. 4543/09, para. 40 [emphasis added].

14 *Cf.* also *Loizidou v. Turkey*, ECtHR 18 December 1996, appl. no. 15318/89, para. 66, where the Court held that 'it would strain the meaning of the notion of "home" in Article 8 (art. 8) to extend it to comprise property on which it is planned to build a house for residential purposes. Nor can that term be interpreted to cover an area of a State where one has grown up and where the family has its roots but where one no longer lives'.

to a predominantly negative interpretation of this Convention right, at least where it concerns the 'home' aspect.[15]

Regardless of the provision's limits, however, the fact that the Court looks at a combination of the relevant factors for concluding whether something is to be considered a 'home' has at least created some *prima facie* room for review of social housing issues. As a result the right to respect for the home does not only provide *prima facie* protection to homeowners, or those legally residing in a house or a flat: a 'home' can also be the place where someone has been living for some time and where he wants to stay, not seldom because of a lack of alternatives.

Whether the interests of the individuals concerned obtain eventual protection depends on whether there was a 'pressing social need' and in particular on the proportionality of the interference.[16] In *Gillow*, for example, this meant that

> 'the economic well-being of Guernsey must be balanced against the applicants' right to respect for their "home", a right which is pertinent to their own personal security and well-being. The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Government.'[17]

Eventually, in this case the Court concluded that the decision to refuse the applicants permanent and temporary licences to occupy 'Whiteknights', as well as the conviction and the fining of Mr Gillow, constituted disproportionate interferences with the applicants' right to respect for their home.[18]

The fact that respect for the home is considered an important right relating to someone's 'personal security' and 'well-being', however, does not mean that this right will (almost) always prevail. A recent example of where the opposite conclusion was reached is the case of *Berger-Krall and Others v. Slovenia*.[19] This case concerned the privatisation of social dwellings and more particularly the Slovenian Housing Act, which had replaced specially-protected tenancies – which had allowed for lifelong use of the flats concerned against the payment of a fee covering maintenance costs and depreciation – with normal lease contracts. Former holders of these tenancies could continue to occupy their flats for a non-profit rent or buy the place against favourable conditions. For those whose dwellings had been expropriated after the Second World War the new system meant that they could only buy the flats when

15 Yet see, *e.g.*, the case of *Loizidou v. Turkey*, ECtHR 18 December 1996, appl. no. 15318/89, where the applicant could instead of on Art. 8 rely on Art. 1 P1.
16 *E.g.*, *Gillow v. the UK*, ECtHR 24 November 1986, appl. no. 9063/80, para. 55.
17 *Ibid.*
18 *Ibid.*, para. 58.
19 *Berger-Krall a.O. v. Slovenia*, ECtHR 12 June 2014, appl. no. 14717/04.

the previous owners would agree within a year from the moment restitution had taken place. Three of the applicants could be considered 'victims' of an alleged violation with their right to respect for their homes under Article 8, because as a result of the changes in the system they eventually had to leave their homes involuntarily.[20] Reviewing the proportionality of the interference, however, the Court eventually concluded that their rights had not been violated. In doing so it had regard to the fact that the new rents were significantly lower than free-market rents. Moreover, as to the new grounds for eviction, as well the exclusion of the possibility to transmit the right to a lease for a non-profit rent *mortis causa*, the Court held that this 'was aimed at ensuring a fair balance between the protection of the rights of the tenants on the one hand and those of the "previous owners" on the other'.[21]

Compared to *Gillow*, the Article 8 issue in *Berger-Krall* was of a more clearly social kind. It concerned the sensitive housing position of those who had formerly held specially-protected tenancies, while the countervailing interests related to the rights and needs of the persons who had previously owned the premises concerned. Yet even though the Court's reasoning suggests that it is willing to take the (potential) social hardship of the applicants into account,[22] in cases like this it is likely that the balance struck by the national authorities is left intact. However, in an effort to ensure effective protection, also when the issue concerned is of a precarious, social kind, the Court has held that in any case, the procedural safeguards provided to the individual(s) concerned must be adequate.[23] This also implies that

> 'a person at risk of losing his or her home should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his or her right of occupation had come to an end.'[24]

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20 *I.e.*, the first was evicted, while against the second an eviction order was issued. The third applicant that could be considered a 'victim' for the purposes of Art. 8, decided to vacate his flat after a judgment of the Supreme Court from which it followed that het was not entitled to continue the lease contract signed by his late father and thus had no title to occupy the premises. See, *ibid.*, para. 256.

21 *Ibid.*, para. 274.

22 In this regard it noted that 'none of the applicants has shown that the level of the non-profit rent was excessive in relation to his or her income', suggesting that this could be a relevant consideration. *Ibid.*, para. 208. Moreover, it considered relevant that rent subsidies were available for persons in financial difficulties (para. 210).

23 *Cf. Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04, para. 85 (see also, *infra*, S. 8.3.2).

24 *Berger-Krall a. O. v. Slovenia*, ECtHR 12 June 2014, appl. no. 14717/04, para. 270, referring to *Cosic v. Croatia*, ECtHR 15 January 2009, appl. no. 28261/06, paras. 21-23. See also, *e.g.*, *McCann v. the UK*, ECtHR 13 May 2008, appl. no. 19009/04, para. 50.

In the case of *McCann*, for example, the Court did not so much conclude that the measure McCann was confronted with as such was disproportional. Rather, it found a violation of the Convention because in reaching the decision to evict him the national authorities had failed to consider his needs.

Altogether, it can be said that by means of a broad interpretation of the right to respect for the home the Court has opted for a certain degree of indivisible protection. At the same time, when assessing the proportionality of sensitive housing complaints involving multiple social interests, the position of the Court generally demands that leeway is granted to the decisions made by the national authorities. The point that in such cases procedural requirements can be a feasible means for ensuring that basic needs are protected is further illustrated in Section 8.3, where the various Roma housing cases are discussed.

8.2.1.2 Private Life and Positive Obligations

Next to the right to respect for the home also the other aspects of Article 8 are relevant in the housing sphere. In this regard it is especially worth noting that the Court has recognised that also when it comes to housing issues the protection of 'private and family life' entails more than just negative obligations. Of particular importance in this regard is the case of *Marzari v. Italy*, which concerned a severely disabled person's request for adequate accommodation.[25] The applicant suffered from a rare illness of metabolic myopathy, was often forced to use a wheelchair and recognised as 100% disabled. After the building in which he lived had been expropriated, he had moved to another accommodation that in his view was inadequate to meet his special needs. He stopped paying his rent, which led to an eviction order. Eventually Mr Marzari lived in a camper for a while and was then hospitalised, but he refused to accept another apartment that was allocated to him. Marzari complained before the Court about the authorities' failure to provide him with adequate accommodation, notwithstanding a local law-based obligation to do so. The Court held that

> 'although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, *a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual*. The Court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the State to abstain from such

25 As will become apparent in the sections to follow, Article 8's private and family life limb as well as Article 3 and Article 1 of Protocol No. 1 have provided alternative routes towards protection under the Convention. See, *e.g.*, *Marzari v. Italy*, ECtHR 4 May 1999 (dec.), appl. no. 36448/97.

> interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter's private life.'[26]

Nevertheless, in the case of *Marzari* the Court concluded that the complaint was inadmissible. It stressed that it is not for the Court to review the decisions taken by the local authorities with regard to (the adequateness of) the housing that had become available. In this regard 'no positive obligation for the local authorities can be inferred from Article 8 to provide the applicant with a specific apartment'.[27]

It may be inferred from *Marzari* that while the right to respect for the home demands that there is an existing home,[28] respect for private life may demand positive state action even if – or especially when – someone does not have a place to live.[29] For this to be the case it is required that there is a 'direct and immediate link' between the latter provision and the housing measures an applicant demands.[30] However, the Court's conclusion in *Marzari* that the refusal of housing assistance to persons suffering from a severe disease *may* raise an issue under Article 8 does not provide much guidance as to what this more concretely entails. It fails to provide content to the positive obligations that apparently follow from this article by not explaining what should at minimum be done or guaranteed. The Court's final conclusion that in *Marzari* there is no obligation to provide the applicant with a specific apartment is not very helpful either.[31] One might cautiously infer from the Court's decision that instead of a specific apartment, at least some – according to the authorities

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26 *Ibid.* [emphasis added], referring to *Botta v. Italy*, ECtHR 24 February 1998, appl. no. 21439/93, paras. 33-34. *Botta* concerned disabled persons who, during their vacation, could not access the sea. The Court also there made mention of possible positive obligations in this sphere once there is a direct link with someone's private life, but concluded that the case was inadmissible. According to the Court, the case 'concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the state was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life' (para. 35).

27 *Marzari v. Italy*, ECtHR 4 May 1999 (dec.), appl. no. 36448/97.

28 Indeed, as was noted above, 'home' refers to an existing home, see *Dukic v. Bosnia and Herzegovina*, ECtHR 19 June 2012, appl. no. 4543/09, para. 40.

29 Even though in *Marzari* there existed an obligation under provincial law to offer adequate accommodation to persons recognised as 100% disabled, the Court's wording does not suggest that this was material in recognising the possibility of a positive obligation. It explicitly stated that an issue may be raised 'under Article 8 of the Convention', without referring to the provincial statute. See, *Marzari v. Italy*, ECtHR 4 May 1999 (dec.), appl. no. 36448/97.

30 *Botta v. Italy*, ECtHR 24 February 1998, appl. no. 21439/93, paras. 33-34.

31 *Cf.* Frohwerk 2012, p. 134, who notes that the negative determination of the Court – that the state had fulfilled its positive obligations – does not further clarify the applicable requirements and criteria.

appropriate – housing should be offered. Yet as the Court is not explicit, this merely remains a matter of guessing.

Also the case of *O'Rourke v. the United Kingdom* signals the potential of Article 8 for positive, indivisible protection, although the conclusion again was that the case was inadmissible.[32] After having been released from prison, O'Rourke had applied for accommodation. Due to his health condition he had a priority need and accommodation was offered in a hotel, until O'Rourke was evicted after complaints had been made about his behaviour. Several other (bed-sit and temporary) accommodations were suggested, but the applicant refused the offers and became homeless. With regard to Article 3 ECHR, the Court stated that the applicant's situation had not attained the requisite level of severity to engage this article.[33] Moreover, even if this had been the case, the applicant was 'largely responsible for his own deterioration following his eviction'.[34] The Court repeated, however, that an issue under Article 8 might arise when housing assistance to an individual suffering from a serious disease is refused, because of the impact of such refusal on his private life. In this context it was considered important that Article 8 does not lay down a right to be provided with a home, and that therefore 'the scope of any positive obligation to house the homeless must be limited'.[35] In *O'Rourke*,

> 'to the extent that there was any positive obligation to accommodate the applicant when he first contacted CLBC [the Camden London Borough Council] in early 1991, this was discharged by the provision of temporary hotel accommodation to the applicant pending the statutory inquiries into whether or not he was homeless, and thus entitled to permanent accommodation.'[36]

Like *Marzari*, *O'Rourke* suggests that states have a (limited) duty to do at least 'something' in case a seriously ill person is in need of a home.[37] Again, however, this must read between the lines of the decision, let alone that it becomes clear when exactly this obligation is triggered and what it more concretely entails.

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32 *O'Rourke v. the UK*, ECtHR 26 June 2001 (dec.), appl. no. 39022/97.

33 See, for some examples of where the protection of Art. 3 was triggered, *infra*, S. 8.2.4.

34 *O'Rourke v. the UK*, ECtHR 26 June 2001 (dec.), appl. no. 39022/97. Homelessness as such, it can be argued, does not reach the level of severity needed in order to trigger the application of the prohibition of inhuman treatment.

35 *Ibid*.

36 *Ibid*.

37 *Ibid*. *Cf.* Frohwerk 2012, p. 132: 'Der Fall ermöglicht mit der Anknüpfung an den individuellen Gesundheitszustand des Beschwerdeführers eine Konkretisierung des Anspruchs auf eine Wohnung: Im Vordergrund der Entscheidung steht kein "Recht auf Wohnung", sondern eine konventionsrechtliche Bewertung des staatlichen Verhaltens im Umgang mit der konkreten Situation. Diese bewusst offen und unbestimmt formulierte Entscheidung präzisiert jedoch erneut keine Anforderungen an einen konventionsrechtlich geforderten Umgang mit sozialen Notlagen.'

The recognition of potential positive requirements under Article 8 in the housing sphere is not limited to situations involving persons who are suffering from a serious disease. Further potential positive obligations might for example be found in cases concerning restitution issues.[38] Moreover, also for the protection of other vulnerable individuals and groups the doctrine of positive obligations has proven relevant. For example, in *Codona v. the UK*[39] the Court stated that it 'does not rule out that, in principle, Article 8 could impose a positive obligation on the authorities to provide accommodation for a homeless gypsy which is such that it facilitates their "gypsy way of life"'.[40] As will be further illustrated in Section 8.3, however, also in cases concerning Roma it can be seen that the Court generally does not say more than that a positive obligation *might* arise, to then jump to the specific circumstances of the case in order to decide whether these do or do not amount to a breach of Article 8.

Altogether, thus, it appears that the Court does not treat the issue of positive obligations as a matter of interpretation (or standard-setting) in the sense that it has clarified what the Convention *prima facie* demands, to then see whether an omission by the state (in the light of this standard) was justified. Instead, it determines the admissibility of a case with the help of a relatively amorphous 'threshold requirement', namely the requirement of a 'direct and immediate link'. However, it can be asked whether this requirement, together with a vague notion of positive obligations, can form a sufficient starting point for reviewing the proportionality of the broad variety of cases it potentially brings within the scope of the Convention.

8.2.2 Homeowners, Leaseholders, Landlords, and Article 1 P1 ECHR

A great bulk of the ECtHR's case law concerning housing relates to Article 1 of Protocol No. 1 ECHR, which contains the right to protection of property. However, in this chapter this article is given only limited attention as most of the issues concerned involve negative protection and 'naturally' fall within the scope of the Convention.[41] 'Classical' interferences with the rights of house owners generally fail to illustrate the type of tension this chapter – or in fact this entire book – is about, namely the tension between the limited role of the

38 *Cf. Cvijetic v. Croatia*, ECtHR 26 February 2004, appl. no. 71549/04. However, this positive obligation was of a rather different, less 'social' kind, as it concerned the obligation to execute court judgments in this context. See also Buyse 2008, p. 60ff. See also *Pibernik v. Croatia*, ECtHR 4 March 2004, appl. no. 75139/01.

39 *Codona v. the UK*, 7 February 2006 (dec.), appl. no. 485/05.

40 *Ibid.* (where the complaint of a Roma person who was offered bricks and mortar accommodation instead of another site for her caravan was held inadmissible).

41 After all, it the case of homeowners interferences with their property rights will be reviewed *qua* interferences with their property rights (and not housing interests) under Art. 1 P1 of the Convention.

Court and the need for effective and indivisible, but also principled social protection. This notwithstanding, it is interesting to highlight a few property rights cases that, although in a more indirect manner, leave some room for social housing concerns. First of all, the Court in some instances has been willing to review the cases of lessees and of formerly protected tenants, rather than only those of house owners. Second, social interests can be said to play a background role in determining whether a fair balance has been struck between the rights of the individual and the general interest.

What can be considered a 'possession' for the purposes of Article 1 P1 of the Convention is explained by the Court in an autonomous matter. As will be elaborately discussed in Chapter 10, this has the important effect that also social benefits, regardless of whether these are based on prior payments, are covered by the scope of this article.[42] In the context of housing, whereas normally only those who own a house or flat appear to profit from the protection of article 1 P1, the broad interpretation of the Court has also created some possibilities for those who do not own such rights. The case of *Stretch v. the United Kingdom*, for example, concerned a lessee who had contracted to lease 22 years ago and had erected a number of buildings on the land concerned.[43] When he was deprived of the benefit of a renewal option on his lease it was not his ownership of the land, but rather the fact that he had 'at least a legitimate expectation of exercising the option to renew' that made that the protection of property applied.[44]

A more interesting example regarding the applicability of Article 1 P1, however, is the recent case of *Berger-Krall and Others v. Slovenia*, which has also been mentioned in discussing the relevance of Article 8 of the Convention in the housing sphere.[45] In this case the applicants complained that in the process of the privatisation of social dwellings they had been deprived of their specially protected tenancy without receiving adequate compensation. The question was hence whether this tenancy – allowing for lifelong use of the flats concerned against the payment of a fee covering maintenance costs and depreciation, and which also entailed possibilities for transferring the right to lease *inter vivos* and *mortis causa* – could be considered a possession obtaining *prima facie* protection under Article 1 P1. In this regard the government stated, amongst other things, that '[e]ven though it might be difficult to compare anachronistic concepts of socially-owned property with traditional property in a democratic society, it was clear that the occupancy right was, mutatis mutandis, more akin to a tenancy'.[46] Nevertheless, the Court refrained from

42 *Infra*, Ch. 10, and especially S. 10.3.1 and 10.4.1.
43 *Stretch v. the UK*, ECtHR 24 June 2003, appl. no. 44277/98.
44 *Ibid.*, para. 35.
45 *Berger-Krall a.O. v. Slovenia*, ECtHR 12 June 2014, appl. no. 14717/04. See, *supra*, S. 8.2.1.1.
46 *Ibid.*, para. 121.

answering the interpretation question and held that it 'does not consider it necessary to examine the government's objection of incompatibility ratione materiae since it has come to the conclusion that, even assuming Article 1 of Protocol No. 1 to be applicable, the requirements of this provision were not violated'.[47] What then followed was a discussion of the interference with the applicants' interests, although it was not clear whether these were in fact protected under the Convention and accordingly allowed for such review in the first place.

The two judges who wrote a separate opinion in *Berger-Krall* (one concurring and one dissenting) consider the approach taken by the Court far from ideal. At least, this is what can be inferred from the fact that both make a serious effort to answer the 'possessions question'. In brief, Judge Yudkivska distils from previous case law the rule that a special tenancy constitutes a property right as long as it entails a reasonably practical possibility of acquiring an apartment.[48] As such a possibility did not exist in *Berger-Krall*, there had not been a reason for the Court to review the issue. On the other hand, Judge Zupancic argued that when considering the situation as a whole, *i.e.*, by combining the different (factual) elements of the case at hand, the Court should have held that Article 1 P1 applied.[49] Arguably, the latter option is the more social one, allowing the Court to take into account the severity of the applicant's loss for deciding whether a tenancy was protected *qua* property right under the Convention. Judge Yudkivska's approach, however, would be the more principled one, in the sense that it lays down a general rule allowing for a more transparent decision on whether or not a property right is concerned. Arguably, indeed, for determining what amounts to 'property' – and this may be different when the interpretation of 'home' or 'private life' is concerned – not all considerations related to situation of the applicants seem to be relevant. In any case, it seems important that the Court provides some more clarity on this matter.

Next to its interpretation, it can be asked whether also the Court's review of cases under Article 1 P1 in any way signals protection of housing needs. When the Court reviews an issue concerning an interference with the rights of a landowner or homeowner, or the expropriation of a house, the question it asks is whether a fair balance has been struck between the different interests concerned. When property rights are interfered with by means of social housing legislation that for example sets a ceiling on rent levels, the state will in prin-

47 *Ibid.*, para. 135.
48 *Ibid.*, concurring opinion of Judge Yudkivska.
49 *Ibid.*, dissenting opinion of Zupancic.

ciple be granted a wide margin of appreciation.[50] Indeed, the paradoxical effect of this is that the housing needs of those who benefit from this legislation thereby obtain (indirect) Strasbourg protection. Sometimes, however, the Court is willing to let the rights of landowners and homeowners prevail. This can be the case when they only receive a very low level of rent, which can potentially be said to cause financial hardship.[51] Also when house owners need their property for housing themselves and their families, but are prevented from evicting their tenants, their needs may play an indirect role in assessing the proportionality of the interference with Article 1 P1.[52]

A final example that can be given of the social housing dimension of the right to protection of property is the case of *Gladysheva v. Russia*.[53] This case concerned an applicant whose title to her flat was invalidated because of fraud in the procedures in which the flat was privatised by a third party, following the discovery of forged documents. In discussing the proportionality of this interference, the Court had regard to the fact that 'the applicant has been stripped of ownership without compensation, and that she has no prospect of receiving replacement housing from the State'.[54] Besides the errors made by the state, this played a role in finding a violation of her right to respect for her property. However, by discussing the social effects of the interference in *Gladysheva* primarily in relation to the applicant's complaint under Article 8,[55] the Court's reasoning in this case also confirms that that is in fact the most appropriate place for dealing with housing needs. Altogether, thus, as the focus logically lies on property rights review, there is little reason for applicants concerned about their housing situation, to (only) rely on Article 1 P1 of the Convention.

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50 *Cf. James a. O. v. the UK*, ECtHR 21 February 1986, appl. no. 8793/79, para. 46. Also, the Court held that '[t]he margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes, even where such legislation interferes with existing contractual relations between private parties and confers no direct benefit on the State or the community at large' (para. 47). *Cf.* also *Mellacher a. O. v.* Austria, ECtHR 19 December 1989, appl. nos. 10522/83, 11011/84 and 11070/84, and Nobel *a. O. v. the Netherlands*, ECtHR 2 July 2013 (dec.), appl. nos. 27126/11, 28084/12, 81046/12 and 81049/12.

51 See *Hutten-Czapska v. Poland*, ECtHR (GC) 19 July 2006, appl. no. 35014/97; *Lindheim a. O. v. Norway*, ECtHR 12 June 2012, appl. nos. 13221/08 and 2139/10.

52 *Cf. Velosa Barreto v. Portugal*, ECtHR 21 November 1995, appl. no. 18072/91 (concerning an applicant who had inherited property he wanted to use to house his family); *Scollo v. Italy*, ECtHR 28 September 1995, appl. no. 19133/91 (In this case the applicant was jobless and 71% disabled, and wanted to evict his tenant so that he could use his property for himself. In this case the Court found a violation of Article 1 P1, although the reason for this was in fact that although there had been a 'declaration of necessity', the authorities had taken no action to evict the tenant.).

53 *Gladysheva v. Russia*, ECtHR 6 December 2011, appl. no. 7097/10.

54 *Ibid.*, para. 80.

55 *Ibid.*, paras. 90-97.

8.2.3 Social Protection Through Article 14 ECHR

Besides the Court's interpretation of 'home' and the (other) developments under Articles 8 and 1 P1 there is more that illustrates the 'socialisation' of the Convention in relation to housing issues. What cannot go unnoticed here is the role of Article 14 ECHR. As was explained in Chapter 2, this article provides for non-self-standing protection against discrimination, *i.e.*, it can only be invoked together with another substantive article of the Convention.[56] However, it does go further than these substantive articles, in the sense that even when a complaint does not fall within the 'scope' of for example the right to respect for private life, it might still fall within its broader 'ambit' and thereby trigger the applicability of Article 14. This allows for the recognition of 'social' Convention requirements in the housing sphere: even when there is no obligation under Article 8 or Article 1 P1 to provide for certain housing arrangements, once such arrangements have been created they must be provided in a non-discriminatory fashion.[57]

A clear example of how this 'socialisation' via the non-discrimination principle works is the 1999 Grand Chamber judgment in *Larkos v. Greece*.[58] The issue at stake concerned a civil servant who was a tenant of the state. When he retired, Mr Larkos' tenancy agreement was terminated and his eviction was ordered. He complained that he had been confronted with unjustified discrimination in the enjoyment of his right to respect for his home as he did not obtain the protection of the Rent Control Law 1983 that 'private' tenants received. Although the Convention does not require such protection, the Court held that the issue fell within the ambit of Article 8 and that therefore, Article 14 applied. It concluded that the applicant was in a similar situation to that of private tenants.[59] His tenancy agreement resembled a normal landlord and tenant agreement; it had not been argued that he paid less than the market rate and the state had rented out the property in a private law capacity.[60] The agreement moreover did not mention that it was dependent on Mr Larkos' capacity as a civil servant or that his retirement would mean the end of his lease. Discussing the possible justification for the difference in treatment made, the Court noted that 'the Government have not provided any convincing explanation of how the general interest will be served by evicting the applicant'.[61] Regardless of the margin of appreciation in the area of the

56 *Supra*, Ch. 2, S. 2.4.2.2.
57 Van Dijk et al. 2006, p. 1051; Arnardóttir 2014.
58 *Larkos v. Greece*, ECtHR (GC) 18 February 1999, appl. no. 29515/95.
59 *Ibid.*, para. 30.
60 *Ibid*. *Cf.*, in contrast, *J.L.S. v. Spain*, ECtHR 27 April 1999 (dec.), appl. no. 41917/98.
61 *Larkos v. Greece*, ECtHR (GC) 18 February 1999, appl. no. 29515/95, para. 31.

control of property, it found a violation of Article 14 in conjunction with Article 8.[62]

Another interesting case that illustrates the socialising potential of Article 14 is *Karner v. Austria*.[63] In Austria, under certain conditions a 'life companion' was entitled to succeed the tenancy after the death of his partner. However, the Austrian Constitutional Court had found that this possibility did not apply in the case of same-sex partnerships, because at the time the Rent Act was enacted, the legislator's intention was not to include homosexuals. The third parties intervening in this case, the non-governmental organisations ILGA-Europe, Liberty and Stonewall, had submitted that a strong justification was required when the ground for a distinction was sex or sexual orientation. The Court went along with this argument and held that even when the aim could be understood to be the protection of the family, no arguments had been advanced that excluding homosexuals was necessary to achieve that aim.[64] For complying with the Convention, thus, entitlements to succession had to be extended to this group.

Both *Larkos* and *Karner* show that protection against discrimination on the basis of Article 14 can be important when it comes to the fragile position of (certain groups of) tenants. Koch has noted, however, that *Larkos* and *Karner* also have in common that they both concern situations in which the applicants were already living in the flats in question.[65] For this reason the cases can be seen as merely involving 'negative' protection.[66] At the same time, it is obvious that there is a more positive aspect involved as well because the state is required to extend the protection offered by the relevant laws. Although the respective legal entitlements cannot be said as such to be required under the Convention, their provision is demanded in order for the state to comply with the non-discrimination requirement. Moreover, on the basis of the Court's reasoning it can be argued that also measures of a distinctively positive kind, *e.g.*, (access to) social housing or housing benefits, must meet the requirement

62 *Ibid.*, paras. 31-32. The applicant had also invoked Art. 14 in conjunction with Art. 1 P1 because according to him the protection against evictions amounted to 'possessions'. The government argued that there was no link with the protection of property whatsoever. The Court, finally, concluded that because of its decision concerning Art. 14 and Art. 8 there was no need to give separate consideration to this complaint.

63 *Karner v. Austria*, ECtHR 24 July 2003, appl. no. 40016/98.

64 *Ibid.*, paras. 37- 41. See also *Kozak v. Poland*, ECtHR 2 January 2010, appl. no. 13102/02. *Cf.* also *Korelc v. Slovenia*, ECtHR 15 December 2009, appl. no. 28456/03. In this case the complaint of the applicant, that for discriminatory reasons he could not succeed the tenancy as there had not been a 'long-lasting life community', was held manifestly ill-founded. He was not in a homosexual relationship with his former housemate, and the application was not dismissed on the basis of gender, but because this relation was not characterised as a 'long-lasting life community'.

65 Koch 2009, p. 127.

66 *Ibid.*

of non-discrimination.[67] This was confirmed in the case of *Bah v. the United Kingdom*, about a woman who had been denied priority treatment under the housing legislation because of her son's conditional immigration status.[68] Here the Court held that 'there is no right under Article 8 of the Convention to be provided with housing', but if a state provides benefits, 'it must do so in a way that is compliant with Article 14'.[69] Thereby it underlined that the potential of the principle of non-discrimination in terms of social protection cannot be overlooked.[70]

However, in determining whether in *Bah* the Convention was violated, the ECtHR took a cautious stance. It emphasised that 'any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need',[71] and that states may justifiably 'limit the access of certain categories of aliens to "resource-hungry" sources', amongst which social housing can be counted.[72] The Court held that the fact that Bah was not granted priority need because of the presence in her household of her son, whose leave to enter the United Kingdom was granted expressly conditional upon his having no recourse to public funds, was not arbitrary.[73] Important was also that in case Ms Bah's risk of becoming homeless would have materialised, the applicable legislation would have required assistance from the local authorities.[74] Finally, because her situation in fact did not seem to have turned out worse than in case she would have been given priority need, the Court concluded that the interference had not been disproportionate and that Article 14 in conjunction with Article 8 had not been violated.[75]

What the judgment in *Bah* shows is that regardless of the broad applicability of Article 14, the non-discrimination principle by no means always provides an easy route towards eventual protection under the Convention. Phrased differently, according to the Court unequal treatment in the field of housing frequently does not amount to discrimination prohibited under the Convention. This has to do with the fact that housing laws will always distinguish between different groups of persons, and often these distinctions cannot be called arbitrary. Especially when costly social measures are concerned, moreover, the subsidiary role of the Court makes that it is hesitant to interfere with decisions made at the national level. This may be different when a distinction

67 *Ibid.*, who refers to *Petrovic v. Austria*, ECtHR 27 March 1998, no. 156/1996/775/976, that dealt with a right to parental leave under Art. 8 ECHR.
68 *Bah v. the UK*, ECtHR 27 September 2011, appl. no. 56329/07.
69 *Ibid.*, para. 40.
70 Consider moreover also the potential of Protocol No. 12, see, *supra*, Ch. 2, Sections 2.4.2.2 and 2.6.1.
71 *Bah v. the UK*, ECtHR 27 September 2011, appl. no. 56329/07, para. 49, referring to *Runkee and White v. the UK*, ECtHR 10 May 2007, appl. nos. 42949/98 and 53134/99, para. 39.
72 *Bah v. the UK*, ECtHR 27 September 2011, appl. no. 56329/07, para. 49.
73 *Ibid.*, para. 50.
74 *Ibid.*, para. 51.
75 *Ibid.*, paras. 51-52.

is made on a 'suspect ground', which requires 'very weighty reasons' as a justification.[76] However, as *Bah* shows, grounds of distinction in the field of social policy are by no means always 'suspect'.[77] Therefore, but also because 'the provision of housing to those in need … is predominantly socio-economic in nature',[78] a wide margin of appreciation will generally be granted, which in turn means that a violation is often unlikely to be found.

8.2.4 Minimum Protection Under Article 3 ECHR?

Finally, before moving to a case study of Roma housing and the role of the Convention therein, it is useful to highight the relevance of Article 3 ECHR in relation to housing rights. At first glance, the 'prohibition of torture, inhuman and degrading treatment or punishment' has little to do with a socio-economic issue like housing. This is because, first, the term 'treatment' suggests that the state should be actively engaged in order for the protection of this article to be triggered. Second, the terms 'torture', 'inhuman' and 'degrading', combined with the absolute character of Article 3 ECHR, indicate that only a very small subset of complaints will actually be serious enough for even coming close to being protected. As was already indicated in Chapter 2, only when a situation reaches a 'minimum level of severity', protection under Article 3 can be granted.[79] Nevertheless, there are several judgments that show that this provision in some circumstances can be relevant also when housing issues are concerned.

Firstly, Article 3 has played a role in the housing sphere where homes were destroyed and the state could be held responsible. In *Selçuk and Asker v. Turkey* a violation of this provision was found where, as part of a security operation, the security forces had destroyed the home and property of the applicants.[80] This was done in a contemptuous manner, in the presence of the applicants, and without having sufficient regard to their safety.[81] The special circumstances, including the age of the applicants and the fact that they had been living in the village all their lives, played an important role in concluding that

76 *Cf. Karner v. Austria*, ECtHR 24 July 2003, appl. no. 40016/98.

77 However, also in *Bah* the applicant had held that the distinction concerned was based on the ground of nationality. The Court instead held that the relevant ground was 'immigration status', thereby allowing for a less rigid test that could lead to the conclusion that there had not been a violation.

78 *Bah v. the UK*, ECtHR 27 September 2011, appl. no. 56329/07, para. 47.

79 *Supra*, Ch. 2, S. 2.4.3.2 (see also, *infra*, Ch. 9, S. 9.2.2; Ch. 10, S. 10.2.2) (see *Ireland v. the UK*, ECtHR 18 January 1978, appl. no. 5310/71, para. 162).

80 *Selçuk and Asker v. Turkey*, ECtHR 24 April 1998, appl. nos. 23184/94 and 23185/94.

81 *Ibid.*, para. 77.

in this instance the minimum level of severity threshold was met and that there had hence been a breach of Article 3.[82]

It must be noted that he case of *Selçuk and Asker* can be considered a 'classic' rights issue, concerning an interference – or indeed 'treatment' – by the state with the personal sphere of the applicants. The truly 'social' housing dimension of this case is hence negligible. Interesting is, however, that is has become clear that not only the actual destroying of houses in cases like this can lead to a finding of a violation of Article 3. The case of *Moldovan and Others v. Romania* also involved applicants whose houses and property had been burned.[83] The result of this was that for years they had no choice but

> 'to live in hen-houses, pigsties, windowless cellars, or in extremely cold and deplorable conditions: sixteen people in one room with no heating; seven people in one room with a mud floor; families sleeping on mud or concrete floors without adequate clothing, heat or blankets; fifteen people in a summer kitchen with a concrete floor … etc.'[84]

Importantly, while the Court in *Moldovan* could not review the actual destruction of the homes, because at the time this happened Romania had not yet ratified the Convention,[85] the living conditions of the applicants formed the reason why Article 3 had been violated.[86] In other words: rather than the actual 'interference' (the destruction of homes), the 'social' results thereof triggered the application of 'the prohibition of inhuman and degrading treatment'. Albeit in a very case-specific manner, this Article 3 case thereby clearly shows the socialising potential of the Convention.

Also in a different context the ECtHR's case law shows that matters concerning living conditions and housing can raise an issue under Article 3 ECHR. It was already briefly mentioned in Chapter 2,[87] and will be further elaborated in

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82 *Ibid.*, para. 78. *Cf.* also the cases of *Bilgin v. Turkey*, ECtHR 16 November 2000, appl. no. 23819/94 and *Dulas v. Turkey*, ECtHR 30 January 2001, appl. no. 25801/94, both of which dealt with similar fact patters and in which the Court also concluded on violations of Art. 3. In *Orhan v. Turkey*, ECtHR (GC) 18 June 2002, appl. no. 25656/94, para. 362, the Court however did 'not find … distinctive elements concerning the age or health of the applicant or the Orhans or specific conduct of the soldiers vis-à-vis either of those persons which could lead to a conclusion that they had suffered treatment contrary to Article 3 of the Convention'.

83 *Moldovan a.O. v. Romania*, ECtHR 12 July 2005, appl. nos. 41138/98 and 64320/01.

84 *Ibid.*, para. 69.

85 *Ibid.*, para. 102.

86 More precisely, 'the Court finds that the applicants' living conditions and the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities, constitute an interference with their human dignity which, in the special circumstances of this case, amounted to "degrading treatment" within the meaning of Article 3 of the Convention'. *Ibid.*, para. 113.

87 See, *supra*, Ch. 2, S. 2.5.2.1.

Chapter 10 on social security,[88] that cases like *Laroshina v. Russia*, *Budina v. Russia* and *M.S.S. v. Belgium and Greece* highlight that when someone is dependent on state support and faces 'serious deprivation or want incompatible with human dignity', a responsibility for the state *could* arise.[89] In the case of *M.S.S.*, the Court concluded that although there is no general obligation to give refugees financial assistance,[90] in this case the applicant refugee was confronted with such deplorable circumstances that Article 3 had nevertheless been breached. After having been sent back to Greece, he had spent months in extreme poverty, while being unable to cater for his most basic needs, like a place to stay. What can be inferred from this is that when someone lacks the means for providing basic shelter and the authorities are unwilling to respond to this situation, the prohibition of inhuman treatment may be violated. Phrased differently, the Convention seemingly entails some kind of minimum socio-economic protection – at least when vulnerable, dependent individuals are concerned.

Recently the Court has confirmed that this line of reasoning is relevant when in particular the right to housing or to appropriate accommodation is concerned. In the 2014 case of *Tarakhel v. Switzerland*, the Court held that returning an Afghan family to Italy without individual guarantees concerning their accommodation would be in violation of Article 3 of the Convention. The Court repeated that the Convention does not oblige the Member States to provide everyone within their jurisdiction with a home,[91] and that Article 3 does not entail 'any general obligation to give refugees financial assistance to enable to maintain a certain standard of living'.[92] At the same time it placed particular weight upon the fact that the applicant belonged to a 'particularly underprivileged and vulnerable population group in need of special protection'.[93] Moreover, the requirement of special protection for asylum seekers 'is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability'.[94] In line with this,

88 See, *infra*, Ch. 10, S. 10.2.2, respectively.

89 *M.S.S. v. Belgium and Greece*, ECtHR (GC) 21 January 2011, appl. no. 30696/09, para. 253; *Budina v. Russia*, ECtHR 18 June 2009 (dec.), appl. no. 45603/05 and *Laroshina v. Russia*, ECtHR 23 April 2002 (dec.), appl. no. 56869/00. On *M.S.S.* see, *e.g.*, Clayton 2011 and (critically) Bossuyt 2012.

90 See *M.S.S. v. Belgium and Greece*, ECtHR (GC) 21 January 2011, appl. no. 30696/09, para. 249.

91 *Tarakhel v. Switzerland*, ECtHR (GC) 4 November 2014, appl. no. 29271/12, para. 95, referring to *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95, para. 95.

92 *Tarakhel v. Switzerland*, ECtHR (GC) 4 November 2014, appl. no. 29271/12, para. 95, referring to *Müslim v. Turkey*, ECtHR 26 April 2005, appl. no. 53566/99, para. 85; *M.S.S. v. Belgium and Greece*, ECtHR (GC) 21 January 2011, appl. no. 30696/09, para. 249.

93 *Tarakhel v. Switzerland*, ECtHR (GC) 4 November 2014, appl. no. 29271/12, para. 97.

94 *Ibid.*, para. 119: 'This applies even when, as in the present case, the children seeking asylum are accompanied by their parents' (*cf. Popov v. France*, ECtHR 19 January 2012, appl. nos. 39472/07 and 39474/07, para. 91).

> 'the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not "create … for them a situation of stress and anxiety, with particularly traumatic consequences" … Otherwise the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention.'[95]

Switzerland did not possess sufficient assurances regarding the adequacy of the specific facility of destination, and sending the applicant family back to Italy would hence be in violation of Article 3 of the Convention.

The judgment in *Tarakhel* has not been received with much enthusiasm. It confirms, however, that especially when vulnerable individuals and groups are concerned, a failure to provide an absolute *minimum* level of social provision seems to be contrary to Article 3 ECHR. Indeed, the Court does not say this in so many words, and it can be asked whether more clarity in this regard could not enhance the transparency as well as the acceptability of its reasoning.

8.3 Housing and Roma: A Case Study

It is well-known that Roma form a vulnerable group in need of special protection. According to the Parliamentary Assembly of the Council of Europe '[t]he Roma people are still regularly victims of intolerance, discrimination and rejection based on deep-seated prejudices in many Council of Europe member states'. For that reason,

> '[t]he situation of Roma with regard to education, employment, housing, health care and political participation is far from satisfactory. The Assembly is convinced that effective and sustainable access to education and decent housing are the first decisive steps towards breaking the vicious circle of discrimination in which most of the Roma are locked.'[96]

The lack of housing or access thereto for Roma – whether or not caused by discrimination – has been and remains one of the critical problems concerning this group. Because of the precarious housing situation of great numbers of Roma, combined with the fact that their particular way of settling is integral to their identity, this issue is intimately linked to their fundamental rights and dignity.

This section presents a case study of the Strasbourg cases that explicitly deal with Roma housing. The reason why particularly this subset of the Court's housing case law was selected for in-depth analysis, is that it brings together various developments discussed in the previous part of this chapter, thereby

95 *Tarakhel v. Switzerland*, ECtHR (GC) 4 November 2014, appl. no. 29271/12, para. 119.

96 Resolution 1740 (2010) of the Parliamentary Assembly of the Council of Europe on 'The situation of Roma in Europe and relevant activities of the Council of Europe'.

allowing a good insight in the Court's approach as well as the shortcomings of its reasoning. As most cases relating to housing, the Roma housing cases generally are of a more 'negative' or 'classic' kind, involving claims to avoid or redress evictions. Most of them, however, also contain a more 'positive', or 'social' aspect. This is the case because what underlies the negative issue is frequently the question whether the state should provide for (suitable) alternative housing or other solutions when it wants to evict Roma illegally residing on a plot of land. It will become clear that the different Roma cases concern complex social policy and planning matters. This is one of the reasons why the Court does not always allow the applicants' claims, even when they live in conditions of severe distress. At the same time, it can be noted that, more recently, the Court seems to have started to accord more weight to the specific interests of the vulnerable group of Roma.

Below it will be asked how the Court's 'effectiveness' and 'indivisibility' approaches play out in its dealing with Roma housing issues at the different adjudicational stages. Article 8, protecting the right to respect for the home, private and family life, most of the time forms the starting point for a Roma housing complaint. How does the Court, in this context, explain this right and does it provide for a definition of any positive aspects thereof? How does it balance the general interests at stake against the fundamental interests of the applicants? These questions and the issues mentioned in the introduction to this chapter, *i.e.*, transparency, consistency, and the room for minimum core protection, will be central to this section. First, the question regarding the Court's interpretation will be answered (8.3.1). Thereafter, attention is had to the way the Court approaches the matter of proportionality, with a particular focus on the role accorded to the social interests of the Roma people concerned (8.3.2). Finally, the role and the scope of the margin of appreciation in Roma housing cases will be illuminated (8.3.3).

8.3.1 Article 8 ECHR and Roma Housing

For obtaining a fair picture of the interpretation of the Convention in the context of Roma housing cases, three issues must be noted. First, in most of the Roma housing cases land was occupied without the individuals involved having any legal permission to do so. This triggered the question whether the right to 'respect for the home' also involves respect for an 'unlawful' home, or applies when a caravan is placed on land belonging to someone else. As was already indicated in Section 8.2.1.1, whether something can be called 'home' depends on the factual links a person has with his place of residence,[97] and the cases discussed below indeed confirm that the legality of the occupa-

97 See, *infra*, S. 8.2.1.

tion is anything but decisive. Secondly, a question has been whether also the private and family life limb of Article 8 should apply to Roma housing cases. This is especially relevant because next to the loss of one's home, the removal of Roma mostly also affects their lifestyle and frequently has the effect that long time communities are being broken down. Finally, it appears that sometimes not just the prohibition or disproval of a (future) removal is requested, but indirectly also the provision of alternative housing, *i.e.*, of housing suited to the customs and traditions of Roma. To what extent does a right to respect for one's home or private and family life include positive aspects concerning the provision of 'suitable' Roma housing? And importantly, to what extent is the Court clear about this at the interpretation stage, when it discusses the *prima facie* content of these rights?

The first Roma housing case the Court had to deal with was the 1996 case of *Buckley v. the United Kingdom*.[98] This case concerned the complaint of an applicant who was not given a planning permission and as a result was not allowed to stay in the caravan she had stationed on a piece of land she owned. Instead, Mrs Buckley was requested to apply for a spot at the official site designated for Roma nearby, a site she claimed was unsuitable for a single woman with children because of the crime and violence occurring there. The applicant had submitted that 'there was nothing in the wording of Article 8 or in the case law of the Court or Commission to suggest that the concept of "home" was limited to residences which had been lawfully established'.

The Court referred to the case of *Gillow v. the United Kingdom* discussed in Section 8.2.1.1. In this case it had held that the right to respect for the home was involved, even though the applicants had not lived in their house on Guernsey for quite a while. Important was that they had returned to live there with a view to taking up permanent residence.[99] Contrary to that of the Gillow family, in *Buckley* the applicant's home had not initially been established legally. Regardless of this fact, however, the Court held that similar factual considerations were relevant. As Mrs Buckley had lived on her land almost continuously since 1988 and was not planning to move elsewhere, the right to respect for her home was involved.[100]

This line of reasoning was confirmed four years later in *Chapman v. the United Kingdom*. This case was one in a series of five that concerned complaints of Roma who had bought a piece of land in a district without a Roma site,

98 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92.

99 *Ibid.*, para. 54, referring to *Gillow v. the UK*, ECtHR 24 November 1986, appl. no. 9063/80, para. 46: '[T]he applicants had established the property in question as their home, had retained ownership of it intending to return there, had lived in it with a view to taking up permanent residence, had relinquished their other home and had not established any other in the United Kingdom. That property was therefore considered their "home" for the purposes of Article 8.'

100 *Ibid.*, para. 54.

with the aim of settling there.[101] Chapman was refused a planning permission and was advised to apply for a pitch for her caravan at an official site outside the district. In line with the *Buckley* judgment, the Court held that also here the right to respect for the home applied.

In fact, it seems that after *Buckley*, the only Roma housing case reviewed by the Court in which the applicability of the right to respect for the home was slightly less clear-cut, was the 2012 case of *Yordanova and Others v. Bulgaria*.[102] The reason for this was that four of the applicants had had their registered addresses elsewhere for unspecified limited periods. The government moreover argued that some of the applicants had aimed at obtaining municipal flats, suggesting that they were not planning to stay. However, since the Roma who had temporarily moved out had returned, and because there had not been any evidence adduced with regard to the government's assertion that the applicants had tried to obtain municipal housing, the Court sidestepped these points. It concluded that because of the factual links the applicants' houses in the Batalova Vodenitsa neighbourhood could be considered their 'homes' for the purposes of Article 8.[103]

In *Chapman*, the Court for the first time also discussed the right to respect for private and family life in relation to Roma housing issues.[104] In this case it stressed that 'the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle'.[105] Therefore,

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101 *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95. The other four cases are *Beard v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 24882/94; *Coster v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 24876/94; *Lee v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 25289/94 and *Jane Smith v. the UK*, ECtHR (GC) 21 January 2001, appl. no. 25154/94.

102 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06. *Cf.* however the admissibility decision of the Court in *Codona v. the UK*, 7 February 2006 (dec.), appl. no. 485/05.

103 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, paras. 102-103. The fact that they – like the applicants in *Buckley* and *Chapman* – were not residing on land they at least owned themselves, was not considered material in this regard. See also *Buckland v. the UK*, ECtHR 18 September 2012, appl. no. 40060/08 (where the applicant had been legally residing on a caravan site, and the Court held that even though she intended to move anyway, the eviction order interfered with her right to respect for the home, since she wished to have the option to stay).

104 Already in *Buckley*, however, the applicant, together with the Commission, had argued that 'since the traditional Gypsy lifestyle involved living in caravans and travelling, [her] "private life" and "family life" were also concerned'. See *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, para. 53. The Court however did not find it necessary to go into this matter.

105 *Chapman v. the UK*, ECtHR (GC)18 January 2001, appl. no. 27238/95, para. 73. According to the Court '[t]his is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence

> '[m]easures affecting the applicant's stationing of her caravans … have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition. The court finds, therefore, that the applicant's right to respect for her private life, family life and home is in issue in the present case.'[106]

Moreover, in *Yordanova and Others*, the Court held that

> '[h]aving regard to the fact that the case concerns the expulsion of the applicants as part of a community of several hundred persons and that this measure could have repercussions on the applicants' lifestyle and social and family ties, it may be considered that the interference would affect not only their "homes", but also their "private and family life".'[107]

What can be inferred from this is that next to their particular lifestyle, also the community ties of Roma can add to the conclusion that in case of removal their private and family life would be affected.

In the 2013 case of *Winterstein and Others v. France*, the Court confirmed its earlier findings with regard to the applicability of the Convention.[108] The case concerned 25 French nationals living as travellers in the municipality of Herblay. After having lived there for many years the municipality had brought an action against them, ordering them to remove all their vehicles and caravans as well as any buildings from the site they unlawfully occupied. The judgment granting the order had not been enforced thus far, and meanwhile studies had been conducted with an eye to determining the situations of the persons concerned and assessing the options for alternative accommodation. However, no solutions had been found for the families who had requested alternative accommodation on family sites, rather than social housing. In this case, the Court straightforwardly held that the various aspects of Article 8 were engaged.[109]

What is notable about the Court's reasoning in *Winterstein* is its explicit discussion of whether or not there had been *an interference* with the applicants' rights. Whereas the government argued that this was not the case because of the limited effects (thus far) of the removal order, the Court had regard to fact that the eviction that was ordered concerned a community of nearly a hundred people, 'avec des répercussions inévitables sur leur mode de vie et

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and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children' (para. 73).

