PROTECTING SOCIO-ECONOMIC RIGHTS THROUGH THE EUROPEAN CONVENTION ON HUMAN RIGHTS: TRENDS AND DEVELOPMENTS IN THE EUROPEAN COURT OF HUMAN RIGHTS*

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Abstract

This article is concerned with jurisprudential trends and developments in the protection of socio-economic rights through the interpretation of the European Convention on Human Rights (ECHR).[1] It focuses on the potential to gain access to healthcare and welfare services, and the financial means to acquire them, through the development of positive obligations in ECHR rights.[2] It demonstrates that, under Articles 3 and 8 ECHR, there has been progress towards a principled jurisprudence of positive obligations to provide for the basic human needs of vulnerable dependent individuals in a range of contexts, although the limits of state responsibility remain fluid and contested. Secondly, it argues 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. Nevertheless, it is suggested that recent developments in Article 14 jurisprudence, particularly as demonstrated in the case of *D.H.* v. *Czech Republic*[3] signal a

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1 Coinciding with the ICJ Report, *Courts and the Enforcement of Economic Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: ICJ 2008) (hereinafter, 'the ICJ Report') there has been a flowering of international and comparative research on the nature and justiciability of socio-economic rights and on jurisprudential techniques to protect them at international regional and domestic level.

See M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: CUP 2008); M. Tushnet, *Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press 2008); S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: OUP 2008); D. Bilchitz, *Poverty and Fundamental Rights* (Oxford: OUP 2007); E. Palmer, *Judicial Review, Socio-economic Rights and the Human Rights Act* (Oxford: Hart 2007); D. Barak-Erez and A.M. Gross (eds.), *Exploring Social Rights: Between Theory and Practice* (Oxford: Hart 2007); F. Coomans (ed.), *Justiciability of Socio-economic Rights: Experiences from Domestic Systems* (Antwerp: Intersentia 2006); J. Vande Lannotte, J. Sarkin, T. De Pelsmaeker and P. Van Der Auweraert (eds.), *Economic, Social and Cultural Rights: An Appraisal of Current International and European Developments* (Antwerp: Maklu 2002).

A small number of authors, expressing different degrees of optimism and different comparative perspectives, have analysed the potential to protect socio-economic rights through the ECHR. See L. Clements and A Simmons, 'European Court of Human Rights: Sympathetic Unease', in M Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: CUP 2008); C. O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) *European Human Rights Law Review* 583; E. Brems, 'Indirect Protection of Social Rights by the European Court of Human Rights', in D. Barak-Erez and A.M. Gross (eds.), *Exploring Social Rights: Between Theory and Practice* (Oxford: Hart 2007) 135; O. De Shutter, 'The Protection of Social Rights by the European Court of Human Rights', in J. Vande Lannotte, J. Sarkin, T. De Pelsmaeker and P. Van Der Auweraert (eds.), *Economic, Social and Cultural Rights: An Appraisal of Current International and European Developments* (Antwerp: Maklu 2002) 207-239.

2 For a general review of the development of positive obligations under the ECHR, see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart 2004).

3 Application No. 57325/00, 13 November 2007.

shift from a narrow formalistic approach to dealing with issues of discrimination to one that may be more capable of addressing systemic inequalities in the distribution of social provisions to vulnerable individuals and marginalised groups.

1 Introduction

It is well known that, with the exception of the First Protocol,[4] the ECHR focuses almost entirely on the traditional canon of civil and political rights. At first sight, it has little to say about the protection of other great freedoms from want and squalor or the promotion of 'social progress and better standards of life in larger freedom', as aspired to in the Preamble to the Universal Declaration of Human Rights (UDHR). Nevertheless, as long ago as *Airey* v. *Ireland*,[5] the European Court of Human Rights (ECtHR) recognised that there is an overlap in the ECHR between civil and political rights, on the one hand, and socio-economic rights, on the other, a view that it has continued to endorse.[6] Thus, although mindful of the limits of its legitimate intervention in national resource allocation policy, the Court has continued to lay the foundations for a body of socio-economic rights jurisprudence through an incremental interpretation of the traditional canon of civil and political rights and the development of positive state obligations in Articles 2, 3 and 8 and Articles 6 and 14 ECHR.[7]

Legal strategies for gaining access to health services, social care, shelter or indeed the financial means to acquire them through the interpretation of ECHR rights fall into distinct albeit often overlapping categories. In the first category, individuals or groups have tested the scope of positive obligations under Articles 2, 3 and 8 ECHR to provide basic health and welfare services or financial support for vulnerable or destitute individuals living at the margins of human existence without social support.[8] The second approach, in which the vulnerability or deprivation of claimants may not be directly at issue, has focused on the indirect protection of socio-economic rights through interpretations of the fair-trial right in Article 6 ECHR or the non-discrimination provision in Article 14 ECHR. Thus, it is notable that overall the cases explored in this article evaluate the potential to protect rights of the kind enshrined in Articles 9 and 11-14, of the International Covenant on Economic Social and Cultural Rights (ICESCR) of 1996[9] and Article 27 of the Convention on the Rights of the Child (CRC),[10] that are not confined to persons who are economically active. Moreover, it is also notable

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4 Articles 1 and 2 of the First Protocol concern, respectively, the right to property and the right to education.

5 In *Airey* v. *Ireland*, A.32 (1979), (1979-1980) 2 EHRR 305, the Court stated that there is no watertight division between socio-economic and civil and political rights and that the fact that ECHR rights have a social dimension should not of itself be a barrier to justiciability. The Court decided that although Article 6(3) only made explicit reference to legal aid in criminal matters, a right to legal aid in civil matters could be inferred from the right to a fair trial. Moreover, Ireland had violated that right.

6 *Stec* v. *UK*, Admissibility decision, (2005) 41 EHRR SE 18, at para. 52.