106 *Ibid.*, paras. 73-74.

107 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, para. 105.

108 *Winterstein a. O. v. France*, ECtHR 17 October 2013, appl. no. 27013/07.

109 *Ibid.*, paras. 141-142.

leurs liens sociaux et familiaux'.[110] This was reason to hold that there had already been an interference with their rights. Yet what it also shows is that the complaint – even though there was clearly a positive aspect to it as well – was merely labelled as one concerning negative duties. The same goes for *Buckley*, *Chapman* and *Yordanova*, where the Court also paid express attention to the question of 'whether there was an "interference" by a public authority'.[111] Because all of these cases involved the issue of eviction, it was not necessary for the Court to take any firm stance on whether Article 8 involves a *prima facie* right to adequate (alternative) housing for Roma as well.

This was different in the case of *Codona v. the United Kingdom*, which concerned the applicant's request for another site for her caravan instead of the bricks and mortar accommodation that was being offered.[112] Here the Court found it 'far from obvious that Article 8 is engaged'. In its decision it stated that there might be a positive obligation to provide for accommodation to homeless Roma that 'facilitates their "gypsy way of life"', but that such an obligation 'could only arise where the authorities had such accommodation at their disposal and were making a choice between offering such accommodation or accommodation which was not "suitable" for the cultural needs of a gypsy'.[113] However, this was not so much an interpretive statement, but rather something the Court remarked in relation to the particular circumstances of the case and in order to conclude that because 'there is no appearance of a violation' the case was manifestly ill-founded. By mixing up the two stages and giving only one overall case-specific outcome, the Court failed to clarify whether in general, there are any *prima facie* positive rights related to Roma housing.[114] Arguably, its explication of the positive (minimum) guarantees that may fall within the scope of the Convention would result in a more transparent starting point for determining whether a case is admissible or whether an omission complained about is justified.[115]

Altogether, in its case law concerning Roma housing, the Court can be seen to have developed a consistent approach to the applicability of Article 8. Regardless of the illegality of a Roma settlement, and because of the Roma identity and lifestyle, it is clear that in case of (planned) eviction or removal the right to *respect* for the home and *respect* for private and family life are engaged. Thereby room is created for 'indivisible' review of the social housing concerns of Roma. At the same time, the Court has not dealt with the question

110 *Ibid.*, para. 143.
111 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, paras. 56-60; *Chapman v. the UK*, ECtHR (GC)18 January 2001, appl. no. 27238/95, paras. 75-78 ; *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, paras. 102-106.
112 *Codona v. the UK*, 7 February 2006 (dec.), appl. no. 485/05.
113 *Ibid*.
114 See, on the importance of a 'bifurcated' approach, *supra*, Ch. 3, S. 3.2.1 and 3.3.3.
115 See also, *supra*, S. 8.2.2.

of whether the different cases are also considered to fall within the scope of Article 8 because of the positive requirements this provision brings along. However, notwithstanding the Court's 'negative' interpretation, the positive aspects of the different complaints have clearly played a role at the application stage.

8.3.2 Positive Obligations: Proportionality Review Demanded

The review of Roma housing issues under Article 8 ECHR takes place in a fairly *ad hoc*, case-specific fashion. That is, the Court tends to pay attention to the specific facts of the case at hand for deciding whether or not this provision had been violated. Still, the more general insights that can be distilled from the case law show some relevant trends.

The most interesting thread running through the Court's Roma housing judgments is the attention it pays to the procedural safeguards that have been available to the applicant(s). In the earlier Roma housing cases these procedural safeguards merely played a role in reviewing whether the 'negative' interference at stake was proportional. Seemingly influenced by the Court's growing recognition of the vulnerable position of Roma and the fact that this might imply positive measures, however, the procedural test has been given a 'positive twist'. In particular, procedural requirements have been linked to the issue of whether the state was required to provide for alternative, suitable housing, and have been concretised in such a way as to almost guarantee specific substantive outcomes. Thus, in discussing the review of the various Roma housing cases that were introduced in the previous section, particular attention is given to how this development concerning procedural protection in combination with positive obligations has come about. In doing so it is analysed whether and how this has added to the principledness of the Court's review.

An emphasis on procedural aspects was already visible in the first Roma housing case, *Buckley v. the United Kingdom*.[116] After holding that the refusal of a permit that would allow the applicant to reside on her own land was in accordance with law and served a legitimate aim,[117] the Court asked whether

116 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92.

117 *Ibid.*, paras. 61-63. Especially the former requirement has proven easy to satisfy in all cases presented here. This has to do with the simple fact that the refusal of a permit as well as removal orders generally find a sufficient basis in domestic law. Also the legitimate aim requirement is generally not hard to meet. However, in the case of *Yordanova a.O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, the Court dealt more extensively with this issue. The applicants had submitted that ordered removal of the inhabitants of Batalova Vodenitsa was meant to benefit a private entrepreneur who wanted to develop the area, as well as 'to satisfy racist demands to free the area of an unwanted Roma settlement' (para. 109). In the end, the Court underlined the fact 'that there is a legitimate public interest in taking

the interference had been 'necessary in a democratic society'. In the case of planning schemes that involve the state's discretionary judgment 'in the implementation of policies adopted in the interest of the community', the ECtHR held that it cannot substitute the national authorities' view as to what would be the best planning policy or individual measures for its own.[118] However,

> '[w]henever discretion capable of interfering with the enjoyment of a Convention right such as the one in issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled case-law that, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.'[119]

The ECtHR held that in the case of *Buckley*, the procedural guarantees had been sufficient and this was reason to conclude that the interference was justified. It had been clear that the site the applicant and her children were requested to move to was not as satisfactory as the dwelling she had illegally established, yet according to the Court 'Article 8 does not necessarily go so far as to allow individuals' preferences as to their place of residence to override the general interest'.[120] Moreover, '[a]lthough facts were adduced arguing in favour of another outcome at national level', the Court considered that the reasons given by the national authorities 'were relevant and sufficient … to justify the resultant interference with the exercise by the applicant of her right to respect for the home'.[121]

What the Court's reasoning makes clear is that the requirement of procedural safeguards in *Buckley* merely served as an expression of a decidedly

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measures to cope with hazards such as those that may stem from an unlawful settlement of makeshift houses lacking sewage and sanitary facilities' (para. 114).

118 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, para. 75, referring to (among other cases) *Klass a. O. v. Germany*, ECtHR 6 September 1978, appl. no. 5029/71, para. 49.

119 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, para. 76. *Cf.* also, on the importance of procedural safeguards in housing review under the Convention , *supra*, S. 8.2.1.1. *Cf.* Resolution 1740 (2010) of the Parliamentary Assembly of the Council of Europe, consideration 17: 'As regards housing, the Assembly urges member states to … 5. take urgent measures to prevent further forced evictions of Roma camps and settlements and – in cases of unavoidable evictions – ensure that such evictions are carried out only when all procedural protections required under international human rights law are in place, including the provision of adequate alternative housing, adequate compensation for expropriation and losses of moveable possessions damaged in the process of eviction; in the absence of such procedural protections, member states should introduce legislation on evictions, providing safeguards and remedies in accordance with international standards.'

120 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, para. 81.

121 *Ibid.*, para. 84.

deferential test. Since the procedural safeguards – including 'relevant and sufficient' reason-giving – were sufficient, the Court could more or less avoid the substantive issue of whether it was actually proportional to refuse the permit, or not.

Attached to the *Buckley* judgment were some quite strong dissenting opinions.[122] On the basis thereof, but also because meanwhile a number of international materials had been adopted or entered into force underlining the vulnerable position Roma and the need for addressing their situation in an adequate manner,[123] one could have expected the Court to take a stricter stance in the next Roma case. In *Chapman and Others v. the United Kingdom*,[124] the Court indeed made mention of the various international developments, and held that it was appropriate to have regard to changing conditions in the Member States.[125] At the same time, it was still

> 'not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. The framework convention [Council of Europe Framework Convention for the Protection of National Minorities], for example, sets out general principles and goals but the signatory States were unable to agree on means of implementation. This reinforces the Court's view that the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection, and the interests of a minority with possibly conflicting requirements renders the Court's role a strictly supervisory one.'[126]

The Court explicitly mentioned that, because of their vulnerable position, special consideration needs to be given to the needs of Roma as well as to their lifestyle and that 'there is thus a positive obligation imposed on the

122 Dissenting Judge Repik noted that the Court's assessment in *Buckley* was quite formal, stressing procedural guarantees rather than the right at issue and its importance as well as the possible consequences for the applicant. He considered that in order to have fulfilled its supervisory role, the Court should have considered the proportionality of the issue. Dissenter Pettiti, on the other hand, argues that the Court did in fact take a material stance, by stating that the authority's grounds were relevant. He stresses the 'vicious circle' persons like *Buckley* are caught in, because of an accumulation of all kinds of administrative rules that make it impossible to make suitable arrangements for Roma accommodation.

123 See the 'relevant international texts', in para. 55ff.

124 *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95.

125 In the intervention by the European Roma Rights Centre, attention was drawn to a recent OSCE-report: 'They submitted that there had emerged a growing consensus amongst international organisations about the need to take specific measures to address the position of Roma, inter alia, concerning accommodation and general living conditions. Articles 8 and 14 should therefore be interpreted in the light of the clear international consensus about the plight of Roma and the need for urgent action' (*ibid.*, par. 89). See also para. 93.

126 *Ibid.*, para. 94.

Contracting States by virtue of Article 8 to facilitate the Gypsy way of life'.[127] At the same time, also in this case the Court merely paid lip service to the interests of the individuals concerned. It considered that the refusal of permitting Roma to occupy land, while there were not enough places available on authorised sites, could not in itself constitute a violation of Article 8. What also was considered relevant was that the home of the applicants had been established in an unlawful manner.[128] Further, the Court held that it was in principle for the national authorities to decide whether the alternative available to the applicants could be considered suitable.[129] Now that the applicant had not adduced any evidence regarding what would be suitable for her, the Court could not hold that the government's suggestion to move to another district where there might be places available was not a feasible one.[130] It concluded that

> '[t]he humanitarian considerations which might have supported another outcome at national level cannot be used as the basis for a finding by the Court which would be tantamount to exempting the applicant form the implementation of the national planning laws and obliging governments to ensure that every Gypsy family has available for its use accommodation appropriate to its needs.'[131]

Indeed, this conclusion underlines that rather than looking at the needs of the individuals concerned, the Court relied on very broad reasoning and phrased the general interest in such weighty terms that it would seem to be impossible to be outbalanced by countervailing (individual) considerations.[132] Arguably, it thereby failed to recognise that somewhat more minimal requirements could have been demanded as well.[133]

In fact, it was already clear at the outset of the judgment that the case of *Chapman* would not be decided differently from *Buckley*. One of the first remarks the Grand Chamber made on the merits of the case was namely that 'while it is not formally bound to follow any of its previous judgments, it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart without good reason, from precedents laid down in previous cases'.[134] Like in *Buckley*, in showing a significant degree of defer-

127 *Ibid.*, para. 96.
128 *Ibid.*, para. 102.
129 *Ibid.*, para. 104.
130 *Ibid.*, para. 112.
131 *Ibid.*, para. 115.
132 Given that there were not enough sites available, the Court was unwilling to require states to make available an 'adequate number of sufficiently equipped sites', because it was not convinced that Article 8 implies 'such a far-reaching positive obligation of general social policy' (*ibid.*, para. 98). It thereby seemed to consider that finding a violation in this case would confer on *all* states the obligation to provide *all* Roma with adequate housing.
133 *Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04, para. 86.
134 *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95, para. 70.

ence the Court in *Chapman* partly relied on the fact that the regulatory framework contained adequate procedural safeguards.[135] Also here, thus, the requirement of procedural protection merely served as an additional ground to avoid the social housing matter concerned.

In contrast to *Buckley* and *Chapman*, in 2004 the Court in *Connors v. the United Kingdom* concluded that there had been a violation of Article 8 of the Convention.[136] However, this case differs from *Buckley* and *Chapman* in some important respects. First, the case concerned the withdrawal of a licence of Roma people for reasons of alleged misbehaviour. There had thus been *lawful* residence and what was at hand was the 'classical' interference as such, without there being any underlying issue concerning the state's responsibility for the provision of (alternative) housing. Secondly, in this case the Court found that the applicable procedural guarantees did not suffice. This was the case because for reasons of flexibility in the management of Roma sites, the eviction of the Connors family could be enforced without any proof of a breach of license.[137] Noticing that 'this case is not concerned with matters of general planning or economic policy but with the much narrower issue of the policy of procedural protection for a particular category of persons',[138] the Court could find a violation of the Convention without having to move even slightly into the direction of recognising more 'social' housing obligations.

In line with this, in *Connors* the Court explicitly narrowed the margin of appreciation, stressing that '[w]here general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant'.[139] If one looks at the facts of this case as well as to those of *Buckley* and *Chapman*, however, the interests of the respective applicants do not seem all that much different, though in the latter cases there was no room for narrowing the leeway granted to the state.[140] Arguably, therefore, it was in fact merely due to the distinctly negative character of the claim in *Connors*, rather than the individual interest at stake, that the Court was willing to overcome its normally very deferential attitude and provide for 'indivisible' fundamental rights protection. It seemed more willing to find in favour of

135 *Ibid.*, para. 114.
136 *Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04.
137 *Cf.* also *Buckland v. the UK*, ECtHR 18 September 2012, appl. no. 40060/08, where a violation was found because the applicant had been unable to challenge the making of a possession order based on her personal circumstances.
138 *Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04, para. 86.
139 *Ibid.*, para. 82.
140 See, on this point, Koch 2009, p. 124.

Connors because the implications of doing so were likely to be less far-reaching than when a violation would have been found in *Buckley* or in *Chapman*.[141]

Some years after *Connors*, a next step in the direction of more positive (procedural) protection for Roma housing interests was taken in the judgment in *Yordanova and Others v. Bulgaria*.[142] Again this case at first glance merely concerned a negative interference in the form of the planned removal of unlawfully residing Roma. Yet it seems from this judgment that the Court here eventually fully appreciated the vulnerable position of Roma, and was willing to ensure effective protection in the field of housing regardless of the demanding obligations that might evolve from this. Like in the earlier Roma housing cases the Court found that the impugned removal order concerning Yordanova and other inhabitants of the Batalova Vodenista neighbourhood had a valid legal basis. The question it had to answer was nevertheless whether the applicable domestic legal framework and the procedures available complied with the Convention.[143]

While reviewing the proportionality of the interference with the applicants' rights, the Court repeated that the margin of appreciation varies according to the nature of the convention right and its importance for the individual, as well as the nature of the aim pursued by the restrictions. It held that 'in this respect' the following relevant considerations could be noted:[144] 1) in spheres involving the application of social or economic policies the margin is wide, as is the case in the planning context; but 2) the margin might be narrower whenever what is at stake for the applicant 'is crucial to the individual's effective enjoyment of key rights'. Further, 3) procedural safeguards are 'especially material', so that 4) any person at risk of losing his home, which the Court considers the most extreme form of interference with one's right to respect for the home,

> 'should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8, notwithstanding that, under domestic law, he has no right of occupation … This means, among other things, that where relevant arguments concerning the proportionality of the interference have been raised by the applicant

141 Indeed, obliging a state to ensure sensible procedural protection against arbitrary removal has less (budgetary) consequences than (indirectly) recognising the obligation to offer alternative, suitable accommodation for Roma and making sure that they do not end up in a deplorable situation.

142 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06.

143 *Ibid.*, paras. 107-108.

144 *Ibid.*, para. 118.

> in domestic legal proceedings, the domestic courts should examine them in detail and provide adequate reasons.'[145]

And finally, 5)

> '[w]here the national authorities, in their decisions ordering and upholding the applicant's eviction, have not given any explanation or put forward any arguments demonstrating that the applicant's eviction was necessary, the Court may draw the inference that the State's legitimate interest in being able to control its property should come second to the applicant's right to respect for his home.'[146]

On the basis of these general principles, the Court concluded that the prospective removal of the applicants was not justified under Article 8. Relevant was the fact that they had been tolerated for several decades and that no alternative solutions had been sought for the risks associated with the applicants' housing lacking basic sanitary and building requirements. The authorities had not considered the risk of the applicants' becoming homeless, even though they had signed an agreement containing an undertaking to secure alternative shelter.[147] Moreover, they had refused to consider approaches especially tailored to the needs of Roma, arguing that this would amount to discrimination against the majority population.[148]

In the end, thus, the reason for finding a violation was not so much that the Court itself concluded that the measure was disproportional. Instead, it considered decisive that the proportionality of this measure had not at all been reviewed at the national level.[149] At first glance, this conclusion seems to fit in well with the procedural approach taken in the earlier Roma housing cases, in the sense that it helped the Court to avoid the actual, sensitive matter concerned. Yet given the substantive hints concerning what the required

145 *Ibid.* See, for this proportionality requirement in earlier cases, *e.g.*, *McCann v. the UK*, ECtHR 13 May 2008, appl. no. 19009/04, para. 50; *Kay and Others v. the UK*, ECtHR 21 September 2010, appl. no. 37341/06, para. 68: '[T]he loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right to occupation has come to an end'. Also in *Buckland v. the UK*, ECtHR 18 September 2012, appl. no. 40060/08, the proportionality requirement was underlined. There, the applicant had no possibility to challenge the making of a possession order on the basis of personal circumstances.

146 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, para. 118.

147 *Ibid.*, para. 126.

148 *Ibid.*, para. 128.

149 See *ibid.*, para. 144, where the ECtHR held that the enforcement of the removal order would violate Article 8, as this order 'was based on legislation which did not require the examination of proportionality and was issued and reviewed under a decision-making procedure which not only did not offer safeguards against disproportionate interference but also involved a failure to consider the question of "necessity in a democratic society"'.

proportionality review should be about – the interests of and risks for the individuals at stake, possible (tailor-made) alternatives, etc. – the Court's approach can be understood as procedural review 'taken to another level'. Focusing on the fact that too little, if any, attention had been given *to the individual interests at stake*, as well as for example to the length of the period the applicants had lived undisturbed in Batalova Vodenitsa,[150] the requirement of proportionality review in fact becomes a requirement that is procedural in nature yet also has a clearly substantive dimension. Hence, it can be derived from the judgment the even while the complaint is presented as one concerning a negative interference, the procedural obligation imposed is anything but purely negative, and indeed quite social in kind.

Arguably, by phrasing its test in procedural terms, the Court was able to ensure transparent review that leaves the decision-making to the national authorities while guaranteeing effective social protection. What can be inferred from the judgment is that 'if forcibly removed persons do not have a self-standing right to be re-housed, they nevertheless have the right to have the state *consider* their risk of becoming homeless as well as their possibilities to be re-housed, potentially with the state's support'.[151] Seen in this way, the 'procedural breach' found in *Yordanova and Others* can be viewed as a concrete step towards actual indivisible protection of the interests of Roma under Article 8.

The 2013 judgment in the Roma case of *Winterstein and Others v. France* confirms this development.[152] Also in this case the ECtHR highlighted certain concrete procedural shortcomings and on the basis thereof it found a breach of the Convention. What makes this judgment especially interesting, however, is the conclusion that there had been another, separate violation of Article 8 in respect of the applicants who had not been provided with alternative accommodation. *Winterstein and Others* concerned the proceedings brought against a number of traveller families who had been living on the same spot for many years. In 2005, the domestic courts had issued orders for the families'

150 *Ibid.*, para. 122.The Court in this context found that 'the underprivileged status of the applicants' group must be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal is necessary, in deciding on its timing, modalities and, if possible, arrangements for alternative shelter. This has not been done in the present case.' (para. 33). This conclusion could not be altered by what the measures taken after 2005-2006, when the removal order was reviewed by the domestic courts. These could not make up for the authorities' failure to address the proportionality of the interference in the first place. See also para. 144, where it was stated that the enforcement of the removal order would violate Art. 8 because it 'was based on legislation which did not require the examination of proportionality and was issued and reviewed under a decision-making procedure which not only did not offer safeguards against disproportionate interference but also involved a failure to consider the question of "necessity in a democratic society"'.

151 Remiche 2012, p. 798.

152 *Winterstein a. O. v. France*, ECtHR 17 October 2013, appl. no. 27013/07.

eviction, on pain of penalty for non-compliance, because of the lack of the necessary permits and the resulting breach of the land-use plan. The orders were upheld by the Court of Appeal, but had not been enforced. Instead, a study was conducted in order to assess the situations of the individuals involved. For those who wished to be provided with alternative accommodation on family sites, no solution had been found and these families continued living in precarious conditions.

The Court held that the interference with the applicants' rights under Article 8 had been in accordance with the law and pursued a legitimate aim, namely the protection of 'des "droits d'autrui" par le biais de la défense de l'environnement'.[153] Like in *Yordanova and Others*, the Court under the heading 'Rappel des principes' summed up the considerations relevant for determining the margin of appreciation and reviewing the case at hand. The lists are very similar in both judgments, although the Court in *Winterstein and Others* provided further clarification as to the specific Roma interests a proportionality test at the national level should take into account.[154] In the words of the Court:

> 'ε) Pour apprécier la proportionnalité d'une mesure d'expulsion, il y a lieu de tenir compte en particulier des considérations suivantes: si le domicile a été établi légalement, cela amoindrit la légitimité de toute mesure d'expulsion et à l'inverse, s'il a été établi illégalement, la personne concernée est dans une position moins forte; par ailleurs si aucun hébergement de rechange n'est disponible, l'ingérence est plus grave que si un tel hébergement est disponible, son caractère adapté ou pas s'appréciant au regard, d'une part, des besoins particuliers de l'individu et, d'autre part, du droit de la communauté à voir protéger l'environnement …;
>
> ζ) Enfin, la vulnérabilité des Roms et gens du voyage, du fait qu'ils constituent une minorité, implique d'accorder une attention spéciale à leurs besoins et à leur mode de vie propre tant dans le cadre réglementaire valable en matière d'aménagement que lors de la prise de décision dans des cas particuliers … ; dans cette mesure, l'article 8 impose donc aux États contractants l'obligation positive de permettre aux Roms et gens du voyage de suivre leur mode de vie.'[155]

Moving to the facts of the case, the Court referred to *Yordanova and Others* and underlined that arguments made by the parties concerning Articles 3 and 8 of the Convention had not been considered at the national level. Moreover, the authorities had failed to provide any argument for why the removal would be 'necessary'.[156] This was sufficient for the Court to find a first violation of the Convention, but it did not stop here. With the help of explicit references

153 *Ibid.*, para. 146.
154 *Ibid.*, para. 148.
155 *Ibid.*, para. 148.
156 *Ibid.*, para. 157.

to Council of Europe and other materials, the Court underlined once more the vulnerable position of Roma and the positive obligations of the state in this regard.[157] More precisely, the vulnerable position of Roma needed to be taken into account 'non seulement lorsqu'elles envisagent des solutions à l'occupation illégale des lieux, mais encore, si l'expulsion est nécessaire, lorsqu'elles décident de sa date, de ses modalités et, si possible, d'offres de relogement'.[158] This had not been properly done by the national authorities. After the situations of the families involved had been assessed in the study conducted by the municipal authorities, some of them – in line with their wishes – had obtained social housing. With regard to these individuals, the Court held that a sufficient solution had been found.[159] However, those who had wanted to obtain alternative accommodation on family sites still found themselves in very difficult circumstances, since either they had stayed, continuously facing the enforcement of the order under penalty, or they had left but without finding any adequate alternative. Therefore, next to the fact that the lack of review of the proportionality of the order of itself already constituted a breach of the Convention, Article 8 had also been violated because in the context of the provision of alternative accommodation, the needs of the applicants had not been sufficiently taken into account.[160]

The *Winterstein and Others* judgment thus suggests that even if the national authorities have reviewed whether the interference (the (planned) removal) was proportional and have thereby taken the special interests of Roma into account, *i.e.*, even if the procedural requirements formulated in earlier judgments have been met, the Court can still conclude that their efforts in regard of the provision of alternative accommodation were insufficient. Indeed, the only thing that still seems lacking is the Court's explicit recognition of a general positive obligation for states to provide vulnerable Roma with (suitable) alternative accommodation, at least when they would otherwise become homeless or would have to live in very severe conditions. After all, it was concluded that especially at the interpretation stage the Court still views the Roma housing cases as primarily 'negative', and that any concrete positive implications of Article 8 remain unnoticed. It has become clear that throughout the years the Court has come closer to recognising the protection of vulnerable groups against homelessness as an essential element of protection in the field of housing. Nonetheless, for its approach to become a truly principled one, it would be helpful for it to turn this into a transparent (minimum) standard on the basis of which it can then conduct its case-specific (procedural) review.

157 *Ibid.*, paras. 159-160.
158 *Ibid.*, para. 160.
159 *Ibid.*, para. 161.
160 *Ibid.*, para. 167.

Finally, a few remarks can be made on the issue of discrimination in Roma housing cases. In all of the Roma cases just presented, the applicants also explicitly relied on the prohibition of discrimination (Article 14 ECHR). Especially given that discrimination is one of the most precarious issues when Roma are concerned,[161] it might come as a surprise that in none of these a violation of the non-discrimination principle was found. The Court seems remarkably hesitant to address this matter, stating in relatively brief terms that the discrimination complaint was not substantiated, or that it is no longer necessary to deal with the issue. In *Buckley v. the United Kingdom*, for example, the Court held that

> '[i]t does not appear that the applicant was at any time penalised or subjected to any detrimental treatment for attempting to follow a traditional Gypsy lifestyle. In fact, it appears that the relevant national policy was aimed at enabling Gypsies to cater for their own needs.'[162]

In *Chapman v. the United Kingdom*, it was considered that because the interference under Article 8 was proportionate, there was no reason to conclude on a violation of Article 14.[163] Similarly, where there was a violation of Article 8, the Court stated that 'no separate issue' arose with regard to non-discrimination.[164]

In regard to these considerations it can be concluded that, if anything, the Court does not treat the requirement of non-discrimination as a 'core issue' in relation to Roma housing issues that is worth attention for reasons of its own. Although it can be argued that sometimes the Court implicitly takes into account equal treatment concerns in discussing the complaint under Article 8 – by stressing, in fact, that extra attention must be had to the needs of Roma –, Article 14 hardly plays a role in these cases. Of course, it is difficult for the Court to engage in review of often implicit or indirect unequal treatment or discrimination. Yet stating that it is 'no separate issue', while finding a violation foremost on the basis of procedural shortcomings, fails to explicitly address what the applicants probably consider is an essential aspect of their complaints.

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161 In the introduction to this section, reference was already made to a Resolution by the Parliamentary Assembly of the Council of Europe (Resolution 1740 (2010)) that mentions 'the vicious circle of discrimination in which most of the Roma are locked'.

162 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, para. 88.

163 *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95, para. 129: 'Having regard to its findings above under Article 8 of the Convention that any interference with the applicant's rights was proportionate to the legitimate aim of preservation of the environment, the Court concludes that there has been no discrimination contrary to Article 14 of the Convention.'

164 *Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04, para. 97; *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, para. 149; *Winterstein a. O. v. France*, ECtHR 17 October 2013, appl. no. 27013/07, para. 179.

8.3.3 Narrowing the Wide Margin in Cases Concerning Planning

The Court's use of the margin of appreciation in Roma housing cases has already been touched upon a few times in the previous subsection. Nevertheless, it is worth highlighting that the cases discussed above signal a slight move away from a wide margin of appreciation in cases concerning social and economic policy, to one that can be narrower, or is at least determined while explicitly having regard to the personal needs and interests of the applicants.

Originally, in *Buckley v. the United Kingdom* and *Chapman v. the United Kingdom* the Court accorded a wide margin of appreciation to the state. In line with other judgments dealing with socio-economic and planning matters, it there held that '[in] so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation'.[165] Although it also mentioned that the importance of the right at stake for the applicant and her family had to be taken into account, it concluded that the decision not to let the applicant reside on her own land did not exceed this wide margin. In *Chapman v. the United Kingdom* the Grand Chamber similarly held that in determining whether there has been a 'manifest error of appreciation', the procedural safeguards available to the individual will be 'especially material'.[166] 'In principle', however, the applicable margin was a wide one.[167] This approach was criticised by the dissenters in the case. These noted that 'a wide margin of appreciation in the choice and implementation of planning policies … cannot apply automatically to any case which involves the planning sphere'.[168]

As was discussed in the previous section, the judgment in *Connors v. the United Kingdom* signalled a greater emphasis on what is at stake for the individual. The Court's reference in this case to the 'generally wide' margin in planning cases seemed somewhat reluctant: It held that 'in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide', yet it seemed unwilling to attach much weight to

165 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, para. 75.

166 *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95, para. 92: 'In these circumstances, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.'

167 *Ibid.*, para. 92.

168 *Ibid.*, joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall, para. 3. They referred to the fact that the Convention always needs to be interpreted and applied in the light of the current circumstances, and to the emerging consensus regarding the special needs of minorities and the obligations to protect them.

this authority.[169] Instead, it considered that '[t]he margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate key rights'.[170] Moreover, distinguishing the case at hand from issues concerning Article 1 of Protocol No. 1, it stated that

> '[w]here general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant.'[171]

Thus, in the context of Article 8, 'which concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community', the Court seemed willing to overcome a 'generally wide margin' and foreground the interests of the applicant.[172]

However, in line with what was said before, it can be argued that the Court in *Connors* opted for a stricter form of review mainly also because of the classic character of the interference concerned. That is, it was willing to narrow the margin having regard to the individual interest concerned, because this interest was explicitly 'negative'. At least, this might explain why it did not narrow the margin in the earlier cases of *Buckley* and *Chapman*, even though all of the applicants in fact faced similar risks.

In *Yordanova and Others v. Bulgaria* and *Winterstein and Others v. France*, the Court eventually seemed to fully acknowledge that the automatic application of a wide margin of appreciation whenever a case concerns socio-economic policy does not live up to the promise of effective protection under the Convention. Even though (the potential implications of) *Yordanova* and *Winterstein* could be considered more positive in nature (than was the case in *Connors*), this was no reason for determining the margin solely on the basis of the social policy field concerned. Although the official starting point remained the wide margin applicable to issues concerning socio-economic policy, the Court repeated here that the margin can be narrowed when 'intimate key rights' are at stake or in other words 'que le droit en cause est important pour garantir

169 *Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04, para. 82.

170 *Ibid.*, referring to *Dudgeon v. the UK*, ECtHR 10 October 1981, appl. no. 7525/76, para. 82 and *Gillow v. the UK*, ECtHR 24 November 1986, appl. no. 9063/80, para. 55. The Court, however, does not go into the matter of what are 'intimate or key rights', and whether or not these were at stake in the present case.

171 *Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04, para. 82. Referring to *Hatton v. the UK*, ECtHR (GC) 8 July 2003, appl. no. 36022/97, paras. 103 and 123.

172 *Cf.*, *infra*, Ch. 10, Sections 10.3.3 and 10.4.3.

à l'individu la jouissance effective des droits fondamentaux ou d'ordre "intime" qui lui sont reconnus'.[173]

Nevertheless, the Court's 'indivisible' use of the margin of appreciation in *Yordanova* and *Winterstein* can be criticised for not being very lucid. Next to the individual interests concerned – and the key importance thereof – the Court in these cases holds that also the availability of procedural safeguards and the question whether or not there had been a proportionality analysis at the national level are relevant as factors determining the applicable margin.[174] On the basis of the discussion in Section 8.3.2, however, it can be asked whether these procedural demands were in fact not more than mere indicators of the strictness of the test. For the clarity of the Court's review this is a relevant issue. Considered to be one of the factors that determine the margin, the availability of procedural safeguards is not likely to be decisive in the substantive review of proportionality. On the other hand, in the two judgments, the question of whether the national authorities conducted a proportionality test seemed to be a crucial element in the Court's review of the reasonableness of the national measures. The question is hence whether the issue of national proportionality review indeed functions as a self-standing, and moreover essential requirement not only relevant to the leeway the state should be granted, but decisive for the outcome of the case. And if this is indeed the case, what role is then left for the margin of appreciation? Especially now that the Court has moved towards a more proactive and positive rights-oriented approach to Roma housing issues, it is important that this issue be resolved.

8.5 Conclusion

In this chapter, multiple examples have been given of the Court's protection in the field of housing. Special emphasis was thereby placed on positive and/or 'social' housing issues, *i.e.*, on the way in which the Court deals with the interests of those not owning a house or lacking the means or possibilities for finding a (suitable or alternative) place to live. It is in cases concerning these issues that the tension that underlies this research, namely that between providing effective and indivisible protection while showing deference to the Member States and providing the necessary guidance, becomes most visible. Discussing the various examples, the question was asked whether the Court in cases concerning housing 'strikes a fair balance' between these different demands.

Section 8.2 started from the different Convention rights that are relevant in the housing sphere. It was shown that whereas some of these provide for

173 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, para. 118, and *Winterstein a. O. v. France*, ECtHR 17 October 2013, appl. no. 27013/07, para. 148, respectively.
174 *Ibid.*

a 'natural' connection with this topic, due to the Court's interpretation of several provisions room has been created for more indivisible protection in this field. The right to respect for the home, for example, has been explained in a broad manner. It is sufficient when there are 'sufficient and continuing links' with a specific place, and a 'home' can therefore also be a flat or plot of land where someone illegally resides. In determining whether the right to respect for the home is breached, however, the Court generally grants a wide margin of appreciation, and is hesitant to interfere in the socio-economic and planning policies decided upon at the national level. Nevertheless, it is important that individuals who are confronted with an interference with their home and risk becoming homeless, are provided with adequate procedural safeguards.

The analysis made of the respect for private and family life limb of Article 8 is relevant for purposes of this chapter mainly because it disclosed the Court's recognition of positive obligations in the housing sphere. At the same time, the analysis revealed that although it regularly holds that such obligations *might* exist, the Court refrains from clarifying when exactly these apply and what they entail. That is, it deals with positive obligations in a very case-specific fashion, and it can be asked whether its reasoning thereby provides sufficient guidance.

Besides Article 8 also Articles 1 P1, Article 14, and Article 3 of the Convention have been shown to be (indirectly) relevant in relation to housing needs. Article 1 P1, first, seems to allow some room for social considerations both when it comes to the interpretation and the application of this article. However, housing needs at most play a subordinate, indirect role, and it can be said that Article 1 P1 is hence not the place for developing indivisible housing protection. Article 14 provides for protection against discrimination. It was shown that when states provide for housing assistance or other social measures, they must do so in a non-discriminatory fashion. This does not mean that differential treatment is not allowed for. Indeed, particularly in the social policy sphere distinctions must be made, and it is therefore not likely that the Court will often find a breach of the Convention in this regard. Article 3, then, at first glance may appear to have little to do with housing. Nevertheless, in several cases the Court has clarified that individual housing situations can be reason for finding that the prohibition of inhuman or degrading treatment has been violated. Arguably, this article protects a kind of 'minimum protection' in this field, yet thus far the Court has failed to indicate that this is indeed the reason for why sometimes protection is granted.

Section 8.3 concerned a case study of the Strasbourg protection offered in cases concerning Roma housing. This topic was selected because it allows for obtaining an interesting image of the development of the Court's role in relation to housing matters. The cases discussed have made clear that over the years the Court has started to provide more indivisible protection in this field. This appears from the fact that it by now clearly indicates that the wide

margin in cases concerning planning can be narrowed in case 'key' individual interests are concerned. Moreover, although it hardly says anything on the positive dimension of Article 8 in cases concerning Roma at the interpretation stage, in its review the Court pays particular attention to whether the applicants' needs were duly considered at the national level, also in regard to the provision of alternative accommodation suitable to the needs of Roma. Phrasing this in terms of procedural protection, it can be said that the Court has found a middle way that allows for providing positive, indivisible protection, while not directly substantively interfering with the decisions made at the national level. What could potentially still improve the Court's approach to housing issues concerning Roma and other vulnerable individuals and groups, would be to distil from the various judgments some general, minimum rights and duties, that could then serve as clear standards both in interpreting and applying the Convention.

9 Health and Health Care

9.1 INTRODUCTION

A right to health is not contained in the Convention. Nevertheless, a vast number of health and health care-related decisions and judgments can be found in the ECtHR's case law. This can be explained by the fact that there are close links between health issues and some of the provisions enumerated in the ECHR, such as Article 2 ECHR (the right to life) or Article 8 (the right to respect for private and family life). One can think of highly debated themes like abortion and euthanasia, matters like self-determination as well as the issue of informed consent as having close links with these ECHR provisions while also being related to health. Moreover, there is of course the plain fact that serious deterioration of a person's health can result in death, while health care (including adequate food and environmental conditions) is also intimately related to the enjoyment of one's private life and the prevention of 'inhuman' circumstances (Article 3 ECHR).

These examples show that health rights issues can be very diverse.[1] Before exploring the case law of the Court, therefore, it is useful to lay out some distinctions and clarify what kind of health cases are of primary concern here. On the one hand, health issues bring up more 'classic' fundamental rights questions. At stake is then for example to what extent a person can decide freely whether or not he is given the treatment that medical experts hold to be 'best for him'. What do personal autonomy and the right to self-determination demand in terms of health care and regulations? These aspects concern the individual sphere of the persons involved and directly involve certain provisions featuring in the Convention, in particular the guarantees enumerated in Article 8 (private and family life). They are 'negative' to the extent that they require non-interference, rather than the provision of health care or a healthy environment.

On the other hand, health-related complaints can also pertain to more 'social' fundamental rights themes. They not seldom involve claims to treatment, (expensive) medication, etc. Applicants may complain about the lack of certain medical arrangements and measures they consider themselves

1 See, generally, on health and human rights (addressing a broad variety of fundamental health topics), Toebes et al. 2012.

entitled to as a human being or because of their particular state of health. Such health claims are primarily 'positive' ones as they demand active engagement by the state through the creation of often costly health programmes and entitlements. Indeed, since it is with regard to these issues that it can be asked whether they should be protected under the 'civil and political' ECHR – or rather exclusively in the sphere of economic and social fundamental rights –, these more positive health claims are central to this chapter.[2]

In what follows, it will be asked to what extent the Convention covers cases concerning the provision of health care, as well as medication and environmental health issues. In particular, it will be examined if the ECtHR in its case law clarifies when and why a case deserves *prima facie* protection by the Convention. In other words: has it provided for a clear interpretation of what the various Convention provisions in relation to health issues entail? Moreover, the question will be addressed whether the Court's application of these rights norms is of a very *ad hoc* kind, or whether it also lays down some general principles on the basis of which states can know what their health care-related duties under the Convention are. Is its protection of health interests 'effective' and 'indivisible', while at the same time leaving the necessary room for decision-making at the national level? It is investigated what the shortcomings are of the Court's reasoning in health-related cases, and where room for improvement can be found.

The cases presented in this chapter have been selected mainly for their relevance in relation to these particular issues. Moreover, a choice has been made for presenting them through a discussion of certain sub-themes that fall within the broader category of health and health care issues under the ECHR.[3] In Section 9.2, first, the relation between the Articles 2, 3, and 8 ECHR and (positive) health claims is outlined. This section shows that many complaints concerning health or health care can be linked to the Convention, and moreover that there is a certain overlap between the possibilities of – as well as limits to – the protection under the different articles. Section 9.3 then discusses the protection granted to 'dependent' and 'vulnerable' individuals. It will be shown that especially these categories of persons can make a successful claim for health arrangements on the basis of the ECHR. Finally, in Section 9.4, 'environmental health' issues will be discussed. This category of cases concerns

2 However, what is concerned here is not just cases that explicitly concern positive obligations. Sometimes, the discontinuation of care may be concerned (see for an example, *infra*, S. 9.2.3), while in other cases the question may be whether the state was justified to 'pollute' (or allow for the pollution of) the applicants' living environment (*infra*, S. 9.4).

3 On its website the Court presents seven Factsheets under the header 'Health', namely 'Detention and mental health'; 'Environment'; 'Euthanasia and assisted suicide'; 'Health'; 'Mental Health'; 'Persons with disabilities and the ECHR'; and 'Prisoners Health Related Rights'. See www.echr.coe.int (under 'Factsheets').

environmental nuisances that have an impact on someone's health.[4] In this section special attention is given to the 'thresholds' the Court has set for granting protection against pollution, and what these imply for the health guarantees that (implicitly) follow from the Convention.

9.2 Health and Health Care and the ECHR

Next to in cases that involve distinctly 'negative' claims, it can be said that also when complaints regarding the provision of health care or medication are concerned there is frequently an obvious link with the Convention. This has to do with the 'indivisibility' of civil and political and economic and social rights. As was explained in Chapter 2, the 'indivisiblity, interdependence and interrelatedness' of fundamental rights has the effect that a distinction between the two categories of rights (norms) cannot always be made, neither in theory nor in practice.[5] In particular, with regard to health, it can be said that a deteriorating state of health, or a lack of medication or treatment, can become an issue of life and death and may therefore become relevant in the context of Article 2 ECHR. Moreover, bad health conditions or inadequate (possibilities for) treatment can have a negative impact on someone's private life (Article 8 ECHR). Somewhat less obviously, a serious failure of the state to protect someone's health even can be considered to amount to 'inhuman treatment' (Article 3 ECHR). However, it must be noted in this regard that the fact that there clearly is a connection with the provisions of the ECHR does not automatically imply that there is ample reason for the Court to review and protect positive health claims. After all, the connection remains a complicated one, because the wording of the Convention does generally not call for entitlements to health (care) and the 'polycentricity' and in particular the costs of the issues involved may form a good reason for the Court not to interfere. In outlining the possibilities for protection under Articles 2, 3, and 8 ECHR (Sections 9.2.1, 9.2.2, and 9.2.3, respectively), therefore, it is the aim of this section to see whether the Court draws any clear lines as to the application of the Convention, *i.e.*, whether it provides for effective and indivisible, but also transparent protection.

9.2.1 Health and the Right to Life (Article 2 ECHR)

A well-known example of a case concerning the right to life in a health-related matter is the case of *Öneryildiz v. Turkey*.[6] This case dealt with individuals

4 As will be seen below, however, it is not always possible to isolate the health aspects from cases concerning environmental pollution (*infra*, S. 9.4).

5 See, *supra*, Ch. 2, S. 2.5.3.

6 *Öneryildiz v. Turkey*, ECtHR (GC) 30 November 2004, appl. no. 48939/99.

living in an area surrounding a rubbish tip. The government had allowed the rubbish tip to operate in breach of certain environmental and health regulations. It was aware of the risks present when in 1993 a methane explosion took place and caused the death of thirty-nine people. In *Öneryildiz* the Grand Chamber of the Court found a violation of the procedural aspect of Article 2, because the Turkish criminal justice system could not be said to have 'secured the full accountability of State officials or authorities for their role … and the effective implementation of provisions of domestic law guaranteeing respect for the right to life, in particular the deterrent function of the criminal law'.[7] Moreover, although the risks of an explosion had been known to the authorities, they had nevertheless ignored planning regulations and had failed to provide information and take effective measures in order to prevent an accident from occurring. The Court therefore found that also the substantive aspect of the right to life had been breached, which shows that in some circumstances the state can be required to actively protect the health of individuals.[8]

Next to this kind of tragic 'environmental health' issues,[9] there are also other types of health-related issues that have (successfully) been linked to Article 2 of the Convention. In fact, in concluding on a violation in the case of *Öneryildiz*, the Grand Chamber referred to what it had held six years earlier in *L.C.B. v. the UK*.[10] The issue at stake in this case concerned the applicant's father's exposure to radiation during nuclear tests on Christmas Island in 1957 and 1958. The question in this regard was whether there had been an obligation to inform the applicant's parents or monitor her health as her leukemia was most likely caused by this event. In *L.C.B.* the Court held that 'the first sentence of Article 2 § 1 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction'.[11] In the end it found no violation, but that there is at least the possibility of finding a breach of the right to life in health care-related issues was confirmed not much later in *Powell v. the United Kingdom*.[12] This case concerned a boy who had died allegedly because his disease had not been timely diagnosed. The case was declared inadmissible, but the Court emphasised that it 'cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2'.[13]

7 *Ibid.*, para. 117.
8 *Ibid.*, paras. 109-110.
9 See, further on this topic, *infra*, S. 9.4. And see, for another 'environmental' case that has been dealt with under Art. 2, *Budayeva a. O. v. Russia*, ECtHR 20 March 2008, appl. nos. 15339/02, 21166/02, 20058/02, 11673/02 (concerning a natural disaster).
10 *L.C.B. v. the UK*, ECtHR 9 June 1998, no. 14/1997/198/1001.
11 *Ibid.*, para. 36.
12 *Powell v. the UK*, ECtHR 4 May 2000 (dec.), appl. no. 45305/99.
13 *Ibid*.

The positive obligations that apply in regard to medical negligence have been further concretised in *Calvelli and Ciglio v. Italy*.[14] In this case the Court held that the duty to take appropriate steps to safeguard the lives of those within its jurisdiction

> 'require[s] States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible be made accountable.'[15]

Just like when 'dangerous activities' are carried out, besides arranging for an effective judicial response, the state is hence required to ensure the regulation – via *inter alia* governing the licensing, operation, or monitoring – of health care.

The 2013 case of *Mehmet Senturk and Bekir Senturk v. Turkey* illustrates how disrespecting these requirements can lead to a 'double' violation of Article 2, not only concerning the lack of a sound investigation conducted afterwards, but also regarding the inadequate care that was provided.[16] The case concerned a pregnant woman who died after a series of misjudgments and a refusal of the hospital authorities to provide her with appropriate emergency treatment because she was not able to pay for such treatment on the spot. The Court found a violation of the procedural aspect of Article 2 because the conviction of the responsible persons had been barred by the statute of limitations, as well as due to the length of the proceedings and a failure to prosecute the doctor.[17] Moreover, in answering the question 'si les autorités nationales ont fait ce que l'on pouvait raisonnablement attendre d'elles et en particulier si elles ont satisfait, de manière générale, à leur obligation de protéger l'inté-

14 *Calvelli and Ciglio v. Italy*, ECtHR (GC) 17 January 2002, appl. no. 32967/96.

15 *Ibid.*, para. 49. See also, *e.g.*, *Erikson v. Italy*, ECtHR 26 October 1999 (dec.), appl. no. 37900/97; *Nitecki v. Poland*, 21 March 2002, appl. no. 65653/01, para. 1. This obligation not only extends to doctors but also to other staff, in so far as their acts may also put the life of patients at risk. See *Dodov v. Bulgaria*, ECtHR 17 January 2008, appl. no. 59548/00. However, as the Court held in *Powell v. the UK*, ECtHR 4 May 2000 (dec.), appl. no. 45305/99, 'where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life'.

16 *Mehmet Senturk and Bekir Senturk v. Turkey*, ECtHR 9 April 2013, appl. no. 23423/09.

17 See for other 'procedural' violations of Art. 2 concerning medical malpractice, *e.g.*, *Šilih v. Slovenia*, ECtHR (GC) 9 April 2009, appl. no. 71463/01; *G.N. a. O. v. Italy*, ECtHR 1 December 2009, appl. no. 43134/05; *Eugenia Lazar v. Romania*, ECtHR 16 February 2010, appl. no. 32146/05; *Oyal v. Turkey*, ECtHR 23 March 2010, appl. no. 4864/05.

grité physique de la patiente, notamment par l'administration de soins médicaux appropriés,'[18] it concluded that also the substantive aspect of this article had been breached.[19]

In other contexts than that of medical negligence, it is less clear what exactly the positive protection of Article 2 in relation to health care entails. In 2002 the Grand Chamber decided on the case of *Cyprus v. Turkey*, concerning complex questions on the situation in northern Cyprus after Turkey's military operations had started there in 1974.[20] One of these questions involved the provision of health care that had been available at the time. The applicant state pointed out the restrictions on the ability of enclaved Greek Cypriots and Maronites in northern Cyprus to receive medical treatment, and argued that this amounted to a violation of the right to life. In response to this complaint, the Grand Chamber held that 'an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual at risk through the denial of health care which they have undertaken to make available to the population generally'.[21] However, in the specific circumstances of the case at hand it had not become clear that health care was actively withheld, nor were the lives of the individuals concerned put in danger on account of any delay in the obtaining of medical services that might have occurred.