7 For a comprehensive review of the development of positive obligations under the ECHR, see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart 2004). For an early discussion of the scope of positive obligations expressly mandated by the right to liberty and security in Article 5, see *De Wilde, Ooms and Versyp* v. *Belgium*, A.12 (1971), (1979-1980) 1 EHRR 388. For positive obligations deemed to arise from the text of Article 6 (the right to a fair trial), see *Artico* v. *Italy*, A. 37 (1980), (1981) 7 EHRR 52.

8 See O'Cinneide, above note 1, at 583. The author argues that 'three principal "gateways" exist via Arts 2, 3 and 8 ECHR through which this protection against destitution can be sought: each "gateway" opens up the possibility of establishing a claim under the Convention based directly on the fact that a state of destitution exists which poses a threat to life, or forces individuals into degrading living conditions'. See also Clements and Simmons, above note 2, at 412. The authors argue that the ECtHR is prepared to examine the state's responsibility – primarily in terms of its obligations under Articles 3 and 8: (a) where gross socio-economic deficits are directly or indirectly attributable to state failure; (b) where severe socio-economic deficits are neither directly nor (obviously) indirectly attributable to state failure to provide.

9 This group of rights to an adequate standard of living, including food, clothing and housing (Article 11), health (Article 12) and education (Articles 13 and 14) are generally regarded as the 'social rights' referred to in the title of the ICESCR.

10 Article 27 CRC enshrines the right of every child to a 'standard of living adequate for the child's physical mental physical and moral and social development.'

that, although rights to property and education have long been regarded as the only substantive socio-economic rights in the ECHR, recent interpretations of Articles 6 and 14 ECHR have come close to the creation of a substantive right to social security that mirrors the right in Article 9 ECHR.[11] Thus, the purpose of this article is to examine trends, developments and obstacles in relation to the protection of a range of general and substantive socio-economic rights (of the kind enshrined in the ICESCR) through the ECHR.

At the heart of the inquiry lie key questions about the limits of an old-fashioned instrument, primarily dedicated to the protection of civil and political rights, to impose positive obligations on states parties for the protection of human rights in the socio-economic sphere. It has therefore been useful from time to time to note the advantageous drafting of comparable provisions in more modern constitutions that similarly focus on the traditional canon of civil and political rights or the approach that has been taken in constitutions such as that of South Africa, where measured and dedicated protection has been afforded to both types of rights.[12] However, rather than focusing on the limitations of the ECHR itself, our purpose here has been to evaluate the incremental approach of the ECtHR to developing the social dimension of the civil and political rights in the ECHR and to consider the potential for a principled approach that would allow the ECtHR to guide the normative development of the rights more effectively, without encroaching on the political resource allocation terrain of national authorities. Moreover although it is conceded that there has been progress towards the development of a principled normative framework for the protection of socio-economic rights of poor and disadvantaged individuals living at the margins of human existence in the member states, it is argued that the ECtHR's incremental approach to the development of positive obligations and its variable use of the malleable margin of appreciation continues to undermine progress towards a principled justificatory model of adjudication for the protection of human rights in the socio-economic sphere.

Thus, in the remainder of Part I, we briefly outline the ECtHR's approach to the development of positive obligations, highlighting the jurisprudential and constitutional difficulties of identifying common standards for the protection of socio-economic rights in 47 member states with very different cultural, political and socio-economic histories. Next, in Part II, we demonstrate that, despite the willingness of the ECtHR to accept that there is indeed a social dimension to many of the Convention rights, its approach to the incremental development of positive obligations has been flawed by a deep-seated reluctance to acknowledge the moral and existential overlap between civil and political and socio-economic rights, to confront the inadequacy of the negative-positive distinction as a basis for determining their justiciability or 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.[13]

Finally, against this background, reviewing what is now a considerable and growing body of case law, we analyse in Parts III and IV the extent to which the Court's approach to the identification of positive obligations continues to undermine the development of a principled justificatory framework for the protection of socio-economic rights

[11] The right to social security in Article 9 is a hybrid right that straddles the boundaries of economic work-related rights.

[12] Rights in the South African Constitution have been formulated in three different ways, each of which requires different responses from the courts. See generally D. Brand, 'Introduction to Socio-economic Rights in the South African Constitution', in D Brand and C. Heyns (eds.), *Socio-economic Rights in South Africa* (Pretoria: Pretoria University Law Press 2005) 1-56. In respect of the second category of rights, which includes the majority of specific socio-economic rights (access to adequate housing, healthcare, food and water, and social security), the state is required to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right. By contrast, the third category, which has been negatively formulated, prohibits the state from interfering with the enjoyment of other rights. For example, in the case of the right to housing in Article 26, the state is directly prohibited from evicting people from their homes 'without an order of the court made after considering all the relevant circumstances.' In addition, Article 27 contains a negatively framed right 'prohibiting the refusal of emergency medical treatment.'

[13] See Fredman, above note 1, especially Chapter 1.

in member states. Moreover, before proceeding, it should be noted that, rather than cataloguing the potential to protect a list of substantive rights – medical care, education, housing or social security – our evaluation has been conceptually organised around the two main strategic approaches described above. Thus, whereas the examination of case law in Part III concerns the potential to gain access to a range of basic health and welfare services through the development of a jurisprudence of positive obligations in Articles 2, 3 and 8 ECHR, Part IV focuses on the potential to achieve fairness in the distribution of public goods through the development of positive obligations in Articles 6 and 14 ECHR.