Moreover, with regard to the available level of health care generally, the Court did not consider it necessary in this case to examine '*the extent to which* Article 2 may impose an obligation on a Contracting State to make available *a certain* standard of health care'.[22] With Harris et al., it can be argued that '[i]t is reasonable to infer from the word "extent" that the Court accepts that

18 *Mehmet Senturk and Bekir Senturk v. Turkey*, ECtHR 9 April 2013, appl. no. 23423/09, para. 89.

19 For an example of where no violation of Art. 2 was found, see the recent case of *Gray v. Germany*, ECtHR 22 May 2014, appl. no. 49278/09. This case concerned the death of a patient in the UK as a result of medical malpractice by a German doctor. The Court held in particular that the German trial court had sufficient evidence available to it for the doctor's conviction without having held a hearing. The applicant had also complained under the substantive aspect of Art. 2, against the UK, yet this complaint was held manifestly ill-founded because they had settled their claims for damages for a sum of compensation (*Gray v. Germany and the UK*, ECtHR 18 December 2012 (dec.), appl. no. 49278/09).

20 *Cyprus v. Turkey*, ECtHR (GC) 10 March 2001, appl. no. 25781/94.

21 *Ibid.*, para. 219 (referring to *L.C.B. v. the UK*, ECtHR 9 June 1998, no. 14/1997/198/1001, para. 36, and the fact that 'Article 2 § 1 of the Convention enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction').

22 *Ibid.*, para. 219 [emphasis added]. It concerned that in as far as there were restrictions, these mainly had to do with the limited freedom of movement of the persons concerned. Issues relating to health care it would more generally take along in reviewing the complaint under Art. 8 (para. 299).

such a general obligation exists to some undefined degree'.[23] This, indeed, implies a significant extension of the relevance of the right to life in issues of health.[24] However, the Court's wording fails to clarify what this obligation more concretely entails, and it may also be asked how it relates to the obligation to not put an individual at risk through the denial of health care which has been made available to the population generally. The latter seems to be a kind of non-discrimination requirement that at first glance does not seem to place any demands on *the level of* care provided generally. However, combined with the potential obligation 'to make available *a certain standard* of health care', it may be considered that the Convention nevertheless places some demands on what it is that a state provides. In the light of the Court's hesitant response to positive claims for health care,[25] as well as considerations related to resources that are inevitable in this context, it may be argued that any general obligation would not be likely to entail more than a very minimal level. As indicated, however, the Grand Chamber in *Cyprus v. Turkey* leaves open whether this is indeed the case.

In this regard it is also worth having a look at the case of *Nitecki v. Poland*, which concerned the provision of medication in relation to the protection offered under Article 2.[26] Nitecki was diagnosed with amyotrophic lateral sclerosis (ALS) and had requested from the health insurance fund a refund covering the cost of the drug prescribed to him, because as a pensioner he could not pay for this drug himself. His request was denied and it was for the Court to see whether Article 2 could be material for Mr Nitecki. The government submitted that this right was '*ratione materiae* hardly applicable', but the Court repeated that Article 2 entails positive obligations, and reiterated what it had said in *Cyprus v. Turkey* regarding the denial of health care a state has undertaken to make available to the population generally.[27] The conclusion was however that the complaint at hand was manifestly ill-founded. The applicant had access to a standard of health care because of the social security contributions he had paid. Moreover, the drug was refunded for 70% by the state, and he only had to pay the remaining 30% by himself. Thus,

23 Harris et al. 2014, p. 213.

24 In the words of Harris et al. (*ibid.* p. 213), this 'would be in accord with national health care standards in European states and indirectly provide a partial, but welcome guarantee of the right to health, which is an established human right that is not otherwise protected by the Convention, except through the prohibition of inhuman or degrading treatment in Article 3, which has been applied to health care in a few situations' (see, on the applicability of Art. 3, *infra*, S. 9.2.2).

25 See also, *infra*, S. 9.2.2 and 9.2.3.

26 *Nitecki v. Poland*, ECtHR 21 March 2002 (dec.), appl. no. 65653/01.

27 More precisely, it repeated that 'an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally'(*ibid.*, para. 1, referring to *Cyprus v. Turkey*, ECtHR (GC) 10 March 2001, appl. no. 25781/94, para. 219).

according to the Court 'the respondent State cannot be said, in the special circumstances of the present case, to have failed to discharge its obligations under Article 2'.[28] Moreover, it follows from *Nitecki* that the positive right not to be denied health care that has been made available generally, does not imply that no difference in treatment can be made at all. In regard to Article 14, the Court in this case found a justification for the alleged discrimination 'in the present health care system which makes difficult choices as to the extent of public subsidy to ensure a fair distribution of scarce financial resources'.[29] This may be seen to confirm that if there indeed follows from the Convention a requirement to make a certain standard of care available, this will not be more than a very minimum standard. It appears that, at least where it concerns the provision of care on top of such a minimum level, choices may be made and in fact have to be made by the authorities in the light of the scarcity of resources.

Indeed, as is often the case when it comes to the protection of social rights, in the adjudication of health issues the issue of resources cannot be avoided.[30] Moreover, as no unequivocal 'right to health' can be found in the ECHR, it is likely that the ECtHR is even more hesitant than national judicial bodies tasked with the adjudication of social rights are to impose costly obligations in this field. From this perspective it is everything but surprising that the Court is unwilling to hold that a refund of 70% is contrary to the Convention, although the consequences of this policy might be detrimental to individuals who are unable to pay the remaining part.[31] Nevertheless, in *Panaitescu v. Romania* a failure to provide specific anti-cancerous medication for free did result in a violation of Article 2 of the Convention.[32] What seemed to form the reason for this finding was the fact that the domestic courts actually had ordered the authorities to provide the applicant with the medication. For this reason it was not open for the state to cite a lack of funds or resources.[33] Lacking an argument like this it however appears unlikely that expensive medication can be successfully claimed under the Convention.[34]

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28 *Ibid.*, para. 1.
29 *Ibid.*, para. 3.
30 *Cf.* the South African case on a request for free treatment Soobramoney v. Minister of Health, KwaZula-Natal, 1997 (12) BCLR 1696 (CC) (*supra* Ch. 6, S. 6.3).
31 *Cf.* also *Sentges v. the Netherlands*, ECtHR 8 July 2003 (dec.), appl. no. 27677/02 (an Article 8 case dealing with a request for a robotic arm in which the Court held that for resource reasons and 'as the applicant has access to the standard of health care offered to all persons insured under the Health Insurance Act' the application was held manifestly ill-founded), see, *infra*, S. 9.2.3.
32 *Panaitescu v. Romania*, ECtHR 10 April 2012, appl. no. 30909/06.
33 *Ibid.*, para. 35.
34 See, on the provision of experimental medication, also the case of *Hristozov a. O. v. Bulgaria*, ECtHR 13 November 2012, appl. nos. 47039/11 and 358/12 (discussed in, *infra*, S. 9.2.2. and 9.2.3).

Altogether, thus, when it comes to health care, the positive obligation to 'take appropriate steps' first of all demands the regulation of health care in such a manner that hospitals actually will protect their patients' lives. Further, Article 2 requires an effective judicial system including, amongst other things, the possibility to investigate the death of patients in the care of the medical profession. Moreover, the Court has formulated the obligation to not put an individual at risk through the denial of health care which the state has (voluntarily) undertaken to make available to the population generally. This requirement leaves room for making choices – in the light of the available resources – as regards what and to whom care is provided beyond what is provided generally. Finally, it may be inferred from the Court's reasoning that the level of care that is generally provided must be of 'a certain' level. Although the case law leaves this unclear, it can be argued that the required level can be at most a very minimum one.

9.2.2 Inhuman or Degrading Treatment (Article 3 ECHR)?

Not seldom applicants who invoke Article 2 in a health related issue concurrently also rely on Article 3 of the Convention. In the case of *L.C.B. v. the United Kingdom*, for example, besides invoking the right to life, the applicant also alleged that Article 3 was violated. This because she had not been warned of the effects of her father's alleged exposure to radiation, which prevented monitoring that would have led to earlier diagnosis and treatment of her illness. The Court however concluded that '[f]or the reasons referred to in connection with Article 2 … the Court does not find it established that there has been a violation by the respondent State of Article 3'.[35] Indeed, even though it may seem very sensible for applicants to phrase their complaints under both Article 2 and Article 3, it appears that in matters related to health and health care, there is frequently an overlap in the reasons for the Court to (not) dismiss the respective complaints.

In this respect, the 2012 case of *Hristozov and Others v. Bulgaria* may be mentioned.[36] This case concerned nine terminally ill cancer patients and their requests for the use of a certain experimental medicine. As the medicine was not registered, their requests had been rejected on the basis of the relevant Bulgarian law. In regard to the right to life the Court held that the applicants had not argued that 'generally available' health care was denied or that they

35 *L.C.B. v. the UK*, ECtHR 9 June 1998, no. 14/1997/198/1001, para. 43. In fact, the applicant also invoked Art. 8 ECHR (as well as Art. 13). In this regard the Court concluded that, 'having examined this question from the standpoint of Article 2, it does not consider that any relevant separate issue could arise under Article 8, and it therefore finds it unnecessary to examine further this complaint' (para. 46).

36 *Hristozov a. O. v. Bulgaria*, ECtHR 13 November 2012, appl. nos. 47039/11 and 358/12.

could not afford the medication they needed.[37] Rather, what they claimed was that the applicable law should be framed in a way that would entitle them, exceptionally, to 'an experimental and yet untested product that would be provided free of charge by the company which developed it'.[38] In this regard, according to the Court, 'Article 2 cannot be interpreted as requiring that access to unauthorised medicinal products for the terminally ill be regulated in a particular way'.[39] The applicants, however, had also invoked Article 3 ECHR, arguing that

> 'they had been forced to await their deaths in spite of being aware of the existence of an experimental product which might improve their health and prolong their lives. Those of them who had died had had to endure pain and suffering before their death, in the knowledge that the use of the product in other countries had in some cases even led to complete remission from the disease.'[40]

The Court emphasised that Article 3 generally is relevant in circumstances concerning intentionally inflicted treatment and thus imposes a 'primarily negative obligation'. However, Article 3 may be applicable when 'suffering which flows from a naturally occurring illness … is, or risks being, exacerbated by treatment stemming from measures for which the authorities can be held responsible'. However, it also held that in such situations there is a high threshold, 'because the alleged harm emanates not from acts or omissions of the authorities but from the illness itself'.[41]

In the case at hand, it considered that the applicants did not complain about a lack of adequate medical treatment.[42] Rather, they claimed that the authorities' refusal to allow them access to experimental mediation, which they held was potentially life saving, had resulted in inhuman and degrading treatment. Like in the context of Article 2, the Court considered that this could not amount to a violation, as 3 does not place an obligation on the Contracting States to alleviate the disparities between the levels of health care available in various countries.[43] Thus, in this case the applicants' efforts to also phrase their complaint in terms of Article 3 did not make any difference, although in other circumstances this may be different.

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37 *Ibid.*, para. 107. This in contrast to, indeed, the case of *Nitecki v. Poland* (ECtHR 21 March 2002 (dec.), appl. no. 65653/01). See also *Pentiacova and 48 Others v. Moldova*, ECtHR 4 January 2005 (dec.), appl. no. 14462/03; *Wiater v. Poland*, ECtHR 15 May 2012 (dec.), appl. no. 422990/08.

38 *Hristozov a. O. v. Bulgaria*, ECtHR 13 November 2012, appl. nos. 47039/11 and 358/12, para. 107.

39 *Ibid.*, para. 108. For this reason there had not been a violation of Art. 2.

40 *Ibid.*, para. 102.

41 *Ibid.*, para. 111 (referring to *N. v. the UK*, ECtHR (GC) 27 May 2008, appl. no. 26565/05).

42 *Ibid.*, para. 112. Neither could their situation be compared to those of seriously ill persons who upon removal to another country would be unable to obtain treatment.

43 *Ibid.*, para. 113.

What is in the end decisive for finding a violation of the absolute prohibition of inhuman and degrading treatment is that a 'minimum level of severity' is met. This requirement, which already has been mentioned a few times before,[44] is relative and dependent on the circumstances of the case.[45] However, as the Court's remarks in *Hristozov* confirm, it appears generally harder to meet this threshold when positive health measures are requested. This is probably because, generally, in case of health issues the harm foremost emanates from the illness a person suffers from, rather than that it is being inflicted by the state. That this makes the requirement of a minimum level of severity a particularly demanding one, clearly also follows from several cases concerning expulsion of seriously ill persons. Worth noting is first of all the case of *D. v. the United Kingdom*, that dealt with an AIDS patient who was about to be expelled to St Kitts.[46] The government in this case stated that the applicant's 'hardship and reduced life expectancy would stem from his terminal and incurable illness coupled with the deficiencies in the health and the social-welfare system of a poor, developing country', and that he would therefore not be worse off than other AIDS victims in St Kitts.[47] However, since the applicant had been physically present in, and thus within the jurisdiction of the UK, the Court considered that it would be for this state to secure his rights under Article 3, even after expulsion. Because of the importance of Article 3, the Court held that it 'must reserve to itself sufficient flexibility to address the application of that Article'.[48] Hence, it was

> 'not prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection.'[49]

Eventually, in *D.* the Court found a violation of Article 3. Important for reaching this conclusion was that the applicant was in 'the advanced stages of a terminal and incurable illness'.[50] His removal would not only accelerate his

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44 See, *supra*, Ch. 2, S. 2.4.3.2; Ch. 8, S. 8.2.4.

45 *Kudla v. Poland*, ECtHR (GC) 26 October 2000, appl. no. 30210/96, para. 91: '[I]t depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim'.

46 *D. v. the UK*, ECtHR 2 May 1997, appl. no. 30240/96.

47 *Ibid.*, para. 42.

48 *Ibid.*, para. 49.

49 *Ibid.*

50 *Ibid.*, para. 51.

death, but also subject him to 'acute mental and physical suffering'.[51] It was known to the Court that the applicant had a cousin in St Kitts, but it was unclear whether this cousin would be capable or willing to take care of a terminally ill man. In view of the 'exceptional circumstances', and even though the conditions in St Kitts as such did not violate the standards of Article 3, it was likely that the applicant would soon die under most distressing circumstances, which would amount to inhuman treatment.[52]

That the judgment in *D.* was 'exceptional', has been confirmed in later cases.[53] In *N. v. the United Kingdom*, another leading case in this field decided some ten years after *D.*, the Court's Grand Chamber emphasised that the variation in medical standards and the socio-economic differences between countries have the consequence that the level of treatment in the respondent state and the country of origin may considerably differ. In this regard, 'Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.'[54] N. was about to be removed to Uganda even though she was HIV-infected. She emphasised the stark contrast between her current situation and the one she would end up in if she became dependent on the medical treatment and medication available and affordable for her in her country of origin. The Court held that the fact that the United Kingdom authorities had provided her with medical and social assistance during nine years 'does not in itself entail a duty on the respondent State to continue to provide for her'.[55] She was not 'at the

51 *Ibid.*, para. 52. Moreover, '[a]ny medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts'.

52 *Ibid.*, 96, para. 53. The Court moreover added that these considerations 'must be seen as wider in scope than the question whether or not the applicant is fit to travel back to St Kitts' (para. 53), thereby responding to the contention of the state that he would only be removed when fit enough.

53 In a number of cases, the fact that the applicant's illness had not 'reached an advanced or terminal stage' was reason to declare the complaint inadmissible. See, *e.g.*, *Karara v. Finland*, EComHR 29 May 1998 (dec.), appl. no. 40900/98; *M.M. v. Switzerland*, ECtHR 14 September 1998 (dec.), appl. no. 43348/98; *S.C.C. v. Sweden*, ECtHR 15 February 2000 (dec.), appl. no. 46553/99; *Arcila Henao v. the Netherlands*, ECtHR 24 June 2003 (dec.), appl. no. 13669/03; *Ndangoya v. Sweden*, ECtHR 22 June 2004 (dec.), appl. no. 17868/03; *Amegnigan v. the Netherlands*, ECtHR 25 November 2004 (dec.), appl. no. 25629/04. Although the availability and costs of treatment and medication varied among the respective receiving countries, 'in principle' such treatment was available. See, *e.g.*, *Arcial Henao v. the Netherlands*, ECtHR 24 June 2003 (dec.), appl. no. 13669/03.

54 *N. v. the UK*, ECtHR (GC) 27 May 2008, appl. no. 26565/05, para. 44.

55 *Ibid.*, para. 49. More generally, the Court considered in *N.* that 'aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State' (para. 42).

present time critically ill' and the rapidity of the health deterioration she would suffer from and the amount of treatment and help she would receive involved a certain degree of speculation. For that reason, the Court held that removal would not amount to a violation of Article 3.[56]

Thus, although the judgment in *D.* has definitely triggered a great number of applications, chances that a violation of Article 3 is found where it concerns the level of health care in the country to which an individual is being expelled are particularly small.[57] Indeed, while the Court in *D.* said that its considerations concerned more than just the question of whether a person's health condition is such that he is fit for travel,[58] *de facto* it seems that the protection it offers does not amount to much more than this. When someone is not (yet) sick enough, expulsion orders can generally be put into practice. The fact that the level of health care in the receiving country is very poor, hardly seems to affect this.

By setting such high thresholds in cases concerning expulsion, the Court clearly does little justice to the health interests of the individuals concerned.[59]

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56 *Ibid.*, paras. 50-51. See for a critical analysis of this case Mantouvalou 2009; but see also Bettinson and Jones 2009.

57 *Cf. Samina v. Sweden*, ECtHR 20 October 2011, appl. no. 55463/09; *Yoh-Ekale Mwanje v. Belgium*, ECtHR 20 December 2011, appl. no. 20286/10. Indeed, this not only goes for persons suffering from HIV: '[T]he same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost' (*N. v. the UK*, ECtHR (GC) 27 May 2008, appl. no. 26565/05, para. 45). In the latter group of cases the hurdle for engaging Article 3 has proven (even more) difficult to jump. *Bensaid v. the UK* (ECtHR 6 February 2001, appl. no. 44599/98), for example, dealt with a schizophrenic man who had received treatment for some years but then had to go back to his country of origin. The Court stressed the speculative character of the effects for his health and the support he would get, and emphasised once more that the issue was not one involving direct responsibility for the infliction of harm (paras. 39-40). A lot of other cases concerning (mentally) ill people have simply been held inadmissible, see, *e.g.*, *Karagoz v. France*, ECtHR 15 November 2001 (dec.), appl. no. 47531/99; *Nasimi v. Sweden*, ECtHR 16 March 2004 (dec.), appl. no. 38865/02; *Salkic a. O. v. Sweden*, ECtHR 29 June 2004 (dec.), appl. no. 7702/04; *Dragan a. O. v. Germany*, ECtHR 3 October 2004 (dec.), appl. no. 33743/03; *Ramadan and Ahjredini v. the Netherlands*, ECtHR 10 November 2005 (dec.), appl. no. 35989/03; *Paramsothy v. the Netherlands*, ECtHR 10 November 2005 (dec.), appl. no. 14492/03; *Rrustemaj a. O. v. Sweden*, ECtHR 15 November 2005 (dec.), appl. no. 8628/05; *Hukic v. Sweden*, ECtHR 27 November 2005 (dec.), appl. no. 17416/05.

58 *D. v. the UK*, ECtHR 2 May 1997, appl. no. 30240/96, para. 53.

59 It is true that in the 2013 case of *Aswat v. the UK*, the Court did find a violation in a case of extradition to the United States. It considered that due to the severe state of the applicant's mental health, placement in a so-called 'supermax' prison would exacerbate his condition of paranoid schizophrenia. Here a non-terminal state of health apparently sufficed for finding a breach of Article 3, but it cannot go unnoticed that in this case not the 'general health care conditions' but the specific conditions (or even: 'inflicted treatment') of detention in the US were the object of concern (*Aswat v. the UK*, ECtHR 16 April 2013,

In other words, it may be said that the Court in this part of its case law does not provide for very 'effective', let alone for truly 'indivisible' protection. This criticism links up with the dissenting opinion that was attached to the judgment in *N.*[60] The dissenting judges Tulkens, Bonello, and Spielmann, amongst other things, criticised the Grand Chamber's remark that '[a]lthough many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights',[61] thereby referring to the case of *Airey v. the UK*.[62] The dissenters noted that the quotation was incomplete (and thus misleading), as in *Airey*, the Court had rather emphasised the necessary extension of the Convention into the socio-economic sphere.[63] Moreover, the dissenters also found problematic the Grand Chamber's statement that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[64] They underlined the absolute character of the prohibition of inhuman and degrading treatment, and the fact that this does not allow for 'balancing' the various interests concerned.

Taking into account the costly and 'social' dimension of claims related to health care, it can be said, could bar 'effective' protection under Article 3 of the Convention. At the same time, the fact that the protection the Court offers in the cases mentioned seems to amount to less than a minimum level of health care, and at most to 'a – not very well defined – minimum core right to treatment for dying patients without anyone to take care of them',[65] also seems understandable. After all, what is concerned is not just the imposition of potential socio-economic duties, but in fact also certain extraterritorial requirements.[66] This complicates any move towards the recognition of a requirement that a certain minimum level of care must be present in the receiving state when an ill person is expelled.

It will be shown in Section 9.3 that more (positive) protection in the field of health care can be required under Article 3 when the responsibility of the

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appl. no. 17299/12).

60 Joint dissenting opinion of Judges Tulkens, Bonello and Spielmann.

61 *N. v. the UK*, ECtHR (GC) 27 May 2008, appl. no. 26565/05, para. 44.

62 *Airey v. Ireland*, ECtHR 9 October 1979, appl. no. 6289/73, para. 26 (see on this case also, *supra*, Ch. 2, S. 2.4.1). *Cf.* also *Abdi Ibrahim v. the UK*, ECtHR 18 September 2012, appl. no. 14535/10, para. 31.

63 Joint dissenting opinion of Judges Tulkens, Bonello and Spielmann, para. 6.

64 *N. v. the UK*, ECtHR (GC) 27 May 2008, appl. no. 26565/05, para. 44 (joint dissenting opinion of Judges Tulkens, Bonello and Spielmann, para. 7).

65 Koch 2009, p. 65. *Cf.* also *Nasri v. France*, ECtHR 15 July 1995, appl. no. 19465/92, para. 46. In this case, Art. 8 ECHR prevented the deportation to Algeria of Mr. Nasri, who was deaf and dumb as well as illiterate. Mainly because of these handicaps and the care that could only be provided by his parents in France, the Court concluded that his deportation would be disproportionate.

66 *Cf.* also Bettinson and Jones 2009. For a more critical stance, see Bossuyt 2012.

state is clearly established. What may be concluded from the cases just discussed, however, is that generally, and especially in cases concerning expulsion, meeting the minimum level of severity purely by referring to the insufficient level of care provided, is everything but easy.

9.2.3 Health Issues and Private Life (Article 8 ECHR)

It goes without saying that health issues can have a serious impact on an individual's private life. Unsurprisingly, thus, besides Articles 2 and 3, applicants regularly also invoke Article 8 of the Convention. A good example is again the case of *Hristozov v. Bulgaria* that was already discussed above. In considering the complaints concerning the right to life and the prohibition of inhuman treatment, the Court was unwilling to interfere with the way in which Bulgaria had regulated the provision of experimental medicine. In line with these complaints, the applicants in regard to Article 8 held that the refusals had not taken into account the specifics of their cases. More concretely, '[t]hey had not been intended to protect the applicants' lives, because … without recourse to some new medicinal product, they only had a short span of life left', and an exception 'might have helped them avert suffering and death'.[67]

In assessing this complaint, the Court started out by stating 'that matters of health-care policy are in principle within the margin of appreciation of the domestic authorities, who are best placed to assess priorities, use of resources and social needs'.[68] Moreover, even though 'the applicants' interest in obtaining medical treatment capable of mitigating their illness or of helping them defeat it is of the highest order',[69] the Court also emphasised the general interest. This interest concerned, first, the protection of the individuals concerned in view of their vulnerable state and the lack of clarity on the potential risks and benefits of the desired treatment. Secondly, there was an interest in ensuring that the prohibitions related to unauthorised products are not diluted or circumvented. Thirdly, the state wanted to prevent the development of new medicinal products from being compromised by diminished patient

67 *Hristozov a. O. v. Bulgaria*, ECtHR 13 November 2012, appl. nos. 47039/11 and 358/12, para.104. It can hence be said that both issues related to their right to life, as to the prohibition of inhuman treatment, were present in their Art. 8 complaint, which underlines the overlap between the different issues.

68 *Ibid.*, para.119. *Cf.* also *Pentiacova and 48 Others v. Moldova* (concerning cut in government funding due to which the applicants had to start paying their medication themselves): 'While it is clearly desirable that everyone has access to a full range of medical treatment, including life-saving medical procedures and drugs, the lack of resources means that there are, unfortunately, in the Contracting States many individuals who do not enjoy them, especially in cases of permanent and expensive treatment' (ECtHR 4 January 2005 (dec.), appl. no. 14462/03).

69 *Hristozov a. O. v. Bulgaria*, ECtHR 13 November 2012, appl. nos. 47039/11 and 358/12, para.120.

participation in clinical trials.[70] In the light of this, and regardless of the fact that there is a trend visible in the Member States to allow for exceptions in the provision of unauthorised medicine, the Court concluded that

> '[i]t is not for an international court to determine in place of the competent national authorities the acceptable level of risk in such circumstances. The salient question in terms of Article 8 is not whether a different solution might have struck a fairer balance, but whether, in striking the balance at the point at which they did, the Bulgarian authorities exceeded the wide margin of appreciation afforded to them … In view of the considerations set out above, the Court is unable to find that they did.'[71]

Thus, for similar reasons as in the context of Articles 2 and 3,[72] the Court held that there had not been a violation of Article 8.

In *Hristozov*, the Court did not take a firm stance on whether the Article 8 complaint had to be treated as one concerning a negative interference or rather positive obligations.[73] Arguably, however, it does make a difference for the clarity the Court can provide as regards the interpretation and application of this article whether a claim is perceived as a positive one or not. A health care-related case that was explicitly dealt with as one concerning positive obligations was the case of *Sentges v. the Netherlands*.[74] The issue at stake was the authorities' refusal to provide the applicant, who suffered from Duchenne muscular dystrophy, with a robotic arm specifically designed to be mounted on his electric wheelchair, which would help him obtain more autonomy in handling objects in his environment. The Court repeated that besides refraining from arbitrary interferences, 'there may be positive obligations inherent in the effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves'.[75] However, there could only be a positive obligation for the state 'where there is a direct

70 *Ibid.*, para.122.
71 *Ibid.*, para.125.
72 *Ibid.*, para.122, where the Court mentions that the different relevant interests '[a]ll … are related to the rights guaranteed under Articles 2, 3 and 8 the Convention'.
73 *Ibid.*, para.118: 'Although the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition, the applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole'.
74 *Sentges v. the Netherlands*, ECtHR 8 July 2003 (dec.), appl. no. 27677/02.
75 *Ibid.* (referring to *X and Y v. the Netherlands*, ECtHR 26 March 1985, appl. no. 8978/80, para. 23; *Stubbings a. O. v. the UK*, ECtHR 22 October 1996, appl. nos. 22083/93 and 22095/93, para. 62).

link between the measures sought by an applicant and the latter's private life'.[76] The Court emphasised that Article 8 cannot be applied in every instance in which an individual's life is disrupted, but only in exceptional cases 'where the State's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world'.[77] Moreover, the burden of proof for demonstrating the existence of such a special link lies on the individual.

In the case of *Sentges*, however, the Court refrained from clearly deciding whether it was convinced that the necessary link was present, instead holding that

> '[e]ven assuming that such a special link indeed exists … regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and to the wide margin of appreciation enjoyed by the States in this respect in determining the steps to be taken to ensure compliance with the Convention.'[78]

The Court had regard to the difficult context of the allocation of limited state resources, and to the fact that the national authorities are better placed to assess how to deal with an issue like this, which it considered to be a reason for an 'even wider' margin of appreciation. In line with its review of health care issues under Article 2 it further noted that the applicant had access to the standard of health care generally offered, and although it 'by no means' wished to underestimate the difficulties faced by the applicant it was hence concluded that the respondent state had not exceeded its margin of appreciation. The case was therefore held manifestly ill-founded.

What the case of *Sentges* shows is that in case of (potential) positive obligations in the field of health care the Court may be hesitant to clearly indicate whether Article 8 is involved or not. Its failure to indicate in a transparent manner when exactly the *prima facie* positive protection of this provision is triggered may be seen to imply that in fact it lacks a clear standard on the basis of which the proportionality of the omission can be judged. In *Sentges* the Court quickly proceeded to an overall balancing of the various interests

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76 *Ibid*. *Cf. Botta v. Italy*, ECtHR 24 February 1998, appl. no. 21439/93, paras. 33-34. *Botta* concerned disabled persons who, during their vacation, could not access the sea. The Court also there made mention of possible positive obligations in this sphere once there is a direct link with someone's private life, but concluded that the case was inadmissible. According to the Court, the case 'concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life' (para. 35). See also, on similar reasoning in regard to possible positive obligations in the field of housing, *supra*, Ch. 8, S. 8.2.1.2.

77 *Sentges v. the Netherlands*, ECtHR 8 July 2003 (dec.), appl. no. 27677/02.

78 *Ibid*.

at hand, informed by not much more than a wide (or 'even wider') margin. In this regard it also held that it 'should also be mindful of the fact that … a decision issued in an individual case will nevertheless at least to some extent establish a precedent'.[79] This may further explain its deferential stance – which may seem necessary when it comes to choices related to costly measures in the field of health. However, it can be asked whether the way in which it dealt with the case of *Sentges* was very helpful in this regard. Indeed, besides potentially failing to ensure that appropriate weight is given to the individual socio-economic interest concerned, a lack of emphasis on the interpretation question may at the same time give the impression that it is always worth trying to have ones' positive health claim reviewed under the Convention, although the changes of success are indeed very limited.

That these respective problems are especially apparent in the context of positive obligations[80] seems to be confirmed by the 2014 case of *McDonald v. the United Kingdom*.[81] *McDonald* concerned a woman's 'positive' claim to night-time care because she has problems with her bladder and due to mobility problems is unable to safely access a toilet or commode unaided. However, as she had initially been provided with a night-time carer, the applicant was according to the Court 'not complaining of a lack of action but rather of the decision of the local authority to reduce the care package that it had hitherto been making available to her'.[82] Thus, the Court addressed the issue as one involving an interference with the applicant's right to respect for her private life, 'without entering into the question whether or not Article 8 § 1 imposes a positive obligation on the Contracting States to put in place a level of entitlement to care equivalent to that claimed by the applicant'.[83] Taking this negative starting point, then, allowed the Court to start by asking the question whether the interference was in accordance with the law, instead of merely taking an overall look at whether the decision not to grant night-care was justified in the light of the (wide) margin of appreciation. For the period in which the local authority had been in breach of its statutory duty to provide care to the applicant in accordance with its own assessment of her need for care, this was not the case, and there had hence been a breach of the Convention.[84] In regard to the remaining period – during which there was no

79 *Ibid.*

80 See, *e.g.*, also the case of *Farcas v. Romania*, ECtHR 14 September 2010 (dec.), appl. no. 27677/02, where the Court also did not answer the question whether the applicant's complaints regarding the refusal of assistance actually fell within the 'positive scope' of Art. 8. Rather, it held that 'en l'espèce, vu le caractère général des allégations du requérant, le doute subsiste quant à l'utilisation quotidienne de ces établissements par celui-ci et quant à l'existence d'un lien direct et immédiat entre les mesures exigées de l'Etat et la vie privée de l'intéressé' (para. 68).

81 *McDonald v. the UK*, ECtHR 20 May 2014, appl. no. 4241/12.

82 *Ibid.*, para. 48.

83 *Ibid.*, para. 48.

84 *Ibid.*, paras. 51-52.

problem concerning the lawfulness of the interference – , the Court took account of the fact that the proportionality of the decision to reduce the applicant's care had been duly considered by the local authorities as well as by the domestic courts. Thus, as the Court found that the interests of the applicant as *prima facie* protected under Article 8 were adequately balanced against 'the more general interest of the competent public authority in carrying out its social responsibility of provision of care to the community at large', it concluded that the authorities had not 'exceeded the margin of appreciation afforded to them, notably in relation to the allocation of scarce resources'.[85]

Thus, it seems that especially when positive complaints are concerned, the individual interests concerned run a risk of being overshadowed by a general balancing of interests that is often informed by a (very) wide margin of appreciation. This is not only the case because positive obligations (appear to) bring along more costs, but also because the Court often leaves open the question whether 'a sufficient link' exists for applying Article 8 in the first place. The latter may hinder meaningful, effective and indivisible protection based on a clear indication of what interests are actually protected by Article 8. Additionally, it also fails to provide the necessary guidance for the Member States – as well as for (potential) applicants – on both the interpretation and the application of the Convention.[86]

It must be concluded that the eventual protection of claims for health care and medication under Articles 2, 3, and 8 of the Convention is relatively limited. Nevertheless, the Court has created several openings for effective and indivisible protection in this field, by formulating positive obligations under Article 2, reviewing cases concerning (expulsion and) health care under Article 3, and by linking this issue to the right to respect for private life. It can moreover be inferred from the case law that the protection offered by the different articles overlaps to a certain extent. In discussing complaints under the different provisions, the Court often refers to the 'standard of health care that has been made available to the population generally'. As long as an individual is not denied this standard, the sensitive position of the Court and the issue of resources make it unlikely that a violation is found. It seems that the standard a state 'voluntarily' provides does need to be of a certain 'minimum' level, although this may be different in the context of expulsion, where the extraterritorial dimension complicates the issues at hand. Recognising these points in a more transparent manner would potentially aid the clarity of the Court's review under the Convention, not least also in cases where the question of the (*prima facie*) positive protection of Article 8 is concerned.

85 *Ibid.*, para. 57.

86 In this regard it is interesting to see how the Court deals with the interpretation and application of Art. 8 in 'environmental health' cases. This will be discussed in, *infra*, S. 9.4.

9.3 Extra Care for 'Dependent and 'Vulnerable' and Individuals

On the basis of the cases presented in the previous section, it can be said that the Convention does not guarantee much in terms of the provision of health care. However, the picture presented in Section 9.2 was not entirely complete. What can be added to the cases discussed there is the fact that in particular 'vulnerable' individuals, or at least those who are under the control of state authorities, may successfully claim more-encompassing health-related protection under the Convention. Whereas what is provided to 'the population at large' generally seems to be left to the state, when specific groups are concerned, the Court has defined more concrete obligations.

Without aiming at giving an exhaustive overview of the protection offered in this regard, this section first of all illustrates the 'extra' protection that may be required when it comes to the health of detainees. Furthermore, although the situation in which the state has deprived individuals of their liberty may form the most prominent example of when extra (social) responsibilities are involved, it will be shown that the requirements related to the needs of vulnerable individuals also reach beyond the prison gates.

Frequently, issues arise under the Convention that relate to the treatment of detainees. When the state deprives someone of his liberty for purposes of detention, it has the responsibility to respect and protect his (other) fundamental rights inasmuch as possible.[87] This implies that the conditions of imprisonment should not be contrary to the Convention. Interesting for the purposes of this chapter is to see what this more specifically requires when the health of detainees is concerned. This particular issue is often dealt with under Article 3 ECHR,[88] and just like in other contexts this means that the question of whether Convention protection is triggered is a relative one that is dependent on the (cumulative) circumstances of the case.[89] In this regard plenty of examples can be given of case-specific circumstances that did or did

87 *Cf.* in this regard Art. 10(1) of the International Covenant on Civil and Political Rights (ICCPR) ('All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person') as well as the European Prison Rules, Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe to member states on the European Prison Rules, that state: '1. All persons deprived of their liberty shall be treated with respect for their human rights' and '3. Prison conditions that infringe prisoners' human rights are not justified by lack of resources'. Special rules on health and health care in prisons can be found in paras. 39-48.

88 See however also the cases on the health of detainees that have been dealt with under Arts. 2 and 5 of the Convention. See, on these cases, *e.g.* Koch 2009, p. 83ff.

89 As the Court underlined in *Dougoz v. Greece*, a case that concerned the overcrowdedness of a Greek prison (partially) lacking sanitary and sleeping facilities, hot water, fresh air and daylight, this means that 'account has to be taken of the cumulative effects of these conditions' (*Dougoz v. Greece*, ECtHR 6 March 2001, appl. no. 40907/98, para. 46).

not result in a finding of a breach of Article 3.[90] Instead of doing so, however, it is worth highlighting some more general remarks the Court has made in relation to the issue of prisoners' health, as this can aid in creating a more general image of what the Convention demands.

In keeping with the idea that besides being deprived of their liberty, prisoners should not be deprived of their other fundamental rights, the Court has on a number of occasions stated that under Article 3,

> 'the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.'[91]

Thus, Article 3 entails a positive obligation for the state to provide for the 'requisite medical assistance' to ensure prisoners' health and well-being. Importantly, moreover, the Court has explicitly held that certain categories of prisoners require special conditions of detention that correspond to their particular needs. In this regard it has referred to 'persons suffering from a mental disorder … or serious illness',[92] 'the disabled',[93] 'the elderly',[94] 'or drug addicts suffering from withdrawal symptoms'.[95] This confirms that especially when dependent on the state *and* vulnerable, detainees obtain special care under the Convention.

Still, what this means in more concrete terms depends on the situation of the individual and in particular on his state of health.[96] Very exceptionally, it can be held that because of a prisoner's health condition, detention as such is incompatible with the Convention.[97] As the Court held in *Khudobin v. Russia*, however, in principle

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90 See especially the Court's Factsheet on 'Prisoners' health-related rights' and 'Detention and mental health' (www.echr.coe.int, under 'Factsheets'), as well as Harris et al. 2014, pp. 265-267; Rainey et al. 2014, pp. 190-191.

91 See, *e.g.*, *Kudla v. Poland*, ECtHR 26 October 2000, appl. no. 30210/96, para. 94.

92 *Dybeku v. Albania*, ECtHR18 December 2007, appl. no. 41135/06, para. 40, referring to *Kudla v. Poland*, ECtHR 26 October 2000, appl. no. 30210/96; *Keenan v. the UK*, ECtHR 3 April 2001, appl. no. 27229/95.

93 *Ibid.*, para. 40, referring to *Mouisel v. France*, ECtHR 14 November 2002, appl. no. 67263/01; *Matencio v. France*, ECtHR 15 Januray 2004, appl. nos. 58749/00 and 58749/00; *Sakkopoulos v. Greece*, ECtHR 15 January 2004, appl. no. 61828/00.

94 *Ibid.*, referring to *Price v. the UK*, ECtHR 10 July 2001, appl. no. 33394/96.

95 *Ibid.*, referring to *Papon v. France*, ECtHR 7 June 2001 (dec.), appl. no. 66646/01.

96 *Ibid.*, referring to *McGlinchey a. O. v. the UK*, ECtHR 29 April 2003, appl. no. 50390/99.

97 *Cf. Mouisel v. France*, ECtHR 14 November 2002, appl. no. 67263/01; *Tekin Yildiz v. Turkey*, ECtHR 10 November 2005, appl. no. 22913/04.

> 'Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds. It rather imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty. The Court accepts that the medical assistance available in prison hospitals may not always be at the same level as in the best medical institutions available for the general public.'[98]

In *Grishin v. Russia*, in the same vein, the Court mentioned that it 'is prepared to accept that in principle the resources of medical facilities within the penitentiary system are limited compared to those of civil clinics'.[99] That the standard of care that is demanded should take into account 'the practical demands of imprisonment',[100] should however not be seen to be in conflict with the Court's repeated statement that 'resource issues' cannot form a sufficient justification when prison conditions are concerned.[101] If what is required is in fact an adequate (minimum) standard – rather than the best circumstances thinkable – the Court's statements may seem fully compatible.

Important to emphasise is that the (extra) protection offered by Articles 2 and 3 of the health needs of dependent and/or vulnerable individuals reaches beyond the prison gates. A prominent example of the fact that the positive, social protection demanded in this regard can indeed reach very far is the 2013 case of *Nencheva a. O. v. Bulgaria*.[102] This case did not concern detainees yet the Court nevertheless recognised a broad 'social' responsibility of the state to provide for the needs of the individuals concerned. *Nencheva* involved the death of 15 children and young adults in a care home. Their relatives and guardians complained under Article 2 ECHR that the authorities failure to provide them with the necessary care was in breach of the Convention. Material in regard to this complaint was the fact that the children had been entrusted to the care of the state and were under the exclusive supervision

98 *Khudobin v. Russia*, ECtHR 26 October 2006, appl. no. 59696/00, para. 93.

99 *Grishin v. Russia*, ECtHR 15 November 2007, appl. no. 30983/02, para. 76; *Vasyukov v. Russia*, ECtHR 5 April 2011, appl. no. 2974/05, para. 62. Contracting states are nevertheless bound 'to provide all medical care their resources might permit'. (para. 76). See also *Aleksanyan v. Russia*, ECtHR 22 December 2008, appl. no. 46468/06, paras. 139, 148-149.

100 *Vasyukov v. Russia*, ECtHR 5 April 2011, appl. no. 2974/05, para. 63.

101 In *Khokhlich v. Ukraine*, *Kuznetsov v. Ukraine* and *Poltoratskiy v. Ukraine* it was clarified that a lack of resources does not establish a valid justification. The Court in these cases explained that it had borne in mind 'that Ukraine encountered serious socio-economic problems in the course of its systemic transition and that prior to the summer of 1998 the prison authorities were both struggling under difficult economic conditions and occupied with the implementation of new national legislation and related regulations. However, the Court observes that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention'. See *Khokhlich v. Ukraine*, ECtHR 29 April 2003, appl. no. 441707/98, para. 181; *Kuznetsov v. Ukraine*, ECtHR 29 April 2003, appl. no. 39042/97, para. 128; *Poltoratskiy v. Ukraine*, ECtHR 29 April 2003, appl. no. 38812/97, para. 148.

102 *Nencheva a. O. v. Bulgaria*, ECtHR 18 June 2013, appl. no. 48609/06.

of the authorities. These had been fully aware of the extremely worrisome circumstances in the care home that, in the harsh winter of 1997 and during a severe economic crisis, had to cope with a lack of heating, food, medical care and medication. There was no doctor available at the time and the nearest hospital was 40 kilometers away. Next to the authorities' knowledge and responsibility, in finding that the state was responsible for the state of health of the children, the Court particularly emphasised the vulnerability of the persons who had died – they were children and young adults who were suffering from severe mental and physical disabilities.[103] It held that

> 'concernant l'obligation des autorités de prendre des mesures de protection, de nombreux éléments au dossier, à savoir l'absence de réaction pendant plusieurs mois aux alertes de la directrice concernant la situation au foyer … ou l'absence apparente d'une aide médicale prompte et appropriée … indiquent que les autorités n'ont pas pris des mesures promptes, concrètes et suffisantes pour prévenir les décès dénoncés, alors qu'elles avaient une connaissance précise des risques réels et imminents pour la vie des personnes concernées.'[104]

Thus, as is the case when dangerous activities are concerned, the vulnerability of the persons whose life might be in danger and for which the state has taken responsibility, can lead to positive obligations related to health.[105] However, it is equally clear that a rather high threshold of severity must be transgressed in order for Articles 2 and 3 to be applicable to health cases especially outside the situation of detention.

9.4 A Healthy Environment

In recent years the Court has regularly dealt with 'environmental' issues.[106] The cases concerned involve complaints about environmental pollution and hazardous state activities, but also airport noise, etc. This category of cases is important for this chapter, as generally the cases involved concern the health of the applicants, which may be at risk due to the pollution that is taking place. Even though the health aspects cannot always very clearly be singled out,[107]

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103 *Ibid.*, *e.g.*, paras. 106, 119, 120, 123, 141.

104 *Ibid.*, para. 124. Although the Court does not explicitly differentiate between the two, next to this substantive aspect the eventual violation was also based on procedural aspects related to the investigation into the deaths and the criminal responsibility of those involved.

105 *Ibid.*, para. 123.

106 *Cf.* the Court's Factsheet on 'Environment-related cases in the Court's case law' (www.echr.coe.int, under 'Factsheets').

107 And moreover, as was already said in the introduction, sometimes housing-related interests are present as well. See, for a recent example, *Bor v. Hungary*, ECtHR 7 October 2013, appl. no. 50474/08 (concerning noise disturbance caused by the operation of a railway station that made the applicant's home 'virtually uninhabitable').

it is interesting to see what approach the Court has developed to issues of this kind.

In this chapter the focus will be on those 'healthy environment' cases that concern Article 8 ECHR. As was already seen in Section 9.2.1, sometimes the right to life is involved as well,[108] but the majority of environmental (health) complaints are brought under Article 8.[109] They sometimes deal with obvious interferences with applicants' private lives and living environments, but often the relevant cases also concern omissions of the state when it comes to ensuring compliance with regulations or providing for solutions when third parties act in a way that is detrimental to the environment. It will be asked whether and how the Court provides effective protection in case of severe instances of environmental nuisances and health risks. Does it make clear when exactly Article 8 is engaged and does it provide reasons for when it can review the issue at hand? If a case is held admissible, how does the ECtHR decide whether or not the Convention has been violated? In answering these questions it is seen whether the interpretation and application by the Court offers consistent guidance to the states, granting them sufficient leeway while at the same time ensuring indivisible protection. This section first addresses the matter of scope (9.4.1), followed by an analysis of the Court's review of environmental health cases (9.4.2). It will be concluded with a discussion of the margin of appreciation (9.4.3).

108 See *Öneryildiz v. Turkey*, ECtHR (GC) 30 November 2004, appl. no. 48939/99. Another interesting example is *Guerra and Others v. Italy*, which concerned the release of large quantities of toxic substances from a factory close to the homes of the applicants. In 1976 there had been a big explosion after which 150 people had to be hospitalised, but the applicants themselves had not yet suffered from any deterioration of their health. Art. 2 was invoked, but the Court decided not to go into this complaint. This was considered unnecessary, as a violation of Art. 8 had already been found. In a concurring opinion Judge Jambrek nevertheless reflected upon the relation between health guarantees and Art. 2 ECHR. In his view, '[t]he protection of health and physical integrity is … as closely associated with the "right to life" as with the "respect for private and family life". An analogy may be made with the Court's case-law on Article 3 concerning the existence of "foreseeable consequences"; where – *mutatis mutandis* – substantial grounds can be shown for believing that the person(s) concerned face a real risk of being subjected to circumstances which endanger their health and physical integrity, and thereby put at serious risk their right to life, protected by law. If information is withheld by a government about circumstances which foreseeably, and on substantial grounds, present a real risk of danger to health and physical integrity, then such a situation may also be protected by Article 2 of the Convention'. See *Guerra a. O. v. Italy*, ECtHR 19 February 1998, no. 116/1996/735/932 (concurring opinion of Judge Jambrek).

109 It is worth indicating that the different 'environmental' issues regularly focus on the procedures provided and for that reason often also involve Art. 6 and/or Art. 13 of the Convention.

9.4.1 The Applicability of Article 8 ECHR: A Threshold Approach?

The first case in which the Court recognised that the Convention leaves room for environmental complaints was the 1990 case of *Powell and Rayner v. the United Kingdom*.[110] The case dealt with noise pollution caused by air traffic, and the Court held that 'the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport … Article 8 is therefore a material provision in relation to both Mr Powell and Mr Rayner'.[111] Whereas earlier complaints regarding the environment had not attracted the protection of the Convention,[112] it thereby clarified that when individual effects are involved, review under the Convention is possible.

What the judgment in *Powell and Rayner* did not make clear, however, was whether *any* adverse effect on an individual's well-being caused by environmental circumstances would be deserving of review under Article 8 of the Convention. Arguably, not every 'nuisance' can be reason for the Court to embark on thorough review on the basis of this right. It can be asked to what extent, for example, a negative impact on an individual's health would be necessary for generating an affirmative answer to the question of the applicability of right to respect for private life. The Court's first concrete efforts at further clarifying this were merely tentative ones. In *López Ostra v. Spain*, the applicant complained about noise, smells, and polluting fumes coming from a nearby plant, from which especially her daughter was suffering.[113] In discussing the application Article 8, the Court famously stated that '[n]aturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private life adversely, without, however, seriously endangering their health'.[114] Even though this indicates that serious health dangers are no necessary prerequisite, it did not provide any information on what other limits there might be to the applicability of Article 8. The same can be said of *Guerra and Others v. Italy*.[115] In this case the Court emphasised that after an escape of several tonnes of potas-

110 *Powell and Rayner v. the UK*, ECtHR 21 February 1990, appl. no. 9310/81.
111 *Ibid.*, para. 40.
112 *X. and Y. v. Federal Republic of Germany*, EComHR 13 May 1976 (dec.), appl. no. 7407/76, D.R. 5, p. 161.
113 *López Ostra v. Spain*, ECtHR 9 December 1994, appl. no. 16798/90.
114 *Ibid.*, para. 51.
115 Article 10 ECHR (the freedom of expression) was invoked as well. With regard to this article, the ECtHR held that it does not impose upon states a duty to collect and disseminate information – in this case regarding environmental dangers and the accompanying health risks – on its own motion. Article 10 was for that reason not applicable. See *Guerra a. O. v. Italy*, ECtHR 19 February 1998, no. 116/1996/735/932, para. 53. See however the concurring opinions of Judge Palm, joined by Judges Bernhardt, Russo, Macdonald, Mararczyk and Van Dijk, and of Judge Jambrek. Judge Thór Vilhjálmsson (partly concurring and partly dissenting opinion) would have even preferred the case to be dealt with under Art. 10.

sium carbonate and bicarbonate solution, containing arsenic trioxide, 150 people were hospitalised. It was also clear that the emissions into the atmosphere coming from the factory were often channelled towards the place where the applicants lived. In *Guerra* the Court held that '[t]he direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable'.[116] Although just like in *López Ostra* the situation was 'clearly' serious enough for being dealt with under the ECHR, the question still remained whether the Court's reasoning was meant to imply that *any* direct effect of pollution on private life, could trigger the applicability of Article 8 of the Convention.

The case of *Kyrtatos v. Greece*, which concerned urban development on the Greek island of Tiros, more particularly required the Court to offer clarity in this regard. Complaining under Article 8, the applicants held that the development 'had led to the destruction of their physical environment and had affected their life'.[117] 'Regardless of the danger for one's health', they stated, 'the deterioration of the environment fell to be examined under Article 8 of the Convention where it adversely affected one's life'.[118] Concerning the issue that the area where their home was located had 'lost all of its scenic beauty', the Court underlined that an adverse effect on the rights safeguarded by Article 8 requires 'a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment'.[119] More importantly, however, as regards the second limb of the applicants' argument that dealt with the light and noise pollution that had resulted from the urban development, the Court concluded that the disturbances had 'not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8'.[120] Thus, next to the fact that 'there is no right to environmental protection unless the environmental issues can be discussed within the context of private life and family life',[121] pollution negatively affecting private and/or family life must be of a certain severity for Article 8 to become relevant.

In the 2005 *Fadeyeva v. Russia* judgment it was confirmed that these 'threshold requirements' are indeed a matter of scope, and hence determine whether an environmental issue deserves review under the Convention in the first place.[122] Ms Fadeyeva was living in close proximity to a severely polluting

116 *Ibid.*, para. 57.
117 *Kyrtatos v. Greece*, ECtHR 22 May 2003, appl. no. 41666/98, para. 44.
118 *Ibid.*, para. 45.
119 *Ibid.*, para. 52. It said that the articles laid down in the Convention are not specifically designed for providing general environmental protection – 'to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect'.
120 *Ibid.*, para. 54.
121 Koch 2009, p. 71.
122 *Fadeyeva v. Russia*, ECtHR 9 June 2005, appl. no. 55723/00.

plant that was operating in breach of domestic environmental standards and endangering her health. The Court made crystal clear that

> 'the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 … The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.'[123]

In concreto, for the applicability of Article 8 this means that 'complaints relating to environmental nuisances have to show, firstly, that there was an actual interference with the applicant's private sphere, and secondly, that a level of severity was attained'.[124] The Court also explained why in *Fadeyeva* these requirements had been met. It referred to a 'very strong combination of indirect evidence and presumptions' that made it likely the applicant's health deteriorated as a result of the industrial emissions. 'Even assuming that the pollution did not cause any quantifiable harm to her health', it stressed that 'the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention'.[125]

Thus, it has become clear that not every environmental impact on an individual's well-being can be reviewed by the Strasbourg Court. Nevertheless, the case law has created room for 'indivisible' review of fundamental interests, not in the least because the criterion of a 'minimum level of severity' explicitly demands taking into account the issue of health.[126] Even though – partly for evidentiary reasons – they do not seem to be an absolute prerequisite,[127] 'physical and mental effects' increase the likelihood that an issue is *prima facie* protected under the Convention. Without becoming all-encompassing, the Court's interpretation in this regard does not seem biased against more social protection. To the contrary, when health effects are clearly present, this makes

123 *Ibid.*, para. 69.
124 *Ibid.*, para. 70.
125 *Ibid.*, para. 88. *Cf.* also *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia*, ECtHR 26 October 2006, appl. nos. 53157/99; 53247/99; 56850/00; and 53695/00.
126 As well as the duration of the nuisances, see, *e.g.*, *Dubetska a. O. v. Ukraine*, ECtHR 10 February 2011, appl. no. 30499/03, para. 118.
127 According to Brems (2007, p. 148), 'the Court has explicitly adopted a higher standard in the context of environmental pollution' in the sense that – although limits exist – the applicability (or violation) of Article 8 is not made contingent upon (a causal relation with) health damage in particular. Indeed, as it is often hard to prove whether health effect exist that actually are the result from the pollution concerned, the Court in this regard will 'primarily give regard to the findings of the domestic courts and other competent authorities in establishing the factual circumstances of the case' (*Dzemyuk v. Ukraine*, ECtHR 4 September 2014, appl. no. 42488/02).

it likely that review is granted,[128] whereas when there are no health issues involved at all this may be (part of the) reason a holding the case inadmissible.[129]

However, regardless of the clarity brought by the thresholds the Court has set in the context of protection against environmental pollution, it does not always apply the criteria identified in a consistent manner. In *Zammit Maempel v. Malta*, for example, a family complained about fireworks that are let of on the occasion of certain village feasts, twice a year for a few hours, at about 150 meters from their home. The Court here explicitly referred to the minimum level of severity nuisances must have attained for a case to be admissible, but as there was 'at least a temporary effect on both the physical and … the psychological state of those exposed to [the fireworks]', and because 'the applicants' family may be exposed to some physical and personal risk',[130] the complaint was nevertheless reviewed. The lack of concrete, severe risks or any health effects further on in the judgment played an important role in concluding that there had not been a violation.[131] However, it can be asked whether this was an issue in which it was for the Court to decide whether the authorities had struck a fair balance in the first place. Also in *Martínez Martínez and Pino Manzano v. Spain* the thresholds set did not play any concrete role.[132] Again, the noise levels and the negligible (possible) effects thereof were explicitly taken into account at the balancing stage and for concluding that the Convention had not been breached, yet were not considered to be relevant for determining whether the issue was actually covered by Article 8.[133]

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128 See, e.g., *Bâcilâ v. Romania*, ECtHR 30 March 2010, appl. no. 19234/04, paras. 63-64. In this case the health effects of the hazardous chemicals released into the atmosphere as well as the concrete health problems of the applicant were clearly established. This fact weighed heavily in reaching the conclusion that Article 8 applied. *Cf.* also *Brânduse v. Romania*, ECtHR 7 April 2009, appl. no. 7586/03, paras. 66-67; *Marchis a. O. v. Romania*, ECtHR 28 June 2011 (dec.), appl. no. 38197/03, para. 38; *Orlikowsci v. Poland*, ECtHR 4 October 2011, appl. no. 7153/07, para. 98; *Darkowska and Darkowski v. Poland*, ECtHR 15 November 2011 (dec.), appl. no. 31339/04, para. 69.

129 *Cf., e.g., Walkuska v. Poland*, ECtHR 29 April 2008 (dec.), appl. no. 6817/04: 'In particular, it has not been shown that the pollution complained of was of such a degree or character as to cause any noxious effect on the applicant's health or that of her family'; *Fägerskiöld v. Sweden*, ECtHR 26 February 2008 (dec.), appl. no. 37604/04; *Furlepa v. Poland*, ECtHR 18 March 2008 (dec.), appl. no. 62101/00.

130 *Zammit Maempel v. Malta*, ECtHR 22 November 2011, appl. no. 24202/10, para. 38.

131 *Ibid.*, para. 67.

132 *Martínez Martínez and Pino Manzano v. Spain*, ECtHR 3 July 2012, appl. no. 61654/08.

133 *Cf.*, for a recent case that concerned noise that made the applicant's home 'virtually uninhabitable', *Bor v. Hungary*, ECtHR 7 October 2013, appl. no. 50474/08. In this case the Court did not pay explicit attention to the minimum level of severity requirement. Instead, it immediately moved to reviewing the issue, thereby having regard to the fact that the noise levels significantly exceeded statutory levels. See, for the importance of 'national irregularities' in reviewing whether there is a breach of the Convention, *infra*, S. 9.4.2.

Another interesting example in this regard is the 2012 case of *Di Sarno and Others v. Italy*.[134] The issue at hand concerned the waste crisis in Italy, where garbage had been piling up in the streets for months without the government being able to take any effective measures. In *Di Sarno* the Court seemed to place particular emphasis on these general circumstances, without thereby focusing too much on the individual effects at stake. Some of the applicants in *Di Sarno* only worked in the polluted area, which means that it could be doubted whether there was any interference with their 'private and family life' at all. The Court did speak of a direct effect of the waste on the applicants 'propre bien-être' (well-being),[135] and moreover held that it could foresee that the situation *could* lead to a 'deterioration of their life quality'.[136] However, also because of the lack of any health effects, it does not seem certain that the criteria set in *Fadeyeva* were actually applied.

It may be concluded that the *Fadeyeva* criteria are sometimes disregarded or used in a confusing manner. However, this is no reason for discrediting the thresholds set as such. In fact, the different criteria seem to allow for providing clear guidance concerning the scope of *prima facie* environmental health protection under Article 8, by distinguishing fundamental, health-related cases from those that merely concern annoyances. It seems that regardless of whether an issue concerns a negative interference or positive demands, by focusing on what the effects are for the individual concerned, the thresholds allow for taking a bifurcated approach and create a clear starting point, at least, that is, when being applied in a consistent manner.

9.4.2 National Irregularities, Procedural Demands, and the Search for A Fair Balance

In deciding on the question of whether environmental issues amount to a violation of Article 8 of the Convention, the crucial question is generally whether the state has struck a fair balance between the individual and general interests concerned. This is everything but easy to determine, not least because of the multiplicity of interests involved. As was seen in the previous subsection, on the side of the individual, health issues may only be one of the concerns involved, while also on the part of the state different (political, budgetary, environmental) interests may play a role. In cases characterised by such complexity, it is difficult for the Strasbourg Court to engage in a balancing exercise without thereby giving the impression of supplanting the national decision-maker's view by its own. The likely result is thus that the Court leaves considerable leeway to the national authorities. However, in the cases it has dealt

134 Di Sarno a. O. v. Italy, ECtHR 10 January 2012, appl. no. 30765/08.
135 *Ibid.*, para. 81.
136 *Ibid.*, para. 108.

with over the past years, the Court has nevertheless been able to rely on a number of criteria for deciding on environmental health issues in a convincing manner. These have not merely been developed by the Court itself, but rather seem to have been presented to it through the facts of the different cases. Mention can be made, first, of the importance of national irregularities for finding a breach of Article 8. Further, the Court has relied in particular on procedural requirements that have helped it to decide on the 'fair balance' question. In the following, its approach will be illustrated by a number of cases, while the question will be answered whether on this basis the Court indeed seems to succeed in providing effective and indivisible environmental health protection.

A first case that shows the importance of national irregularities for the Court's balancing review is the case of *López Ostra v. Spain*. Although the Court in this case held that there might be a link with Article 8 even when no serious health dangers exist,[137] it took the severe health condition of the applicant's daughter into account in its assessment of the fair balance struck by the national authorities. However, even more weight was granted to the fact that the factory was operating without the necessary municipal licence, and that its closure had therefore been ordered. Thus, regarding the question of whether the necessary measures had been taken, '[i]t has to be noted that the municipality not only failed to take steps … but also resisted judicial decisions to that effect'.[138] A fair balance between the economic well-being of the town and the applicant's fundamental right had therefore not been struck.

In *Guerra and Others v. Italy* the Court recognised the importance of obtaining the necessary information on (the seriousness of) the health risks present. Ascertaining 'whether the national authorities took the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life as guaranteed by Article 8',[139] particular emphasis was placed on the fact that the authorities had known about specific dangers but had not provided information to the persons concerned in order to enable them to assess the risks inherent in staying in the vicinity of the plant. The fact that in this case there had been a violation, however, was again premised on the fact that there was a national law, concerning the dissemination of information, with which the state had failed to comply.

In *Fadeyeva v. Russia*, next to clearly pinpointing the thresholds that have to be met for having one's environmental complaint reviewed under the Convention, the Court also confirmed the importance of 'national irregularities' for concluding whether or not there had been a violation. It mentioned that

137 *López Ostra v. Spain*, ECtHR 9 December 1994, appl. no. 16798/90, para. 51 (see, *supra*, S. 9.5.1).

138 *Ibid.*, para. 56

139 *Guerra a. O. v. Italy*, ECtHR 19 February 1998, no. 116/1996/735/932, para. 58.

'in all previous cases in which environmental questions gave rise to violations of the Convention, the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic legal regime'.[140] However, different from in cases concerning negative obligations,[141] it considered that when positive claims are concerned, such irregularities do not necessarily suffice for concluding on a violation:

> '[I]n cases where an applicant complains about the State's failure to protect his or her Convention rights, domestic legality should be approached not as a separate and conclusive test, but rather as one of many aspects which should be taken into account in assessing whether the State has struck a 'fair balance' in accordance with Article 8 § 2.'[142]

Moreover, the Court stated that even though 'in today's society the protection of the environment is an increasingly important consideration', because of the complexity of the issues involved the Court's task remains a primarily subsidiary one.[143]

Although in *Fadeyeva* the combination of relevant circumstances eventually tipped the scale towards finding a violation,[144] the approach the Court in this case outlined thus seems to be a quite hesitant one. In this regard one may also have a look at the well-known case of *Hatton and Others v. the United Kingdom*, which involved sleep deprivation caused by a new night flight scheme at Heathrow airport.[145] After the Chamber had concluded on a violation because it did not find the decisions made at the national level convincing,[146] the review by the Grand Chamber took a more cautious stance. Important in reaching the eventual conclusion that Article 8 had not been

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140 *Fadeyeva v. Russia*, ECtHR 9 June 2005, appl. no. 55723/00, para. 97. *Cf.* also, *e.g.*, Deés v. Hungary, ECtHR 9 November 2010, appl. no. 2345/06 (regarding noise pollution due to heavy traffic) where statutory limits had been crossed and the authorities had failed to take effective measures.

141 With regard to active interferences the Court notes that '[t]he breach of domestic law in these cases would necessarily lead to a finding of a violation of the Convention'. See *Fadeyeva v. Russia*, ECtHR 9 June 2005, appl. no. 55723/00, para. 95.

142 *Ibid.*, para. 98. *Cf.* also *Dubetska a. O. v. Ukraine*, ECtHR 10 February 2011, appl. no. 30499/03, para. 141.

143 *Fadeyeva v. Russia*, ECtHR 9 June 2005, appl. no. 55723/00, para. 103, with a reference to *Fredin v. Sweden (no. 1)*, ECtHR 18 February 1991, appl. no. 12033/86, para. 48.

144 *Ibid.* The Court eventually found that the fact that the steel plant did not comply with the domestic environmental standards with regard to the necessary sanitary zone, *in combination with* the fact that the state had failed to regulate the industry and provide the applicant with a solution, was reason for finding a violation.

145 *Hatton a. O. v. the UK*, ECtHR 2 October 2001, appl. no. 36022/97; *Hatton a. O. v. the UK*, ECtHR (GC) 8 July 2003, appl. no. 36022/97.

146 It had held that 'mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others' (*Hatton a. O. v. the UK*, ECtHR 2 October 2001, appl. no. 36022/97, para. 97).

breached was the subsidiary position of the Strasbourg Court and the state's wide margin of appreciation, as well as, indeed, the fact that the 'element of domestic irregularity is wholly absent in the present case'.[147] What *Hatton* thereby seems to confirm is that especially in the absence of such an irregularity, the leeway the Court grants seems a strong indication that it will not find a violation.

However, it must be noted that apart from the element of whether national rules were complied with, the Grand Chamber in Hatton also stated that in cases 'involving State decisions affecting environmental issues', besides an assessment of the substantive merits of the case, 'it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual'.[148] And although in *Hatton* the applicants were not much aided by this 'procedural test', in later cases it has been shown to form a workable starting point for investigating environmental health complaints in a meaningful manner, without thereby interfering with the decisions made at the national level in a too far-reaching manner. Just like in the context of housing,[149] procedural review that moreover looks at whether the socio-economic needs of the individuals involved were duly considered, allows the Court to give attention to serious health concerns even if the authorities did not act contrary to domestic legislation.

A good example is the case of *Taskin and Others v. Turkey*, which concerned a complaint about the issuing of permit to use a cyanidation operation process that posed a risk for human health and safety and where the Court recalled the possibility of 'procedural review'.[150] In *Taskin*, the Court only briefly reflected on the substantial aspect and referred to the wide margin of appreciation granted in this regard. Procedurally, however, it held that in complex issues of environmental and economic policy,

> 'the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8 … It is therefore necessary to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available.'[151]

147 *Hatton a. O. v. the UK*, ECtHR (GC) 8 July 2003, appl. no. 36022/97, para. 120.
148 *Ibid.*, para. 99.
149 See, especially, the Roma housing case law that was presented in the previous chapter (*supra*, Ch. 8, S. 8.3). See also the way the Court deals with issues concerning the respect for the home more generally (*supra*, Ch. 8, S. 8.2.1.1).
150 *Taskin a. O. v. Turkey*, ECtHR 10 November 2004, appl. no. 46117/99, para. 115.
151 *Ibid.*, para. 118. *Cf.* also *Hatton a. O. v. the UK*, ECtHR (GC) 8 July 2003, appl. no. 36022/97, para. 104; *Giacomelli v. Italy*, ECtHR 2 November 2006, appl. no. 59909/00, para. 82; *Hardy and Maile v. the UK*, ECtHR 14 February 2012, appl. no. 31965/07, para. 219.

More concretely,

> 'the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake … The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question … [They must] be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.'[152]

Because in *Taskin* the authorities had 'deprived the procedural guarantees available to the applicants of any useful effect', the Court concluded that Article 8 had been breached.

Another example of the Court's emphasis on 'procedural review' is the case of *Giacomelli v. Italy*, which concerned an applicant who lived 30 metres away from a plant for the storage and treatment of 'special waste'.[153] An environmental impact assessment had only been initiated years after the 'detoxification' of the hazardous waste had begun to take place. The Court in this regard

> 'considers that the procedural machinery provided for in domestic law for the protection of individual rights, in particular the obligation to conduct an environmental-impact assessment prior to any project with potentially harmful environmental consequences and the possibility for any citizens concerned to participate in the licensing procedure and to submit their own observations to the judicial authorities and, where appropriate, obtain an order for the suspension of a dangerous activity, were deprived of useful effect in the instant case for a very long period.'[154]

152 *Taskin a. O. v. Turkey*, ECtHR 10 November 2004, appl. no. 46117/99, para. 119. See also, *e.g.*, *Giacomelli v. Italy*, ECtHR 2 November 2006, appl. no. 59909/00, para. 83; *Grimkovskaya v. Ukraine*, ECtHR 28 June 2011, appl. no. 38182/03, para. 67, *Hardy and Maile v. the UK*, ECtHR 14 February 2012, appl. no. 31965/07, paras. 220/221.

153 *Giacomelli v. Italy*, ECtHR 2 November 2006, appl. no. 59909/00.

154 *Ibid.*, para. 94.

There had hence been a violation of the Convention.[155]

In a later case the Court has found a violation on the basis of the fact that that the state had failed to provide the information known in order for those involved to take the necessary steps, thereby referring to the importance of the precautionary principle.[156] Elsewhere, it held that the fact that it had taken ten years before an issue was settled before the domestic authorities made that the state had failed to show due diligence and give proper consideration to all competing interests.[157] In other instances the Court has concluded that the procedural safeguards were sufficient, and combined with a deferential stance on the substantive issue, this then often led to the conclusion that Article 8 had not been breached.[158] In any case, it seems that by now, the Court has moved from a rather narrow focus on national irregularities, to a test that encompasses review of the substantive issue and an explicit focus on the (decision-making) procedures concerned and whether these have shown due account to the (health, housing, and other) needs of the individuals involved. Thereby, it seems to have found an approach that has at least has the potential of providing effective and indivisible socio-economic protection, while preventing the Court from overstepping the boundaries of its delicate task. In fact, when combined with a clear determination of the scope of the Convention on the basis of the (essential) importance of the (health) interests concerned, this approach could come close to what feasible minimum core protection in a complex field like environmental policy may entail.[159]

9.4.3 An 'Environmental Policy' Margin

The (wide) margin of appreciation the Court grants the national authorities in cases concerning environmental pollution already has been briefly touched upon. To conclude this chapter, however, a few more remarks may be made on how the Court uses the margin of appreciation doctrine in this part of its

155 See for a comparable, 'purely' procedural violation of Article 8 due to a failure to (timely) conduct the necessary studies *Lemke v. Turkey*, ECtHR 5 June 2007, appl. no. 17381/02. Also in the case of *Mileva a. O. v. Bulgaria* (ECtHR 25 November 2010, appl. nos. 43449/02 and 21475/04), a procedural violation was found in respect to complaints about noise resulting from a computer club. The Court held that 'the respondent State failed to approach the matter with due diligence or to give proper consideration to all competing interests, and thus to discharge its positive obligation to ensure the applicants' right to respect for their private and family lives'.

156 *Tâtar v. Romenia*, ECtHR 27 Januray 2009, appl. no. 67021/01.

157 *Udovicic v. Croatia*, ECtHR 24 April 2014, appl. no. 27310/09.

158 *Hardy and Maile v. the UK*, ECtHR 14 February 2012, appl. no. 31965/07. See also *Luginbühl v. Switzerland*, ECtHR 17 January 2006 (dec.), appl. no. 42756/02; *Gaida v. Germany*, ECtHR 3 July 2007 (dec.), appl. no. 32015/02.

159 See, *supra*, Ch. 7, S. 7.4, and for some more concrete conclusions in this regard, *infra*, Ch. 11, S. 11.1.

case law, and whether this allies with the aims of providing effective and indivisible protection.

In regard to its review of environmental issues the Court has often held that

> '[w]hether the question is analysed in terms of a positive duty on the State – to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 –, or in terms of an 'interference by a public authority' to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation.'[160]

These general considerations bring up at least two questions. First, they do not make clear what 'a certain' margin is, or how the margin that applies in a particular case needs to be determined. Moreover, the quotation does not say anything on how the requirement of a fair balance and the margin that is granted relate to each other.

In regard to the first question, it may be noted that Court has often repeated that the scope of the margin is dependent on the context of the case. More precisely, the relevant factors that determine the scope of the margin include 'the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned'.[161] However, as already became clear in the previous subsection, the applicable margin in environmental health issues is generally a 'wide' one,[162] and it may hence be asked whether the Court truly takes the individual interests concerned into account.

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160 *López Ostra v. Spain*, ECtHR 9 December 1994, appl. no. 16798/90, para. 51. See also, *e.g.*, *Powell and Rayner v. the UK*, ECtHR 21 February 1990, appl. no. 9310/81, para. 41; *Hatton a. O. v. the UK*, ECtHR (GC) 8 July 2003, appl. no. 36022/97, para. 98; *Giacomelli v. Italy*, ECtHR 2 November 2006, appl. no. 59909/00, para. 78.

161 See, for the first time, *Buckley v. the UK*, ECtHR 25 September 1996, appl. no. 20348/92, para. 74.

162 See, *e.g.*, *Taskin a. O. v. Turkey*, ECtHR 10 November 2004, appl. no. 46117/99, paras. 116-117; *Fadeyeva v. Russia*, ECtHR 9 June 2005, appl. no. 55723/00, para. 104 ; *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia*, ECtHR 26 October 2006, appl. nos. 53157/99; 53247/99; 56850/00 and 53695/00, para. 110; *Giacomelli v. Italy*, ECtHR 2 November 2006, appl. no. 59909/00, para. 80; *Fägerskiöld v. Sweden*, ECtHR 26 February 2008 (dec.), appl. no. 37604/04; *Walkuska v. Poland*, ECtHR 29 April 2008 (dec.), appl. no. 6817/04; *Allen a.O. v. the UK*, ECtHR 6 October 2009, appl no. 5591/07, para. 60; *Dubetska a. O. v. Ukraine*, ECtHR 10 February 2011, appl. no. 30499/03, para. 141; *Zammit Maempel v. Malta*, ECtHR 22 November 2011, appl. no. 24202/10, para. 66; *Hardy and Maile v. the UK*, ECtHR 14 February 2012, appl. no. 31965/07, para. 218. On the other hand, no expressly 'wide' margin is given in for example *López Ostra v. Spain*, ECtHR 9 December 1994, appl. no. 16798/90, para. 58; *Deés v. Hungary*, ECtHR 9 November 2010, appl. no. 2345/06, para. 23; *Mileva a. O. v. Bulgaria*, ECtHR 25 November 2010, appl. nos. 43449/02 and 21475/04, para. 98. A 'considerable' margin was applied in *Grimkovskaya v. Ukraine*, ECtHR 28 June 2011, appl. no. 38182/03, par. 65.

The case of *Hatton and Others* provides an interesting example in this regard. In this case the Grand Chamber held that it was 'faced with conflicting views as to the margin of appreciation to be applied'.[163] Discussing the issue of whether the state's regulations on limitations for night flights had struck a fair balance between the individual and the general interests involved, it considered that

> 'on the one hand, the Government claim a wide margin on the ground that the case concerns matters of general policy, and, on the other hand, the applicants' claim that where the ability to sleep is affected, the margin is narrow because of the "intimate" nature of the right protected. This conflict of views on the margin of appreciation can be resolved only by reference to the context of a particular case.'[164]

In this particular context, it found that the issue of sleep deprivation was not 'intimate enough' for concluding that the margin of appreciation had to be a narrow one,[165] and it instead opted for the wide 'environmental margin'.[166] This turned out to be one of the most important reasons for why the Grand Chamber judgment in *Hatton* has been criticised.[167] Indeed, in *Hatton* the fact that the severity of the individual interests at stake could also mitigate the margin – rather than only turn it into a very narrow one – is not even considered, which means that it hardly seems possible to overcome the wide margin the Court 'generally' grants in the field of environmental policy. Especially when the Court would apply the various thresholds for applying the Convention that were discussed in Section 9.4.1 in a consistent manner, this approach is questionable. After all, the environmental cases it would then review are those that explicitly concern 'direct effects' on individuals that moreover have reached a 'minimum level of severity'.[168] Given that something serious is going on for the applicants concerned, thus, this would seem reason to at least consider the possibility of (somewhat) narrowing down the margin of appreciation.

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163 *Hatton a. O. v. the UK*, ECtHR (GC) 8 July 2003, appl. no. 36022/97, para. 103.

164 *Ibid.*

165 *Ibid.*, para. 123: 'However, the sleep disturbances relied on by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in *Dudgeon* to call for an especially narrow scope for the State's margin of appreciation … Rather, the normal rule applicable to general policy decisions … would seem to be pertinent here.'

166 In any case, moreover, it stated that '[e]nvironmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights' (*Hatton a. O. v. the UK*, ECtHR (GC) 8 July 2003, appl. no. 36022/97, para. 122).

167 See the dissenting opinion of Judges Costa, Ress, Türmen, Zupancic, and Steiner, under III. *Cf.* Koch 2009, p. 69ff.

168 See *Fadeyeva v. Russia*, ECtHR 9 June 2005, appl. no. 55723/00, para. 88.

As regards the second question, which concerns the relation between the requirement of a fair balance and the applicable margin, it may be considered that the Court uses different approaches dependent on whether the substantive or rather the procedural aspect of the Court's review is concerned. In *Taskin and Others v. Turkey*, for example, it clearly distinguished between these two and when discussing the former, the ECtHR noted that interests had been balanced by the national court and held that 'no other examination of the material aspect of the case with regard to the margin of appreciation generally allowed to the national authorities in this area is necessary'.[169] It then proceeded with a stricter review of the procedural aspect, yet without noting what margin is to be granted in this regard.[170] The judgment in *Giacomelli v. Italy* is equally obscure as to the exact function of the doctrine. There, it was stated that '*[i]n determining the scope of the margin of appreciation* allowed to the respondent State, the Court must … examine whether due weight was given to the applicant's interests and whether sufficient procedural safeguards were available to her'.[171] It appears from this that rather than something that determines the strictness of the Court's review, the margin is instead what follows from a procedural test.[172] However, the quotation could also be read as merely implying that the procedural aspects of a case can generally be scrutinised more closely. The latter would be in keeping with *Taskin* as well as with what the Court said in *Fadeyeva v. Russia*, namely that

> 'it is certainly within the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests. In this respect the Court reiterates that the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community.'[173]

Indeed, thus, it seems that, where the procedural safeguards are concerned, the margin left to the authorities is more or less insignificant. One could also say that a certain substantive margin of discretion is then 'built into' the test itself, as the requirement of procedural safeguards does not ask what the right

169 *Taskin a. O. v. Turkey*, ECtHR 10 November 2004, appl. no. 46117/99, para. 117.

170 *Cf.* also *Udovicic v. Croatia*, ECtHR 24 April 2014, appl. no. 27310/09, where the Court also conducted a 'procedural' test and did not refer to the margin once.

171 *Giacomelli v. Italy*, ECtHR 2 November 2006, appl. no. 59909/00, para. 80 [emphasis added].

172 The outcome of this case is however confusing in this regard, because after having discussed the procedural safeguards and whether the applicants' interests had been sufficiently taken into account, the Court concludes that 'notwithstanding the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance' (*Giacomelli v. Italy*, ECtHR 2 November 2006, appl. no. 59909/00, para. 97). This again seems to imply that the margin was given, before the Court conducted its procedural test.

173 *Fadeyeva v. Russia*, ECtHR 9 June 2005, appl. no. 55723/00, para 128.

answer (or rights means for protecting the right at stake[174]) would have been, but rather whether the individual needs of the individual were given serious attention. Emphasising the 'non-negotiability' of this requirement may increase the effectiveness of the Court's approach to environmental issues, and signal that it is willing to provide truly indivisible protection in this regard.

9.5 Conclusion

It has been shown in this chapter that the Court has over the years dealt with a great variety of (social) health issues. Some of these directly concern claims for care or medicine, while others – like the cases concerning environmental pollution – concern the issue of health in a more indirect manner. The relevant cases are numerous and the Court often deals with them in a very case-specific fashion, taking into account the particular (health-related) circumstances concerned. This chapter aimed to illuminate some general lines and developments in the Court's case law on health and health care, in order to answer the question of whether its approach can provide for effective, indivisible protection that nevertheless fits the (limited) role of the Court in the sensitive context of health. Some of the important points that were discussed are worth summarising here.

First of all, Section 9.2 discussed the protection of claims for care and medication under Articles 2, 3, and 8 of the Convention. It was seen that the guarantees that can be distilled from the Convention in this regard are, at most, 'minimum guarantees'. That is, the Court often holds that individuals should not be denied care that has been made available to the public generally, yet when it comes to exceptional or expensive medicine or care, the Court generally refrains from interfering with the decisions made at the national level. Even though the cases concerned may involve issues of life and death, the Court's restraint seems understandable given the limited resources of the states and the likewise limited role of the ECtHR in determining what would be the proper choice regarding the distribution thereof. Nevertheless, although the level of care that is provided to the public generally seems something the state can freely decide upon, the case law suggests that it should nevertheless attain a certain minimum level. This would mean that in exceptional circumstances, applicants may rely on the Convention, although the Court has failed to further elaborate on this.

Besides the Court's hesitant approach to positive claims for care, however, in Section 9.3 it was shown that in some contexts it provides more concrete duties for the state. This is the case when for example detainees are concerned, or other vulnerable individuals who are placed under the control of the state.

174 *Ibid.*, para 124.

In this regard the state has the responsibility to provide 'adequate care' suited to the needs of the individual concerned.

Finally, a look was had at the Court's reasoning in 'environmental health' cases (Section 9.4). Although these cases do not exclusively concern the issue of the health of the applicants, they form an important illustration of how the ECtHR has made an effort at providing effective protection in this field that also ensures that the issue of health is given serious attention. It is natural that environmental pollution may affect a person's private life, yet the Court has clarified that in order to raise an issue under Article 8 of the Convention, there must be a 'direct effect' that moreover reaches a 'minimum level of severity'. It was argued that with the help of these thresholds, the Court seems able to distinguish between more and less serious (or fundamental) issues, *i.e.*, between those environmental cases that do and that do not deserve review under the Convention. However, it was also argued that the thresholds could be applied in a more consistent manner. The issue of whether a fair balance has been struck between the competing interests concerned, then, is answered by the Court by foremost having regard to whether the authorities have acted in conformity with national legislation. Besides that, it looks at whether sufficient procedural safeguards have been provided. This has enabled the Court, without having to embark on the substantive outcomes concerned, to provide meaningful review. By requiring that the individual interests are duly taken into account at the national level, moreover, the procedural requirements it has formulated do not remain substantively empty but instead can protect the socio-economic needs of the individuals involved in complex decision-making on environmental issues. Indeed, although its use of the margin in socio-economic cases does not seem to bear witness to this, the Court generally seems capable of providing meaningful environmental health-related protection.

10 Social Security

10.1 INTRODUCTION

The Convention does not contain a provision guaranteeing (or even containing the words) social security. As will be illustrated in this chapter, however, the ECtHR is clearly engaged with this topic. An explanation for this may be that social security has become an inherent aspect of the welfare-oriented state that developed after the Second World War, which has brought along questions and conflicts concerning procedural protection, equal treatment, etc. Moreover, (the lack of) social security measures can seriously affect an individual's private life and proprietary interests – issues that have an obvious relation to the Convention. In fact, over the past years the Court's engagement in the area of social security has expanded significantly and by now its case law on this topic forms a substantial part of the Strasbourg fundamental rights *acquis*.

Nevertheless, the fact that social security clearly is an ECHR issue does not yet answer the question whether one can also distil an individual right to social security from the Convention. On the one hand, the fact that the ECtHR receives many social security complaints might suggest that it is generally thought that such a right can be claimed. On the other hand, since the Convention does not contain any norm explicitly dealing with this topic, it could be expected that a right to social security is unlikely to be 'read into' the Convention. In reality, the truth lies somewhere in the middle. The Convention does not unequivocally guarantee a subjective right to be provided with social security benefits, yet a close look at the case law prevents the conclusion that a social security benefit not awarded to an individual at the national level can never be successfully claimed by means of the Convention.

The overview presented in this chapter is intended to illuminate what the effects are of the Court's 'effectiveness' and 'indivisibility' approaches to ECHR protection in cases dealing with the topic of social security.[1] It is explained to what extent the Court's interpretation enables review of social security issues, and explored what it has said about often complex and politically sensitive, national social security arrangements. This discussion must be seen

1 Part of the material presented in this chapter previously appeared, in a different form, in 'From *Stec* to *Valkov*: Possessions and Margins in the Social Security Case Law of the European Court of Human Rights', 13 *Human Rights Law Review* 2013, pp. 309-349 (Leijten 2013a) (see also Leijten 2013b).

in the general context discussed in Chapter 2 of this book, in particular against the backdrop of the criticism that has been directed at the ECtHR's case law dealing with economic and social interests.[2] It was mentioned there that the main criticism is that in socio-economic cases the Court proceeds in an altogether too incremental and casuistic manner, relying on *ad hoc* reasoning while not providing for principled guidance. Moreover, it has been said that although the Court's interpretation of the Convention rights may promise a lot, the actual protection it offers is often very limited. Just like in the chapters on housing and health care, in this chapter it is asked if the Court's reasoning is transparent and provides the certainty that is needed to develop a case law that furthers the aims of effective and indivisible protection as well as fits in well with the particular role of the Court. It is seen whether it is really clear when exactly a social security benefit amounts to a possession for purposes of review under Article 1 of Protocol No. 1 of the Convention, and whether the Court's proportionality analysis provides sufficiently clear reasons for why a certain conclusion is reached.

These various issues will be dealt with in this chapter as follows. In Section 10.2 some further introductory remarks will be made with regard to the relation between the Convention and social security protection. It is explained how this issue is linked to the Court's understanding of the right to respect for private and family life and the protection of property, as well as may trigger review under Articles 3 and 6 of the Convention. Thereafter, the chapter will provide a more in-depth analysis of the cases that concern property protection,[3] addressing the issues and questions formulated above. Section 10.3 deals with cases concerning alleged discrimination and property rights. It shows that non-discrimination review has in fact been the driving force behind the development of the Strasbourg social security case law, although the eventual protection provided is arguably limited. The extent to which the Court deals with social security complaints that do not involve alleged discrimination is the subject of Section 10.4. This section illuminates a range of cases concerning in particular revocations and reductions of benefits and pensions, and shows the way in which the Court is dealing with issues of this kind as well as the room there might be for more core rights-oriented protection. Section 10.6 summarises the chapter's findings.

2 *Supra*, Ch. 2, S. 2.6.2.

3 This because in cases concerning social security (welfare benefits, pensions, etc.) Art. 1 P1 has proven to be by far the most relevant Convention article. Moreover, the limited attention in this chapter for the other articles relevant in the context of social security can be explained by the fact that issues that could be considered to be 'social security cases' under for example Art. 3 or 8 frequently concern housing or health care assistance, and have for that reason been discussed in, *supra*, Ch. 8 and 9, respectively.

10.2 Social Security as an ECHR Issue

To enable a more thorough discussion of the ECtHR's social security case law, its potential and pitfalls, it is useful first to explore the link between the Convention and social security in more general terms. Contrary to various other (socio-economic) fundamental rights documents,[4] the ECHR does not contain any reference to (a right to) social security.[5] Besides, social security regulation is generally perceived as a national prerogative. Nonetheless, there are several connections between this topic and the norms enumerated in the Convention that ensure that social security interests can be considered to be protected by it. It has turned out to be impossible – as well as undesirable – to maintain a 'water-tight division' between the sphere of the Convention and social security issues.[6] To explain this, this section first looks at the relation between the right to respect for private life and family life and to protection of property and social security complaints (10.2.1). Thereafter, the (indirect) protection of social security claims on the basis of Article 3 ECHR and Article 6 ECHR is briefly discussed (10.2.2).

10.2.1 A Strained Relationship with Article 8 and Article 1 Protocol No. 1 ECHR

Be it in the form of health care allowances, a state pension or another form of assistance, the modern welfare state organises a certain level of redistribution, the fruits of which are enjoyed by a significant percentage of individuals. Yet this does not automatically make social security a fundamental rights issue. Indeed, it is still often considered that the provision of social assistance – at least when not based on prior contributions – has nothing to do with the idea of 'rights', properly understood. Rather, receiving 'solidarity benefits' is frequently perceived as a privilege that in the light of changing political preferences or budgetary considerations can be revoked almost as easily as it was created. At a closer look, however, this understanding seems oversimplified. Not only do many individuals receive some kind of social assistance, a significant number of them today is dependent on the provision of state-organised support. When private social networks fail to provide the necessary safety nets and this task is largely left to fine-grained social security schemes, the relation between individuals and the 'social state' becomes a prominent one. Indeed, this relation is an asymmetrical one, characterised by the power of

4 See, *e.g.*, Art. 22 UDHR; Art. 9 ICESCR; Art. 12 (R)ESC; as well as the materials of the International Labour Organisation (ILO). See also Art. 34 of the Charter of Fundamental Rights of the European Union (CFR).

5 Indeed, it can be said that the (textual) link between the Convention and housing and health issues is less controversial than the ECHR's connection with social security. See, *supra*, Ch. 8 and 9.

6 *Cf. Airey v. Ireland*, ECtHR 9 October 1979, appl. no. 6289/73, para. 26.

the state and the vulnerability of the individual concerned, thus creating a situation in which fundamental individual interests can be harmed.[7]

The inherent relation between social security and fundamental individual interests provides an answer to the question why this topic is relevant under the Convention, next to in the context of economic and social fundamental rights. Still, and this may be unsurprising given the lack of a textual reference in the Convention, the obvious effects of (the revocation of) social security measures for an individual's private and/or family life have not automatically led to the applicability of Article 8 and the prohibition of disproportional interferences or omissions on the basis of this norm.[8] In a similar vein, the importance of pecuniary support has not compelled the straightforward recognition of all social security benefits as 'possessions' deserving protection under the right to protection of property.

What has always proven relevant in the context of social security and the Convention is the prohibition of discrimination. Via this provision the rights under Article 8 and Article 1 P1 have increasingly come to be applied to matters of social security.[9] Important in this regard is that although the prohibition of discrimination (Article 14) is not a self-standing requirement, its scope of application is relatively broad as it covers the 'ambit' of the substantive right invoked together with Article 14, rather than the more narrow 'scope' of this right that is decisive when there is no unequal treatment involved.[10] An example of how this can lead to social security protection is the case of *Petrovic v. Austria*.[11] In this case the applicant father was refused a parental leave allowance because only mothers could claim this allowance. Discussing the applicability of Article 8 of the Convention, the Court in this case held that 'the refusal to grant Mr Petrovic a parental leave allowance cannot amount to a failure to respect family life, since Article 8 does not impose any positive obligation on states to provide the financial assistance in question'.[12] Yet since the applicant had invoked Article 8 *in conjunction with* Article 14 (the prohibition of discrimination), the Court continued as follows:

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7 According to Kenny 2010, p. 502, certain themes recur in the Court's social security case law: '[C]ertain members of society are dependent on the state's provision of social welfare; those members deserve certainty and security; social welfare is an expression of society's solidarity with its more vulnerable members'.

8 This is different in cases concerning evictions and other housing matters, that have 'automatically' been considered to fall within the scope of Art. 8. However, this primarily has to do with the fact that Art. 8 contains a 'right to respect for the home', although positive obligations under Art. 8 more generally have been recognised as well. See, *supra*, Ch. 8.

9 Bossuyt 2007, p. 321. See also Koch 2003, p. 19.

10 For the point that the 'ambit' is generally perceived as something that is more inclusive than the narrow 'scope' of the right that is invoked together with Art. 14, see, *supra*, Ch. 2, S. 2.4.2.2 and, *e.g.*, Wintemute 2004; Wintemute 2004a; Arnardóttir 2014.

11 *Petrovic v. Austria,* ECtHR 27 March 1998, appl. no. 20458/92.

12 *Ibid*., para. 26.

> 'Nonetheless, this allowance paid by the State is intended to promote family life and necessarily affects the way in which the latter is organised as, in conjunction with parental leave, it enables one of the parents to stay at home to look after the children. The Court has said on many occasions that Article 14 comes in play whenever "the subject-matter of the disadvantage … constitutes one of the modalities of the exercise of a right guaranteed" … or the measures complained of are "linked to the exercise of a right guaranteed" … By granting parental leave allowance States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the allowance therefore comes within the scope of that provision. It follows that Article 14 – taken together with Article 8 – is applicable.'[13]

Petrovic thus shows that whereas the Court quite resolutely rejected the possibility of recognising positive claims to parental leave allowances under the Convention directly,[14] it was willing to review the case in the light of the prohibition of discrimination.[15] Because the allowance paid was intended at promoting and affects family life, there was a sufficient relation with Article 8 for holding that Article 14 applied.

This may raise the question of how direct the connection of social benefits with private and family life needs to be to enable the Court to deal with a complaint via the non-discrimination clause. The Court's judgment can be read as implying that only because parental leave allowances directly relate to the organisation of family life, the connection with Article 8 is a sufficient one.[16] Other arrangements then, that only have a more indirect impact on family and/or private life or have not been expressly created by the state to demonstrate respect for these rights, might not open up the possibility of non-discrimination review. At the same time, given the broadness of especially the notion of 'private life', and the fact that the Court has often underlined that 'Article 14 comes into play whenever "the subject-matter of the disadvantage

13 *Petrovic v. Austria,* ECtHR 27 March 1998, appl. no. 20458/92, paras. 27-29.

14 Regardless of the Court's strictness in *Petrovic*, however, it has become clear that when there is a 'direct and immediate link between the measures sought by an applicant and the latter's private life', Article 8 taken alone can apply to social assistance issues as well. See, *e.g.*, *Marzari v. Italy*, ECtHR 4 May 1999 (dec.), appl. no. 36448/97, which concerned housing assistance and was discussed in, *supra*, Ch. 8, S. 8.2.1.2.

15 It however did not find a violation, because Austria could not be blamed for the fact that it had only gradually introduced legislation extending parental leave allowance to fathers (*Petrovic v. Austria,* ECtHR 27 March 1998, appl. no. 20458/92, para. 41). *Cf.* Koch 2003, p. 23; Kapuy 2007, p. 231; Koch 2009, pp. 188-198.

16 *Petrovic v. Austria,* ECtHR 27 March 1998, appl. no. 20458/92, para. 29. *Cf.* also *Okpisz v. Germany*, ECtHR 25 October 2005, appl. no. 59140/00, para. 32; *Niedzwiecki v. Germany*, ECtHR 25 October 2005, appl. no. 58453/00, para. 31; *Konstantin Markin v. Russia*, ECtHR 7 October 2010, appl. no. 30078/06, para. 45; *Konstantin Markin v. Russia*, ECtHR (GC) 22 March 2012, appl. no. 30078/06, para. 130.

... constitutes one of the modalities of the exercise of a right guaranteed"',[17] the variety of social security arrangements that can be reviewed does not appear to be very limited.[18] Indeed, when either the benefit (*e.g.*, a survivors' benefit) or the relation concerned (*e.g.*, a homosexual relation) falls within the 'wider ambit' of private or family life, Article 14 will apply.[19]

Also in the context of Article 1 of Protocol No. 1, the prohibition of discrimination provides an important route towards protection.[20] The applicability of Article 1 P1 normally depends on the economic value the interest complained about has or does not have.[21] Moreover, for a property right to be recognised as justiciable it should generally be an *existing* right.[22] Alternatively, there should be a 'legitimate expectation' of obtaining effective enjoyment of such right.[23] A right to acquire property is not recognised,[24] and it is thus not surprising that the Court has held that Article 1 P1 does not oblige a state to provide individuals with certain benefits. Nevertheless, over time it has allowed for the adjudication of a great number of benefits-related cases,[25] again foremost through the prohibition of discrimination.[26] When a benefit not necessarily amounts to a 'possession', but nevertheless falls 'within the ambit' of the protection of property, and is not awarded because of a failure

17 *E.g.*, *Petrovic v. Austria,* ECtHR 27 March 1998, appl. no. 20458/92, para. 29; *Konstantin Markin v. Russia*, ECtHR (GC) 22 March 2012, appl. no. 30078/06, para. 129.