1.1 Socio-economic Rights, Positive Obligations and the Role of the ECtHR

The use of parts of the traditional canon of civil and political rights to protect individuals against threats to human rights in the socio-economic sphere is not novel. The right to life, due process or non-discrimination provisions in domestic bills of rights have been widely used, with varying success, to gain access to socio-economic entitlements.[14] Moreover, in the international arena, longstanding arguments that, in contrast to civil and political rights, socio-economic rights are non-justiciable (in light of their positive orientation and resource-dependent nature) have lost much of their traditional force. Thus, it is now generally conceded that, during the Cold War when the international normative framework for the protection of human rights was in the process of negotiation by the United Nations, ideological perceptions about differences between the two sets of rights were allowed to undermine the persuasive logic of their unitary moral and existential foundations.[15]

Nevertheless, it must also be accepted that the constructs of civil and political and socio-economic rights are products of different political philosophies, with correspondingly different ideas of the relationship between individual and state and the role of the individual as a citizen in society. Whereas civil and political rights are creatures of political philosophies that conceive of the state as a potential threat to individual liberty,[16] socio-economic rights are associated with moral and political theories of citizenship and a conception of the state in which welfare protection is regarded as a fundamental precursor to the attainment of individual freedom.[17] However, it is also clear that, despite the polarisation of these ideological constructs since the end of World War II, a more holistic conception of social democracy has prevailed in Western Europe, whereby governments have accepted international and domestic obligations to safeguard traditional democratic freedoms while at the same time ensuring varying levels of economic and social provision.

It is therefore entirely consistent with such a model of social democracy that the right to life in Article 2 should be interpreted in accordance with positive state obligations to provide resources for a public or private police force that protects individuals against the life-threatening intrusions of violent crime, whether committed by state agents or third parties. Further, it can easily be accepted that, in order to give practical effect to the ECHR rights in the context of police custody or prison detention, where individual liberties are most seriously truncated, Articles 2, 3 or 8 ECHR should be interpreted in accordance with affirmative state duties to provide timely healthcare or to take preventive measures against threats to life, such as the provision of essential medicines or condoms to protect against AIDS, or to provide conditions of human existence that are consistent with maintaining the psychological and physical integrity of vulnerable claimants. However, beyond those circumstances of dependency and state control, there

[14] For an overview of the indirect protection of socio-economic rights though civil and political rights in a range of contexts, see the ICJ Report, above note 1, at 65-73.

[15] The preamble of the ICCPR states 'the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his [or her] civil and political rights as well as his [or her] economic, social and cultural rights.'

[16] See generally F. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press 1960); and C. Fried, *Right and Wrong* (Cambridge, MA: Harvard University Press 1994).

[17] See generally T.H. Marshall, *Citizenship and Social Class* (London: Routledge 1959).

remain difficult questions about the extent to which governments should be obliged to make basic provision for vulnerable or destitute individuals, irrespective of whether social disadvantage or extreme deprivations can be attributed directly or indirectly to the conduct of the state.

Moreover, turning to consider the indirect protection of socio-economic rights through the fair trial clause in Article 6 or the non-discrimination provision in Article 14, here too we find difficult questions about the role of the ECtHR in reviewing policies and administrative procedures for the fair distribution of socio-economic entitlements in 47 member states. Not only have states parties developed very different mechanisms for determining what constitutes due process in relation to different types of discretionary socio-economic entitlements: they have also adopted very different policies for funding health or welfare services and housing and applied different eligibility criteria, such as age, disability, nationality or other factors, in setting financial limits to social security benefits.

Thus, recent challenges founded on Article 6 or 14, taken in conjunction with Article 1 of Protocol No. 1, have highlighted the extent to which the incremental approach of the ECtHR to the interpretation of Convention rights can conflict with administrative procedures or policies for the fair distribution of socio-economic entitlements in member states. For example, the recent case of *Tfsayo* v. *UK*[18] (Article 6) has called into question the legitimacy of internal administrative procedures that had hitherto been widely accepted in UK courts as constitutionally appropriate for the adjudication of appeals against the refusal of social housing or welfare benefits. Moreover, the pragmatic judgment of the ECtHR in *Stec* v. *UK*,[19] which concluded that non-contributory social security payments are individual possessory entitlements within the meaning of Article 1 of Protocol No. l, has been particularly difficult to reconcile with the traditional reticence of UK courts in reviewing the fairness of social security entitlements, on the grounds that 'contributions to the social security fund are hardly distinguishable from general taxation'.[20]

Article 14 is the repository of the fundamental principle of equality that suffuses the Convention in its entirety and which might have been expected, as in other constitutions, to play a more prominent role.[21] However, there has been longstanding frustration not only with the ECtHR's restricted application of Article 14 but also with the potential for national authorities to *justify* discrimination within the narrow grounds enumerated and with the wide margin of appreciation variably deployed by the ECtHR in Article 14 disputes.[22] Moreover, there has been disappointment regarding the formalistic approach of the ECtHR to issues of direct discrimination[23] and the Court's failure to develop, through Article 14, a more sophisticated model of substantive equality that might have the potential to address more effectively the underlying causes of systemic disadvantage and discrimination across member states.[24] Nevertheless, in the past few

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18 Application No. 60860/00, November 2006.

19 See above at note 6.

20 Lord Hoffman, *R (Carson)* v. *Secretary of State for Work and Pensions* [2005] UKHL 37, at para. 12.

21 The free-standing equality provision under Section 15 of the Canadian Charter spells out that every individual has a right to equal benefit and protection of the law without discrimination and in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Similarly, Article 26 ICCPR provides that 'all persons are equal before the law an are entitled without any discrimination to the equal protection of the law … and [shall] guarantee to any person effective protection against discrimination on [the enumerated grounds] or other status. By comparison, Article 14 has been restricted in two ways: the substantive arena in which discrimination or prejudice is forbidden has been restricted to the 'enjoyment of the rights and freedoms set forth in [the] Convention'. The grounds upon which discrimination have been forbidden are restricted to sex, race colour, language, religion, political or other opinion, national or social origin, association with a national minority, birth or 'other status'. See G. Moon, 'Complying with Its International Human Rights Obligations: The United Kingdom and Article 26 ICCPR' (2003) 3 *EHRL Rev* 283.