18 *Cf.*, *e.g.*, *Karner v. Austria*, ECtHR 24 July 2003, appl. no. 40016/98, discussed in, *supra*, Ch. 8, S. 8.2.3, which concerned the succession of a tenancy which was allowed to 'life-companions' but refused to homosexuals.

19 *Cf.* Arnardóttir 2014. Also important in this regard is the development of Art. 1 of Protocol No. 12, which provides for a 'self-standing' non-discrimination provision and is hence applicable regardless of whether another Convention right is involved. See, *supra*, Ch. 2, S. 2.6.1. However, the practical added value of this article has thus far turned out limited. See, *e.g.*, the case of *Ramaer and Van Willigen v. the Netherlands*, ECtHR 23 October 2012 (dec.), appl. no. 34880/12, that is discussed in, *infra*, S. 10.3.

20 Koch and Vedsted-Hansen 2006, p. 20, in this regard hold that although the prohibition of discrimination is often regarded as a negative right, it 'may have positive implications if the differential treatment concerns distribution of certain benefits'.

21 Van Dijk et al. 2006, p. 866, point out that it is difficult to deduce precise criteria from the Court's case law, but that '[t]he basic point of departure seems to be the economic value of the right or interest: whenever State measures do not affect this economic value, no responsibility under Article 1 is engaged'.

22 See Van Dijk et al. 2006, p. 869. In the case of *Stran Greek Refinieries and Stratis Andeadis v. Greece*, ECtHR 9 December 1994, appl. no. 13427/87, the Court noted that an existing right should be 'sufficiently established to be enforceable' (para. 59).

23 Mere 'hope' is not enough. See *Prince Hans-Adam II of Liechtenstein v. Germany*, ECtHR (GC) 12 July 2001, appl. no. 42527/98, where it concerned the expropriation of a painting of the father of the applicant, in 1946. The right had become non-exercisable and did hence not amount ot a 'legitimate expectation' (para. 85). See also Van Dijk et al. 2006, p. 869.

24 *E.g.*, *Van der Mussele v. Belgium*, ECtHR 23 November 1983, appl. no. 8919/80, para. 48; *Pistorova v. the Czech Republic*, ECtHR 26 October 2004, appl. no. 73578/01, para. 38.

25 See, especially, *infra*, S. 10.4.

26 *Cf.* also Cousins 2009.

to fulfil an allegedly discriminatory criterion, an obligation to be provided with this benefit could follow from the Convention.

A classic illustration of how Article 14 can protect social security interests is the case of *Koua Poirrez v. France*, which concerned unequal treatment on the basis of nationality.[27] The applicant had been registered as 80% disabled and had been issued with an invalids' card, but because he did not have the French nationality he was refused a disability allowance. The Court held that the right concerned 'is a pecuniary right for the purposes of Article 1 P1'.[28] In this regard, it considered that

> 'the refusal to award the allowance to the applicant prior to June 1998 was based on criteria – possession of French nationality or the nationality of a country having signed a reciprocity agreement with France in respect of the AAH [allowance for disabled adults] – which amount to a distinction for the purposes of Article 14 of the Convention.'[29]

The Court reviewed the case under Article 1 P1 in conjunction with the non-discrimination principle, and given the suspect character[30] of a distinction made on the ground of nationality and the fact that the government had not adduced an 'objective and reasonable justification', it found a breach of the Convention.[31] Although the case of *Koua Poirrez* arguably could have also been reviewed under Article 1 P1 taken alone,[32] it was dealt with as a matter of unequal treatment, which eventually led to protection of the social security interest in question.

Thus, it can be said that both in relation to Article 8 and Article 1 P1, Article 14 plays an important role in the review of social security issues. It allows for meaningful review, even when there is no substantive right to the benefit concerned under the Convention. The exact implications of the Court's non-discrimination review in relation to property rights issues will be further elaborated in Section 10.3. Moreover, in Section 10.4 it is discussed that – arguably also as a corollary of the broad understanding of the 'ambit' of the right to protection of property – the Court by now reviews a great variety of social security issues under Article 1 P1 taken alone as well. Most of these issues, it will be shown, are of a particularly complex kind, concerning for example sensitive dilemmas related to gender-based distinctions, systems in

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27 *Koua Poirrez v. France*, ECtHR 30 September 2002, appl. no.40892/98.

28 *Ibid.*, para. 37.

29 *Ibid.*, para. 41.

30 Generally, 'supsect classifications' require 'very weighty reasons' to be justified. See, *e.g.*, Van Dijk et al. 2006, pp. 1046-1049. *Cf. Gaygusuz v. Austria*, ECtHR 16 September 1996, appl. no. 17371/90, para. 42, were the Court held that 'very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention'.

31 *Koua Poirrez v. France*, ECtHR 30 September 2002, appl. no.40892/98, paras. 46-50.

32 *Ibid.*, para. 37.

transition, or austerity measures taken in response to severe economic circumstances. Before further expounding upon social security issues *qua* property rights matters, however, some remarks can be made about the role of Article 3 and Article 6 of the Convention.

10.2.2 The Relevance of Article 3 and Article 6 ECHR

Perhaps somewhat less obviously, next to Articles 14, 8, and 1 P1 ECHR there are more Convention provisions relevant to the protection of social security interests. First, Article 3, containing a right to freedom from torture and inhuman and degrading treatment or punishment, in a few cases has been linked to social security issues.[33] Needless to say, the absolute protection of this article can only be triggered in very severe circumstances, or, in the terminology of the Court, when these circumstances 'attain a minimum level of severity'.[34] It has held that '[t]he assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.'.[35]

In fact it is because of this 'relative' understanding that also issues related to the provision of benefits cannot be excluded from the protection of Article 3. In *Larioshina v. Russia* the applicant complained about the insufficient amount of pension and other benefits she received for maintaining a proper standard of living.[36] In deciding on the admissibility of her complaint, the Court considered that

> 'a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment. However, on the basis of the material in its possession, the Court finds no indication that the amount of the applicant's pension and the additional social benefits has caused such damage to her physical or mental health capable of attaining the minimum level of severity falling within the ambit of Article 3 of the Convention.'[37]

In the case of *Budina v. Russia* the Court confirmed that it is very difficult to satisfy the (high) threshold of 'a minimum level of severity', especially when

33 See, on the applicability of this provision to socio-economic issues more generally, Cassese 1991. Needless to say, since this article was published, plenty of developments in the Court's case law have taken place.
34 *Ireland v. the UK*, ECtHR 18 January 1978, appl. no. 5310/71, para. 162.
35 *Ibid*. See also, *supra*, Ch. 2, S. 2.4.3.2; Ch. 8, S. 8.2.4, Ch. 9, S. 9.2.2.
36 *Larioshina v. Russia*, ECtHR 23 April 2002 (dec.), appl. no. 56869/00.
37 *Ibid*.

someone is not left bereft of 'essential medical treatment'.[38] Yet there is one example of where the Court has found a violation of Article 3 in the context of a social security-related matter. This is the case of *M.S.S. v. Greece and Belgium*, which has been brought up already a few times.[39] The case concerned a situation in which an asylum seeker lacked minimum means of subsistence, and although the Court held that Article 3 does not entail 'any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living',[40] it did find a violation of this provision.[41] Indeed, especially when a person is considered 'vulnerable'[42] and 'dependent'[43] on the state, Article 3 may imply an obligation for the authorities to ensure a basic level of socio-economic protection, yet is seems for them to decide on how exactly this is arranged for.

Also in the Court's case law on Article 6 (the right to fair trial) social security cases can be found. In fact, compared to Article 3 it seems relatively easy to attract the protection of this article since social security disputes generally are considered to fall within the provision's reach.[44] However, if protection is granted under this article, it is not of a substantive kind, as Article 6 only ensures a procedure that meets the different fairness requirements.[45]

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38 *Budina v. Russia*, ECtHR 18 June 2009 (dec.), appl. no. 45603/05. There, the Court reiterated that the Convention may be relevant, but considered that 'the applicant has failed to substantiate her allegation that the lack of funds translated itself into concrete suffering'. She had explained that her pension allowed her to pay her flat and sufficed for food and hygiene items, 'but was not enough for clothes, non-food goods, sanitary and cultural services, health and sanatorium treatment'. In this regard the Court considered that she was not left bereft of essential medical treatment and that her pension was hence not insufficient to protect her from damage to her physical or mental health or from 'a situation of degradation incompatible for human dignity'. *Cf.* also Brems 2007, pp. 156-157. See also Koch 2009, pp. 181-182.

39 *M.S.S. v. Belgium and Greece*, ECtHR (GC) 21 January 2011, appl. no. 30696/09, para. 253. See, *supra*, Ch. 2, S. 2.4.3.2 and Ch. 8, S. 8.2.4.

40 *Ibid*., para. 249, referring to *Müslim v. Turkey*, ECtHR 26 April 2005, appl. no. 53566/99, para. 85.

41 *M.S.S. v. Belgium and Greece*, ECtHR (GC) 21 January 2011, appl. no. 30696/09, paras. 263-264.

42 *Ibid*., para. 251.

43 *Ibid*., para. 253.

44 This because the notion of 'civil rights and obligations' in this provision has been interpreted in an autonomous manner. Although in earlier cases the Court 'balanced' the private and public aspects of a social security cases for finding out whether Art. 6 applied, since the judgment in *Salesi v. Italy*, ECtHR 26 February 1993, appl. no. 13023/87, it is considered that all social security disputes fall within the article's reach. See also, *supra*, Ch. 2, S. 2.4.2.1; Kapuy 2007, pp. 223-225; Koch 2009, pp. 183-187.

45 It is not the Court's function 'to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention' (*Garcia Ruiz v. Spain*, ECtHR (GC) 21 January 1999, appl. no. 30544/96, para. 28).

This notwithstanding, it is worth providing an example of the protection of Article 6 in social security cases in order to illustrate what this can imply. The 2006 case of *Tsfayo v. the United Kingdom* concerned the applicant's application for housing and council tax benefits.[46] Since she had failed to timely apply for these benefits, Tsfayo also had requested backdated payment, yet this was refused. Tsfayo appealed against this refusal before the Council Housing Benefit and Council Tax Benefit Review Board (HBRB), but her appeal was rejected. According to the Court, the HBRB only had to answer a simple question of fact, namely whether there was 'good cause'. The applicant had provided evidence that she had not been notified that anything was amiss with her claim for housing benefit until she received a notice from her landlord because her rent was in arrears. This the HBRB had found unconvincing. The Court, however, considered that 'the HBRB was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute, since it included five councillors from the local authority which would be required to pay the benefit if awarded', which 'might infect the independence of judgment in relation to the finding of primary fact in a manner which could not be adequately scrutinised or rectified by judicial review'.[47] It concluded that there had been a violation of Article 6(1) of the Convention.[48]

Hence, next to Article 3, also Article 6 ECHR can be considered a relevant additional guarantee when it comes to social security issues. Although it cannot directly ensure a beneficial outcome, the example mentioned shows that it can lead to meaningful protection in the sense of ensuring that social interests are dealt with in a procedurally fair manner.[49] This does not mean, however, that next to relying on Article 6 applicants do not at the same time also try

46 *Tsfayo v. UK*, ECtHR 14 November 2006, appl. no. 60860/00. See on this case further Palmer 2009, pp. 420-421.

47 *Tsfayo v. UK*, ECtHR 14 November 2006, appl. no. 60860/00, para. 47.

48 Another interesting example concerns the cases of *Maggio* and *Sterfanetti* that will be discussed more extensively with regard to the Article 1 P1 complaints below (*Maggio a. O. v. Italy*, ECtHR 31 May 2011, appl. nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08; *Stefanetti a. O. v. Italy*, ECtHR 15 April 2014, appl. nos. 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10). See, *infra*, S. 10.4. The cases concerned the entry into force of a new law that altered the method of calculation of pensions of those who had spent part of their working lives in Switzerland. The Court noted that this law settled retrospectively the terms of disputes on pension claims pending before the ordinary courts. It considered that financial considerations could not alone be reason for doing so, and that by interfering in a decisive manner in proceedings to which it had been a party to ensure a favourable outcome the state had breached Article 6(1).

49 For a critical outlook on the far-reaching outcome in *Tsfayo* however, see Palmer 2009, pp. 420-421.

to obtain substantive protection under the Convention, for example by invoking Article 1 P1.[50]

10.3 Alleged Discrimination and Proprietary Interests

In Section 10.2.1, some introductory remarks were made about the role of the non-discrimination provision taken together with Article 1 P1 in social security cases, yet it is useful to provide some further (recent) examples of what this role implies. It is the aim of this chapter to see whether the Court's protection of social security interests – besides being in line with the ideas effective and indivisible protection – complies with the demands of transparency and consistency. In this respect it is worth highlighting that, although it has always been clear that Article 14 applies in some social security cases, there has been and in fact remains some controversy on how far this application exactly reaches. Moreover, holding that a case falls within the ambit of the right to protection of property and can therefore be reviewed under Article 14 is only the first step. It will be shown how the Court has reviewed a great variety of mostly very complicated social security-related discrimination issues, and whether this has led to effective as well as principled protection under the Convention. To that end, after a more thorough analysis of the factual situations to which Article 14 in conjunction with Article 1 P1 applies (10.3.1), the Court's review of the possible justifications for unequal treatment (10.3.2) and the role of the margin of appreciation therein (10.3.3.) will be discussed.

10.3.1 The 'Ambit' of the Protection of Property

It was demonstrated in Section 10.2.1 that the requirement of non-discrimination in combination with Article 1 P1 is of great relevance in social security cases. However, it has not always been crystal-clear how much exactly is covered by the 'ambit' of this article. In most social security schemes the connection between benefits and the contributions that have been paid is a very loose one. Frequently, collective security systems are not linked to contributions that can be individualised in any way. Moreover, many schemes are based on the 'principle of solidarity', which implies that no contributions have been paid at all. This has raised the question of whether also non-contributory benefits actually can be considered to fall within the ambit of the protection of property, and therefore trigger the applicability of Article 14 of the Convention.

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50 *Cf. Maggio* and *Stefanetti* (ECtHR 31 May 2011, appl. nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08; ECtHR 15 April 2014, appl. nos. 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10), discussed in, *infra*, S. 10.4.

In *Gaygusuz v. Austria*, the ECtHR held the Convention applicable to a complaint of a Turkish citizen living in Austria who claimed that he was entitled to an advance on his pension in the form of emergency assistance.[51] Just like Austrian nationals, Mr Gaygusuz had paid unemployment insurance contributions. And even though emergency payments were granted by the state to persons in need, and not directly funded by insurance contributions, the Court found that the emergency benefit was available only to persons who had exhausted their entitlement to unemployment benefits. Accordingly, Gaygusuz would have received emergency assistance but for his failure to meet the condition that required beneficiaries of this benefit to be Austrian nationals, and this was reason to render Article 14 in conjunction with Article 1 applicable.[52] The controversy that emerged after the Court's judgment was whether the payment of contributions to the unemployment insurance scheme was crucial for holding that the emergency benefit fell within the ambit of Article 1 P1.[53] Or was it rather the emergency character of the benefit that made the Court hold that Article 14 was applicable?[54]

The Grand Chamber of the Court clarified this issue in its 2005 admissibility decision in the case of *Stec and Others v. the United Kingdom*.[55] The *Stec* case has been of great importance for the development of the Court's social security case law and is therefore worth discussing in some detail. After Mrs Stec had severely injured her back at work, she was unable to continue working and was awarded a reduced earnings allowance (REA). This income-related additional benefit was a non-contributory one, *i.e.*, it was not conditional on any direct contributions to an insurer. As a result of the gradual termination of the benefit, legislative measures were adopted to remove or reduce the compensation for claimants no longer of working age. For Mrs Stec this meant that when she reached the age of 60, her award was replaced by a less valuable retirement allowance (RA). Due to the fact that at that time the pensionable age in the UK was not the same for men and women, however, Mrs Stec would

51 *Gaygusuz v. Austria*, ECtHR 16 September 1996, appl. no. 17371/90.

52 *Ibid*., para. 41.

53 See, *e.g.*, *Willis v. the UK*, ECtHR 11 June 2002, appl. no. 36042/97, para 32, where the Court states that 'in *Gaygusuz* … it considered that the right to emergency assistance, entitlement to which was linked to the payment of contributions to the unemployment insurance fund, constituted a pecuniary right for the purposes of Article 1 of Protocol No. 1'. See also Kapuy 2007, p. 227.

54 This second rationale was illustrated in *Koua Poirrez v. France*, ECtHR 30 September 2003, appl. no. 40892/98, para. 37: 'The Court also points out that it has already held that the right to emergency assistance – in so far as provided for in the applicable legislation – is a pecuniary right for the purposes of Article 1 of Protocol No. 1. That provision is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay "taxes or contributions".' See also Bossuyt 2007, pp. 321-322.

55 *Stec a. O. v. the UK*, ECtHR(GC) 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01. This case was already briefly introduced in, *supra*, Ch. 2, S. 2.4.2.2, 2.4.3.4, and 2.5.2.1.

have received the more valuable REA until the age of 65 if she had been a man. Before the Strasbourg Court she argued that the measures taken breached the non-discrimination principle in conjunction with the right to property of Article 1 P1.[56] Thus, the Court had to answer the question whether in this case the non-contributory benefits came 'within the ambit' of the 'possessions' protected by the ECHR.[57]

REA and RA were funded by general taxation rather than by the National Insurance Scheme, which made it difficult for the Court to squarely hold that the issue involved 'possessions'. The UK government referred to *Gaygusuz* and argued that it had relied on the rule laid out in that case that 'there is no entitlement … where … contributions have not been made'.[58] The Court however noted that 'precedents' had also pointed in a different direction.[59] To end the confusion as to the applicability of Article 1 P1 to cases on social security issues, the Grand Chamber now expressly decided to 'examine afresh the question whether a claim to a non-contributory welfare benefit should attract the protection of Article 1 of Protocol No. 1'.[60] It first of all considered that 'since the Convention is first and foremost a system for the protection of human rights', changing conditions had to be taken into account to render its rights 'practical and effective, not theoretical and illusory'.[61] The Court emphasised that the ECHR must be read as a whole to promote harmony and internal consistency between the various provisions. In *Salesi v. Italy* it had held that Article 6(1) ECHR (right to a fair trial) was applicable to a dispute over entitlement to non-contributory welfare benefits.[62] This was reason to interpret the autonomous concept of 'possessions' accordingly.[63] Also, the

56 *Ibid*., para. 33.
57 *Ibid*., para. 41.
58 *Gaygusuz v. Austria*, ECtHR 16 September 1996, appl. no. 17371/90, para. 39.
59 *I.e.*, that even a non-contributory benefit had incidentally constituted a possession. See, *e.g.*, *Koua Poirrez v. France*, ECtHR 30 September 2003, appl. no. 40892/98 (in this case Judge Mularoni dissented from the majority because in her view the allowance could simply not constitute a 'possession'. Given the severity of the case however, she found that it could have been reviewed under Article 14 in conjunction with Article 8 ECHR). The Court also refers to *Buchen v. the Czech Republic*, ECtHR 26 November 2002, appl. no. 36541/97, para. 46; *Wessels-Bergervoet v. the Netherlands*, ECtHR 4 June 2002, appl. no. 34462/97; *Van den Bouwhuijsen and Schuring v. the Netherlands*, ECtHR 16 December 2003 (dec.), appl. no. 44658/98.
60 *Stec a. O. v. the UK*, ECtHR (GC) 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, para. 47ff. *Cf.* also, *supra*, Ch. 2, S. 2.5.2.1.
61 *Ibid*., para. 47.
62 *Salesi v. Italy*, ECtHR 26 February 1993, appl. no. 13023/87. See also, *Schuler-Zgraggen v. Switzerland*, ECtHR 24 June 1993, appl. no. 14518/89, para. 46: '[T]he development in the law … and the principle of equality of treatment warrant taking the view that today the general rule is that Article 6(1) does apply in the field of social insurance, including even welfare assistance.'
63 *Stec a. O. v. the UK*, ECtHR (GC) 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, para. 49.

variety of funding methods in the Member States made it 'appear increasingly artificial' to include only contributory benefits. Doing so would moreover disregard the fact that in a non-contributory benefit system, the payment of taxes can also be regarded as a financial contribution.[64] In the words of the Court:

> 'In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognize that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right.'[65]

The part of the decision headed 'the approach to be applied henceforth' ends with the holding that since Article 1 P1 does not create a right to acquire property, the freedom of the state to decide on whether and what kind of social security system it creates is not in any way restricted. But *if* a state creates a benefits scheme, and regardless of whether this scheme is a contributory or a non-contributory one, 'it must do so in a manner which is compatible with Article 14'.[66] Thus, Mrs Stec's REA benefits came within the ambit of Article 1 P1 and the Court held that Article 14 was applicable.

With the admissibility decision in *Stec and Others* the issue of social security in relation to non-discrimination and the protection of property had been clarified:[67] whenever a state provides for benefits, of whatever kind, it must do so in a non-discriminatory manner. Unsurprisingly, this rule has invited many new social security-related applications – ever since the *Stec*-decision applicants invoke this case as the main argument for why their complaints deserve to be reviewed under the Convention. This has led to the admissibility of highly complex issues concerning for example the cessation of the USSR and the transition from a centralised socialist to a market economy, involving questions concerning the payment pensions or the timing of social security reforms.[68] Several cases moreover not only confirm the straightforward approach that was outlined in *Stec*, but also show that starting from the *Stec*-

64 *Ibid*., para. 50.
65 *Ibid*., para. 51.
66 *Ibid*., paras. 54-55.
67 An example of the effect of this clarity also in a national legal context is the statement by Lord Neuberger in the House of Lords, who pointed out that *Stec*, 'was a carefully considered decision, in which the relevant authorities and principles were fully canvassed, and where the Grand Chamber of the ECtHR came to a clear conclusion, which was expressly intended to be generally applied by national courts'. See *R. (on the application of RJM) v. Secretary of State for Work and Pensions (RJM)*, UKHL 2008, 63, 3 W.L.R. 123, para. 31. See Cousins 2009, p. 122.
68 See, *e.g.*, *Andrejeva v. Latvia*, ECtHR (GC) 18 February 2009, appl. no. 55707/00, and *Andrle v. the Czech Republic*, ECtHR 17 February 2011, appl. no. 6268/08, respectively.

decision, the Court arguably took the applicability of Article 14 in conjunction with Article 1 P1 even further. It has become clear, for example, that when instead of a particular benefit, *access* to a social security system and hence the future possibility to obtain a benefit, is concerned, there is sufficient reason for applying Article 14 as well.[69] The unequal treatment an applicant complains about hence does not need to be directly related to the granting of a benefit as such.[70] Moreover, whereas the Court has repeatedly held that Article 1 P1 does not guarantee a right to a pension of any particular amount, when a non-discrimination complaint concerns the level of a pension, this is no reason to hold the case inadmissible.[71]

Thus, while de-emphasising the question of whether or not the interest at stake in some way equals a possession, the Court has come to apply the Convention to complaints that before 2005 did not even come close to attracting fundamental rights protection. Yet before discussing how the Court reviewed and answered the difficult social security questions it thereby got itself involved in, a few cases must be mentioned in which the Court (recently) has shown a more hesitant approach. Thereby it is shown that in struggling to provide effective protection by means of a broad interpretation while also leaving room for the state when it comes to social security issues, the picture that emerges is not always a very lucid one. Indeed, although the line set out in and after *Stec* at first glance may appear to be clear, some decisions and judgments suggest that the Court is not entirely certain about its approach to non-discrimination issues in the social security sphere.

First, in the case of *Valkov and Others v. Bulgaria*, the Court was asked to review the applications lodged by nine Bulgarian nationals who claimed that the statutory cap on their pensions breached their rights under the Convention.[72] They invoked the right to property taken alone, as well as in conjunction with the prohibition of discrimination. The applicants considered that they had been discriminated against compared to those individuals who fell below the cap, as well as compared to those whose pensions were exempted from it.[73] Although in the light of what was said in *Stec* this non-discrimination complaint could be expected to automatically fall within the ambit of the

69 *Luczak v. Poland*, ECtHR 27 November 2007, appl. no. 77782/01. See also *Stummer v. Austria*, ECtHR (GC) 7 July 2011, appl. no. 37452/02.

70 *E.g., B. v. the UK*, ECtHR 14 February 2012, appl. no. 36571/06 (concerning the applicant's failure to report a material fact; she complained about the fact that persons unable to report facts because they were unaware of them were treated differently from those who were unable to report facts for some other reason).

71 *Cf. Carson a. O. v. the UK*, ECtHR 4 November 2008, appl. no. 42184/05 (concerning the complaint of pensioners who had moved abroad that their pensions were not up-rated in line with inflation).

72 *Valkov a. O. v. Bulgaria*, ECtHR 25 October 2011, appl. nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05.

73 *Ibid*., para. 102.

protection of property, the Court in this case opted for a different approach. It underlined the broad ambit of the Convention rights for the purposes of non-discrimination review, yet concluded its discussion of the applicability of Article 14 in conjunction with Article 1 P1 by stating that it 'does not consider it necessary to determine whether the facts of the case fall within the ambit of that provision'.[74] This because, '[e]ven assuming that they do, and that Article 14 is thus applicable, the Court finds that there has been no violation of that provision for the reasons that follow'.[75] Apparently it was clear from the start that the issue at stake would not amount to a breach of the Convention. However, the ECtHR's failure to address the interpretation question does lead to confusion as regards the possible limits to what is and what is not *prima facie* covered by the Convention.

A second example of such confusion is the Court's inadmissibility decision in the case of *Ramaer and Van Willigen v. the Netherlands*.[76] This case dealt with the effects of the new Dutch health care system for pensioners living abroad. The applicants complained under the right to protection of property about the fact that with the new system, they had lost their former health care contracts and thereby their premiums based entitlements. Moreover, they invoked the prohibition of discrimination, arguing that the health care insurance they could obtain under the new system was not equivalent to that available to Netherlands residents. In its admissibility decision the Court first of all held that Article 1 P1 taken alone did not apply. The expectations the applicants had were 'based on the hope to see their insurance contracts continued, or renewed, on terms no less favourable for them than those which they enjoyed previously', and this was not enough for concluding that there had been a 'possession'.[77] In relation to the non-discrimination complaint the Court then held that it

> 'has already found that Article 1 of Protocol No. 1 is inapplicable in the absence of a proprietary right that can properly be equated to a 'possession'. It follows that Article 14 cannot apply in combination with that Article. This complaint too is therefore incompatible *ratione materiae* with the provisions of the Convention.'[78]

The interests the applicants complained about were indeed far removed from being 'possessions' and there was hence reason to conclude that Article 14 did not apply. However, although the Court referred to the broader ambit

74 *Ibid*., para. 113.
75 *Ibid*. The Court concluded in a similar way on the complaint under Art. 1 P1 taken alone, see, *infra*, S. 10.4.1.
76 *Ramaer and Van Willigen v. the Netherlands*, ECtHR 23 October 2012 (dec.), appl. no. 34880/12. See on this case Leijten 2013b.
77 *Ramaer and Van Willigen v. the Netherlands*, ECtHR 23 October 2012 (dec.), appl. no. 34880/12, paras. 81-82.
78 *Ibid*., para. 87.

of Article 1 P1 in non-discrimination cases, it is surprising that it straightforwardly held that *because* Article 1 P1 taken alone did not apply, it also could not form the basis for an admissible non-discrimination complaint. It must be noted that the Court did review the case under the self-standing non-discrimination provision enshrined in Article 1 of Protocol No. 12 to the Convention,[79] and perhaps that was the reason why it did not go into the Article 14 complaint. Regardless of this possible explanation, however, the Court's approach does create doubt as to the meaning of Article 1 P1 in conjunction with Article 14. Although later cases do not confirm this, it could be inferred from the decision in *Ramaer and Van Willigen* that now that it can rely on Article 1 P12, the Court no longer sees the use of concluding on a (very) broad 'general scope' of the various Convention rights in order to provide for the necessary non-discrimination protection.[80]

In conclusion, it can be said that at the interpretation stage the Court seems unwilling to make a distinction between cases concerning contributory social security benefits and those concerning non-contributory ones or dealing with other aspects of social security schemes. In case of alleged discrimination virtually all social-security related complaints seem to allow for review under the Convention. This definitely signals an 'indivisible' approach, that does not discriminate between different categories of rights and can ensure practical and effective protection against discrimination irrespective of how a particular benefit is funded or what exact matter is concerned. However, it was shown that the Court sometimes places some doubt upon the broad applicability of Article 14 in the field of social security. This can be said to undermine the clarity of its interpretation and to result in insecurity for (prospective) applicants as to whether their complaint will be reviewed under the Convention.

As will become clear in the remainder of this chapter, next to the cases mentioned here there are more examples of where the ECtHR seemingly aims at restricting to some extent its broad interpretation of the Convention rights in social security cases.[81] A reason for this may be found in the inherent complexity of the eventual application of these rights, showing the limited possibilities of the Court in this field.

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79 *Ibid.*, para. 88ff. However, the conclusion was that this complaint was manifestly ill-founded.

80 Important in this regard, however, could also be the fact that since *Stec*, also the 'scope' of Article 1 P1 has broadened significantly, and that therefore there hardly seems reason anymore for distinguishing between the 'ambit' and the 'scope'. See, *infra*, S. 10.4.1.

81 See, in particular, *infra*, S. 10.4.1.

10.3.2 (Non-)Similar Situations and Objective and Reasonable Justifications

With the admissibility decision in *Stec and Others* the Court opted for a broad *interpretation* of the reach of Article 1 P1 and the possessions it protects in the context of alleged discrimination. It is interesting to see whether at the *application stage* this has led to principled and effective protection of individual social security rights. When the Court reviews a non-discrimination complaint, it first asks whether the differential treatment was made on a ground covered by Article 14 and whether the applicant found himself in a 'relevantly similar situation'.[82] In the end, only when no 'objective and reasonable justification' has been given for the differentiation made, it will be held to violate Article 14. This will be the case when the distinction does not pursue a legitimate aim, or lacks a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[83] The question to be addressed in this section is whether the Court has approached these tests in a transparent and consistent manner, thereby offering at least some added value for the applicants who decided to bring their social security cases to Strasbourg.

First of all, compared to the struggle the Court went through to hold the case applicable, its eventual review in *Stec* was rather limited. The Court's Grand Chamber concluded that the situation that Mrs Stec saw herself confronted with did not amount to a violation of the Convention.[84] The disadvantage she and the other applicants had faced resulted from the then legitimate policy of the United Kingdom to correct the disadvantaged position of women by differentiating in pensionable age.[85] The Court agreed that the reform towards equality had indeed taken quite a long time.[86] However, because of the reform's 'extremely far-reaching and serious implications, for women and for

82 *E.g.*, *Fredin v. Sweden (No. 1)*, ECtHR 18 February 1991, appl. no. 12033/86, para. 60; *Willis v. the UK*, ECtHR 11 June 2002, appl.no. 36042/97, para. 48.

83 See, *e.g.*, *Chassagnou a. O. v. France*, ECtHR (GC) 29 April 1999, appl. nos. 25088/94, 28331/95 and 28443/95, para. 91; *Serife Yigit v. Turkey*, ECtHR 2 November 2010, appl. no. 3967/05, para. 67.

84 Interesting is the concurring opinion of Judge Borrego Borrego added to the Grand Chamber judgment, who returned to the question of interpretation and held that he had voted with the majority, 'based on the belief that the applicants could not be considered to have "possessions" within the meaning of Article 1 of Protocol No. 1, which guarantees the protection of property'.

85 *Stec a. O. v. the UK*, ECtHR (GC) 12 April 2006, appl. nos. 65731/01 65900/01, para. 59.

86 *Ibid.*, para. 63. The Court notes that many other countries still maintain differences between men and women when it comes to the age at which they become eligible for a state pension. And: 'In the light of the original justification for the measure as correcting financial inequality between the sexes, the slowly evolving nature of the change in women's working lives, and in the absence of a common standard amongst the Contracting States … the Court finds that the United Kingdom cannot be criticised for not having started earlier on the road towards a single pensionable age' (para. 64).

the economy in general'[87] and the wide margin of appreciation granted in the light of the social and economic character of the complaint at issue,[88] Mrs Stec and her co-applicants left Strasbourg empty-handed.[89]

A similarly deferential approach is visible in the judgment in *Andrle v. the Czech Republic*.[90] Andrle had been taking care of his children for a number of years and applied for a retirement pension at the age of 57. His application was dismissed since he had not reached the age required by the Pension Insurance Act, which for a man in his situation was 61 years and ten months.[91] Also here the issue concerned a problematic distinction on the suspect ground of sex,[92] yet the Court held that the slow reform of the legislation that enabled women who had raised children to retire at an earlier age did not amount to a breach of the Convention. In this regard, it reflected in quite general terms on why it was important to grant much leeway to the state. It considered that pension payments are of a distinct kind since '[t]hey are founded on the principle of long-term contributions' and because 'the inherent features of the [pension] system allow for lifelong family and career planning'.[93] It thus accepted that adjustments of pension schemes must be carried out gradually and should not be forced on the state by a supranational

87 *Ibid.*, para. 65.

88 *Ibid.*, para. 63.

89 Also without luck were the applicants in *Walker v. the UK*, *Barrow v. the UK*, and *Pearson v. the UK* (ECtHR 22 August 2006, appl. no. 37212/02; ECtHR 22 August 2006, appl. no. 42735/02; ECtHR 22 August 2006, appl. no. 8374/03). These cases concerned problems that were similar the issue in *Stec*. Again, the Court had to deal with the United Kingdom's difference in pensionable age between men and women, this time in relation to the payment of National Insurance contributions. All three claimants received judgments that almost literally reiterated the Court's argumentation in *Stec*: The difference in treatment had to have an objective and reasonable justification, and it had to pursue a legitimate aim. A difference in treatment based exclusively on the grounds of sex, moreover, required very weighty reasons as justification. But, 'against this must be balanced the countervailing proposition that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one' (*e.g.*, *Pearson*, para. 24). This meant that in all cases the differentiation did not amount to a violation of Article 14 in conjunction with Article 1 of Protocol No. 1.

90 *Andrle v. the Czech Republic*, ECtHR 17 February 2011, appl. no. 6268/08.

91 Differentiated age limits for men and women in the Czech Republic had existed from 1957 onwards, with lower limits for women that further decreased according to the number of children they had raised. The reason for this was that women in the former Czechoslovakia were expected to fully participate in the labour process and were at the same time responsible for raising children. Since 2003, the system was in the process of being reformed, but the reform was not yet completed due to political struggles.

92 Generally, a distinction made on this ground requires 'very weighty reasons'. See, *e.g.*, Van Dijk et al. 2006, pp. 1046-1049; *Gaygusuz v. Austria*, ECtHR 16 September 1996, appl. no. 17371/90, para. 42.

93 *Andrle v. the Czech Republic*, ECtHR 17 February 2011, appl. no. 6268/08, para. 51.

Court,[94] which was reason to conclude that the differential treatment in *Andrle* was reasonably and objectively justified.[95]

Also in the case of *Stummer* the Court's review was of a deferential kind. In this case the applicant complained about the fact that he could not be affiliated to an old-age pension system during the 28 years he was imprisoned and had worked in the prison bakery and kitchen. As a result he was not entitled to an early retirement pension. The Court held that working prisoners are in a comparable situation to ordinary workers,[96] yet the wide margin and the lack of consensus amongst the Member States of the Council of Europe regarding pension scheme affiliation for prisoners led to the conclusion that Austria could not be said to have violated the Convention.[97]

However, regardless of the leeway the Court generally grants the state, not all social security complaints are easily dismissed on the merits. The case of *Luczak v. Poland* shows that in some instances the socio-economic interest of the applicant obtains actual protection.[98] In *Luczak* the applicant had been barred from joining the Polish Farmers' Social Security Fund solely on the basis of his nationality, and the Court unanimously concluded that Article 14 in conjunction with Article 1 of Protocol No. 1 had been violated. The Court stressed that very weighty reasons were required to justify a difference in treatment based on the ground of nationality.[99] Moreover, it held that even when very weighty reasons were advanced, 'to leave an employed or self-employed person bereft of any social security would be incompatible with current trends in social security legislation in Europe'.[100] According to the Court, Luczak found himself in a comparable position to Polish nationals. When he was employed he even supported the farmers' scheme by paying taxes.[101] Moreover, since the law excluding Luczak had eventually been changed in 2004 the Court could not but find that the original scheme could not be justified.[102] '[I]n the instant case', according to the Court, 'the Government have not provided any convincing explanation of how the general interest was served by refusing the applicant's admission to the farmers' scheme during the period in question'.[103]

94 *Cf.* also *Runkee and White v. the UK*, ECtHR 10 May 2007, appl. nos. 42949/98 and 53134/99.
95 *Andrle v. the Czech Republic*, ECtHR 17 February 2011, appl. no. 6268/08, para. 60.
96 *Stummer v. Austria*, ECtHR (GC) 7 July 2011, appl. no. 37452/02, para. 93.
97 *Ibid.*, paras. 104-111.
98 *Luczak v. Poland*, ECtHR 27 November 2007, appl. no. 77782/01.
99 *Ibid.*, para. 48.
100 *Ibid.*, para. 52.
101 *Ibid.*, para. 55.
102 Also: '[T]he Court does not find it established that the continuation of the distinction at issue in the present case was justified because of the allegedly far-reaching and serious implications for the State's economy if that distinction were to be continued' (*ibid.*, para. 58).
103 *Ibid.*, para. 59.

Another example of where the individual social security interest obtained eventual protection is the case of *Andrejeva v. Latvia*.[104] In this case the Court's Grand Chamber had to deal with the complaint of a former USSR citizen who had worked in Latvia since 1973. When the Soviet Union ceased to exist Andrejeva became stateless and in 1995 she was granted the status of 'permanently resident non-citizen'. For her pension this meant that only periods of work in Latvia could be taken into account, but because Andrejeva had been working for a Moscow-based employer, her working years in Latvia were treated as an 'extended business trip' and therefore could not add to any pension.[105] Like in *Luczak*, the differential treatment complained about concerned the suspect ground of nationality, and the Court stressed that 'very weighty reasons' were necessary for justifying the distinction made between Ms Andrejeva and others who did have the Latvian nationality and whose periods of work outside Latvia had been taken into account when their pensions were calculated.[106] Since the Court was not convinced of a 'reasonable relationship of proportionality', it concluded that the Convention had been violated.

What can be inferred from the cases of *Stummer*, *Luczak*, and *Andrejeva*, is that it seems to make a difference when a distinction is made on the suspect ground of nationality,[107] rather than on the ground of, for example, 'being a prisoner'.[108] Moreover, a violation seems less likely to be found when the effects of an exclusion are arguably of a less far-reaching kind, whereas when someone is left bereft of *any* social security cover this may very well be in breach of the Convention. However, regardless of the outcomes of the different cases, the way in which the Court approached the various complex issues can be criticised. With regard to *Stummer*, first, it can be argued that by merely focussing on consensus as regards pension schemes for prisoners, the Court paid too little attention to the fact that affiliation to such schemes cannot be viewed in isolation but instead forms only a part of a complex web of arrangements states might have in place for detainees. Yet would the Court have tried to make sense of all the relevant information from the different states, it arguably would have even been more complicated to solve the case in a reasoned manner. Also in *Luczak*, moreover, the Court's approach lacked transparency in the sense that although its review was clearly strict enough for the case to come out in favour of the applicant, it remained unclear how

104 *Andrejeva v. Latvia*, ECtHR (GC) 18 February 2009, appl. no. 55707/00. See for some critical remarks the lengthy partly dissenting opinion of Judge Ziemele attached to the judgment.

105 *Ibid.*, para. 18.

106 *Ibid.*, paras. 81-88.

107 However, according to Bossuyt 2007, p. 325, the question is: 'Is nationality a ground that should be subject to the highest level of scrutiny, and this regardless of the right in which the difference of treatment is practiced?' He argues that this might be less convincing in the context of socio-economic rights.

108 *Stummer v. Austria*, ECtHR (GC) 7 July 2011, appl. no. 37452/02, para. 90.

the requirement of a convincing explanation related to the margin of appreciation that was granted.[109]

Finally, the judgment in *Andrejeva* has been criticised for not taking due account of all relevant matters. For example, the Grand Chamber did not pay any express attention to the fact that Latvia relied on bilateral agreements to arrange matters like this.[110] It also did not want to accept the argument that naturalisation would have saved Andrejeva's interest.[111] In *Andrejeva*, the Court had to answer the question of who was responsible for the payment of pensions to persons in Andrejeva's situation. It had to assess and evaluate extraordinarily complex economic constellations that were undoubtedly hard to determine from a supranational point of view and that could have just as well led to a different outcome. Strasbourg review in this case led to indivisible protection of the social security interest put forward. At the same time, given also that the case did not even concern the basic, minimum pension but additional entitlements,[112] it can be said that by reviewing it the Court reflected upon politics and policies it generally does not consider itself capable of touching upon.[113]

Frequently, also, the Court does not take a stance on whether or not differential treatment was 'objectively justified'. Its conclusion with regard to complex social security-related discrimination issues is not seldom that the applicants simply were not in a relevantly similar situation to those who received the treatment they too desired. This can be illustrated by the case of *B. v. the United Kingdom*, in which the applicant had for some time received too high an amount of income support because she had failed to notify the relevant author-

109 In line with the 'very weighty reasons-requirement' that comes with a classification on a suspect ground, it speaks of the 'convincing explanation' that was not provided, whereas it also tends to favour deferential review, by concluding that 'even having regard to their margin of appreciation in the area of social security', there was no reasonable and objective justification (*Luczak v. Poland*, ECtHR 27 November 2007, appl. no. 77782/01, para. 59). It can hence be a point of discussion whether the Court actually applied a 'very weighty reasons-test' here. See further, *infra*, S. 10.3.3.

110 *Andrejeva v. Latvia*, ECtHR (GC) 18 February 2009, appl. no. 55707/00, para. 90.

111 *Ibid.*, para. 91.

112 According to the dissent of Judge Ziemele, 'Latvia decided to guarantee a minimum pension to everyone living in the country [including Andrejeva], citizens and non-citizens alike, and additionally to compensate for losses incurred as a result of the demise of the USSR on the basis of the criteria of citizenship and territory' (para. 6, but see also para. 1 and para. 7).

113 See again the partly dissenting opinion of Judge Ziemele attached to the judgment in *Andrejeva*, who held for example that '[t]he Republic of Latvia, as an independent subject of international law, was under no obligation either to extend its social protection to, or repair the loss of Soviet social protection in respect of, persons who had worked in the Soviet Union, another subject of international law to which Latvia was not a successor State' (para. 6).

ities of the fact that her children had been taken into care.[114] B. complained about a difference in treatment between persons who could not reasonably be expected to report a material fact to the social security authorities because they were unaware of the fact, and persons who, like herself, could not reasonably be expected to report a fact because they were not aware of its materiality. The ECtHR held that 'although neither could be said to be "to blame" for the failure to report, the Court considers the situation of persons who are not aware of a fact to be qualitatively of a different nature to that of persons who are aware of a fact but who are not aware of its materiality'.[115]

The 'not in a relevantly similar situation' reasoning has also appeared in a number of judgments concerning social security claims of individuals who had moved abroad. In *Ramaer and Van Willigen* the Court held that Article 14 did not apply, but as was mentioned above, it did consider the case in the light of the non-discrimination provision of Article 1 P12. The applicant pensioners claimed that they were in a relevantly similar position to Netherlands residents because they had paid the same health care insurance premiums. However, their private insurance contracts were terminated with the entry into force of the new Health Care Insurance Act and were therefore held 'irrelevant to the present situation'.[116] The new Act provided for an essentially territorial system, and the applicants were now 'treaty beneficiaries' who were entitled in accordance with Council Regulation 1408/71/EEC to basic health care in their respective countries of residence. '[A]ccordingly', the ECtHR held, 'the applicants are not in a relevantly similar situation to Netherlands residents, or to each other'.[117] The upshot of this was that the complaint was declared manifestly ill-founded.

The approach of the Court in *Ramaer and Van Willigen* can be traced back to the Grand Chamber's 'landmark' judgment in *Carson and Others v. the United*

114 *B. v. the UK*, ECtHR 14 February 2012, appl. no. 36571/06.

115 *Ibid.*, para. 57. It continued by saying that '[a]s the Court of Appeal found, the proposition that you cannot report something that you do not know is a simple proposition of logic, whereas the proposition that you cannot report something you do not appreciate you have to report depends on difficult questions of cognitive capacity and moral sensitivity which vary from person to person'. The Court found the applicant's alternative formulation, namely that persons who did not have the capacity to understand their obligation to report should be treated differently from persons who did, 'somewhat more persuasive'. However, the decision not to treat the applicant in a different way pursued the legitimate aim of 'ensuring the smooth operation of the welfare system and the facilitation of the recovery of overpaid benefits'. Moreover, since a number of steps had been taken to ensure that the burden the applicant had to bear was not excessive, the state's failure to treat the applicant differently was 'proportional' and objectively and reasonably justified (paras. 58-61).

116 *Ramaer and Van Willigen v. the Netherlands*, ECtHR 23 October 2012 (dec.), appl. no. 34880/12, para. 97.

117 *Ibid.*, para. 101.

Kingdom.[118] The Chamber had held in its judgment in this case that the pensioners who had emigrated to countries in which their pensions were not up-rated in line with inflation were not in a relevantly analogous situation to those residing inside the UK 'insofar as concerns the operation of pension or social security systems'.[119] Neither could they be compared to pensioners resident in other countries where up-rating was available.[120] In 2010, the Grand Chamber confirmed this conclusion, albeit on the basis of somewhat different reasoning.[121] It explicated that the applicants had misconceived the relationship between National Insurance contributions and the state pension: according to the Grand Chamber these were not exclusively linked. Rather, the complex and interlocking system made it 'impossible to isolate the payment of National Insurance contributions as a sufficient ground for equating the position of pensioners who receive up-rating and those … who do not'.[122] Further, the Grand Chamber emphasised the 'essentially national character of the social security system',[123] and expressed that it is generally hard to draw comparisons, because of the great variety of applicable social and economic variables.[124] It thus had regard to the web of relations between various benefits and contributions, holding that 'random effects' are in any case inescapable.[125] Like in the context of pension scheme reforms, in this case the

118 *Carson a. O. v. the UK*, ECtHR (GC) 16 March 2010, appl. no. 42184/05. This also goes for the cases of *Raviv v. Austria*, ECtHR 13 March 2012, appl. no. 26266/05, and *Efe v. Austria*, ECtHR 8 January 2013, appl. no. 9134/06. *Raviv* concerned a special insurance regime in Austria, under which victims of Nazi prosecution have the possibility of paying retroactive contributions on a voluntary basis in order to be entitled to an old age pension. Mrs Raviv held that she was discriminated against since under this special system periods of child raising spent abroad were not counted for the purpose of calculating her pension. The Court however held that she was not in a relevantly similar position to those who were not covered by the special system but instead had made regular contributions to the old-age system. *Efe v. Austria* concerned an applicant who had worked in Austria while his children had stayed in Turkey, and who complained about the fact that he had not received a family allowance after in 1996 a Social Security Agreement between Turkey and Austria had been terminated. In this case the ECtHR concluded 'that the social security system in Austria was … primarily designed to cater for the needs of the resident population and that it was therefore hard to draw any genuine comparison with the position of those who based their claim on persons resident elsewhere' (para. 52).

119 *Carson a. O. v. the UK*, ECtHR 4 November 2008, appl. no. 42184/05, para. 78.

120 *Ibid.*, para.79. According to Cousins 2009, p. 134, however, this conclusions was somewhat less convincing: 'From the point of view of the individual pensioner it must appear anomalous that payment of an increase should depend on whether she lives in a country which does or does not have a reciprocal agreement with the United Kingdom'.

121 *Carson a. O. v. the UK*, ECtHR (GC) 16 March 2010, appl. no. 42184/05.

122 *Ibid.*para. 84. *Cf.* also *Valkov a. O. v. Bulgaria*, ECtHR 25 October 2011, appl. nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, para. 95.