22 Lord Lester of Herne Hill, 'Equality and UK Law: Past Present and Future (2001) *Public Law* 7.

23 See generally O. Arnardottir, *Equality and Non-Discrimination under the European Convention on Human Rights* (The Hague: Kluwer 2002).

24 There is a rich literature on the contrasting nature of open-textured 'substantive' models of equality as opposed to 'formal' models, which tend to look for rational or reasonable justifications for differences in treatment between analogously placed persons or situations. See generally N. Bamforth, M. Malik and

years, developments in ECHR jurisprudence, as most keenly exemplified in the case of *D.H.* v. *Czech Republic*,[25] have hinted at the potential for progress from a formalistic approach based on ostensibly neutral comparisons between the treatment of analogous groups to one that is capable of addressing underlying causes that contribute to systemic inequalities in the accessibility of social provision.[26]

Recognition that positive action may be necessary to ensure that states parties and individuals conform to human rights standards embodied in the ECHR may be viewed as progress from an individualised system of compensatory justice to an international regime that participates more widely in the monitoring and development of international human rights standards.[27] Nevertheless, for states parties, 'dynamic' developments in ECHR jurisprudence, which dictate the imposition of positive obligations, may not only be difficult to square with their understanding of the negative obligations that they had undertaken at the time of ratification:[28] positive obligations in sensitive areas of policy, such as immigration or national security or social provision, may also be in tension with dominant values and customs in individual member states and the ECtHR's duty to respect them. To what extent can core principles and values enshrined in ECHR rights serve to overcome the problems of national difference in these areas?

Problematically, the Court has declined to offer a single theory to explain the expansion of affirmative duties in ECHR rights.[29] In some cases, the identification of positive duties has been tersely explained by reference to an overriding obligation 'to ensure to everyone the rights and freedoms set out in the Convention'[30] or to ensure that rights guaranteed by the Convention are not merely 'theoretical and illusory' but 'practical and effective'.[31] In other cases, judicial creativity has been justified by reference to the general interpretative obligation to ensure that the 'the object and purpose' of the Convention are fulfilled.[32]

Moreover, over time, commentators have accepted the increased inference of affirmative duties as a necessary part of the *effective* protection of ECHR rights[33] or as a facet of the 'dynamic interpretation of the Convention, in light of changing social and moral assumptions'.[34] However, as we shall see further in Part II, there is continuing concern about the ECtHR's failure to provide a principled theory of positive obligations by which to define more clearly the limits of state responsibility for the protection of ECHR rights, particularly in the area of socio-economic needs.[35]

C. O'Cinneide, *Discrimination Law: Theory and Context – Text and Materials* (London: Sweet & Maxwell 2008). See also S. Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide Resources' (2005) 21(2) *SA Journal on Human Rights* 163 at 167; see also S. Fredman and S. Spencer, 'Beyond Discrimination: its Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes' (2006) *EHRLR* 598-606.

25 See above at note 3.

26 For a recent critique, see R. O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' (2009) 29(2) *Legal Studies* 211.

27 See A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon 1993).

28 The Convention entered into force in 1953 and has been ratified by all forty-seven member states of the Council of Europe.

29 See *Plattform "Arze fur das Leben"* v. *Austria*, A.139 (1988), (1990) 12 EHRR 1.

30 Article 1 ECHR.

31 *Marckx* v. *Belgium*, A.31 (1979), (1979) 2 EHRR 330.

32 The Convention is an international treaty and as such should be interpreted in accordance with the Vienna Convention on the Law of Treaties (1969), which provides in Article 31(1) that '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 light of its object and purpose.'

33 See J.G Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester: MUP 1993) 102.

34 D. Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: OUP 2002, 2nd ed.).

35 For example, see the criticism of this aspect of the ECtHR jurisprudence by the UK House of Lords in *N* v. *UK* (2008).

2 Principle or Pragmatism: Developing Positive Obligations in ECHR Rights

2.1 The Negative-Positive Dichotomy Revisited: To 'Respect, Protect and Promote the Rights'?

Since *Airey*, the ECtHR has developed positive obligations across the full range of Convention rights. However, it is well known that the phenomenon can be most fully demonstrated in relation to Article 8 ECHR. Thus, in conjunction with expansive interpretations of the substantive elements of Article 8 (private and family life, home and correspondence), the Strasbourg organs have increasingly allowed the malleable notion of 'respect' in Article 8(1) to support the development of a wide range of both positive and negative obligations in the ECHR.[36] Moreover, although at first sight there is little to associate the negative formulation of Article 3 with the imposition of positive obligations, the ECtHR has concluded during the past decade that states parties may be required to undertake a growing range of affirmative duties in order to be Article 3 compliant.[37]

Furthermore, the imposition of positive duties for the protection of rights in Articles 2, 3 and 8 ECHR is no longer confined to traditional areas of governmental responsibility, such as national security, state detention or the administration of justice. It is now a commonplace that the ECtHR has indicated a readiness, albeit somewhat fluctuating, to impose positive obligations on states parties in widening areas of governmental responsibility, including the protection of the environment, child protection and public health and welfare systems.[38] Therefore, in some cases, drawing explicitly on core values of equality, respect for human dignity and psychological and physical integrity, which are increasingly seen as immanent in all ECHR rights, the Court has hinted at the potential for a duty to provide public health care under Article 2,[39] to ensure appropriate medical care or welfare for vulnerable individuals under Article 3 in extreme circumstances[40] and to ensure access to welfare provision in the form of housing for vulnerable applicants under Article 8,[41] even in cases where there has been no allegation of a direct interference with the right in question.

Nevertheless, it is notable that, in its dynamic development of Convention rights, the ECtHR has continued to use the perfunctory language of positive and negative duties – an approach that is in direct contrast to the modern tripartite analysis that identifies a cluster of correlative obligations 'to protect, respect and fulfil' inherent in all human rights, whether civil and political or socio-economic.[42] As we have seen in the ICJ Report, this prescriptive and functional model, when applied in the international human rights discourse and in modern constitutional drafting, not only addresses the conceptual weaknesses of the positive-negative classification of rights but also recognises that particular problems of adjudication and enforcement arise in cases where human rights compliance necessitates the imposition of long-term financial obligations on governments, whatever the category of the right.

However, as amply demonstrated by Alistair Mowbray, although couched in the language of negative-positive rights, over time the ECtHR has in practice identified a range of procedural and substantive obligations that correspond exactly to those found

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36 See C. Warbrick, 'The Structure of Article 8' (1998) *EHRL Rev* 32-44.

37 See Mowbray, above note 2, 42-65.

38 See D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Oxford: OUP 2009) 18-21.

39 See *LCB* v. *United Kingdom* (1998) 27 EHRR 212; *Cyprus* v. *Turkey* (2002) 35 EHRR 71.

40 *D* v. *United Kingdom* (1997) 24 EHRR 423; *O'Rourke* v. *United Kingdom*, Application No. 39022/97, 26 June 2001 (unreported).

41 *Marzari* v. *Italy* (1999) 28 EHRR CD 175.

42 See the ICJ Report, above note *, at 42-54 for the use of tripartite classification (to respect, protect and fulfil) in breaking down barriers to the justiciability of socio-economic rights.

in Henry Shue's elaborate taxonomy[43] – not least the duty to avoid depriving a person of his or her basic rights (the duty to respect) or the duty to take procedural steps to promote (facilitate) rights.[44] Therefore, when we examine the full range of positive obligations across the ECHR rights, although not articulated by the ECtHR, we find that the implication of affirmative duties has been consistent with the recognition that threats to *all* human rights require a range of protective and preventive measures that take into account the context in which the violation occurs, the seriousness of the threat and the immediacy of the action necessary to fulfil or facilitate the protection of the right. Thus, among those commentators who have recently posited a more principled lens in Articles 3 and 8 ECHR through which issues of state responsibility for extreme socio-economic deficits can be examined, Clements and Simmons have suggested that, when analysing the impact of the Convention, it is no longer helpful to follow the two broad categories 'state action denied' and 'state action demanded'. Rather, it is suggested that, although still artificial, a better approach is to analyse according to context: to 'what degree it can be said that the State [itself] is culpable and just how severe is the destitution in issue?'[45]

2.2 State responsibilities, resources and the variable margin of appreciation

Not only has the ECtHR's immersion in the language of negative-positive rights impeded the development of a more sophisticated normative framework that applies to both sets of rights,[46] but the well-known fallacy that positive obligations (in contrast to negative duties to refrain) invariably impose inappropriate financial burdens on states parties has further contributed to a defensive and fragmented approach to the interpretation of positive obligations and a reluctance by the ECtHR to determine the liability of states parties for breach.[47] Moreover, until recently, academic critiques have also focused on issues of constitutional propriety rather than on the Court's failure to develop a coherent principled approach to the development of positive obligations for the effective protection of ECHR rights in member states.

Thus, while recognising that the principle of effectiveness justifies the inference of a limited range of affirmative duties in ECHR rights, in one of the earliest critiques of their expansion, in a passage that echoes traditional objections to the inference of positive duties in the US Constitution,[48] Professor Merrills argued that the negative orientation of the Convention rights should, except in a small number of cases, inhibit the expansion of positive obligations by the ECtHR. Therefore, in questioning what he saw as the incautious expansion of positive obligations in the ECHR rights, Professor Merrills pointed in particular to the dangers of their expansion in the areas of social and economic policy. Although agreeing that governments that have signed the ECHR may have understood that policies would have to be modified in some areas, he argued that 'what a government may not bargain for, is to find itself put to considerable trouble and expense … as a result of an obligation to advance particular social or economic policies which it may not wholly support'.[49] Nevertheless, only on rare occasions have the ECHR organs adopted an originalist stance on the interpretation of ECHR rights.[50]

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43 See H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton, NJ: Princeton University Press 1996, 2nd ed.) 'Afterword' (at 155).

44 For a comprehensive analysis of the relationship between Henry Shue's taxonomy and the ECHR jurisprudence, see A. Mowbray, above note 2, at 221-228.

45 Id., at 412. In a landmark decision, *R. (on the application of Limbuela)* v. *Secretary of State for the Home Department*, the UK House of Lords concluded that state responsibility is engaged where positive state action drives individuals into inhuman and degrading living conditions. For a full discussion of the context of the case which concerned the enactment of legislation denying support and the possibility of work from destitute asylum seekers, see Palmer, above note 1, at 254-270.

46 See K. Starmer, 'Positive Obligations Under the Convention', in Jowell and Cooper (eds.), *Understanding Human Rights Principles* (Oxford: Hart 2001) 139.

47 For examples of negatively framed rights in Articles 26 and 27 of the South African Constitution, see above note 12.

48 See *DeShaney* v. *Winebago Social Services Department* (1989) 489 US 189.

49 Merrills, above note 33, at 106.

50 *Marckx* v. *Belgium*, above note 31.