123 *Carson a. O. v. the UK*, ECtHR (GC) 16 March 2010, appl. no. 42184/05, para. 85.

124 *Ibid.*, para. 86.

125 *Ibid.*

Court thereby underlined the complexity of social security issues, and the limited role of the Strasbourg Court therein.

Altogether, what can be concluded from the Court's review of the various social security cases under Article 14 in conjunction with Article 1 P1 is, first, that the Court is generally showing a relatively large degree of deference when it comes to (the reform of) social security systems. How exactly it thereby uses the concept of the margin of appreciation is further elaborated in Section 10.3.3, but it can be noted here that, for the Court, the fact that it is literally far removed from these systems can be reason not to engage with the issue in a thorough manner. Secondly, that another reason for why the Court often does not have to answer the question of whether a distinction in the field of social security was proportional, is because it concludes that the applicant does not find himself in a 'relevantly similar situation'. What exactly this criterion entails remains hard to say, yet it can be seen that in the context of complex, interlocking social security systems there often will be a reason for holding that situations were not sufficiently similar for providing eventual protection.[126] Also in this regard, thus, the broad applicability of the Convention does not always add much. Finally, there are several cases where the Court does thoroughly engage with the merits of the discrimination complaint. Even in these cases, however, it remains unclear what exact difference the ground of differentiation makes, or why – in view of all the circumstance – a case is determined in one way or another. Surely, the issues the Court is required to 'resolve' are often extremely difficult to get a good overview of and judge upon. Distinctions in the field of social security are omnipresent as well as necessary,[127] and even a distinction based on the suspect ground of nationality in this context cannot always be considered to constitute discrimination.[128] However, the point is that although there may be clear cases in which the state for example altered its regime, 'admitting' that a distinction made in the past

126 *Ibid.* For determining the similarity of situations, it is important what level of abstraction is chosen. Pensioners receiving Dutch pensions can be considered to be in a similar situation merely due to this fact, yet their situation can also be considered non-similar if the focus shifts to the country they live in (*cf. Ramaer and Van Willigen v. the Netherlands*, ECtHR 23 October 2012 (dec.), appl. no. 34880/12).

127 As the Court has noted in this regard: '[A]ny welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need'. See, *e.g., Runkee and White v. the UK*, ECtHR 10 May 2007, appl. nos. 42949/98 and 53134/99, para. 39. See also Kenny 2010, p. 498.

128 *Cf.* Bossuyt 2007, p. 325. See for the difficulties in judging upon alleged discrimination in social security in relation to EU law (and the nationality issues featuring therein) moreover Burri 2013; Pennings 2013.

was wrong,[129] in other cases the Court seems unable to take stock of all the relevant information in a transparent and convincing manner.

Thus, the Court's interpretation creates room for indivisible and effective protection against discrimination, and in some cases it actually grants such protection. This notwithstanding, in many instances its review does not get to the heart of the matter concerned or creates a confused image of interests and considerations that omits to provide for any clear standards.

10.3.3 The Role of the Margin

Before discussing the cases in which Article 1 P1 was invoked on its own, it is worth to zoom in on the role of the margin of appreciation in the Court's reasoning in non-discrimination cases. Does it use this doctrine in a consistent way that adds clarity to the Court's review and is moreover in line with the aim of providing effective and indivisible rights protection? Or is it in fact also due to the way the Court utilises the margin that Court's case law can be criticised?

In the landmark case of *Stec and Others*, the Grand Chamber made the following remarks with regard to the margin of appreciation:

> 'The Contracting State enjoys a 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 the background … As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention … On the other hand, a wide margin 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".'[130]

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129 *Cf. Luczak v. Poland*, ECtHR 27 November 2007, appl. no. 77782/01, where the Court moreover held that it cannot be accepted that someone is left bereft of any social security cover.

130 *Stec a. O. v. the UK*, ECtHR (GC) 12 April 2006, appl. nos. 65731/01 and 65900/01, paras. 51-52. See also Cousins 2009, p. 128. According to Cousins 'we have a somewhat variable list of statuses which require "very weighty reasons" to justify differential treatment. Those mentioned by the Court of Human Rights – in Carson and in previous judgments – include gender, nationality, sexual orientation, and racial or ethnic origin. Outside that sphere a (very wide) margin of appreciation is to be allowed' (p. 132).

In the case on hand, the state had opted for using the state pension age as the cut-off point for REA because this made the scheme easy to understand and administer. The Court held that 'such questions of administrative economy and coherence are generally matters falling within the margin of appreciation'.[131] Moreover, the fact that the reform was introduced slowly and in stages could, 'given the extremely far-reaching and serious implications, for women and for the economy in general', also be considered to 'clearly' fall within the state's margin.[132]

It already became clear in the previous section that especially when it concerns the timing of pension reforms, the Court's review is of a very deferential kind. Also in *Andrle* the Court, unsurprisingly, held that it

> 'cannot but reiterate that the national authorities are better placed than an international judge to determine such a complex issue relating to economic and social policies, which depends on manifold domestic variables and direct knowledge of the society concerned, and that they have to enjoy a wide margin of appreciation in this sphere.'[133]

However, also in the cases that did not concern the timing of a (pension) reform the Court has made similar remarks as to the width of the margin, even when the issue at stake was held to be in breach of the Convention. This can be illustrated by the judgment in *Andrejeva*, where the Court recalled that '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'.[134] Nonetheless, although 'being mindful of the broad margin of appreciation enjoyed by the state in the field of social security', it did hold that the arguments presented by the state were not sufficiently convincing for concluding that the distinction made was justified. Indeed, what played an important role in this case was that the applicant was discriminated against on the basis of her nationality. Apparently, however, this did not influence the 'wide' or 'broad' margin of appreciation, but rather seemed to 'outbalance' the great measure of leeway that was automatically granted.[135]

Indeed, the fact that the Court in social security cases almost without exception speaks of a wide margin of appreciation does not help in making

131 *Stec a. O. v. the UK*, ECtHR (GC) 12 April 2006, appl. nos. 65731/01 and 65900/01, para. 57.

132 *Ibid.*, para. 65.

133 *Andrle v. the Czech Republic*, ECtHR 17 February 2011, appl. no. 6268/08, para. 56

134 *Ibid.*, para. 83 (see also para. 89)

135 This also explicitly follows from the Court's remark that, although sometimes very weighty reasons are required, 'against this must be balanced the countervailing proposition that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one' (*Walker v. the UK*, ECtHR 22 August 2006, appl. no. 37212/02, para. 33; *Barrow v. the UK*, ECtHR 22 August 2006, appl. no. 42735/02, para. 35; *Pearson v. the UK*, ECtHR 22 August 2006, appl. no. 8374/03, para. 24).

its review and the different outcomes reached more insightful. More concretely, it makes one wonder what exactly is the relation between this margin and the ground of discrimination or the other specific circumstances at hand. On the one hand the Court generally holds that very weighty reasons are required to justify a difference in treatment based on the suspect grounds of sex or nationality. However, it then may continue by stating that 'on the other hand', measures of economic and social strategy require a wide margin of appreciation, thereby seeming to maintain that these are two separate things and that the former does not influence the latter. Indeed, in many cases, after stating some general remarks on the margin the Court does not conclude on how in the specific case at hand, and given the 'circumstances, subject matter and background', the margin should or should not be adjusted. Interesting in this regard is the case of *Luczak*, where, as was already mentioned, the Court unanimously concluded that the exclusion of Luczak from the farmers' social security scheme on the ground of his nationality had violated Article 14 together with Article 1 P1. What it did not do to reach this conclusion, however, was explicitly narrowing the margin of appreciation. The Court's final remarks in *Luczak* were that

> 'while the Court accepts that a measure which has the effect of treating differently persons in a relevantly similar situation may be justified on public-interest grounds, it considers that in the instant case the Government have not provided any convincing explanation of how the general interest was served by refusing the applicant's admission to the farmers' scheme during the period in question … In conclusion, the Court finds that the Government have not adduced any reasonable and objective justification for the distinction such as to meet the requirements of Article 14 of the Convention, even having regard to their margin of appreciation in the area of social security.'

This may confirm that in the area of social security, the margin is merely perceived as a given, rather than as something that is actually dependent on various factors and, importantly, on what exactly was at stake for the applicant. In *Luczak* the Court underlined that the exclusion of a person from a social security scheme 'must not leave him in a situation in which he is denied any social insurance cover, whether under a general or a specific scheme, thus posing a threat to his livelihood'. Moreover, 'to leave an employed or self-employed person bereft of any social security cover would be incompatible with current trends in social security legislation in Europe'.[136] Albeit these considerations seemingly led to some stricter form of review, when essential needs are at stake this does not seem reason for the Court to narrow the margin of appreciation in a more transparent manner.

136 *Luczak v. Poland*, ECtHR 27 November 2007, appl. no. 77782/01, para. 52.

Thus, the Court's references to the margin of appreciation are consistent, yet perhaps also a bit *too* consistent. The Court may always mention the doctrine, yet this often does not truly add something to its review and can even be said to be part of the reason why its reasoning is perceived as problematic.[137] Arguably, the differences that characterise the cases that come before it could in fact be reason for a more tailor-made (indivisible) approach, but the Court fails to recognise that for example when certain very important ('core') social security benefits are concerned, that have a direct impact on the applicant's livelihood, even an issue concerning a 'general measure of social security' may perhaps demand a narrow(er) margin of appreciation. Instead, the *wide* margin merely seems to be one amongst many relevant factors the Court considers in the context of an opaque balancing test. In doing so, it is not using the doctrine as an instrument for recognising different levels of interference and adjusting the review of a case accordingly.

10.4 Property Rights and Social Security Benefits

Next to under Article 14, complaints regarding social security benefits are also often made under Article 1 P1 taken alone. Generally, a successful property claim should be 'sufficiently established'[138] as well as 'adequately definable',[139] and a right to acquire property is not recognised.[140] According to the Court's earlier case law, systems that create definable individual shares in specific funds by payment of directly related contributions are property-creating systems. Accordingly, claims to benefits derived from these schemes can be seen as 'possessions' for the purposes of the Convention.[141] At the same time, in the case of systems 'based on the principle of solidarity' a definable proprietary interest has proven harder to find. In *G. v. Austria*, for example, the former European Commission of Human Rights held that '[a] claim of entitlement to a survivor's pension for civil servants does not constitute a possession attracting the protection of this provision where, as in

137 Although there may be some exceptions. Sometimes, the Court for example holds that the margin in dependent on the existing consensus, see, *e.g.*, *Stummer v. Austria*, ECtHR (GC) 7 July 2011, appl. no. 37452/02, para. 104. See also *Efe v. Austria*, ECtHR 8 January 2013, appl. no. 9134/06, para. 44. Also in these cases, however, it did not actually 'change' the margin according to its findings on this matter.

138 *Stran Greek Refinieries and Stratis Andeadis v. Greece*, ECtHR 9 December 1994, appl. no. 13427/87, para. 59. See also Van Dijk et al. 2006, p. 869.

139 See Van Dijk et al. 2006, p. 867.

140 *E.g.*, *Van der Mussele v. Belgium*, ECtHR 23 November 1983, appl. no. 8919/80, para. 48; *Pistorova v. the Czech Republic*, ECtHR 26 October 2004, appl. no. 73578/01, para. 38.

141 Van Dijk et al. 2006, p. 867.

Austria, these pensions are based on the principle of maintenance and are not entirely founded by prior contributions'.[142]

It was demonstrated that with its admissibility decision in *Stec*, the Court has clarified that in the context of discrimination cases it should not be material whether a benefit is or is not based on prior contributions. In this section it will be discussed whether this broad understanding of the 'ambit' of the right to protection of property has also influenced the way the more narrow 'scope' of this right is understood. How, in other words, does the Court today interpret Article 1 P1 of the Convention in social security-related issues, and does this allow for effective, indivisible protection while providing general insights on what is and what is not covered by this article? After discussing the *prima facie* scope of this provision (10.4.1), the discussion will continue with several examples of the review of the Court in Article 1 P1 cases (10.4.2). In that context, it will be investigated whether the Court's proportionality review allows for applying the right to protection of property in a principled manner, and what use is thereby made of the margin of appreciation (10.4.3).

10.4.1 Wide Scope or Vague Scope?

It was explained in Section 10.2.1 that because of the apparent 'ambit'/'scope' distinction it seems easier to obtain ECHR protection when a Convention provision is invoked together with Article 14. The Court used to be quite strict on what could amount to a 'possession' for the purposes of Article 1 P1,[143] although it allowed for some exceptions in the special context of alleged discrimination.[144] Against this background, it can be asked whether next to the widening of the ambit of Article 1 P1 in discrimination cases, the *Stec* decision has in fact had the parallel effect of also broadening the scope of the protection of property in the context of social security complaints that do not invoke Article 14.

Many cases indicate that the understanding of Article 1 P1 that followed from *Stec* is indeed not restricted to cases concerning Article 14. Already shortly after the 2005 decision, *Stec* was considered a relevant precedent at the admissibility stage in a case claiming 'pure' property protection. In *Gouds-*

142 *G. v. Austria*, EComHR 14 May 1984, appl. no. 10094/82. See also *X. v. the Netherlands*, EComHR 20 July 1971 (dec.), appl. no. 4130/69; *Mrs. X. v. the Netherlands*, EComHR 18 December 1973 (dec.), appl. no. 5763/72.

143 *G. v. Austria*, EComHR 14 May 1984, appl. no. 10094/82; *X. v. the Netherlands*, EComHR 20 July 1971 (dec.), appl. no. 4130/69; *Mrs. X. v. the Netherlands*, EComHR 18 December 1973 (dec.), appl. no. 5763/72.

144 *E.g.*, *Buchen v. the Czech Republic*, ECtHR 26 November 2002, appl. no. 36541/97, para. 46; *Wessels-Bergervoet v. the Netherlands*, ECtHR 4 June 2002, appl. no. 34462/97; *Koua Poirrez v. France*, ECtHR 30 September 2003, appl. no. 40892/98; *Van den Bouwhuijsen and Schuring v. the Netherlands*, ECtHR 16 December 2003 (dec.), appl. no. 44658/98.

waard-Van der Lans v. the Netherlands – dealing with a complaint under Article 1 P1 concerning an allegedly disproportionate and unjustified reduction of a widow's pension – the Court needed but a single reference to *Stec* to find that the Convention applied.[145] The case did not in any way concern discrimination, and it can be doubted whether the applicability of Article 1 P1 alone could be readily inferred from what was held in *Stec*.[146] Yet *Goudswaard-Van der Lans* turned out to be no exception. Also in other cases in relation to Article 1 P1 taken alone the Court has underlined that although this article does not guarantee a right to acquire property, or to a pension of a particular amount,

> 'where a Contracting State has in force legislation providing for the payment as of right of a pension – whether or not conditional on the prior payment of contributions – that legislation has to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements … The reduction or the discontinuance of a pension may therefore constitute interference with possessions that needs to be justified.'[147]

One example that illustrates the potentially very far-reaching role the Court hereby creates for itself in national social security issues is *Moskal v. Poland*.[148] This 2009 case concerned Ms Moskal's early retirement pension that was revoked after it had become clear that she did not satisfy the relevant conditions. Moskal complained that the reconsideration *ex officio* of her claim to the pension, followed by the negative decision and a period of three years in which no replacing benefit was granted, amounted to a violation of Article 1 P1. The government submitted that this provision did not extend to pensions and welfare benefits that were erroneously acquired.[149] The Court referred to *Stec*, and held that '[w]here an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable'.[150] The

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145 *Goudswaard-Van der Lans v. the Netherlands*, ECtHR 22 September 2005 (dec.), appl. no. 75255/01. What could have played a role here as well is, however, the fact that the applicant, the government, and the third parties agreed on the applicability of Article 1 P1.

146 After all, the bottom-line of *Stec* seems to be that whenever a state creates social security benefits, and regardless of whether these are of a contributory or of a non-contributory kind, it must do so in a manner compatible with Art. 14.

147 *Lakicevic and Others v. Montenegro and Serbia*, ECtHR 13 December 2011, appl. nos. 27458/06, 33604/07, 37205/06 and 37207/06, para. 59, with plenty of references to earlier cases (see also para. 34, where the Court held that the applicants' pensions complaints 'naturally fall to be examined under Article 1 of Protocol No. 1 only'. See also, *e.g.*, *Grudic v. Serbia*, ECtHR 17 April 2012, appl. no. 31925/08, para. 72.

148 *Moskal v. Poland*, ECtHR 15 September 2009, appl. no. 10373/05. See more recently also *Czaja v. Poland*, ECtHR 2 October 2012, appl. no. 5744/05.

149 *Moskal v. Poland*, ECtHR 15 September 2009, appl. no. 10373/05, para. 36.

150 *Ibid*. See also *Stec a. O. v. the UK*, ECtHR (GC) 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, para. 51.

fact that the benefit was subject to lawful revocation, and was indeed revoked because one of the three criteria for receiving it had not been met, was no reason for the Court to judge differently. According to the Court, a property right had been generated the moment the applicant's dossier was evaluated in a favourable way.[151]

What can be inferred from this is that whenever a state discontinues or reduces the provision of a social security award – and regardless of whether this was lawful and moreover resulted from the fact that it had been erroneously granted – it has to justify this in terms of the Convention.[152] Indeed, especially also in times of austerity this means that many of the legislative measures and individual decisions taken in the area of social security could end up being reviewed in Strasbourg.[153]

Although the acceptance of a link between non-contributory social security awards and the 'possessions' protected by Article 1 P1 still raises some eyebrows,[154] it appears that the Court has consciously opted for offering protection in this field. The application of the *Stec* reasoning to cases concerning Article 1 P1 taken alone has led to a far-reaching, yet at first glance transparent and comprehensible approach to social security complaints that allows individuals and states to know what their *prima facie* rights and duties are.[155]

151 *Moskal v. Poland*, ECtHR 15 September 2009, appl. no. 10373/05, para. 45.

152 *Cf. Iwaszkiewicz v. Poland*, ECtHR 26 July 2011, appl. no. 30614/06. In this case, concerning the withdrawal of a veteran's disability pension after a fresh medical examination that replaced an earlier and allegedly inaccurate test, the Court did not even question the applicability of Article 1P1 found that the reach of Article 1 P1 was not even an issue worth discussing. The matter of applicability was a mere formality, and review was more or less granted automatically.

153 See, for some austerity related cases, *Koufaki and Adedy v. Greece*, ECtHR 7 May 2013 (dec.), appl. nos. 57665/12 and 57657/12; *Da Conceição Mateus and Santos Januário v. Portugal*, ECtHR 8 October 2013 (dec.), appl. nos. 62235/12 57725/12, and *Savickas a. O. v. Lithuania*, ECtHR 15 October 2013 (dec.), appl. nos. 66365/09, 12845/10, 28367/11, 29809/10, 29813/10 and 30623/10. These cases concerned salary cuts and reductions and revocations of Christmas and holiday subsidies that resulted from austerity measures and the EU's Economic and Financial Assistance Programme. The Court however took a deferential stance in these cases and considered them to be manifestly ill-founded. See further, *infra*, S. 10.4.2.

154 *Cf.* for a generally critical outlook on the Court's approach to social security case law, Bossuyt 2007, who especially with regard to the possessions question refers to the concurring opinion attached to the eventual judgment in *Stec* of Judge Borrego Borrego, who noted not without irony that the Court's new interpretation 'has an undeniable attraction! Without any need for a revolution, all Europe's citizens have become property owners, protected by Article 1 of Protocol No. 1. Everyone, from a billionaire right down to the poorest person subsisting on social security, has become a property owner' (*Stec a. O. v. the UK*, ECtHR (GC) 12 April 2006, appl. nos. 65731/01 and 65900/01).

155 *I.e.*, it has been considered that virtually all social security complaints can be reviewed under the Convention. *Cf.* Cousins 2008, p. 22; Cousins 2009, p. 118; Kapuy 2007, p. 221, who 'concludes that the right to protection of property … [is], as a general rule, applicable in the field of social security'.

However, like in the case of the protection against discrimination, also in the context of social security and property rights there are some (recent) cases that create doubt as to whether the Court's approach is actually as unambiguous as it seems.

An example can be found in the case of *Sali v. Sweden*, which concerned the domestic authorities' refusal to grant an unemployment benefit on the ground that the applicant did not fulfil the requirement of being unemployed in terms of the relevant law. In this admissibility decision a crucial role was given to the point made in *Stec* that there was no longer any justification for distinguishing between contributory and non-contributory benefits. Seemingly, however, the Court was not sure whether this sufficed for considering Article 1 P1 applicable. Rather than holding that Article 1 P1 applied (or not), it decided to avoid the issue and to 'proceed *on the assumption* that the refusal to grant the applicant [an] unemployment benefit constituted an interference with her peaceful enjoyment of possessions'.[156]

The Court did something similar in the case of *Maggio and Others v. Italy*. There, one of the applicants complained that the fact that his pension turned out lower than he had expected, due to a legislative change providing for a new method of calculation, resulted in an interference with the peaceful enjoyment of his possessions. In this case the Court jumped to an assessment of the merits of the case stating that it 'does not consider it necessary … to determine whether the first applicant in the present case had a possession within the meaning of the Protocol No. 1, as in any event it considers that there has been no breach of Article 1 of Protocol No. 1'.[157]

Perhaps one must not think too much of the Court's reluctance to clearly interpret the scope of Article 1 P1 in these cases. 'Assuming' that the different benefits fell within this provision's reach may seem to confirm that it is likely that they do, and the reason for the Court not to explain this in detail might simply be that in the end what mattered was that no violation could be found. Against this argument, however, one may hold that it is strange that the Court proceeded to the review of the case without identifying whether there was a Convention right applicable in the first place. In any case, although the

156 *Sali v. Sweden*, ECtHR 10 January 2006 (dec.), appl. no. 67070/01 [emphasis added]. *Cf.* also *Valkov a. O. v. Bulgaria*, ECtHR 25 October 2011, appl. nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05. In this case the Court not only refrained from answering the interpretation question with regard to the Article 14 complaint, it also did not find it necessary to take a firm stance on whether the cap on the applicants' pensions amounted to an interference with their 'possessions', 'because it considers that there has been no breach of Article 1 of Protocol No. 1 for the reasons that follow'. Again, it proceeded '*on the assumption* that Article 1 of Protocol No. 1 is applicable and that the pensions cap, in all its forms, can be regarded as an interference with the applicants' rights under that provision' (para. 87).

157 *Maggio a. O. v. Italy*, ECtHR 31 May 2011, appl. nos. 46286/09 52851/08 53727/08 54486/08 56001/08, para. 59.

approach illustrated by *Sali* and *Maggio* may still be squared with a broad understanding of the scope of Article 1 P1, there is a recent judgment that more concretely questions the assumption that in 'virtually all' social security issues, Article 1 P1 applies.

In the 2013 case of *Damjanac v. Croatia* the applicant complained about the stopping of his military pension for thirteen months after he had changed his place of residence to Serbia.[158] In regard to the question whether his pension could be considered a possession for the purposes of Article 1 P1, the Court repeated that pension legislation in principle can be considered as creating proprietary interests, and that 'where the amount of a benefit or pension is reduced or eliminated, this may constitute an interference with possessions which requires to be justified in the general interest'.[159] However, it did not stop there, but continued by stating the following:

> 'Where, however, the person concerned does not satisfy, or ceases to satisfy, the legal conditions laid down in domestic law for the grant of any particular form of benefits or pension, there is no interference with the rights under Article 1 of Protocol No. 1 … Finally, the Court observes that the fact that a person has entered into and forms part of a State social security system does not necessarily mean that that system cannot be changed either as to the conditions of eligibility of payment or as to the *quantum* of the benefit or pension.'[160]

Read together, these considerations seem to imply – or at least allow for the conclusion – that Article 1 P1 is not concerned when due to changes in the system, *i.e.*, because of alterations regarding the relevant conditions or the *quantum* of the benefit at stake, someone does no longer satisfy the legal conditions for being granted any particular benefit or pension. And although this may seem a sensible interpretation, arguably the Court hereby opted for a stricter understanding of the right to protection of property than it normally does. The Court's interpretation of Article 1 P1 has become known for its inclusiveness, *i.e.*, for including virtually all social security cases, at least when at some point the relevant conditions were met.[161] From the remarks in *Damjanac*, however, it may be inferred that no complaint under Article 1 P1 can be made if the reason for a reduction or elimination of a benefit or pension lies in the fact that someone no longer meets the applicable conditions, or when it relates to more a more general change in the system – which is indeed often the reason for no longer obtaining a benefit or a benefit of a certain amount. The reasoning in *Damjanac*, in other words, would enable the Court to exclude a large category of cases from review under the Convention, although it does

158 *Damjanac v. Croatia*, ECtHR 24 October 2010, appl. no. 52943/10.
159 *Ibid.*, para. 85.
160 *Ibid.*, para. 86.
161 *Cf. Moskal v. Poland*, ECtHR 15 September 2009, appl. no. 10373/05

not clarify if this is actually what it wants to do and why such an approach should be preferred.

The straightforwardness of the approach the Court here outlined is confirmed by its application of the principles stated to the case on hand. It held that since 'there is no right under Article 1 of Protocol No. 1 to receive a social security benefit or pension payment of any kind or amount, unless national law provides for such entitlement', the task that remained for the Court was to determine whether all the relevant requirements had been satisfied so that a property right had been established.[162] In this regard,

> '[a] negative answer to this question will consequently lead the Court to a finding that the stopping of the payment of the applicant's pension, as a result of conditions which he had created himself, did not amount to an interference with his property rights under Article 1 of Protocol No. 1 given that the applicant would not have a proprietary interest falling within Article 1 of Protocol No. 1 … However, by contrast, if the Court finds that the applicant satisfied the requirements as set out by the relevant Croatian pension legislation, then the stopping of the payment of the applicant's pension by the domestic authorities will be regarded as an interference with the applicant's property interests which was not in accordance with the law as required under the Convention. Such a conclusion will make it unnecessary for the Court to ascertain whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights in finding a violation of Article 1 of Protocol No.1.'[163]

Indeed, what the Court is saying here is that not (or no longer) fulfilling the conditions means that there is no issue that falls within the scope of the right to protection of property, whereas if the conditions are met, a failure to provide the applicant with the relevant benefit will automatically result in a violation of the Convention. This binary approach seems much more categorical than what is common in the Court's case law and in fact it renders the balancing of the various interests at stake redundant. Moreover, the Court's stricter interpretation seems hard to square with the 'rule' that followed from *Moskal*, namely that as soon as a benefit has been granted, the reduction or elimination thereof can be reviewed under the Convention. Ms Moskal turned out not to meet one of the criteria for being granted an early retirement pension, while in many other cases the issue will be that after conditions have been changed – due to austerity or other measures – someone will no longer comply with the requirements and lose the rights he once had.[164]

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162 *Damjanac v. Croatia*, ECtHR 24 October 2010, appl. no. 52943/10, para. 87.

163 *Ibid.*, paras. 88-89.

164 *Cf.* also *Richardson v. the UK*, ECtHR 10 April 2012 (dec.), appl. no. 26252/08, where the Court reasoned in a similar manner on a complaint about the raising of the pensionable age for women and alleged discrimination on the grounds of age and sex. It stated that social security systems can change as to the conditions or *quantum* of the benefit and

Altogether, whereas the Court's socio-economic case law can generally be seen to suggest that virtually all social security complaints were covered by Article 1 P1 of the Convention,[165] recent case law shows that this is not entirely certain. The question is whether this should be considered problematic, since perhaps a more constrained approach to social security claims under the right to protection of property is defensible (also) because of the complex position of the Court and its limited capacities to say something on national social security matters. However, it seems in any case important that a bright line is provided in order to ensure transparency and legal certainty also at the national level. The more recent case law makes one wonder if a case like *Moskal* would still be held admissible, and if one can always rely on Convention protection when a benefit (or an expectation thereof) is eliminated in accordance with the law yet without ensuring an alternative safety net or a transitory period. When it comes to crucial issues like this it seems important that clear guidance is provided.[166]

10.4.2 Applying the Right to Protection of Property to Social Security Issues

Even though the exact scope of Article 1 P1 does not seem entirely clear, it is obvious that, over the past years, the Court has reviewed many instances of pension reductions, benefit eliminations, etc. Like in the non-discrimination context, this brings up the question whether the promise of review under the Convention has also resulted in meaningful protection. How does the Court deal with individual social security interests *qua* property rights, while having regard to the sensitive policies and (budgetary) decisions at stake? Does it have the capacity to reason in a consistent and persuasive manner why a given interference is proportional or not? In order to answer these questions and show the potential but also the weaknesses of the Court's approach, the

concluded that the applicant 'has no right under domestic law to receive pension payments between the ages of 60 and 65. It follows that she has no proprietary interest in such payments for the purposes of Article 1 of Protocol No. 1. The complaint under that provision must, therefore, be declared incompatible *ratione materiae*' (para. 18).

165 *Cf.*, *e.g.*, Cousins 2008, p. 22; Cousins 2009, p. 118; Kapuy 2007, p. 221, who 'concludes that the right to protection of property … [is], as a general rule, applicable in the field of social security'.

166 It can be noted here that the recent case of *Bélané Nagy v. Hungary*, ECtHR 10 February 2015, appl. no. 53080/13, makes things even more confusing. In this case the Court used the concept of 'legitimate expectations' to hold that the applicant had a claim under Art. 1 P1 to a disability benefit, thereby seemingly taking a step towards recognising a 'right to a social security benefit' under the Convention. The three dissenters however argued that the complaint did not involve a 'possession', and the case has been referred to the Grand Chamber. For that reason, as well as because the judgment was only rendered after this research was concluded, the case is not discussed here – it may however be hoped that the Grand Chamber takes the opportunity to provide a clear interpretation of the scope of the protection of property in social security cases.

examples below are presented under three different headers. First, brief mention is made of some cases in which the Court could conclude its review by holding that a social security measure was not in accordance with the law. Secondly, the Court's proportionality review is discussed, and besides the fact that many cases are easily dismissed on the merits it is shown that when the Court resorts to *ad hoc* balancing its reasoning is not always very convincing. Finally, it will be shown that the Court from time to time refers to criteria that potentially could help in making its reasoning more principled and insightful, yet that would need further elaboration for actually having this effect.

10.4.2.1 Unlawful Measures

It is generally not easy for the Court to judge upon the proportionality of interferences with individual social security rights. Frequently, on the other side of the scale there are considerations related to ideological preferences, budgetary considerations and/or austerity concerns, and balancing these against individual interests is a delicate task, especially for a (supranational) court. However, in some cases the Court does not need to go into the difficult question of what is and what is not allowed at the national level in terms of interferences with social benefits. This is the case, for example, when it concludes that a measure or decision taken by the state was unforeseeable and hence does not meet the lawfulness test.

As was highlighted in the previous section, in *Damjanac* the Court placed a lot of emphasis on the fact that for complaining under Article 1 P1, it is required that all the requirements for obtaining a benefit or pension are met. In turn, when this is the case, the non-granting of the benefit automatically results in a violation. In line with this the Court concluded that the fact that Mr Damjanac's military pension was discontinued when he moved to Serbia had not been foreseeable, *i.e.*, according to the applicable law it could be said that he actually met the relevant requirements and there was hence no ground for stopping his pension.[167] This meant that no proportionality test was required, and that the Court had a straightforward reason for concluding on a violation of the Convention.[168]

Also in the case of *Grudic v. Serbia* the Court concluded that there had been a violation of Article 1 P1 because the interference had not been in compliance with the national law. In this case, Mr and Mrs Grudic complained about the suspension of their disability pensions and the Court held that because the

167 The Court found that military pensions had been integrated in the general pension scheme, and Damjanac could therefore rely on the Social Insurance Treaty that guaranteed that pensions could not be 'reduced, stopped, seized or confiscated on the ground of residence on the territory of the contracting States'(*Damjanac v. Croatia*, ECtHR 24 October 2010, appl. no. 52943/10, para. 102).

168 *Ibid.*

suspension was based on Opinions of the Ministry for Social Affairs and the Ministry for Labour, Employment and Social Policy, which do not amount to legislation, the lawfulness requirement had not been met. Like in *Damjanac*, this made it

> 'unnecessary for it to ascertain whether a fair balance has been struck between the demands of the general interest of the community on the one hand, and the requirements of the protection of the individual's fundamental rights on the other … , the seriousness of the alleged financial implications for the respondent State notwithstanding.'[169]

However, it appears from the Court's case law that most of the social security measures that are reviewed by the Court are based on national law, as well as accessible and foreseeable. When this is the case, the Court has to dive more deeply into the issue at stake and decide whether a 'fair balance' has been found.

10.4.2.2 Balancing Social Security Rights and the General Interest

Most of the social security complaints that were held admissible under the Convention have turned on the requirement of proportionality and more in particular on the Court's 'balancing' of the different interests. Frequently, the result of this test is that cases are dismissed on the merits, although there are also examples of where the Court actually found a violation. In the first category, the case of *Goudswaard-van der Lans v. the Netherlands* can be mentioned.[170] The issue at stake concerned the reduction of a widow's pension, and the Court concluded that the complaint under Article 1 P1 was manifestly ill-founded. It straightforwardly held that the Convention 'does not place Contracting Parties under a positive obligation to support a given individual's chosen lifestyle out of funds which are entrusted to them as agents of the public weal'. In this way it substantiated the conclusion that the legislative change had not resulted in an 'individual and excessive burden'.[171]

Logically, the Court also did not rule in favour of the individuals concerned in the cases where it already at the outset held that it was not necessary to take a firm stance on the applicability of Article 1 P1 since the Convention had not been violated.[172] In *Sali*, the Court proceeded on the assumption that the issue concerned an interference with the applicant's peaceful enjoyment of possessions. It granted the state much leeway in respect to its restrictive legislation on unemployment benefits that was meant to protect the general

169 *Grudic v. Serbia*, ECtHR 17 April 2012, appl. no. 31925/08, para. 81.
170 *Goudswaard-Van der Lans v. the Netherlands*, ECtHR 22 September 2005 (dec.), appl. no. 75255/01.
171 *Ibid.*
172 *Supra*, S. 10.4.1.

interests of the Swedish society and the case was held manifestly ill-founded.[173] In *Valkov and Others v. Bulgaria*, moreover, the Court explicitly confirmed that its role in the field of social security measures is a very limited one.[174] In this case, it explained it statement at the outset that the Convention had not been breached on the basis of various references to the margin of appreciation,[175] as well as discussions on national prerogatives and the undesirability of second-guessing determinations of the domestic policy-maker.[176] Several comparative studies that proved the specificity of, and variance among national pension schemes,[177] helped the Court affirm that the matter at issue – a statutory cap on the first-tier pension – was to be decided primarily by the national authorities.[178] It may be remarked here that such a deferential stance is difficult to square with the expectations the Court has created by holding that social security issues generally come within the scope of the Convention.[179]

The question of the added value of Strasbourg review in social security cases may also come up when looking at the reasoning of the Court in the case of *Maggio*. In this case the Court had stated that 'in any event' there had not been a violation,[180] and while discussing whether the applicant had been confronted with an individual and excessive burden due to the legislative change that made him obtain a lower pension than he had expected, the Court had regard 'to the particular context in which the issue arises in the present case, namely that of a social security scheme'.[181] It considered that '[s]uch schemes

173 *Sali v. Sweden*, ECtHR 10 January 2006 (dec.), appl. no. 67070/01.

174 *Valkov a. O. v. Bulgaria*, ECtHR 25 October 2011, appl. nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05.

175 *Ibid.* As to the question of what is in the public interest (para. 91), but also with regard to passing laws in the context of a change of political and economic regime (para. 96), the Court awards the state a (wide) margin of appreciation.

176 *Ibid.*, para. 92.

177 *Ibid.*, paras. 66-68.

178 *Ibid.*, para. 92. See however the partly dissenting opinion of Judge Panova, who holds that the pension cuts were disproportional, also because the transitional process from a centralised socialist to a market economy that had been ongoing in Bulgaria 'cannot be endless and unlimited in time – twenty-two years have now elapsed since 1989 – and cannot perpetually serve to justify limitations on citizens' social rights'.

179 See in this regard also the various austerity-related cases the Court has been confronted with over the past years, *e.g.*, *Koufaki and Adedy v. Greece*, ECtHR 7 May 2013 (dec.), appl. nos. 57665/12 and 57657/12, *Da Conceição Mateus and Santos Januário v. Portugal*, ECtHR 8 October 2013 (dec.), appl. nos. 62235/12 57725/12, and *Savickas a. O. v. Lithuania*, ECtHR 15 October 2013 (dec.), appl. nos. 66365/09, 12845/10, 28367/11, 29809/10, 29813/10 and 30623/10. Although it can be said that especially in the crisis context a judicial safety net for the individuals concerned is very important, these three cases were all held manifestly ill-founded.

180 *Maggio a. O. v. Italy*, ECtHR 31 May 2011, appl. nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, para. 59.

181 *Ibid.*, para. 61.

are an expression of a society's solidarity with its vulnerable members',[182] and since the applicant lost 'considerably less than half' of his pension, he had to endure 'a reasonable and commensurate reduction, rather than the total deprivation of his entitlements'.[183] It was considered that the new method of calculating the pensions of those who had worked in Switzerland – where they had paid lower contributions – yet decided to retire in Italy in fact equalised a state of affairs thereby avoiding unjustified advantages. Accordingly, there had not been a violation of the Convention.

Given the circumstances of the case, the Court's conclusion in *Maggio* does not seem unreasonable.[184] Interesting is, however, that the Court's proportionality analysis in the similar case of *Stefanetti and Others v. Italy* resulted in the opposite conclusion.[185] This case concerned the situation of eight Italian pensioners who were confronted with the same legislative change that altered the method of calculation of the pensions of those who had been spending (part of) their working lives in Switzerland. The ECtHR noted that unlike in *Maggio*, the applicants in *Stefanetti* had lost more than half of what they would have received in pension had the calculation not been altered.[186] At the same time, the Court stated that account must be had to more than just the amount or percentage of the reduction, as well as that it is material whether the benefit concerned was based on actual contributions rather than being 'gratuitous welfare aid solely funded by the tax-payer in general'.[187] Eventually, the Court held that the reductions had 'undoubtedly affected the applicants' way of life and hindered its enjoyment substantially'.[188] Given also their legitimate expectation of receiving higher pensions, the lack of a compelling general interest and the unforeseeability of Law no. 296/2006 that laid down the new

182 *Ibid*.

183 *Ibid.*, para. 62. See also, *e.g.*, *Valkov a. O. v. Bulgaria*, ECtHR 25 October 2011, appl. nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, para. 97.

184 Apart from the fact, that is, that it can be asked how the Court can judge on the proportionality of an interference with a property right, without deciding whether in the case at hand such a right is present.

185 *Stefanetti a. O. v. Italy*, ECtHR 15 April 2014, appl. nos. 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10. Different from in *Maggio*, moreover, in *Stefanetti* the Court held that '[i]n the light of its case-law the Court is ready to accept that for the purposes of this case the applicants' pension entitlements constituted a possession within the meaning of Article 1 of Protocol No. 1 to the Convention' (para. 53).

186 This was reason to 'reassess the matter and scrutinise the reduction more closely' (*ibid.*, para. 58). The Court firmly states that 'the deprivation of the entirety of a pension is likely to breach the said provision', whereas 'minimal reductions to a pension or related benefits are likely not to do so' (para. 59).

187 *Ibid.*, para. 60. This may seem somewhat unsurprising, because the Court's express inclusion of both into the scope of the Convention arguably was meant to assure that the variety of ways in which benefits are funded should not affect citizens' fundamental rights protection.

188 *Ibid.*, para. 64.

method of calculation, it concluded that 'the applicants had not suffered commensurate reductions but were in fact made to bear an excessive burden'.[189]

Since the Court must provide for individual protection, it on the one hand seems unproblematic that whereas the legislative change had proportional effects in one case, it led to a violation in another. On the other hand, the Court explicitly did not base its conclusion in *Stefanetti* solely on the percentage of the reduction, and since many of the other relevant circumstances were identical in the two cases, it remains unclear when and why exactly the measure became disproportional.[190] Indeed, the point that can be made about the cases of *Maggio* and *Stefanetti* is that analysing the proportionality *stricto sensu* of an interference with social security rights is an inherently complicated task. The similarity of the facts that form the background to these makes painfully clear that it is difficult, if not impossible to draw the line. Consequently, it can be asked to what extent the Court is capable of reaching convincing conclusions on social security matters, and should indeed always engage in this type of review in the first place. In this regard it is interesting to read the partly dissention opinion that was attached to the judgment in *Stefanetti*.[191] The dissenters emphasised the wide margin of appreciation of the state and they underlined the 'huge and unjustified disparity there would have been, to the advantage of the applicants, had the system not been amended'. Moreover, they held that none of the applicants fell into the lowest pension bracket, and that 'still less the old-age pensions actually received by the applicants … are at such a level as to deprive the applicants of the basic means of subsistence'. Thereby they seem to suggest that only when this would have been the case, the Court could have justifiably interfered with the measures taken by the Member State. This is an interesting point, as it may suggest that only when 'minimum essential levels' of socio-economic rights are concerned, the Court can legitimately step in. This would be in keeping with the core rights perspective elaborated in Chapter 7 and could arguably have prevented the confusion that now emerged.[192]

In the same vein, finally, it is worth mentioning the case of *N.K.M. v. Hungary*.[193] The applicant in this case complained that the levying of tax at

189 *Ibid.*, para. 66.

190 Moreover, the issue in *Stefanetti* concerned eight applicants, yet the Court does not distinguish amongst these, although it can be asked whether the reduction was as disproportional for Mr Andreola – who still received EUR 1,820 – as for Mr Rodelli – who now only got EUR 714. While looking not only at the percentage but also at the effects of the reduction, one could argue that the Court should have given an explanation for why the individuals involved (different from Mr Maggio) had *all* been confronted with a disproportionate interference.

191 Partly dissenting opinion of Judge Raimondi joined by Judge Lorenzen.

192 See, on the way the Court sometimes refers to the importance of whether or not 'essential' social security rights were at stake, *infra*, S. 10.4.2.3.

193 *N.K.M. v. Hungary*, ECtHR 14 May 2013, appl. no. 66529/11.

a rate of 98% on part of her severance pay had amounted to a breach of Article 1 P1. Although the Court's approach to tax issues is normally a very hesitant one,[194] in *N.K.M.*, it held that '*considered as a whole*, the circumstances conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1'.[195] The same 'mixture' of circumstances, moreover, was also reason for concluding on a violation of this article. In the applicant's case, the tax measure had led to an overall tax burden of about 52% on the entirety of her severance pay, yet 'given the margin of appreciation the applicable tax rate cannot be decisive in itself'.[196] The Court noted that the applicant 'had to suffer a substantial deprivation of income in a period of considerable personal difficulty, namely that of unemployment'.[197] Referring to Article 34 of the Charter of Fundamental Rights of the European Union and the importance of providing protection in the case of loss of employment the Court considered it 'quite likely' that the applicant had been exposed to 'substantial personal hardships'.[198] Since other civil servants had not been required to contribute to a comparable extent to the public burden and since the relevant tax statute entered into force only weeks before the termination of the civil service relationship and no transitional period had been granted, it concluded that there had been a violation.[199] Unsurprisingly, in a similar case where the applicant was notified of her dismissal only six weeks after the law was enacted, and was confronted with an overall tax burden of 60%, the Court's concluded in a like manner.[200] However, it must be noted that this 'exceptional' review of a tax issue made the Court enter a discussion of proportionality *stricto sensu* in this field, and also here the question is whether it is capable of drawing a clear line. After all, even though the cases mentioned arguably were 'clearly' disproportional, what if the Court would be confronted with a case in which the overall tax burden would be significantly lower? Would the fact that part of the severance pay was taxed at a rate of 98%, then still amount to a violation?[201] While hardly paying attention to the lawfulness,

194 Which also has to do with what is stated in Art. 1 P1, namely that this right shall not 'impair the right of a State to … secure the payment of taxes'. *Cf.* Harris et al. 2014, pp. 901-903.
195 *N.K.M. v. Hungary*, ECtHR 14 May 2013, appl. no. 66529/11, para. 33 [emphasis added].
196 *Ibid.*, paras. 66-67.
197 *Ibid.*, para. 70.
198 *Ibid.*, para. 70.
199 *Ibid.*, paras. 71-76.
200 *Gáll v. Hungary*, ECtHR 25 June 2013, appl. no. 49570/11.
201 A third related case suggests that this might be the case. In *R.Sz. v. Hungary* a violation was found as well, albeit the Court there, different from in the other two cases, specifically had regard to comparative law, *i.e.*, to tax rates that in other European countries and in the US, according to the highest courts of these countries, have been considered unconstitutional. See *R.Sz. v. Hungary*, ECtHR 2 July 2013, appl. no. 41838/11, paras. 19-22, 54.

suitability or necessity tests[202] and balancing 'all the circumstances of the case' in an unordered way, the judgment brings up more questions than it answers.

Altogether, the Court's efforts in some cases may be said to ensure eventual, indivisible protection. Proportionality analysis creates the flexibility to do so: by resorting to an overall balancing of all relevant factors even similar cases can lead to different outcomes and 'occasional' protection can be provided. However, this flexibility comes at the expense of the clarity and predictability of the Court's case law, and of a more principled approach to socio-economic rights, and social security interests in particular.

10.4.2.3 'Proportionality Criteria': Good Governance, Non-Discrimination, and the Essence of Rights

Framed as a human rights concern, it can be argued that property review needs to take into account all relevant circumstances of the case in order to provide, where necessary, individual relief. When social benefits or pensions are concerned, however, it has been shown throughout this chapter that this easily triggers the Court to decide on social circumstances and the appropriateness of welfare policies. The cases discussed reveal that when the Court engages with the merits of a case, it generally resorts to balancing the various interests at stake, yet hardly makes clear how this leads to a particular outcome. Whereas this may be unproblematic for a democratic legislator, for a supranational court that has to set clear standards, it is less so.

By contrast, it is more promising from this perspective that, in some cases, the Court places particular emphasis on a specific aspect for determining whether something was proportional or not. Arguably, paying particular attention to 'good governance', non-discrimination, or to whether or not an interference concerned the essence of the applicant's social security rights, can serve the aim of granting effective and indivisible protection, while also providing more clarity on when and why an interference exactly amounts to a breach of the Convention. However, in order for these 'proportionality criteria' to actually make the Court's reasoning more transparent, it can be

202 The fact that the Modified Tax Act laying down the 98% tax rate on severance payments exceeding a particular amount had been adopted only weeks before the applicant had been dismissed, for example, did not lead to the conclusion that there was no proper legal basis, but played a role in the eventual proportionality test. The Court held that even though 'serious doubts remain' regarding the relevance of the considerations given by the government regarding the aim of the tax measure, it was 'not necessary for the Court to decide … on the adequacy of a measure that formally serves a social goal, since this measure is in any event subject to the proportionality test' (*N.K.M. v. Hungary*, ECtHR 14 May 2013, appl. no. 66529/11, para. 59).

said that they would need to be applied in a more explicit and consistent manner.

First of all, in *Moskal*, the case concerning the revocation of an erroneously granted early retirement pension, the Court relied on the principle of 'good governance' for concluding that no fair balance had been struck between the demands of the general interest and the protection of the individual's fundamental rights.[203] According to the Court this principle 'requires that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency'.[204] The test it applied was a rather stringent one: even though the interference was provided for by law and pursued a legitimate aim,[205] the effects of the relatively late withdrawal and the fact that it took three years before she received another benefit, made the case turn out in Moskal's favour.[206] The judgment thereby can be seen as suggesting that every lawful revocation requires the national authorities to scrutinise the individual hardship that might thereby be caused and act accordingly.[207] Nonetheless, according to the dissenters in the case, the 'good governance test' of the majority was not entirely convincing. They argued that the Court, in judging the proportionality of the interference, lost sight of the fact that the right to the benefit could not be relied on indefinitely.[208] Moreover, the dissenters emphasised that the revocation of the benefit had been subjected to careful examination at three levels of jurisdiction at the national level. Finally, the applicant never had to pay back the sums that had mistakenly been paid to her. It had taken a while for her to obtain an alternative and less valuable pension, but the award of these benefits was backdated to the year she had lost her pension.[209]

It may be inferred from the dissenters' criticism that instead of emphasising the principle of good governance the Court could have better relied on an overall balancing test focussing on all the different circumstances of the case. It is unlikely, however, that this would have resulted in more transparent reasoning, or in a more objective conclusion, let alone that it would have increased the predictability of the Court's case law. Alternatively, it can be

203 *Moskal v. Poland*, ECtHR 15 September 2009, appl. no. 10373/05, paras. 68–76.
204 *Ibid.*, para. 51, referring to *Beyeler v. Italy*, ECtHR 5 January 2000, appl. no. 33202/96, para. 120; *Megadat.com S.r.l. v. Moldova*, ECtHR 8 April 2008, appl. no. 21151/04, para. 72.
205 *Moskal v. Poland*, ECtHR 15 September 2009, appl. no. 10373/05, paras. 54-63.
206 The government's error in granting the pension in the first place seems to have been important here, too. The Court emphasised that 'if a mistake has been caused by the authorities themselves … a different proportionality approach must be taken'. *Ibid.*, para.73.
207 *Cf.* Kenny 2010, p. 500. If, in contrast to the situation in *Moskal*, someone's means of subsistence are not at stake, and the authorities have acted in an appropriate manner by for example immediately granting a replacing pension, a violation is unlikely to be found. *Cf. Iwaszkiewicz v. Poland*, ECtHR 26 July 2011, appl. no. 30614/06.
208 Partly dissenting opinion of Judges Bratza, Hirvelä, and Bianku, para. 7.
209 *Ibid.*

said, the Court should have been more clear on what is so crucial about the requirement of good governance, and importantly, on what it exactly implies. Even if one would not agree with the outcome of the case, it would have then at least been clear what the conclusion was based on and the court would have provided a clear standard also for future cases.[210]

Next to 'good governance', the Court in its review of social security issues also has paid particular attention to the notion of 'equality'. Normally, cases concerning allegedly discriminatory treatment are dealt with under Article 14 (or Article 1 of Protocol No. 12) of the Convention. When the Court opts for taking another substantive article as the starting point for its review, however, it apparently seems willing to 'weigh in' the unequal treatment issue. In *N.K.M.* this arguably played a significant role. In reviewing whether the 98% tax the applicant was confronted with amounted to a violation, the Court gave particular attention to the 'unequal treatment aspect', *i.e.*, to the fact that compared to the applicants, other civil servants had not been confronted with a similar (tax) burden.[211] In regard to the applicant's Article 14 complaint the Court then held 'that the inequality of treatment of which the applicant claimed to be a victim has been sufficiently taken into account in the above assessment that has led to the finding of a violation of Article 1 of Protocol No. 1 taken separately'.[212] It could be a point of discussion whether this is a desirable approach: on the one hand it can be argued that by focusing on the discrimination complaint under Article 14 the Court could have avoided the inherently difficult balancing test. On the other hand the 'non-discrimination criterion', as it was now taken on board in the review under the protection of property, may also form an interesting focal point for further concretising the seriousness of the interference and developing a more insightful test.

Finally, and this is important in the light of the topic of this research, the Court also regularly refers to the 'essence' of the social security right concerned. That

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210 It is true that after *Moskal*, the Court relied on similar 'good governance' reasoning in a line of other cases. See, *e.g.*, *Czaja v. Poland*, ECtHR 2 October 2012, appl. no. 5744/05. These cases concerned more or less the same situation, and hence do not show how the criterion of good governance would work out in other circumstances.

211 *N.K.M. v. Hungary*, ECtHR 14 May 2013, appl. no. 66529/11, para. 71. The Court held that 'the applicant, together with a group of dismissed civil servants … , was made to bear an excessive and disproportionate burden, while other civil servants with comparable statutory and other benefits were apparently not required to contribute to a comparable extent to the public burden, even if they were in the position of leadership that enabled them to define certain contractual benefits potentially disapproved by the public. Moreover, the Court observes that the legislature did not afford the applicant a transitional period within which to adjust herself to the new scheme'.

212 *N.K.M. v. Hungary*, ECtHR 14 May 2013, appl. no. 66529/11, para. 84; *Gáll v. Hungary*, ECtHR 25 June 2013, appl. no. 49570/11, para. 79; *R.Sz. v. Hungary*, ECtHR 2 July 2013, appl. no. 41838/11, para. 70.

is, it does not explicate what exactly this essence is and what consequences this has for its review, but it does hold that 'an important consideration' in reviewing a case under Article 1 P1 is whether the essence of the applicant's right to social security is impaired.[213] An example of where this criterion seemingly played an important role is the case of *Lakicevic and Others v. Montenegro and Servia*, where the applicants complained about the suspension of their pensions because they had reopened their legal practices on a part-time basis. The Court held that

> '[w]hile it must not be overlooked that Article 1 of Protocol No. 1 does not restrict a State's freedom to choose the type or amount of benefits that it provides under a social security scheme … it is also important to verify whether an applicant's right to derive benefits from the social security scheme in question has been infringed in a manner resulting in the impairment of the essence of his pension rights.'[214]

It considered that the applicants had been granted an entitlement to a pension at a time when receiving a full pension was not incompatible with gainful employment on a part-time basis, which had been reason for the applicants to reopen their legal practices. The subsequent suspension of their pensions had not been due to any changes in their own circumstances, but solely resulted from changes in the law. No regard was thereby had to the amount of revenue generated by their part-time work, and the Court considered that the pension must still have constituted a considerable part of the applicants' gross monthly income.[215] The Court held that the applicants were made to bear an individual and excessive burden, and that this

> 'could have been otherwise had the applicants been obliged to endure a reasonable and commensurate reduction rather than the total suspension of their entitlements … or if the legislature had afforded them a transitional period within which to adjust themselves to the new scheme. Furthermore, they were required to pay back the pensions they had received as of 1 January 2004 onwards, which must also be considered a relevant factor to be weighed in the balance'.[216]

Thus, it seems that when a pension or other benefit, which moreover forms a substantial part of someone's monthly income, is suspended or discontinued entirely and cannot easily be substituted by another benefit, this is likely to

213 For some of the first examples, see, *Kjartan Ásmundsson v. Iceland*, ECtHR 12 October 2004, appl. no. 60669/00, para. 39; *Wieczorek v. Poland*, ECtHR 8 December 2009, appl. no. 18176/05, para. 57.

214 *Lakicevic a. O. v. Montenegro and Serbia*, ECtHR 13 December 2011, appl. nos. 27458/06, 33604/07, 37205/06 and 37207/06, para. 63.

215 *Ibid.*, para. 70.

216 *Ibid.*, para. 72.

be in breach of the Convention.[217] Unfortunately, it remains unclear what role the 'essence criterion' exactly played in reaching the conclusion that there had been a violation. Did the mere revocation of their entire pensions constitute an interference with the essence of the applicant's rights, which was then seen as one amongst multiple factors that had to be considered for determining the justifiability of the interference?[218] Or was the impairment of their essential rights instead the result of all the circumstances taken together, and moreover *the* reason to conclude that there had been a violation? In terms of the distinctions made in Chapter 7, the Court's reference to the essence (or 'core') does not clarify at all whether the content of this essence is something that is 'relative' (dependent on all the circumstances of the case), or rather of a more general ('absolute') kind; neither does it make clear whether the protection of this essence is absolute in the sense of prohibiting any interference, or 'relative' in that it is just one amongst many factors and hence not decisive.[219]

The Court may also use the 'essence criterion' for substantiating that an interference with social security rights is *not* in breach of the Convention. In *Maggio*, for example, it held that 'the applicant's right to derive benefits from the social insurance scheme in question has not been infringed in a manner

217 *Cf.* also *Kjartan Ásmundsson v. Iceland*, ECtHR 12 October 2004, appl. no. 60669/00, where the applicant's disability pension had been stopped entirely after a new assessment of his disability based upon his work capacity in general and not on his capacity to perform the same work. The Court concluded that he was made to bear an individual and excessive burden. See also Brems 2007, p. 155. In cases where there are alternative benefits, indeed, this can be reason for holding that a complaint is manifestly ill-founded, even if because of someone's savings or capital he is not eligible for these benefits (*Hoogendijk v. the Netherlands*, ECtHR 6 January 2005 (dec.), appl. no. 58641/00).

218 A hint that according to the Court the mere loss of an entire pension – or means of subsistence – may constitute an interference with the essence of ones right, was given in *Valkov a. O. v. Bulgaria*, ECtHR 25 October 2011, appl. nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, para. 97, where it held that the cap on the applicants' pensions 'did not totally divest the applicants of their only means of subsistence. The applicants are, in the nature of things, the top earners among the more than two million persons in Bulgaria who are currently in receipt of a retirement pension. They can therefore hardly be regarded as being made to bear an excessive and disproportionate burden, or as having suffered an impairment of the essence of their pension rights'. See also *Markovics a. O. v. Hungary*, ECtHR 24 April 2014 (dec.), appl. nos. 77575/11, 19828/13 and 19829/13, para. 42: 'Although there has been an actual decrease in the nominal amount of the monthly disbursements, the measure did not totally divest the applicants of their only means of subsistence nor did it place them at risk of having insufficient means to live on. They cannot therefore be regarded as being made to bear an excessive and disproportionate burden, or as having suffered an impairment of the essence of their social security benefits.'

219 See, for the different core rights approaches identified on the basis of the comparative studies, *supra*, Ch. 7, S. 7.2.1.

resulting in the impairment of the essence of his pension rights'.[220] Another example would be the case of *Da Conceição Mateus and Santos Januário v. Portugal*,[221] which concerned austerity-related pension cuts in the form of (temporary) revocations of holiday and Christmas allowances. In this case, as well as in several other austerity cases,[222] the Court decided that the applicants' complaints were manifestly ill-founded. Thereby it also relied on 'the important consideration' of whether the applicants' rights had been infringed in a manner resulting in the impairment of the essence thereof.[223] This may seem to suggest that in the sensitive austerity context, the Court will nevertheless step in whenever the essence of a right is concerned. At the same time, the reference is again a superficial one as it is not clarified why in the case at hand the essence of the applicants' rights had not been touched upon, let alone what this essence is and what an impairment thereof would mean for the Court's review. Thus, although it seems important to emphasise that the Court's limited role does include the protection of the essence of rights, to truly add to the clarity and principledness of the Court's review the 'essence criterion' needs to be used in a more sophisticated manner. Just like in the case of good governance, indeed, the potential of this 'standard' seems not yet fully realised.

10.4.3 The Margin and Measures of Economic and Social Strategy

Finally, it can be asked whether – if not the criteria just outlined – at least the Court's use of the margin of appreciation in cases concerning Article 1 P1 taken alone has the effect of structuring the Court's review. Unfortunately, on the basis of its reasoning in the cases discussed above it must be concluded that the Court's references to the margin are quite minimal. Just like in the non-discrimination cases, it mostly remains unclear what exact margin applies and the Court thereby seems to miss an opportunity to clarify why it reaches a certain conclusion. Indeed, it can be doubted whether the margin as it is currently used actually adds something to the Court's review in social security

220 *Maggio a. O. v. Italy*, ECtHR 31 May 2011, appl. nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, para. 63. See also, *e.g.*, *Panfile v. Romania*, ECtHR 20 March 2012 (dec.), appl. no. 13902/11, para. 24; *Khoniakina v. Georgia*, ECtHR 19 July 2012, appl. no. 17767/08, para. 77; *Torri a.O. v. Italy*, ECtHR 24 January 2012 (dec.), appl. nos. 11838/07 and 12302/07, para. 45; *Arras a.O. v. Italy*, ECtHR 14 February 2012, appl. no. 17972/07, para. 83; *Cichopek a.O. v. Poland*, ECtHR 14 May 2013 (dec.), appl. no. 15189/10 (and 1,627 others), para. 153.

221 *Da Conceição Mateus and Santos Januário v. Portugal*, ECtHR 8 October 2013 (dec.), appl. nos. 62235/12 and 57725/12.

222 *E.g.*, *Koufaki and Adedy v. Greece*, ECtHR 7 May 2013 (dec.), appl. nos. 57665/12 and 57657/12; *Savickas a. O. v. Lithuania*, ECtHR 15 October 2013 (dec.), appl. nos. 66365/09, 12845/10, 28367/11, 29809/10, 29813/10 and 30623/10.

223 *Da Conceição Mateus and Santos Januário v. Portugal*, ECtHR 8 October 2013 (dec.), appl. nos. 62235/12 and 57725/12, para. 24.

cases, apart from serving as a reminder that the states' leeway in this field generally can – but does not always – prevent a finding of a violation.

First of all, in some cases the Court only at the very end refers to the margin of appreciation. In *Sali*, for example, the Court concluded that

> 'having regard to the wide margin of appreciation enjoyed by the State in the area of social legislation, the Court finds that the present case does not disclose any indication of a failure on the part of the respondent State to strike a fair balance between the individual interests of the applicant and the general interests of Swedish society.'[224]

Also in *Maggio*, the Court's review of the issue was concluded with the remark that 'bearing in mind the State's wide margin of appreciation in regulating the pension system … the Court considers that the applicant was not made to bear an individual and excessive burden'.[225] It may be inferred from this that the margin in these judgments merely seems to have the function of underlining once more that the issues concerned could not be considered to be in breach of the Convention, rather than doing anything more than that.[226]

In most cases, however, as in the cases discussed in Section 10.3, the Court did start its review of the issue at hand with some remarks on the margin. Generally, it is held that that in the context of 'general measures of economic or social strategy' the states enjoy a wide margin of appreciation and also regarding the question whether a measure was 'in the public interest' states are granted a lot of leeway. General statements on the margin are usually followed by the remark that 'however', there should be a reasonable relationship of proportionality. The judgment in *Grudic* provides for a clear example. In this case the Court considered that

> 'in the area of social legislation including in the area of pensions States enjoy a wide margin of appreciation, which in the interests of social justice and economic well-being may legitimately lead them to adjust, cap or even reduce the amount of pensions normally payable to the qualifying population. However, any such measures must be implemented in a non-discriminatory manner and comply with the requirements of proportionality. Therefore, the margin of appreciation available to the legislature in the choice of policies should be a wide one, and its judgment

224 *Sali v. Sweden*, ECtHR 10 January 2006 (dec.), appl. no. 67070/01.

225 *Maggio a. O. v. Italy*, ECtHR 31 May 2011, appl. nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, para. 63.

226 Alternatively, it could be argued that since the Court in both cases had refrained from holding whether or not the case was actually covered by Article 1 P1, it in fact was lacking a starting point on the basis of which the applicable margin could be outlined in a more concrete manner. In any case, the way the margin is used in these cases, adds even less to the Court's review than its references to the margin discussed in, *supra*, S. 10.3.3.

> as to what is "in the public interest" should be respected unless that judgment is manifestly without reasonable foundation.'[227]

When, like in *Grudic* or *Damjanac*, it is concluded that the interference resulted in a violation of the Convention for failing to comply with the lawfulness requirement, this might explain why the Court leaves it at that and does not concretise the applicable margin any further. Noticeably, however, also when a case turns upon the issue of proportionality, the Court often does not say more of the margin than that it is 'generally wide'.[228]

Indeed, what can be noticed with regard to the Court's references to the margin of appreciation in property rights cases concerning social security issues, is that it in fact does not really *use* the margin in the sense of adjusting it according to the 'circumstances, subject matter and background' of the case concerned, but merely mentions it as a kind of general predisposition. In the cases in which it eventually concludes that the Convention had been violated, the Court sometimes refrains from using the word 'wide'. However, what it does not do in these cases is explicitly narrowing the margin and explaining why this is appropriate given the circumstances of the case, although this would have arguably made its conclusion more insightful. Indeed, also in cases where the individual interest concerned was arguably of a very serious kind and concerned the applicant's minimum means of subsistence, this did not have any clearly traceable effect on the applicable margin.[229] Of course, as became clear above, it makes a difference for the outcome of the case whether the applicant is or is not dependent on the benefit concerned, and whether or not this benefit is taken away entirely or merely reduced. This seemingly is important for 'giving weight' to the individual interest as opposed to the general one in the eventual balancing test. It is not, however, used to develop a more multi-layered standard of review, *i.e.*, a not just 'wide' but differentiated margin suited to the specific kind of social security issue (or interest) concerned. This bars the Court from developing a truly indivisible approach, yet also fails to clarify the actual strictness of its test.

10.5 Conclusion

It was considered in this chapter that over the past decades the Court has dealt increasingly with social security-related complaints, and that its case law on this topic by now forms a substantial part of the Strasbourg fundamental rights

227 *Grudic v. Serbia*, ECtHR 17 April 2012, appl. no. 31925/08, para. 75.

228 See also the discussion of the margin in non-discrimination cases in, *supra*, S. 10.3.3.

229 *Cf. Lakicevic and Others v. Montenegro and Serbia*, ECtHR 13 December 2011, appl. nos. 27458/06, 33604/07, 37205/06 and 37207/06, where the Court no less than three times mentioned the 'wide' margin of appreciation (paras 61 and 63); *N.K.M. v. Hungary*, ECtHR 14 May 2013, appl. no. 66529/11, paras. 37, 49, 57, 61, 65, and 67.

acquis. It was investigated whether in this case law, the Court provides for effective and indivisible protection, while at the same time ensuring an insightful interpretation and application of the rights concerned.

In Section 10.2 the relation between the topic of social security and the rights enshrined in the Convention was further introduced. It was held that there is an apparent connection between social security and private and family life (Article 8) and property protection (Article 1 P1), although this connection remains a controversial one. Also Article 3 and Article 6 can be relevant when it comes to social security complaints. However, whereas because of the high threshold for applying the former the cases in which Article 3 is engaged have proven to be rare, the latter can only provide 'non-substantive', procedural protection.

In the end, as the lion's share of this chapter has illustrated, what has proven most relevant in the context of social security is the protection provided under Article 1 of Protocol No. 1. Taken alone or in conjunction with the non-discrimination principle laid down in Article 14 of the Convention, Article 1 P1 has been the starting point for numerous complaints about pensions, allowances and benefits, and more particularly about the reduction or elimination thereof. The way in which the Court has dealt with these complaints, however, at various points has shown to be inconsistent or lacking in transparency.

First, in Section 10.3 it was illustrated that in dealing with complaints of alleged discrimination in the field of social security, the Court has generally interpreted the 'ambit' of Article 1 P1 in a generous manner. This creates room for truly indivisible protection of social security interests, although it must be admitted that the cases the Court has been confronted with have proven everything but easy to judge upon. Its review does not always appear very effective, and it does not always seem to add much for the applicants concerned. Often the Court takes a very deferential stance, or concludes that the applicant did not find himself in a 'relevantly similar situation'. In the cases in which it did get to the heart of the matter, it has been criticised for insufficiently taking all the relevant factors into account. The margin of appreciation, rather than forming a useful starting point for tackling this inherently complicated task, seems to constitute yet another factor that somehow has to be considered in balancing the various interests. It does not seem to help in distinguishing between different socio-economic cases, as it is generally wide, regardless of the circumstances at hand.

Section 10.4, concerning complaints under the protection of property taken alone, showed that although the Court on the basis of the case of *Stec* has held that both contributory and non-contributory benefits can be considered 'possessions' under the Convention, its interpretation remains somewhat ambiguous. Regardless of the proprietary character of the interests concerned, more recently the Court has suggested that it will only review cases when all conditions have been met, while emphasising that 'the fact that a person has entered into and forms part of a state social security system does not

necessarily mean that that system cannot be changed either as to the conditions of eligibility of payment or as to the *quantum* of the benefit or pension'.[230] It was held that uncertainty as to whether this must be understood as a restriction of Article 1 P1's scope is undesirable. Moreover, with regard to the Court's analysis of the proportionality of interferences with social security rights, it was shown that it often remains unclear why exactly the circumstances of a particular case do or do not result in a breach of the Convention. Generally, the Court resorts to 'balancing' while having regard to multiple relevant considerations, yet this not always allows for drawing a line in a transparent manner. In its case law, the Court from time to time refers to criteria that could be helpful in this regard, namely the importance of good governance and non-dsicrimination, or the protection of the essence of social security rights. However, what these criteria exactly imply and what role they (could) play in the Court's review, remains unclear. To make the Court's review more principled, thus, the criteria identified would have to be utilised in a more sophisticated manner. The same goes for the Court's references to the margin of appreciation, which also in cases concerning Article 1 P1 taken alone fail to structure its test by adapting to what actually is at stake for the individual concerned.

In conclusion, it can be said that it is understandable that the Court is cognisable of its supranational position when dealing with complex and politically sensitive social security complaints. However, when it opts for a broad interpretation of Article 1 P1 in this field, thereby explicitly allowing for indivisible rights review, it should also deal with the various cases in an effective as well as consistent and transparent manner. In the final chapter of this book, some further remarks will be made as to how a 'core rights perspective' could be helpful in this regard.

230 *Damjanac v. Croatia*, ECtHR 24 October 2010, appl. no. 52943/10, para. 86.

11 Conclusion

11.1 The Added Value of a Core Rights Perspective

The topic of core rights deserves particular care. The notion of core rights can easily be misunderstood, and its (potential) technical finesses are not always appreciated. What is more, the idea of core rights protection may be perceived as going against what a belief in fundamental rights today seems to be about: a broad coverage of rights, balancing of interests, etc. In this study an effort was made to develop the idea of core rights in such a way that it could lead to workable suggestions for a particular legal context, namely that of the protection of socio-economic interests by the European Court of Human Rights under the European Convention on Human Rights. The protection of economic and social interests is a particularly delicate aspect of the practice of the ECtHR, because it highlights the difficulties inherent in providing effective protection while showing the necessary deference, as well as providing the guidance Member States need to protect ECHR rights. In this final chapter some concluding remarks are made as to how core rights can be used in the socio-economic fields discussed in the previous three chapters. In addition, the potential, broader implications of this study are addressed in relation to the current trends in judicial fundamental rights protection.

Chapter 7 of this book has offered some conclusions on the possible use and added value of the notion of core rights and on the preferred use of this notion for the Strasbourg socio-economic rights context. Although it is not the aim of this final chapter to repeat or summarise what was outlined there, it is important to briefly recall some of these conclusions before linking the 'theory' of the core rights perspective that was developed in Parts I-III of this book to the 'practice' of the Strasbourg reasoning. The first two parts of this book introduced the tasks of the Court and the socio-economic dimension of the Convention, the different possibilities of fundamental rights reasoning, and various core rights doctrines. This led, first, to a critical appraisal of several persistent ideas on core rights, on the basis of which a broader and more workable image of this notion was created, and, secondly, to the development of a 'core rights perspective' that would potentially fit the Strasbourg socio-economic practice. What was outlined in Chapter 7 was hence not so much a theoretical, philosophical conclusion on the idea of core rights. Rather, the findings presented were drawn from concrete (practical and constitutional)

examples from Germany, South Africa, and the field of international economic and social fundamental rights, albeit the theoretical underpinnings of these examples thereby played a prominent role. Moreover, in outlining a core rights perspective for the ECtHR, more was done than merely extracting the most interesting ideas from the different doctrines to then combine them into an 'ideal' perspective. Instead, the more normative account of the role and tasks of the Court that was presented in Chapter 2, in combination with the importance of a bifurcated approach to fundamental rights reasoning, formed the starting point for what was presented as a promising way to deal with core rights in particular at the Strasbourg level.

Adding the notion of core rights to the ideas of 'effective' and 'indivisible' fundamental rights protection that were introduced in Chapter 2, the perspective presented first of all placed significant emphasis on the determination of the scope of rights, *i.e.*, on the interpretation of the ECHR in order to decide whether an individual socio-economic interest does or does not fall within the scope of the Convention. For a great many interests that could (also) be called 'economic' or 'social', this may automatically be the case. One can think of complaints concerning the issue of fair trial or of interferences with an individual's respect for his home. Beyond this, however, it was noted that the question of scope is less straightforward, and it was held that with the help of the idea of core rights it could be approached in a more principled manner. More precisely, it was suggested that when 'minimum essential levels' of socio-economic rights are concerned, an issue can be considered to fall within the ECHR's scope. When it involves interferences with, or rather a state's failure to provide such a minimum, this is reason for review under the 'civil and political' Convention. In fact, the aim of effective and indivisible fundamental rights protection calls for *prima facie* protection of such issues, and supranational review is justified by their importance. However, a socio-economic scope that exclusively covers minimum socio-economic rights fails to do justice to the promise of the Convention. Besides this, therefore, additional 'core indicators' were identified that concern the protection against discrimination as well as the needs of vulnerable individuals and groups. When these issues are at stake, it was argued, there is likewise reason for review under the ECHR.

However, the 'core rights perspective' that was outlined does not merely serve to demarcate the 'socio-economic scope' of vague Convention norms that potentially cover a very wide range of interests. The recognition that a minimum core right is concerned also may be considered relevant at the stage of application, *i.e.*, at the stage of review of the justifiability of a certain restriction or omission to act. According to the preferred 'absolute-relative' understanding of core rights, the fact that an interference or omission involves a core socio-economic right need not automatically lead to the conclusion that the rights norm that was invoked has been violated. Yet it does place particular weight on the individual interest at stake, meaning that there is a 'thumb on the scale' when it is 'balanced' against other interests. Phrased differently, core

socio-economic rights protection does not bar a proportionality analysis – it should however guide the Court's review in a given case. This entails that when what is provided or what is 'left over' is evidently insufficient in terms of minimum socio-economic levels, a violation of the Convention will be found. Additionally, it was held that in order to make the 'core' requirement to ensure minimum levels more tangible, procedural requirements could play an important role. Such requirements allow for concretising what is, as a matter of priority, demanded, without the Court having to 'quantify' the required minimum levels. In this regard, it must be noted that when the Court's review is limited to core socio-economic rights cases, the role of the margin of appreciation is a particularly small one. When an issue concerns unequal treatment, or the needs of vulnerable individuals, but not minimum essential levels, there is some room for the state to decide an issue in one way or another. When minimum essential levels are concerned, however, the state is granted leeway only as regards *the way in which* it ensures this minimum, but not regarding whether a minimum level is guaranteed in the first place.

Altogether, the approach that was outlined serves two goals in particular. First, with the help of a core rights perspective the ECtHR could work towards a principled approach to the adjudication of (positive) economic and social rights claims, characterised by a clear interpretation of rights and hence a demarcation of its jurisdiction in this field. Secondly, the perspective outlined serves the aim of providing meaningful, robust protection of important socio-economic interests. Rather than inviting a wide margin and instead of being easily 'outbalanced' by state interests, a core rights perspective can ensure indivisible protection of socio-economic needs by stating them in a clear fashion that can guide the Court's (proportionality) review. In the specific context concerned here, core rights protection may hence well be described by the catchphrase 'less is more'.

A promise was made, however, to use this final chapter to also embark on some more concrete suggestions as to what core rights can do for the reasoning of the ECtHR in socio-economic cases. The case law studies presented in Chapters 8 to 10 have not presented an exhaustive overview of the Court's decisions and judgments on the topics of housing, health and health care, and social security. Rather, they aimed to present the most prominent lines of reasoning, developments, and shortcomings. It can be derived from the case law studies, first, that the core rights perspective outlined in Chapter 7 actually can be made to 'fit' the current Strasbourg practice. It is in line with the apparent aim of the Court to provide effective, yet not unlimited socio-economic rights protection. This objective is illustrated by the fact that it regularly holds that 'the

Convention is essentially directed at the protection of civil and political rights',[1] and 'does not guarantee, as such, socio-economic rights',[2] while, at the same time, reviewing a great variety of socio-economic issues. Also, a core rights approach seems a fitting tool for the Court's apparent struggle to distinguish between the interpretation and application of Convention rights, and to answer the question of proportionality in a (more) convincing manner. What is more, the idea of core rights protection in fact uncovers what is already happening to some extent in the Strasbourg practice. In its dealing with socio-economic interests, the ECtHR's protection can sometimes be seen to entail a kind of 'minimum' socio-economic guarantees. Moreover, in its case law generally, the Court also places emphasis on the protection of vulnerable individuals and groups, like children, disabled persons, or asylum seekers, while the working of Article 14 creates a significant role for non-discrimination protection. Important is also that the Court has started to experiment increasingly with the idea of 'procedural' protection: especially in sensitive fields – like socio-economic rights – it frequently asks whether the procedural guarantees provided to the applicant were sufficient. Although certain parts of the case law are farther removed from this 'blueprint', the idea of a core rights perspective could thus be seen to 'connect the dots' – starting form what is already there it may lead to a more principled, coherent and transparent approach to socio-economic rights.

Some concrete examples can be given of how this could work. First, when it comes to the protection under Article 8, and this goes especially for cases concerning housing and health care, it has become clear that the Court often fails to define the (positive) scope of the Convention. When complaints concern claims for housing assistance or for example medication or treatment, no clear statement is given on the interpretation and applicability of the Convention. The Court may underline that Article 8 entails positive obligations, yet at the same time it often holds that the Convention does not guarantee a right to housing, health care, etc. Rather than clarifying the obligations that nevertheless exist in this field, what results is an overall (balancing) test lacking information on what kind of *prima facie* Convention right is concerned or whether there is such a right in the first place. The core rights perspective that was outlined can be helpful in this regard. It would provide a principled starting point for determining when a (positive) socio-economic claim falls within the scope of the Convention. This would be the case when an issue concerns 'minimum essential levels' of the rights to housing, or health care, or social assistance, because such issues should be *prima facie* protected by the Convention. According to the 'perspective' outlined in Chapter 7, it would not be necessary for the Court to expressly concretise what such minimum levels should amount

1 *N. v. the UK*, ECtHR (GC) 27 May 2008, appl. no. 26565/05, para. 44.

2 *Cf. Pancenko v. Latvia*, ECtHR 28 October 1999 (dec.), appl. no. 40772/98. *Cf.* also, *e.g.*, *Kyrtatos v. Greece*, ECtHR 22 May 2003, appl. no. 41666/98, para. 52.

to. Rather, when a housing or health care issue can be seen to involve minimum social entitlements, the Court can explain that this is why it deserves to be reviewed, thereby providing more clarity on the scope of the Convention is socio-economic cases. Also when a case for example concerns the housing situation of vulnerable individuals like severely ill or handicapped persons Article 8 may be considered applicable. Again, the Court can then hold that it is not merely for the fact that there is '*a* link' with someone's private life, but because *essential* socio-economic guarantees in the form of protection of vulnerable individuals are concerned, that Convention review is granted. In turn, such a clear statement as regards the interpretation of the Convention could then form an important benchmark for judging whether an interference or omission was justified. Rather than being 'outbalanced' by a wide margin of appreciation merely because of the social policy character of the issue involved, the core interest concerned would bring about more robust protection. This implies that when the level of care – the contours of which are to be determined at the national level – in the view of the Court is 'evidently insufficient', a violation will be found. This could for example be the case when no efforts were made at all to provide a severely handicapped person with adequate accommodation. Moreover, the Court may also rely on 'procedural' requirements, and demand that even when something was not 'evidently insufficient' the interests of the individuals concerned were actually and sufficiently taken into account. It was seen in Chapters 8 and 9 that the Court under Article 8 indeed has started to develop a 'procedurally-oriented' test for dealing with housing and health-related complaints, for example in the case of Roma housing issues or environmental health cases. This is a positive development, especially when the Court explicitly demands that the socio-economic needs of the individuals concerned are taken into account in the national (decision-making or judicial) process. In fact, when this approach would be combined with the clear and transparent interpretation of the 'socio-economic scope' the Convention outlined here, it may lead to principled, effective and indivisible 'core' socio-economic rights protection. Thus, in the Roma cases for example, the Court should state that it is because a vulnerable group is concerned – as well as, often, minimum housing needs – that there is a *prima facie* (positive) right under the Convention not to be evicted or to be provided with suitable, alternative housing. When the protection granted is obviously insufficient, or when there are procedural shortcomings, any margin that would be granted – and this cannot always be a wide one – can be overcome and a violation can be found.

Secondly, under Article 3 ECHR, the Court on the one hand seems hesitant to explicitly include socio-economic protection. This especially holds true in cases in which it is hard to say that a severe socio-economic situation was the result of actual 'treatment', like when its severity primarily emanates from the illness a person suffers from. Nevertheless, the Court has generally been willing to review issues that merely concern someone's living conditions, or

housing or health in particular, to see whether the specific circumstances of the case attained the 'minimum level of severity' needed for triggering the protection of Article 3. What is more, on the basis of the cases in which is has found a violation of this norm, it can be argued that the ECtHR guarantees some kind of minimum level of socio-economic protection, especially when vulnerable individuals are involved. A core rights perspective would suggest that this be done in a more open and explicit manner. Indeed, the Court should clarify that an obvious lack of minimum *socio-economic* guarantees related to health care or housing, can very well amount to 'inhuman' or 'degrading' treatment in breach of Article 3 of the Convention. Because of the 'absolute' protection prescribed by the wording of this provision, the threshold set should however be a high one. After all, including core socio-economic protection in the context of Article 3 leaves no room for justified limitations. Thus, for example, in the case of expulsion of a sick person who has no chance to actually *survive* (at least for a while), the socio-economic dimension of Article 3 may be triggered. In such a case the Court should make clear that it is only because a *core* socio-economic guarantee is concerned, that protection is provided, thereby also informing potential applicants that they need not bring all of their 'social' complaints under Article 3 of the Convention.

Also Article 14 plays an important role in the Court's socio-economic protection. It is said to have a 'socialising' effect, in the sense that the socio-economic entitlements a state decides to create need to be distributed in a non-discriminatory manner. To this extent, the Court's approach already is in line with the core rights perspective presented in Chapter 7, which holds that the importance of non-discrimination, also in the sphere of social policy, calls for review of alleged discrimination under the Convention. However, in the various case law chapters it has also become clear that complaints of discrimination are not always dealt with in a straightforward manner. First, when it comes to social security benefits or housing assistance, there generally is a good reason as well as a budgetary need for distinguishing between different groups of persons, and frequently unequal treatment in these fields does not amount to discrimination prohibited under the ECHR. Secondly, other cases of alleged discrimination, like those occurring in the context of Roma housing, have been shown to be very sensitive and for that reason very difficult to judge upon in a convincing manner. In this context the core rights perspective first of all suggests that it be recognised that protection against discrimination is nevertheless of crucial importance in the socio-economic sphere. For that reason, complaints concerning unequal treatment should not be marginalised from the outset. At the same time, it must also be clear that not all 'differential treatment' in the socio-economic sphere amounts to discrimination. What the notion of core rights in this regard could add is that besides for example a distinction between different (suspect and non-suspect) grounds of discrimination, a distinction between core and non-core socio-economic entitlements can inform the proportionality analysis that is conducted in order to see whether

Article 14 has been violated. More concretely: when someone is treated differently in regard to the provision of minimum social benefits, like a basic pension or standard health care, regardless of the exact ground that is concerned, this would be reason to opt for a stricter form of review. Currently, when the Court reviews cases of alleged discrimination, it does not make a distinction between core and non-core entitlements. A core rights *perspective* does include this focus, thereby allowing for more insightful reason-giving as to why a distinction is easily justified, or rather should be approached with more suspicion.

Article 14 not least played a role in the social security case law of the Court, and it indeed seems defensible that the Court opts for a wide interpretation of the 'ambit' of the protection of property (Article 1 P1) in order to allow for non-discrimination review under the Convention. A different issue, however, is whether also on the basis of this Convention provision 'taken alone', so when there is no differential treatment, *every* instance of an interference with social security benefits should obtain *prima facie* property rights protection. As the relation between 'possessions' and especially non-contributory social benefits is a strained one, this is certainly not self-evident. And although the Court no longer distinguishes between contributory and non-contributory benefits, more recently it sometimes seems unwilling to straightforwardly apply Article 1 P1 in social security cases. On the basis of the core rights perspective developed in this study, two important submissions can be made here. First, it can be argued that because of the lack of a clear link, not every social benefit, pension, etc. should obtain *prima facie* protection *qua* property right under the Convention. When interferences with social security arrangements concern alleged discrimination and/or 'minimum essential levels', yet not 'property', they may then nevertheless be reviewed under Article 14 or Article 8 (or even Article 3) ECHR, respectively. In other words, also here the 'core criteria' could form an (additional) aid for demarcating the scope of the Convention. When benefits are concerned that do not guarantee a subsistence minimum, for example, the fact that no contributions were paid may form a reason to exclude the issue from review under the ECHR. Secondly, however, when if it is preferred to hold on to a (very) broad interpretation of the 'possessions' protected by Article 1 P1 – also because what is considered a 'possession' generally does not depend on how much one needs it – core rights protection may still improve the Court's reasoning. If only at the application stage, it would enable the Court to underline the core or non-core character of the individual interest concerned. Rather than being overshadowed by a 'generally wide' margin, in case minimum benefits are concerned that can be considered to form someone's minimum means of subsistence, this would then be reason for a stricter test. Thus, even when the scope of property protection does not seem dependent on how essential the social issue at stake is, a core rights perspective can aid in deciding the issue of proportionality in a more transparent and convincing manner. It allows the Court to argue that *because* an essential

guarantee was at stake, the margin is narrow and it is hence more likely that there will be a violation of the Convention.

Thus, in various respects a core rights approach can contribute to the clarity and transparency of the Court's case law. Nevertheless, it must be emphasised that a core rights approach does not solve all possible issues related to the protection of socio-economic interests under the Convention. The 'absolute-relative' understanding of core rights that was propagated in Chapter 7 does not provide an answer to every socio-economic complaint, but leaves room for or even requires taking into account other considerations. Core rights reasoning may need to be corroborated by other tests or instruments in order to reach a conclusion on whether or not the Convention was violated. Indeed, rather than forming *the* relevant test, an absolute-relative core rights approach *informs* the Court's review. Yet it does allow for a more principled, rule-based approach to socio-economic complaints under the Convention. Once their core character allows for review of socio-economic issues, the evidently insufficient provision of minimum levels is very likely to amount to a violation. Besides this, for example with the help of procedural requirements, core rights allow for clearer standards to be set that may enable the Court to deal with complex issues in a more transparent manner. Hence, although a core rights perspective cannot work miracles, it clearly can have added value. It may add to the notions of effective and indivisible rights protection, and to what is already visible in the Court's case law, in a way to help the Court making its approach future-proof.

11.2 Implications in Regard to the Development of Judicial Fundamental Rights Protection

It was mentioned in the introductory chapter that the scope of the research presented in this book is limited.[3] The outcomes exclusively concern the practice of the ECtHR, and more particularly the Strasbourg Court's protection of socio-economic interests. The various findings are relevant, in other words, for the supranational protection of socio-economic interests under civil and political rights norms. Regardless of these limitations, however, in the introduction to this book the practice and especially the reasoning of the ECtHR were linked to broader developments in the field of fundamental rights adjudication.[4] It was considered that in dealing with conflicts between individual and general interests courts around the world frequently make use of proportionality review and 'balancing'. An important trend is moreover the recognition of positive obligations – also when the norms concerned are

3 *Supra*, Ch. 1, S. 1.3.
4 *Supra*, Ch. 1, S. 1.1.

phrased in 'negative' terms –, as well as the movement towards a more constructive approach to economic and social fundamental rights protection. It was explained that the case law of the ECtHR could be seen as exemplary of these different trends. The Court has contributed to a great extent to the consolidation of proportionality analysis as *the* approach to fundamental rights adjudication, as well as to the acceptance of positive obligations. Moreover, as has been amply shown in this thesis, the ECtHR's case law also signals the possibility of (supranational) judicial socio-economic rights protection. Thereby it confirms the emerging perception that next to civil and political rights also economic and social guarantees should be taken seriously as legal constructs by means of which individual claims can be protected. Having introduced the practice of the ECtHR in connection with these topics, it may be asked what implications the findings of this study may have for the direction in which these various developments are or should be going.

Although the ECtHR was labelled a 'forerunner', and its practice 'avant-garde', arguably it is particularly this court that should remain cautious in its approach to fundamental rights protection. Its position is a sensitive one as the acceptance and implementation of its judgments is dependent on the willingness of the Member States. The Court is far removed not only from the actual effects of its decisions and judgments, but also from what occurred and was decided at the national level in the first place. Although its 'human rights mandate' may provide the ECtHR with some leeway in applying the Convention in an 'evolutive' way in order to ensure effective protection, its role can neither be described as particularly 'transformative', nor is it expected that the Court supports certain (social) political goals.[5] In the light of this, as well as in the context of the criticism that has been voiced regarding the Court's practice, it was asked in the introduction whether a combination of the various trends just mentioned could in fact also hamper the success of the Court. Its reliance on proportionality analysis or *ad hoc* balancing, in combination with the room for positive and, moreover, economic and social rights protection, may have the effect (or at least give the impression) that the Court is doing more than its competences allow for, thereby fuelling and exacerbating current criticism. Even when relying on a wide margin and not often concluding on a violation of the Convention in the socio-economic sphere, it may still be considered that it is not for the Strasbourg Court to determine whether a fair balance has been struck between competing interests in a particular field in the first place.

In this regard, the 'core rights perspective' developed in this book was said to have the potential of improving the Court's reasoning in socio-economic

5 That is, in this regard the Court's role may be different from that of national constitutional courts, like the South African Constitutional Court (that is said to interpret and apply a 'transformative' constitution), or the German *Bundesverfassungsgericht* (protecting the 'social state principle' of Art. 20(1) GG). See, *supra*, Ch. 4, S. 4.4.2, and Ch. 6, S. 6.2, respectively.

rights cases, by leading to a more principled and transparent approach. It could ensure effective and indivisible, *i.e.*, meaningful protection of important socio-economic interests, while also doing justice the sensitive role and position of the Court. The proposed approach neither suggests that proportionality review needs to be avoided, nor was it argued that positive obligations or the explicit protection of socio-economic rights claims cannot have a place in the Court's case law. Rather, first and foremost, for a combination of these tests and doctrines to work in a way that leaves enough room for national decisions and policies and renders essential guidance to the domestic authorities, the core rights approach that was outlined suggests that a clear interpretation be provided. Where Möller speaks of the 'global model of constitutional rights',[6] he rejects the (traditional) dominant narrative[7] and presents a modern account of judicial fundamental rights protection at both the constitutional and the ECHR level. This account is characterised by positive and socio-economic rights, horizontal protection, proportionality analysis, *and* by 'rights inflation', *i.e.*, by a very broad understanding of the scope of rights that allows practically all (autonomy-related[8]) individual interests to automatically pass the interpretation stage. This conception is visible – in one way or another – in many important academic works on fundamental rights adjudication,[9] and implies that clear statements on the interpretation and scope of rights become superfluous, while balancing – especially in the context of positive obligations – gets all the attention. Yet what the gist of the argument presented here in fact indicates is that 'the global model' may fare better, at least in some judicial contexts, when there is less room for 'inflation' and attention is instead had to a clearer demarcation of rights. For the protection by the ECtHR of (positive) socio-economic interests under civil and political rights norms – but perhaps also in other complex (supranational) judicial contexts, or in other cases where specific norms are concerned – a principled starting point seems desirable. The Court should not 'from scratch' start balancing the various interests at stake in a given case, regardless of their importance and character, as it is often simply for the national legislator, aided by executive and national judiciary, to conduct this important task. Proportionality review by a court like the ECtHR may work, but only if there is a fundamental right to balance the general interest against. In other words, the necessary (*prima facie*) standards need to be set, especially in the case of socio-economic, positive claims, for the Court to be able to conduct its proportionality review or balancing test in a trans-

6 Möller 2012.

7 Which holds '(1) that rights cover only a *limited domain* by protecting only certain *especially important* interests of individuals; (2) that rights impose exclusively or primarily *negative obligations* on the state; (3) that rights operate only *between a citizen and his government*, not between private citizens; and (4) that rights enjoy a *special normative force*, which means that they can be outweighed, if at all, only under *exceptional circumstances*' (*ibid.*, p. 2).

8 *Ibid.*, Part I.

9 *E.g.*, Alexy 2002; Kumm 2010; Barak 2012; Klatt and Meister 2012.

parent fashion. A core rights perspective allows for making clear interpretive statements on the sensitive, socio-economic dimension of the Convention, which in turn create a starting point for what was in Chapter 3 termed 'the *second* stage' of fundamental rights adjudication, namely that of reviewing the justification. Moreover, even when core rights are not used to explicitly restrict the *prima facie* scope of socio-economic protection, distinguishing between core and non-core socio-economic interests may lead to more insightful reasoning as well as provide a solid ground for leaving more or less leeway to the Member States.

In the end, thus, there are some implications of this research for theorising judicial rights reasoning. Contrary to what current trends prescribe, on the basis of this study the argument may be made that not in every legal context the demarcation of the scope of rights is of inferior importance. Even when the recognition of positive obligations, indivisible protection, and the importance of proportionality are applauded, there may still – or even especially – be reason to critically look at the interpretation stage and at what we define as rights in the first place. Defining what 'fundamental rights' are about should not be given up easily, as this not only allows for deliberation on judicial versus other powers, but also serves as a reminder of the importance of fundamental rights protection. The arguments presented in this study neither provide a complete, nor a definite answer to issues concerning the development of judicial fundamental rights protection. It is hoped that they nevertheless provide a contribution to the continuation of a long-standing, crucially important debate that should always remain alive.

Summary

CORE RIGHTS AND THE PROTECTION OF SOCIO-ECONOMIC INTERESTS BY THE EUROPEAN COURT OF HUMAN RIGHTS

This thesis deals with the protection of socio-economic interests under the classic fundamental rights norms enshrined in the European Convention on Human Rights (ECHR; Convention). Over the years the case law of the European Court of Human Rights (ECtHR; Court) has come to cover an increasing number of individual interests. Regularly, the cases it adjudicates concern socio-economic issues like housing, health care, and social security. The question that is addressed in the thesis is how the ECtHR can deal with such issues in a principled way that ensures effective rights protection while at the same time giving the necessary leeway to Member States' social policies. In particular, it is assessed what use or added value the notion of core rights could have in this regard.

Part I – Setting the Stage

Chapter 2 starts out with an introduction to the 'civil and political' ECHR. It traces back the history of this treaty and the reasons why it contains foremost 'classic' rights norms, such as the prohibition of torture and the freedom of expression. At the time the Convention came into being there was broad agreement on these 'negative' rights, whereas the meaning and the (positive) implications of socio-economic rights were much more controversial. One of the reasons why so much emphasis was placed on the question of which rights should be taken up in the Convention, was that it – and this was unique at the time – was backed up by a supranational court that obtained the power to render binding judgments on the basis of these rights. Meanwhile, the ECtHR has created an immense and rich body of case law, which has provided content to the Convention rights, but also has influenced the understanding and the protection of fundamental rights at the national level. This does not mean, however, that the smooth functioning of the Convention system is a given. The Court has been confronted with a steadily growing number of applications, and recently serious measures had to be taken to prevent the system from collapsing. Besides that, especially in recent years serious criticism has been voiced concerning the practice of the ECtHR, by lawyers as well as by

politicians. That the 'successful' ECtHR is not immune to criticism is unsurprising given the fact that it needs to meet several demands that do not always appear compatible: First, the Court is required to provide effective individual rights protection, which may require far-reaching interpretations of Convention rights and a close focus on the particularities of a case. However, it also has a 'constitutional' task, in the sense that it should set clear standards and provide guidelines with the help of which Member States can comply with the Convention on their own. Finally, the Court must show deference to the (democratic) decisions made by national authorities, which are generally 'better placed' than the Court to strike a right balance between competing interests.