Instead, the Court has continually affirmed its intention to treat the Convention as a dynamic living instrument, which must adapt to changing political and social mores in member states.[51]

It is true that the Convention primarily provides a set of negative restraints on government action, which at the time of drafting were aimed at the protection of traditional civil and political freedoms. However, it may also be argued that there is a very important difference between the nature of the ECHR and the US Constitution. Unlike the latter, whose text has often been deemed to be hostile to any form of positive state intrusion in the original constitutional settlement, the ECHR is an international convention dedicated to the *protection* of human rights. Thus, under Article 1 ECHR, the general obligation on states parties is to '*secure* to everyone in their jurisdiction the rights and freedoms defined in … the Convention.' Therefore, despite its primarily negative orientation and its embodiment of traditional civil and political liberties, the ECtHR has recognised that, in contrast to the US Constitution, rather than primarily to 'safeguard individual freedom from over mighty government', the purpose of the Convention is 'is to safeguard human dignity, even in the sphere of individuals among themselves'.[52]

Nevertheless, the Strasbourg organs have continued to emphasise that, in sensitive areas of social policy involving complex resource allocation issues, especially those involving individual claims for priority in the allocation of health or welfare resources, supervision by a supranational court should give way to state discretion in enforcing its own laws.[53] However, this wide 'margin of appreciation' has been deployed variably by the ECtHR. On the one hand, it has been used to connote a general principle of judicial review, whereby the standard of scrutiny should be moderated in accordance with the complexity or sensitivity of the subject matter and the greater potential for appropriate *adjudication* by domestic courts.[54] On the other hand, it has also been used more generally to defer on constitutional grounds to the propriety of decision making as regards resource allocation by the national authorities themselves.[55] Thus, in such cases, the ECtHR relies on a general interpretative obligation to respect domestic cultural traditions and values when determining the meaning and scope of ECHR rights, which is a principle of general application in international law.[56]

There are divergent views on the efficacy or constitutional propriety of the margin of appreciation deployed in Strasbourg. For constitutionalists who emphasise the need to respect the diversity of values and different democratic traditions in member states, the margin of appreciation is applauded. However, for those who approve the development of the Court's constitutional role in promoting common values and standards of respect for human dignity in a growing family of European democratic states, the use of the

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[51] *Tyrer* v. *UK*, A.26 (1979-1980) 2 EHRR 1. For a recent overview of the 'dynamic or evolutive' interpretation of the ECHR, see Harris, O' Boyle and Warbrick, above note 38, at 7-8.

[52] *X* v. *Netherlands* (1986) 8 EHRR 235. See Starmer, above note 46, at 203.

[53] For a recent discussion of the concept of the 'margin of appreciation' deployed by the ECtHR, see Harris, O'Boyle and Warbrick, above note 38, at 11-14.

[54] See *Sentges* v. *Netherlands*, Application No. 27677/02, Judgment of 18 July 2003, where the ECtHR starkly reaffirmed this principle. Finding the applicant's claim to be 'manifestly unfounded', the ECtHR stated that '… 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 States in this respect in determining the steps to be taken to ensure compliance with the Convention… This margin of appreciation is even wider when, as in the present case, the issues involve an assessment of the priorities in the context of the allocation of limited State resources…'.

[55] See, for example, *Handyside* (1979-1980) 1 EHRR 737, at paras. 48-51; See also *Evans* v. *UK* (2007) 46 EHRR 7287, at para. 77G: It will also be wide where there is no consensus among the members of the Council of Europe either as to the relative importance of interests at stake or the best means of protecting it, especially where the case raises sensitive moral or ethical issues. Compare the use of the concept to limit the adjudication of positive rights in *Chapman* v. *UK*. See the ECtHR comment in *Chapman v UK*, in text relating to footnote 124.

[56] See generally Harris, O'Boyle and Warbrick, above note 38, at 13-14. On the principle of subsidiarity in the Convention, see R.St.J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff 1993) at 76.

doctrine to restrict the standard of review may reflect an abnegation of the Court's primary duty to determine the proportionality of state conduct in relation to the rights protected by the Convention.[57]

2.3 Methodological Issues: Imposing a Principled Jurisprudence of Positive Obligations on the Negative Convention Framework

It is well known that the Convention framework discloses a dual purpose. In upholding the principle of democracy, it seeks to balance the rights of the individual in society against other public interests. At the same time, in accordance with the rule of law (see the Preamble), it seeks to ensure that the 'tyranny of the majority' is not allowed to interfere disproportionately with the rights of minorities in member states.

Thus, consistent with this duality of purpose, the Strasbourg organs have not only recognised the principle that 'inherent in the framework of the Convention is a search for a fair balance between the demands of the whole community and the protection of fundamental rights',[58] but have also sought to ensure that limitations imposed on individual rights are imposed only if they are 'prescribed by law, intended to achieve a legitimate objective and necessary in a democratic society'. Therefore, suffusing the Convention in its entirety is the concept of proportionality, which requires a judicial evaluation of whether state interference is 'necessary in a democratic society'. In practice, moreover, this requires that 'restrictions on rights' must be justified by 'a legitimate aim' and one that is 'proportional to the need at hand', further interpreted in the case law as meaning a 'pressing social need'.[59]

In addition to general principles for determining the legitimacy of the interference, in the case of some rights, specific limits have been implied or, as in Articles 8-10, expressly provided in the articles themselves. Thus, for example, Article 8(2) provides that

> 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 well-being 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.

Therefore, in complaints founded on allegations of negative intrusion, a sophisticated jurisprudential method has evolved, whereby, once it has been demonstrated to the satisfaction of the Court that a complaint falls within the ambit of a particular Convention right, limitations and restrictions of the kind included in Articles 8-11 ECHR are applied in order to determine whether there has been a substantive violation.[60]

Thus, typically, in Article 8[61] claims founded on allegations of state interference, the Court decides first whether the right in Article 8(1) encompasses a specific duty, for example to involve natural parents in the decision-making process when children have been removed into care,[62] then whether there has been an interference with that right, before seeking a fair balance between the competing interests of the individual and the community, as required by the defensive precepts in Article 8(2). Thereafter, once a duty has been recognised as falling within the scope of the right in Article 8(1), the

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57 For a critique of the doctrine, see P. Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism' (1998) 19 *Human Rights Law Journal* 1, where he compares the roles of the ECtHR and the US Supreme Court. See also K.A. Kavenaugh 'Policing the margins: rights protection and the European Court of Human Rights' (2006) 4 *EHRLR* 422.

58 *Soering* v. *United Kingdom* (1989) 11 EHRR 439, at para. 89.

59 *Handyside* v. *United Kingdom* (1979-80) 1 EHRR 737, at para. 48.

60 This format and wording is closely followed in Articles 9-11, although the restrictions, some of which are tailored to the rights, are different. For example, only Article 8(2) refers to the economic well-being of the country.

61 Article 8 reads as follows: '(i) 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 well-being of the country…'.

62 See, for example, *Johansen* v. *Norway* (1997) 23 EHRR 33.

state, as duty bearer, is required by Article 8(2) to show that any interference with the complainant's right is 'in accordance with the law … necessary in a democratic society … in the interests of … the economic well-being of the country … or for the protection of rights and freedom of others.'[63]

By this methodology, complainants have the benefit of the rigorous inquiry afforded by Article 8(2), which finally seeks to determine whether the measure impugned is necessary in a democratic society. For example, in cases where negative duties encompassed by Article 8 give rise to state expenditure,[64] Article 8(2) affords an internal mechanism of appreciation by which the Court must seek to balance the economic interests of the whole community and the rights and interests of others with those of the individual complainant. Moreover, despite the wide margin that the Strasbourg organs have notionally allowed to states parties in matters of resource allocation, in the case of *Lopez Ostra*,[65] which concerned the state's failure to protect the applicant against harm caused by toxic omissions from a privately owned chemical plant, it was firmly concluded that, in this exercise of appreciation under Article 8(2), a mere incantation of scarce resources will not be enough.[66]

However, commentators have suggested that a difference in the treatment of claims, for example under Article 8, can be found in practice, depending on whether they have been framed as allegations of negative or positive breaches of state duties.[67] This is because, it is argued, in complaints framed as positive breaches of duty (failure to protect the right), it is all too easy for the question of breach to be conflated with the logically prior question of the scope of the duty encompassed by Article 8(1).[68] It has therefore been argued that, in complaints framed as positive breaches of duty, both parties may lose the benefit of the complex balancing exercise that has traditionally followed the preliminary inquiry and which has marked the evolution of the ECHR as a sophisticated mechanism of differential rights adjudication.

Nevertheless, in *Powell and Rayner* v. *UK*,[69] anxious to dispel such concerns, the ECtHR was clear that whether the case was presented in terms of a positive state duty to take reasonable and appropriate measures to secure the applicants rights under Article 8(1) or in terms of 'an interference' by a public authority, the *same methodological approach* should be applied. Moreover, in response to similar concerns relating to allegations of breach of the positive aspects of Article 3, in *Rees* v. *UK*,[70] the ECtHR was clear that, despite the absence of an express requirement of proportionate interference, the defensive precepts in Article 8(2) are no less appropriate as yardsticks for determining the limits of state liability for positive breaches of duty under Article 3 ECHR. Nevertheless, in its analysis of the same question in Pretty v. UK,[71] the Court significantly held that

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63 Id., at paras. 78-95.

64 For example, the duty not to separate family members may have significant resource implications and in some cases give rise to a positive obligation to provide housing.

65 See *Lopez Ostra* v. *Spain* (1995) 20 EHRR 277.

66 Although the applicant complained of the state's failure to protect her against a direct violation of her rights (positive breach), the *Lopez* case was cast in terms of negative interference.

67 See C. Warbrick, 'The Structure of Article 8' (1998) *EHRLR* 1, at 32-44.

68 See the remarks of Judge Wildhaber in *Stjerna* v. *Finland* (1994) 24 EHRR 194, where it was recognised that it was difficult to address complaints founded on positive breaches of duty by means of the traditional methodological approach to determining whether there has been an intrusive violation of Article 8.

69 A.172 (1990) 12 EHRR 355. The applicants, who lived near Heathrow Airport, complained that excessive noise from the airport breached their right under Article 8 to respect for their private life and home. Therefore, as a preliminary issue, the government sought to question whether the complaint disclosed the necessary 'interference by a public authority', because Heathrow Airport and the traffic using it were not owned or controlled by the government or its agents.

70 A.106 (1986), (1987) 9 EHRR 56. The applicant claimed that refusal by the UK government to allow her legally to alter her birth certificate so as to reflect her gender reassignment constituted a positive breach of her Article 8 right to respect for private life.

71 Application No. 2346/02, ECHR 2002-III, (2002) 35 EHRR 1.

… while states may be *absolutely forbidden to inflict the proscribed treatment* on individuals within their jurisdictions, the steps appropriate to discharge a positive obligation may be *more judgemental, more prone to variation from state to state, more dependent on the opinion and beliefs of the people and less susceptible to any universal injunction*'.[72]

Thus, once again (as in the preceding sections of Part II), we find the ECtHR's reluctance to embrace a modern theory of human rights adjudication, which recognises: that issues of state liability (especially where resources are implicated) should be determined *not* by the negative or positive designation of the right in question but rather by the immediacy and seriousness of the threat, the degree – if any – of state involvement and the extent to which resources are implicated in the satisfaction of the right.