Chapter 2 also presents a preliminary overview of the socio-economic case law of the Court. It shows that the Court has recognised that there is no 'water-tight division' separating the socio-economic sphere from the sphere covered by the Convention. The ECtHR regularly provides for 'indirect' socio-economic guarantees by means of procedural review or protection against discrimination. Furthermore, several Convention articles allow for substantive protection in the field of socio-economic rights. For example, through the recognition of positive obligations under Article 3 ECHR (the prohibition of torture and inhuman and degrading treatment) it has become clear that this provision may require states to provide the necessary (health) care – whereas the same development under Article 8 ECHR (the right to respect for private and family life) may entail that adequate housing be provided. Also the protection of social security benefits under the right to protection of property (Article 1 Protocol 1 to the ECHR) forms a telling example of the socio-economic dimension of the Convention. Two explanations are then given for this phenomenon: The first is the 'effectiveness thesis', which holds that it is in order to effectuate the rights norms enshrined in the ECHR that the ECtHR protects interests that cannot always be labelled 'civil or political'. The Court often underlines the importance of effective protection, and together with its teleological, autonomous, and 'living instrument' interpretation, this idea has led to a broad understanding of the scope of the Convention. The second is the 'indivisibility thesis', which holds that it is not just for the mere effectuation of the ECHR, but also because of the inherent worth of economic and social rights that socio-economic protection is regularly granted. This thesis builds upon the idea that rights are 'indivisible, interdependent and interrelated', and that they must be treated as such. 'Indivisibility' is clearly visible in the case law of the Court when it explicitly refers to socio-economic norms in order to justify a 'social' interpretation of an ECHR right. It is argued that both theses not only explain, but also justify the socio-economic dimension of the Convention. However, this does not mean that they form a sufficient starting point for dealing with complex socio-economic issues. Potentially, the socio-economic protection offered by the ECtHR can go much further, and the question is where potential limits to the Court's legitimate interference in this field may be found. In line

with this, the Court has been criticised for lacking a principled starting point for addressing socio-economic issues. Its case law is considered to be 'incremental', and whereas it creates plenty of room for review of socio-economic issues, it remains unclear what eventual protection can be expected. Because the idea of 'core rights protection' is often linked to the field of economic and social rights, yet has not been explored in any depth in relation to the socio-economic protection under the Convention, it is worth researching what this notion has to add in this context.

Before embarking on an investigation of the idea of core rights, Chapter 3 first presents some insights in the practice of fundamental rights adjudication, and rights reasoning in particular. An important distinction is made between the stage of interpretation and the stage of application. Whereas the former concerns the determination of the scope of a fundamental right, the latter concerns the question whether a *prima facie* right also obtains eventual protection. This distinction follows from the structure of fundamental rights understood as norms, or principles, that are not absolute but can in certain circumstances be limited. Applied in a consistent fashion, it allows for a clear and independent interpretation of rights. Besides the two main stages, the determination of the intensity of review is singled out as an important task. Generally, courts – and in particular also supranational courts – should grant a measure of deference to decisions made by the other (national) branches. According to what is at stake this measure may vary.

With regard to the interpretation stage, it is further clarified that different interpretive methods and principles can point to different interpretations. Also important is whether a broad or rather a more narrow understanding of the scope of rights is preferred. The former allies with the idea that the government should provide reasons for interfering in the personal sphere of individuals, and that *prima facie* rights cover more than only a limited category of very important interests. A reason for a more narrow interpretation may however be that a (particular) court should not be competent to judge on virtually all conflicts between (individual and general) interests. It is argued, however, that when positive rights are concerned the determination of the scope is less straightforward, and that this may lead to avoiding the scope question altogether. At the application stage, where a court reviews the justification adduced for an interference with a *prima facie* right, it can likewise opt for a broader or rather a more narrow approach. That is, in line with the level of inclusiveness of a fundamental rights norm, the room for limitations can be considered more or less significant. At the review stage state interests should explicitly be taken into account. Often this is done by means of proportionality review, whereby – in the light of the aim of a particular interference – it is assessed whether a measure was suitable, necessary, and proportional *stricto sensu*. The latter test generally boils down to a balancing exercise: this implies that the various interests at stake are 'balanced' against each other in order to establish whether the individual or rather the general interest prevails.

Alternatively, a court could make use of more 'categorical' modes of review that by means of different categories and accompanying rules allow for generating answers to fundamental rights disputes in a less *ad hoc* manner. Finally, in concluding on the strictness of the test, courts also opt for different approaches. Some of these lead to much clarity with regard the applicable standard of review, while others, instead, provide the necessary flexibility. For all stages and tasks it can be said that a combination of approaches is often possible, too. Important is that the different tasks and options are there – and that they together provide the framework for courts like the ECtHR for adjudicating rights cases.

Part II – Core Rights Doctrines

Part II turns to the notions of 'core rights' and 'core rights protection'. By means of a comparative study of three core rights 'doctrines', insights are gained on the possibilities and pitfalls inherent in the idea of core rights that could potentially be of relevance for the Strasbourg socio-economic rights protection. Chapter 4 starts out with a discussion of the German *Wesensgehaltsgarantie*. This guarantee holds that 'In no case may the core content of a constitutional right be infringed' (Article 19(2) of the German *Grundgesetz*). It provides a classic example of core rights protection in the form of a 'limit to limitations'. The genesis of Article 19(2) GG shows that its aim was to prevent the legislature, and to some extent also the other branches, from limiting fundamental rights – including positive rights – to such extent that nothing would remain. As straightforward as this may seem, however, there has been quite some controversy – at least in legal academic debate – on what exactly this provision entails. The most important point of discussion is whether the *Wesensgehaltsgarantie* forms an absolute or rather a relative guarantee. The former understanding implies that core rights are protected that are determined independent from case-based circumstances. The relative view, on the other hand, holds that what belongs to a right's core must always be determined in the light of these circumstances. 'Relativists' then argue that the *Wesensgehaltsgarantie* does not add anything to a proportionality test, in the sense that such a test will automatically ensure that the core of a right is left intact: when a measure is proportional, the essence of a right simply has not been interfered with.

It is the predominance of the relative understanding that makes that the *Wesensgehaltsgarantie* hardly plays any meaningful role in the practice of the German *Bundesverfassungsgericht*. Another example of what could be perceived as a kind of core rights protection, however, is this court's recognition of a right to an *Existenzminimum* (subsistence minimum). On the basis of the guarantee of human dignity (Article 1 GG), in combination with the 'social state principle' (Article 20(1) GG), it has determined that such a *minimum* right can be inferred from the *Grundgesetz.* This is an interesting example, for it

shows that focusing on core socio-economic guarantees may be a means of providing effective protection while recognising the limits to what a court can demand in this regard. In line with this, the *Bundesverfassungsgericht* has held that it cannot provide a quantitative interpretation of what a subsistence minimum entails. Instead it has elaborated certain 'procedural' requirements the legislature has to comply with when determining the minimum subsistence level to be provided.

Chapter 5 provides further insights on what core rights protection could entail in the particular context of socio-economic rights protection. It does so by means of a discussion of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the 'minimum cores' or 'minimum core obligations' that have been recognised on the basis thereof. It has proven particularly difficult to effectively monitor state compliance with the rights enshrined in the ICESCR. These rights need to be guaranteed to the maximum of a state's available resources and according to the standard of 'progressive realisation'. This means that they need not be fully complied with from the start, which is in line with practical realities yet creates the risk that states cannot be held accountable for they can always claim a lack of resources. In order to overcome this risk the Committee on Economic, Social and Cultural Rights (CESCR) has concretised the meaning of the different rights by pinpointing certain rights and obligations that need to be guaranteed first and foremost. These are termed 'minimum core obligations', and can be said to 'narrow' the problematic scope of broad socio-economic rights that – for one reason or another – cannot be complied with entirely. Examples are given of the core obligations related to the rights to housing, health, and social security. It is shown that what the different 'cores' have in common, is that they tend to focus on non-discrimination, on the protection of disadvantaged and marginalised individuals and groups, and on the provision of minimum essential levels of the various economic and social rights. Additionally, it can be inferred from the CESCR's General Comments that the more precise content of core obligations can be determined not just by looking at the rights norms themselves. Additionally, information can be gathered from 'external sources', such as state practices or consensus, or expert opinions on what minimum socio-economic protection should embody.

Chapter 6 concerns the debate on the possible use of core rights in the context of the protection of socio-economic rights under the South African Constitution. In South Africa, economic and social rights, such as the right to housing, health care, food, water, and social security, have been made explicitly justiciable. It is interesting to see how the Constitutional Court has gone about in taking up the important, but inherently difficult task of adjudicating these rights. Some landmark cases are presented, that signal the Constitutional Court's willingness to grant protection to individual socio-economic needs, yet also show that in doing so it takes a relatively deferential stance. It has rejected an explicit core rights approach and instead opts for

reasonableness review. The reason for this is that it does not consider itself capable of determining the core of the different rights, and that it cannot be expected that even core requirements would be complied with entirely. The debate continues, however, and the Constitutional Court's case law is criticised for not providing the necessary standards, lacking a bifurcated approach, and failing to recognise that some interests are so urgent that they explicitly need to be prioritised. Opponents of the minimum core at the same time argue that defining core obligations gives the court a greater task than it can legitimately claim, that this would bar further dialogue on the content of rights, and, more generally, that there simply are no objectively determinable minimum cores. However, different authors have suggested that it is possible to overcome the core rights/reasonableness dichotomy. Whereas Liebenberg argues that the reasonableness test could become more substantive (also) by looking at the core of a right, Bilchitz develops a 'less rigid' minimum core approach. According to this approach, core rights need not be absolutes in the sense that they never allow for any limitations. Even if they do it is important to state what socio-economic core rights must be protected as a matter of priority, simply because these are so urgent that they cannot be ignored.

Part III – Core Rights and the ECtHR

Part III (Chapter 7) brings together parts I and II and develops a core rights perspective tailored to the protection of socio-economic interests under the ECHR. First, it outlines a more workable understanding of a notion that is often perceived as redundant or impracticable. On the basis of the information gathered through the different comparative studies, it can be said that core rights need not necessarily be absolutes: neither in the sense that they are determined once and for all, nor in the sense that they may never be justifiably limited. Next to this 'absolute-absolute' understanding, in fact, core rights can be relative in that they are determined in the context of a particular case while still requiring absolute protection ('relative-absolute'), outlined in a general fashion while leaving some room for non-fulfilment ('absolute-relative'), or in the sense that both their determination *and* the protection offered is case-dependent ('relative-relative'). Moreover, core rights may be useful not only at the review stage, but may also help determine a more workable scope of broad (socio-economic) rights. They may be 'indeterminable' in some ways, but practice has shown that they nevertheless can be workable, too. 'Minimum' core protection, moreover, has the potential of maximising efforts. It presents a difficult task to the courts, but also demarcates their influential task by tying specific consequences to the fact that a core right is concerned.

In fact, core rights protection may be seen as a notion inherent in fundamental rights protection. To develop a particular mode of core rights reasoning for the ECtHR, the specific role and tasks of this court must however be kept in mind. It was argued that the ECtHR needs to provide effective rights

protection while being mindful of its subsidiary position *and* providing the necessary guidelines to enable Member States to protect the ECHR rights on their own. In this regard it is contended that a model of absolute-relative core rights protection would best fit the socio-economic protection of the Strasbourg Court. This would allow for clear guidelines through the demarcation of the scope of the Convention rights in this field. At the same time it would allow for some flexibility in applying these core rights, which would be in line with the fact that the ECtHR cannot always demand absolute protection, not even when it comes to core socio-economic rights, and that in most instances it should defer to legislative choices. In this way, a 'core rights perspective' could add to the notions of 'effectiveness' and 'indivisibility' and thereby lead to a more principled approach to economic and social rights protection under the Convention. When it comes to the 'content' of the relevant cores, the perspective that is outlined suggests that in interpreting the classic rights of the Convention, the ECtHR could ask whether an issue concerns interference with or the lack of minimum essential levels of socio-economic rights. If this is the case, there is reason to link the issue at stake to the norms enshrined in the Convention and proceed to the review stage. This should moreover be done when a case involves the socio-economic needs of vulnerable individuals or when alleged discrimination is concerned. At the review stage, the fact that it is 'core' socio-economic matters that are being reviewed suggests that the ECtHR should provide for meaningful, robust review. To avoid assuming policy-making capacities in this regard, it could thereby resort to procedural forms of review. In any case, to ensure effective, indivisible protection the 'socio-economic character' of the issues involved should not automatically lead to a wide margin of appreciation and hence to the possibility that essential social needs are easily 'balanced away'. Instead, due to their essential character – albeit some room for limitations remains – the review should be strict enough to ensure effective protection.

Part IV – The Socio-Economic Case Law of the ECtHR

This part delves more deeply into the ECtHR's case law on particular socio-economic issues, namely housing, health and health care, and social security. The aim of this part is to see where there is room for improvement and whether the perspective outlined in Part III could actually have added value in this regard. Chapter 8 concerns the ECtHR's case law on housing issues such as requests for adequate accommodation meeting someone's special needs or protection of lessees. It shows that at the interpretation stage, the Court has created a lot of room for (positive) housing claims, but that eventual protection – due to a wide margin – is often not granted. A 'case study' on the issue of Roma housing illuminates that there the Court's case law comes close to recognising a positive right to alternative housing. What it requires is that the national authorities recognise the (special) interests of Roma people and

explicitly 'balance' their interests against those of the general community by means of a proportionality test. This forms a promising starting point for incorporating a core rights perspective. Doing so would allow for explaining why the essential needs of the vulnerable group of Roma must be protected under the Convention, and how procedural review can aid in achieving this.

Chapter 9 continues with the topic of health and health care and discusses those cases that concern 'positive' health issues related to the provision of care, medication, etc. Sometimes the Court is willing (for example under Article 3 ECHR) to provide protection to individuals suffering from serious health conditions, yet it does so in an *ad hoc* manner that fails to provide the necessary clarity on what the Convention requires. Furthermore, even though complaints concerning the provision of medication may be reviewed under (various articles of) the Convention, due to a wide margin the added value of such review is not always apparent. In the context of 'environmental health' issues under Article 8, moreover, the Court does not always provide for a consistent interpretation and application of the Convention. It has set certain 'thresholds' for holding the Convention applicable in environmental cases, but it is argued that it should apply these in a more principled manner and that also here a core rights perspective may prove helpful.

Finally, Chapter 10 discusses the sensitive issue of the protection of social security under the Convention. Over the past years, the ECtHR's case law on this topic has expanded significantly. This has not been without problems: after all, the link between the Convention and all kinds of social security claims is not always a very solid one, and it may hence be asked how far the Court can go in this regard. Also here, it has provided a lot of room for review of social security cases, in the form of review of alleged discrimination under Article 14 ECHR but foremost by means of a broad interpretation of the 'possessions' protected under Article 1 of the First Protocol to the Convention. Often the Court even refrains from answering the difficult question why a specific pension or other social security benefit can be considered to be a 'possession', to directly see whether the interference was proportional or not. In the light of the important distinction between interpretation and review, such an approach does not seem desirable. It is hence argued that the Court should provide more clarity as regards the scope of Article 1 P1 in social security issues, while also its proportionality analysis and balancing test could be improved. It would potentially be helpful if the Court thereby would more clearly distinguish between cases concerning essential social security claims, the discriminatory provision of benefits and the protection of vulnerable groups on the one hand, and more peripheral issues on the other. When the former are concerned, regardless of the Court's habit to 'generally' grant a (very) wide margin when socio-economic policy is concerned, a core rights perspective would allow for a stricter test as well as for clarifying why such a test is justified.

Chapter 11 provides the final conclusions. It draws together the different parts of the study and concludes that the core rights perspective that was developed in the thesis would actually fit the practice of the ECtHR. Already, the Court sometimes emphasises that it aims at protecting the 'essence' of fundamental rights, and pays (extra) attention to vulnerable individuals and protection against discrimination. It is argued that a more explicit core rights perspective would 'connect the dots' and could hence result in a more principled and less incremental case law. More generally, what this study suggests is that in times in which rights are generally interpreted in a broad, indivisible manner, and reviewed by means of proportionality review, a clear demarcation of the scope of (socio-economic) rights and/or a focus on the core aspects thereof, may still be important.

Samenvatting (Dutch Summary)

KERNRECHTEN EN DE BESCHERMING VAN SOCIAALECONOMISCHE BELANGEN DOOR HET EUROPEES HOF VOOR DE RECHTEN VAN DE MENS

Dit proefschrift gaat over de bescherming van sociaaleconomische belangen onder de klassiek geformuleerde grondrechten die zijn neergelegd in het Europees Verdrag voor de Rechten van de Mens (EVRM; Verdrag). Door de jaren is de jurisprudentie van het Europees Hof voor de Rechten van de Mens (EHRM; Hof) een toenemend aantal individuele belangen gaan omvatten. Zo behandelt het regelmatig zaken die gaan over sociaaleconomische belangen verband houdende met huisvesting, gezondheidszorg, sociale zekerheid, etc. De vraag die centraal staat in dit onderzoek is hoe het EHRM op een principiële manier sociaaleconomische bescherming kan bieden en tegelijkertijd voldoende ruimte kan laten voor de beleidskeuzes van de Lidstaten. Meer specifiek wordt onderzocht wat de rol of meerwaarde van de notie van 'kernrechten' hierbij zou kunnen zijn.

Deel I – 'Setting the Stage'

Hoofdstuk 2 begint met een introductie van het 'burgerlijke en politieke' EVRM. Het bespreekt de historie van het Verdrag en de redenen waarom het in beginsel 'klassieke' grondrechtsnormen bevat, zoals het verbod van foltering en de vrijheid van meningsuiting. Ten tijde van de totstandkoming van het EVRM bestond er consensus over het belang van deze 'negatieve' rechten, maar waren de betekenis en (positieve) implicaties van sociaaleconomische rechten veel meer omstreden. Een van de redenen waarom uitgebreid werd gediscussieerd over welke rechten moesten worden opgenomen, was omdat het Verdrag – en dit was destijds uniek – de mogelijkheid creëerde voor een supranationaal hof om bindende uitspraken te doen op basis van deze rechten. Inmiddels heeft het EHRM een omvangrijke en gedetailleerde jurisprudentie tot stand gebracht, waarmee het inhoud heeft gegeven aan de rechten die zijn neergelegd in het EVRM, maar ook grote invloed heeft gehad op de opvattingen over en bescherming van fundamentele rechten op nationaal niveau. Toch is het soepel functioneren van het EVRM-systeem geen gegeven. Het Hof heeft zich geconfronteerd gezien met een constant groeiende zaakslast, en recentelijk waren serieuze maatregelen nodig om ervoor te zorgen dat het niet onder deze

last zou bezwijken. Daarnaast is er in het bijzonder in de laatste jaren sprake van serieuze kritiek op het functioneren van het Hof, afkomstig van juristen maar ook van politici. Dat het 'succesvolle' EHRM niet immuun is voor kritiek mag eigenlijk niet verbazen gezien het feit dat het wordt geacht aan verschillende eisen te voldoen, die niet altijd even goed lijken samen te gaan: Ten eerste wordt het EHRM geacht effectieve individuele rechtsbescherming te bieden, wat kan leiden tot relatief verstrekkende interpretaties van het Verdrag en een duidelijke focus op de omstandigheden van het geval. Tegelijkertijd heeft het Hof ook een 'constitutionele' taak, wat wil zeggen dat het standaarden dient te creëren die duidelijkheid verschaffen aan de Lidstaten over wat het EVRM precies vereist. Ten slotte dient het Hof ruimte te laten voor (democratische) besluiten genomen door de nationale autoriteiten, die in het algemeen immers als beter gesitueerd kunnen worden beschouwd dan het Hof om een afweging te maken tussen conflicterende belangen.

Hoofdstuk 2 geeft ook een eerste overzicht van de sociaaleconomische jurisprudentie van het EHRM. Duidelijk wordt dat het Hof heeft erkend dat er geen 'waterdichte scheiding' is tussen de sociaaleconomische sfeer en datgene wat wordt beschermd onder het EVRM. Het EHRM oordeelt regelmatig 'indirect' over sociaaleconomische kwesties door middel van procedurele toetsing of het bieden van bescherming tegen discriminatie. Bovendien bieden verschillende EVRM-artikelen de mogelijkheid voor meer directe sociaaleconomische bescherming. Door middel van het erkennen van positieve verplichtingen onder Artikel 3 EVRM (het verbod van foltering en van onmenselijke en vernederende behandeling) is bijvoorbeeld duidelijk geworden dat dit artikel ook van staten kan verlangen dat zij iemand de nodige (gezondheids)zorg verlenen – dezelfde ontwikkeling onder Artikel 8 EVRM (recht op respect voor privé- en familieleven) kan met zich brengen dat voor adequate huisvesting moet worden gezorgd. Ook de bescherming van sociale zekerheidsuitkeringen onder het eigendomsrecht (Artikel 1 Eerste Protocol EVRM) vormt een sprekend voorbeeld van de sociaaleconomische dimensie van het Verdrag. Vervolgens worden twee verklaringen gegeven voor dit fenomeen: de eerste is de '*effectiveness*-thesis', welke inhoudt dat het EHRM naast klassieke ook sociaaleconomische belangen beschermt met als doel de EVRM-rechten te effectueren. Het Hof benadrukt regelmatig het belang van effectieve bescherming, en in combinatie met diens teleologische, autonome en '*living instrument*'-interpretatie heeft dit geleid tot een ruime uitleg van het Verdrag. Ten tweede is er de '*indivisibility*-thesis', volgens welke de sociaaleconomische bescherming die wordt geboden onder het Verdrag niet zozeer het gevolg is van de effectuering van EVRM-rechten, maar (ook) van het expliciet erkennen van het inherente belang van economische en sociale rechten. Deze uitleg steunt op de gedachte dat rechten 'ondeelbaar, onderling afhankelijk en onlosmakelijk verbonden' zijn, en als zodanig moeten worden behandeld. Deze gedachte is duidelijk zichtbaar in de rechtspraak van het Hof wanneer het expliciet verwijst naar sociaaleconomische normen om een 'sociale' interpretatie van een EVRM-recht te rechtvaar-

digen. Beargumenteerd wordt dat beide thesen niet alleen de sociaaleconomische dimensie van het EVRM kunnen verklaren, maar haar ook kunnen rechtvaardigen. Dit betekent echter niet dat ze ook een voldoende uitgangspunt vormen voor het Hof om met complexe sociaaleconomische zaken om te gaan. Er is ruimte voor verdere uitbreiding van de sociaaleconomische bescherming, en de vraag is dan ook waar mogelijke grenzen aan de bevoegdheden van het Hof op dit terrein kunnen worden gevonden. In lijn hiermee wordt het Hof bekritiseerd vanwege het niet bieden van 'principiële' bescherming in sociaaleconomische kwesties. De jurisprudentie van het Hof op dit terrein wordt als '*ad hoc*' en 'incrementeel' aangeduid, en waar het enerzijds veel ruimte laat voor het toetsen van sociale kwesties, blijft tegelijkertijd onduidelijk welke uiteindelijke bescherming mag worden verwacht. Omdat de notie van 'kernrechten' regelmatig in verband wordt gebracht met sociaaleconomische rechtsbescherming, maar nog niet grondig is onderzocht in relatie tot het bieden van sociaaleconomische bescherming onder het EVRM, is het interessant te onderzoeken wat deze notie hier zou kunnen bijdragen.

Voordat wordt begonnen met een onderzoek naar de idee van kernrechten, biedt hoofdstuk 3 eerst verschillende inzichten in de praktijk van rechterlijke beoordeling, en rechterlijke argumentatie in het bijzonder. Een belangrijk onderscheid wordt hierbij gemaakt tussen de interpretatiefase en de toetsingsfase. Waar de eerste het afbakenen van de reikwijdte van een fundamenteel recht betreft, gaat het bij de laatste om de vraag of een *prima facie*-recht ook uiteindelijke bescherming verdient. Dit onderscheid volgt uit de structuur van grondrechten opgevat als normen, of beginselen, die niet absoluut zijn maar in sommige gevallen beperkt mogen worden. Wanneer dit onderscheid consequent wordt toegepast, kan het zorgen voor een duidelijke en onafhankelijke interpretatie van grondrechten. Naast de twee hoofdfasen wordt ook aandacht besteed aan het bepalen van de intensiteit van de rechterlijke toetsing. In het algemeen moeten rechters – en supranationale rechters in het bijzonder – voldoende afstand bewaren tot de besluiten die zijn genomen door de andere (nationale) machten. De precieze intensiteit van de toets kan vervolgens aangepast worden aan de omstandigheden van een zaak.

Met betrekking tot de interpretatiefase wordt vervolgens duidelijk gemaakt dat verschillende interpretatiemethoden en -beginselen in de richting van verschillende interpretaties kunnen wijzen. Ook belangrijk is een eventuele voorkeur voor een ruime of juist een beperkte opvatting van de reikwijdte van grondrechten. Een ruime opvatting sluit aan bij de gedachte dat de overheid redenen dient te geven voor inmenging in de persoonlijke sfeer van individuen, en dat *prima facie*-rechten meer dan een beperkt aantal zeer belangrijke belangen omvatten. Reden voor een meer beperkte opvatting zou echter kunnen zijn dat het niet aan een (bepaalde) rechter is om uitspraak te doen over praktisch alle conflicten waarbij verschillende (individuele en algemene) belangen aan de orde zijn. Beargumenteerd wordt dat vooral bij positieve rechten het echter niet zo eenvoudig is om voor een duidelijke afbakening

te zorgen, en dat dit tot gevolg kan hebben dat de interpretatievraag in het geheel niet wordt beantwoord. Ook in de toetsingsfase kan gekozen worden voor een ruime of een engere aanpak. Dat wil zeggen, in lijn met een ruime of juist beperkte interpretatie van grondrechten kan de ruimte voor beperkingen van grondrechten als meer of minder omvattend worden opgevat. In de toetsingsfase dienen de belangen van de staat expliciet te worden meegenomen. Vaak gebeurt dit door middel van een proportionaliteitstoets, waarbij – in het licht van het doel van de beperking – wordt gekeken of een maatregel geschikt, noodzakelijk en proportioneel *stricto sensu* was. Deze laatste toets komt doorgaans neer op een 'afweging' van de verschillende aan de orde zijnde belangen om op die manier te kijken of het individuele of toch het algemene belang aan het langste eind trekt. Als alternatief kan gebruik worden gemaakt van meer 'categorische' toetsingsmethoden die met behulp van categorieën en bijbehorende regels mogelijkheden bieden voor het beslechten van conflicten op een manier die minder *ad hoc* van aard is. Tot slot, ook bij het bepalen van de intensiteit van de toets kunnen rechters voor verschillende aanpakken kiezen. Sommige daarvan geven veel duidelijkheid over (de striktheid van) de toe te passen toets, terwijl andere, in plaats daarvan, voor de nodige flexibiliteit zorgen. Voor alle fasen en taken geldt dat een combinatie van aanpakken eveneens tot de mogelijkheden behoort. Belangrijk is dat de verschillende opties er zijn – en dat deze tezamen het raamwerk vormen voor het beslechten van fundamentele rechten-kwesties door rechterlijke instanties zoals het EHRM.

Deel II – Kernrechtdoctrines

Deel II bespreekt de concepten 'kernrechten' en 'kernrechtbescherming'. Door middel van een vergelijkende studie van drie 'kernrechtdoctrines' worden inzichten verkregen in de kansen en mogelijke problemen van kernrechtbescherming die relevant kunnen zijn voor de bescherming van sociaaleconomische rechten onder het EVRM. Hoofdstuk 4 begint met een bespreking van de Duitse *Wesensgehaltsgarantie*. Deze garantie houdt in dat 'in geen geval de kern van een grondrecht mag worden beperkt' (Arikel 19(2) *Grundgesetz*). Het betreft een klassiek voorbeeld van kernrechtbescherming in de vorm van een 'beperking aan beperkingen' van grondrechten. De historische achtergrond van Artikel 19(2) GG laat zien dat het doel van deze bepaling was om de wetgever, en tot op zekere hoogte ook de uitvoerende en de rechterlijke macht, ervan te weerhouden grondrechten – inclusief positieve rechten – zodanig te beperken dat er praktisch niets overblijft. Door de jaren heen is er behoorlijk wat discussie geweest – althans in de juridische literatuur en in de verschillende *Grundgesetz*-commentaren – over wat Artikel 19(2) precies inhoudt. Het belangrijkste punt van debat is de vraag of de *Wesensgehaltsgarantie* als 'absolute' of eerder als 'relatieve' garantie moet worden aangemerkt. Volgens de absolute opvatting moeten kernrechten worden beschermd die onafhankelijk zijn van de specifieke omstandigheden van het geval. De relatieve theorie, aan de andere kant, houdt

in dat wat onder een kern van een recht moet worden verstaan enkel kan worden bepaald in het licht van deze omstandigheden. 'Relativisten' beargumenteren dat de *Wesensgehaltsgarantie* niet daadwerkelijk iets toevoegt aan de proportionaliteitstoets, omdat een dergelijke toets er automatisch voor zou zorgen dat de kern van een recht wordt beschermd: als een maatregel proportioneel is, is de kern daarvan simpelweg niet aangetast.

Dat de relatieve theorie de dominante is, uit zich ook in het feit dat de *Wesensgehaltsgarantie* in de praktijk van het Duitse Constitutionele Hof, het *Bundeseverfassungsgericht*, nauwelijks een rol speelt. Een ander voorbeeld van wat als kernrechtbescherming kan worden bestempeld is echter de erkenning van het *Bundeseverfassungsgericht* van een recht op een bestaansminimum (*Existenzminimum*). Op basis van de garantie van de menselijke waardigheid (Artikel 1 GG), in combinatie met het 'Sozialstaatsprinzip' (Artikel 20(1) GG), is bepaald dat een recht op een dergelijk minimum afgeleid kan worden uit de Grondwet. Dit is een interessant voorbeeld, omdat het laat zien dat een focus op 'kern'-sociaaleconomische rechten een manier kan zijn om effectieve bescherming te bieden terwijl tegelijkertijd wordt erkend dat de mogelijkheden van de rechter in deze context beperkt zijn. In lijn hiermee heeft het *Bundesverfassungsgericht* aangegeven dat het geen 'kwantitatieve' uitleg kan geven aan wat een bestaansminimum precies inhoudt. In plaats daarvan heeft het verschillende 'procedurele' vereisten geformuleerd waaraan de wetgever moet voldoen bij het vaststellen van het precieze minimum waarin wordt voorzien.

Hoofdstuk 5 gaat nader in op de (mogelijke) betekenis van kernrechtbeschrming in het bijzonder in de context van sociaaleconomische rechten. Dit gebeurt door middel van een bespreking van het Internationaal Verdrag inzake Economische, Sociale en Culturele Rechten (IVESCR) en de 'minimumkernen' ('*minimum cores*') of '*minimum core*'-verplichtingen die op basis daarvan zijn vastgesteld. Het is bijzonder moeilijk om de naleving van de rechten die zijn neergelegd in het IVESCR effectief te monitoren. De standaard voor implementatie van deze rechten is 'progressieve realisatie', in het licht van de aan de staat ter beschikking staande middelen. Dit houdt in dat de rechten niet vanaf het begin volledig gegarandeerd hoeven te worden, wat aansluit bij de praktische realiteit dat dit simpelweg niet haalbaar zou zijn, maar tegelijkertijd ook het risico in zich draagt dat staten niet verantwoordelijk kunnen worden gehouden omdat zij zich altijd kunnen beroepen op een gebrek aan middelen. Om dit risico te beperken heeft het Comité Economische, Sociale en Culturele Rechten (CESCR) de inhoud van de verschillende rechten proberen te verduidelijken door het aanwijzen van verschillende rechten en plichten die in elk geval, of althans met voorrang gegarandeerd dienen te worden. Het gaat hier om 'minimum kernverplichtingen' ('*minimum core obligations*') waarvan kan worden gezegd dat ze de problematische reikwijdte van breed geformuleerde sociaaleconomische grondrechten – die om wat voor reden dan ook niet in hun geheel kunnen worden gegarandeerd – beperken en verduidelijken. Voorbeelden worden gegeven van de kernverplichtingen die behoren bij het recht op

huisvesting, gezondheid en sociale zekerheid. Duidelijk wordt dat wat de verschillende 'kernen' gemeen hebben is een focus op non-discriminatie, op de bescherming van achtergestelde en gemarginaliseerde groepen, en op het voorzien in een 'minimumniveau' van de verschillende rechten. Bovendien kan uit de *General Comments* van de CESCR worden afgeleid dat de meer precieze inhoud van sociaaleconomische kernrechten niet alleen bepaald kan worden door te kijken naar het recht zelf, maar ook met behulp van 'externe bronnen', zoals de praktijken van of consensus onder staten, of de opinies van experts ten aanzien van wat minimum sociaaleconomische bescherming dient te omvatten.

Hoofdstuk 6 onderzoekt het debat over het mogelijke nut van kernrechten in de context van de bescherming van sociaaleconomische rechten onder de Zuid-Afrikaanse Grondwet. In Zuid-Afrika kunnen economische en sociale rechten worden ingeroepen voor de rechter, en het is interessant om te zien hoe het Constitutionele Hof daar omgaat met de belangrijke maar ook zeer moeilijke taak van het beschermen van deze rechten. Enkele *landmark cases* worden besproken, waaruit kan worden opgemaakt dat het Constitutionele Hof bereid is op te komen voor deze rechten, maar daarbij tegelijkertijd wel vrij afstandelijk toetst. Het heeft een expliciete kernrechtaanpak verworpen en toetst in plaats daarvan of dat wat de autoriteiten hebben gedaan of hebben nagelaten, 'redelijk' was. De reden hiervoor is dat het Hof zich niet in staat acht tot het bepalen van de kern van de verschillende rechten en bovendien dat het een illusie is om te denken dat kernrechten onmiddellijk zouden kunnen worden gegarandeerd. Desondanks gaat het debat verder, en wordt de rechtspraak van het Constitutionele Hof bekritiseerd vanwege het feit dat het geen duidelijke standaarden creëert, niet gekenmerkt wordt door een 'tweefasen'-toets, en op die manier niet erkent dat er individuele sociaaleconomische belangen zijn die zo urgent zijn dat ze expliciet prioriteit vereisen. Tegenstanders van de *minimum core* beargumenteren dat het definiëren van kernverplichtingen niet behoort tot de taken van de rechter, dat dit een verdere dialoog over de inhoud van sociaaleconomische rechten zou blokkeren, en dat er simpelweg geen objectief bepaalbare kernen zijn. Niettemin laten verschillende auteurs zien dat het mogelijk is om een brug te slaan tussen een aanpak gebaseerd op kernrechten en redelijkheidstoetsing. Liebenberg beargumenteert dat de redelijkheidstoets meer inhoudelijk kan worden als de rechter (ook) in ogenschouw neemt of de kern van een recht aan de orde is of niet, terwijl Bilchitz een 'minder rigide' kernrechtaanpak voorstelt. Deze aanpak houdt in dat kernrechten niet per se altijd absolute bescherming genieten. Zelfs als er enige ruimte voor gerechtvaardigde beperkingen bestaat is het volgens Bilchitz echter van het grootste belang om duidelijkheid te verschaffen over welke 'kernaspecten' prioriteit verdienen, simpelweg omdat de bescherming ervan zo urgent is dat ze niet mogen worden genegeerd.

Deel III – Kernrechten en het EHRM

In Deel III (Hoofdstuk 7) worden de delen I en II samengebracht en wordt een 'kernrechtperspectief' ontwikkeld dat aansluit op de sociaaleconomische bescherming onder het EVRM. Allereerst wordt een meer werkbare interpretatie gepresenteerd van een notie die niet zelden als 'overbodig' of 'onpraktisch' wordt bestempeld. Op basis van de informatie die is verkregen door middel van de vergelijkende kernrechtsudies kan worden gezegd dat kernrechten niet per se 'absoluut' hoeven te zijn. Kernrechten hoeven niet voor eens en voor altijd gedefinieerd te worden en het hoeft evenmin te gaan om aspecten van rechten die nooit aan beperkingen onderhevig kunnen zijn. Naast een '*absolute-absolute*'-opvatting van kernrechten – waarbij zowel de definitie als de bescherming absoluut is – kan er ook gesproken worden van kernen die in een bepaald opzicht relatief zijn. Bij '*relative-absolute cores*' wordt de inhoud bepaald in de context van een specifieke zaak, maar wordt wel 'absolute' bescherming geboden, terwijl er ook kernen zijn die worden bepaald in een algemene, zaaksonafhankelijke zin, maar die niettemin (enige) ruimte voor beperking laten ('*absolute-relative*'). Ten slotte kunnen zowel de definitie van kernrechten als de bescherming die deze 'essentiële' rechten verdienen relatief worden opgevat ('*relative-relative*'). Bovendien kunnen kernrechten niet alleen relevant zijn in de toetsingsfase, tijdens welke de gegeven rechtvaardiging voor een inbreuk op een recht wordt getoetst, maar ook bij de bepaling van de reikwijdte van ruim geformuleerde, sociaaleconomische grondrechten (in de interpretatiefase). Ze mogen dan misschien in een bepaald opzicht 'onbepaalbaar' zijn, in de praktijk is duidelijk geworden dat kernrechten wel degelijk werkbaar kunnen zijn. 'Minimum' kernrechtbescherming kan bovendien tot 'maximale' bescherming leiden. Het vormt een lastige opdracht voor de rechter, maar biedt tevens houvast, zodat van rechterlijk activisme geen sprake hoeft te zijn.

In feite kan kernrechtbescherming worden gezien als iets wat inherent is aan de bescherming van fundamentele rechten. Om een model van kernrechtargumentatie te ontwikkelen dat aansluit op de praktijk van het EHRM is het echter wel noodzakelijk om de precieze rol en taken van dit Hof in het achterhoofd te houden. Duidelijk is geworden dat het EHRM moet zorgen voor effectieve, individuele rechtsbescherming. Tegelijkertijd moet het zich bewust zijn van zijn supranationale positie *en* de nodige richtlijnen verstrekken op basis waarvan Lidstaten in staat worden gesteld om zelf de verschillende EVRM-rechten te garanderen. In het licht hiervan wordt beargumenteerd dat '*absolute-relative*'-kernrechtbescherming het beste zou passen bij de sociaaleconomische bescherming van het Straatsburgse Hof. Dit biedt ruimte voor het creëren van duidelijke richtlijnen door middel van het afbakenen van de reikwijdte van de EVRM-rechten op dit terrein. Tegelijkertijd laat het bij het toetsen aan het deze rechten enige ruimte voor gerechtvaardigde beperkingen, wat aansluit bij het feit dat het supranationale EHRM niet altijd absolute bescherming kan verlangen, zelfs niet wanneer het om kernaspecten van soicaaleconomische rechten gaat. Op deze manier kan een 'kernrechtperspectief' iets toevoegen aan de uitgangspunten van 'effectieve' en 'ondeelbare' bescherming, en leiden

tot een meer principiële aanpak van sociaaleconomische bescherming onder het Verdrag. Wat de inhoud van de verschillende 'kernen' betreft, suggereert het ontwikkelde 'perspectief' dat bij het interpreteren van de klassieke EVRM-rechten moet worden nagegaan of een klacht *minimum essential levels* van sociaaleconomische rechten betreft. Als dit het geval is, is er reden om de klacht onder de reikwijdte van het Verdrag te scharen en kan vervolgd worden met toetsing. Dit dient eveneens te gebeuren wanneer een zaak de sociaaleconomische belangen van kwetsbare individuen en groepen betreft of wanneer er sprake is van vermeende discriminatie. Aangekomen bij de toetsingsfase betekent het feit dat er 'kern'-sociaaleconomische belangen in het geding zijn dat er serieuze, robuuste bescherming moet worden geboden. Om te voorkomen dat het Hof hierbij overgaat tot het maken van gevoelige beleidskeuzes, kan het daarbij gebruikmaken van 'procedurele' eisen. In elk geval, om effectieve, ondeelbare bescherming te garanderen, dient het sociaaleconomische karakter van een kwestie niet automatisch een ruime *margin of appreciation* tot gevolg te hebben. In plaats daarvan, en ook al is er enige ruimte voor gerechtvaardigde beperkingen, moet de toets strikt genoeg zijn om daadwerkelijke bescherming van essentiële sociaaleconomische rechten te kunnen garanderen.

Deel IV – De Sociaaleconomische Jurisprudentie van het EHRM

Deel IV gaat dieper in op de jurisprudentie van het EHRM over kwesties betreffende huisvesting, gezondheid en gezondheidszorg en sociale zekerheid. Het doel van dit deel van het boek is na te gaan of het ontwikkelde kernrechtperspectief concrete meerwaarde zou kunnen hebben. Hoofdstuk 8 gaat over de rechtspraak van het Hof over huisvestingskwesties zoals verzoeken om een adequaat onderkomen of de bescherming van huurders. Duidelijk wordt dat de interpretatie van het Hof veel ruimte heeft gecreëerd voor toetsing van (positieve) claims betreffende huisvesting, maar dat uiteindelijke bescherming – mede door de ruime *margin of appreciation* – niet vaak wordt geboden. Een *case study* van zaken over huisvesting van Roma laat zien dat de jurisprudentie van het Hof in de richting lijkt te gaan van het erkennen van een recht op alternatieve huisvesting. Wat het EHRM verlangt is dat de nationale autoriteiten de (bijzondere) belangen van Roma onderkennen en expliciet afwegen tegen het algemene belang door middel van een proportionaliteitstoets. Dit vormt een veelbelovend startpunt voor een op kernrechten gerichte aanpak. Een dergelijke aanpak zou duidelijk maken waarom de essentiële belangen van de kwetsbare Roma (*prima facie*) bescherming verdienen onder het Verdrag, en hoe procedurele garanties hierbij behulpzaam kunnen zijn.

Hoofdstuk 9 bespreekt de rechtspraak over gezondheid en gezondheidszorg, en in het bijzonder die zaken die gaan over 'positieve' claims betreffende de verkrijging van zorg, medicijnen, etc. In sommige gevallen, bijvoorbeeld in de context van Artikel 3 EVRM, is het Hof bereid om bescherming te bieden

aan individuen die ernstig ziek zijn. Het doet dit echter op een zeer *ad hoc*-wijze, waardoor er onduidelijkheid blijft bestaan over wat het Verdrag op dit terrein precies vereist. Bovendien, hoewel klachten over (een gebrek aan) medicatie aan verschillende Verdragsartikelen kunnen worden getoetst, is de meerwaarde van deze toetsing mede door het toekennen van een ruime *margin* niet altijd duidelijk. Om die reden kan de vraag worden gesteld of het Hof in sommige gevallen überhaupt wel tot toetsing moet overgaan. Tot slot beoordeelt het Hof regelmatig zaken over milieubescherming in relatie tot gezondheidskwesties onder Artikel 8 EVRM. De 'drempelwaarden' die het heeft gecreëerd voor toepassing van het Verdrag in milieuzaken hanteert het echter niet altijd op consistente wijze. Beargumenteerd wordt dat hier ruimte is voor verbetering en dat met behulp van een kernrechtperspectief zowel de interpretatie als de (procedurele) toetsing in mileukwesties op een meer transparante manier kan plaatsvinden.

Tot slot gaat Hoofdstuk 10 in op de – gevoelige – bescherming van sociale zekerheid onder het EVRM. Met name in de laatste jaren is het Hof zich steeds meer in gaan laten met sociale zekerheidskwesties. Dit kan problemen opleveren, niet in de laatste plaats omdat de relatie tussen sociale zekerheid en de in het EVRM neergelegde normen niet heel solide is, en de vraag rijst dan ook hoe ver het Hof in deze context kan gaan. Ook in zaken betreffende sociale zekerheid heeft het Hof veel ruimte geboden voor toetsing, onder Artikel 14 EVRM (non-discriminatie) maar bovenal via een ruime interpretatie van de 'eigendommen' die worden beschermd onder het recht op bescherming van eigendom (Artikel 1 van het Eerste Protocol bij het EVRM). Daarbij laat het EHRM regelmatig in het midden of en waarom een bepaald belang precies als 'eigendom' kan worden aangemerkt, om direct over te gaan tot de vraag of de inbreuk proportioneel was of niet. In het licht van het belangrijke onderscheid tussen interpretatie en toetsing is een dergelijke aanpak onwenselijk. Beargumenteerd wordt daarom dat het Hof meer duidelijkheid moet verschaffen betreffende precieze reikwijdte van Artikel 1 EP in sociale zekerheidskwesties, terwijl ook de proportionaliteitstoets transparanter zou moeten zijn. Het zou zinvol kunnen zijn als het Hof daarbij een duidelijker onderscheid maakt tussen kwesties die essentiële sociale zekerheidsaanspraken betreffen, dan wel vermeende discriminatie of de bescherming van kwetsbare groepen, en zaken die gaan over meer 'perifere' klachten. Ongeacht de gewoonte van het Hof om in zaken over sociaaleconomisch beleid een ruime *margin* te laten, zou, als kern-sociaalecoomische kwesties aan de orde zijn, een 'kernrechtperspectief' ervoor kunnen zorgen dat een striktere toets wordt aangelegd en duidelijk maken waarom een dergelijke toets gerechtvaardigd is.

Hoofdstuk 11 presenteert de uiteindelijke conclusies. Het brengt de verschillende onderdelen van het onderzoek samen en concludeert dat het ontwikkelde kernrechtperspectief daadwerkelijk inpasbaar zou zijn in de rechtspraak van het EHRM. Zo af en toe verwijst het Hof al naar het belang van het beschermen

van de 'essentie' van fundamentele rechten, en biedt het (extra) bescherming aan kwetsbare groepen en tegen discriminatie. Een meer expliciet kernrechtperspectief kan deze verschillende aspecten samenbrengen tot een coherente aanpak en op die manier bijdragen aan een principiëlere sociaaleconomische rechtspraak. Tot slot kan meer algemeen uit dit onderzoek worden opgemaakt dat in tijden waarin rechten in het algemeen zeer ruim worden uitgelegd, en rechterlijke beoordeling plaatsvindt door middel van proportionaliteitstoetsing, een duidelijke afbakening van (sociaaleconomische) rechten en/of een focus op de belangrijkste aspecten daarvan, nog steeds van belang kan zijn.

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Curriculum Vitae

Ingrid Leijten was born in 1984 in Tollebeek (Noordoostpolder), the Netherlands. After finishing her pre-university education at the Zuyderzee College in Emmeloord, and spending a year at the dance academy in Tilburg, she studied political science and law in Leiden and New York. In 2009 she finished her Masters in Political Science (with distinction) and Constitutional and Administrative Law (with distinction) in Leiden. Additionally, she completed the Talent Programme of the Graduate School of Legal Studies. In 2010 Ingrid obtained her LL.M. degree (Harlan Fiske Stone Scholar) from Columbia Law School in New York. During her studies she worked as a student-assistant for Professor Rikki Holtmaat and as an editorial assistant for the *Nederlands Tijdschrift voor de Mensenrechten/NJCM-Bulletin* (*Dutch Journal of Fundamental Rights*) and for the *Columbia Journal of European Law* (*CJEL*).

In 2010 Ingrid passed the New York State Bar Exam. She is admitted as an attorney-at-law to the New York State Bar.

Since September 2010, Ingrid works as a researcher and lecturer at the Department of Constitutional and Administrative Law of the Leiden Faculty of Law. In 2011 she started her NWO-funded PhD research under the supervision of Professor Janneke Gerards (Radboud University Nijmegen). She has been a visiting researcher at the Max Planck Institute for Comparative Public Law and International Law In Heidelberg, Germany, and at the Human Rights Centre of Ghent University in Belgium. Ingrid regularly publishes on the topic of her PhD research as well as on other issues related to (the legitimacy of) supranational fundamental rights protection, judicial reasoning, and socio-economic rights. She is a staff annotator at *European Human Rights Cases* (*EHRC*) and a regular contributor to various blogs.

As of September 2015, Ingrid will be working as an assistant professor at the Department of Constitutional and Administrative Law in Leiden.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2014 and 2015

MI-224 A.F. Rommelse, *De arbeidsongeschiktheidsverzekering: tussen publiek en privaat. Een beschrijving, analyse en waardering van de belangrijkste wijzigingen in het Nederlandse arbeidsongeschiktheidsstelsel tussen 1980 en 2010*, (diss. Leiden), Leiden: Leiden University Press 2014, ISBN 978 90 8728 205 9, e-ISBN 978 94 0060 170 3

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