However, it would be misleading to suggest that the ECtHR has been able to ignore the reality that positive obligations are an integral aspect of all human rights rather than extraneous constructs superimposed on the existing catalogue of so-called negative rights. Nor has the ECtHR been immune from a growing trend in judicial review whereby constitutional and administrative courts are increasingly expected to shape our understanding of what is positively required of governments in protecting fundamental human rights.[73] Thus, as we turn to examine the potential to protect socio-economic rights through the interpretation of Articles 3 and 8 ECHR, we find that the reflexive incremental approach of the ECtHR described in the preceding sections sits uneasily beside the emergence of a more principled approach to the development of positive obligations, determined in accordance with the universal fundamental standards of dignity, equality and personal autonomy inherent in the Convention rights.

3 Developing Core Responsibilities for Socio-Economic Provision: Articles 2, 3 and 8 ECHR

During the past two decades, individuals and groups have increasingly tested the extent to which governments and public authorities might be held to account through the judicial system for failing to provide access to services such as health treatment, education and housing or for failing to prioritise the needs of vulnerable individuals or groups in the allocation of scarce resources.[74] Moreover, the ECtHR has not escaped this trend. Over time it has been required to provide a more coherent response (than previously afforded by the Commission) to some of the most challenging and often agonising decisions in public law adjudication: those in which the very essence of the dispute involves competition by individuals and groups over access to scarce resources, in many cases for the purpose of survival. Thus, here, as in other areas, we see the gradual transition of the ECtHR from a forum that has predominantly been required to give effective protection to rights for individual complainants before it to one that must address fundamental questions concerning the limits of state responsibility for the health and well-being of individuals in the jurisdiction, irrespective of whether failures can be attributed directly or indirectly to the conduct of the state, its agents or third parties. Thus, the ECtHR has been faced with questions concerning the boundaries of state responsibility for meeting basic human needs such as life-prolonging treatment for terminally ill patients, facilities to increase the ability of disabled people to live a fulfilling life in the community or basic provisions for those who have suffered extreme socio-economic deprivations or psychological injury as a result of conduct by the state, its agents or third parties.

3.1 The Unfulfilled Promise of Article 2: The Right to Life

As noted in the introduction to this article, recent strategies for the protection of socio-economic rights through the ECHR have focused on the potential to protect the health and welfare rights of vulnerable individuals through Articles 3 and 8 ECHR. However,

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72 Id., at para. 15 (emphasis added).

73 See D. Dyzenhaus, *The Unity of Public Law* (Oxford: Hart 2004) especially at 2-23.

74 See Langford, above note 1.

almost two decades ago, academic commentators had optimistically considered the possibility, that Article 2 might be developed by the ECtHR to furnish a positive general 'social right', encompassing health treatment, shelter and a healthy environment, of the kind developed by the Indian Constitutional Court.[75] Alternatively, it was suggested that the positive aspect of Article 2 might be fashioned into a right to health treatment of the kind enshrined in Article 11 of the European Social Charter.[76] Indeed, in *Osman* v. *the United Kingdom*,[77] in its preliminary opinion, the Commission famously speculated on the scope of this obligation:

> Whether risk to life derives from disease, environmental factors or from the intentional activities of those acting outside the law, there will be a range of policy decisions relating inter alia to the use of State resources, which it will be for Contracting States to assess on the basis of their aims and priorities, subject to these being compatible with the values of democratic societies and the fundamental rights guaranteed in the Convention… the extent of the obligation to take preventive steps may increase in relation to the immediacy of the risk to life. Where there is a real and imminent risk to life to an identified person or group of persons a failure by the State authorities to take appropriate steps may disclose a violation of the right to protection of life by law.[78]

Nevertheless, an examination of the case law shows that during the past two decades, in its interpretation of Article 2(1), the Court has not moved far from an orthodox conception of 'life protection' aimed at protecting individuals against unlawful killings in the traditional contexts of national security and policing. Thus, although the Court has confirmed the potential of Article 2 to protect against environmental hazards[79] and has found an infringement of Article 2 in the prison context, in circumstances where failure to protect had *not* resulted in death,[80] only in a small number of cases has the protection of Article 2(1) been extended to the public health or welfare arena.[81]

Thus, for example, in *Nicketi* v. *Poland*,[82] where the state system allowed for a 70% contribution towards the cost of treating his chronic life-threatening condition, the applicant claimed that, since he was unable to afford the remaining 30%, his health would deteriorate to the point where lack of treatment would inevitably result in untimely death. The ECtHR accepted that the positive obligation under Article 2 could be engaged in such cases, but having reviewed the facts, ruled the application inadmissible. It therefore stated that 'bearing in mind the medical treatment and facilities provided …

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75 See generally D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths 1995) 41.

76 As long ago as *X* v. *Ireland* (1976) 7 DR 78, the Commission stated that the fact that Article 2(1) enjoins the state not only to refrain from taking life intentionally but also to safeguard life encouraged expectations. Article 11 ESC states: '… The parties undertake either directly or in cooperation with public or private organisations to take appropriate measures designed *inter alia*: (1) to remove as far as possible the causes of ill-health; (2) to provide … facilities for the promotion of health and encouragement of individual responsibility in the matters of health; (3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

77 Application No. 23452/95, Report of the Commission dated 1 July 1997.

78 Id., at 91.

79 In *Guerra*, the Court found it unnecessary to consider the applicant's alleged violation of her Article 2 rights due to the prior finding of a breach of the state's positive obligations under Article 8. Subsequent case law has applied the judgment in *Guerra*. See, for example, *Oneryildiz* v. *Turkey* (2004) 39 ECHR 353, where the Court acknowledged, in para. 64, that 'a violation of the right to life can be envisaged in relation to environmental issues…'.

80 It is clear from *Keenan* v. *United Kingdom* (2002) 33 EHRR 913, at para. 90, that the obligation upon prison authorities under Article 2 encompasses the duty to take proportionate and reasonable steps to guard against the risk of death and injury suffered in custody and that this 'obligation is particularly stringent where that individual dies.'

81 See, for instance, *Cyprus* v. *Turkey* (2002) 35 EHRR 731, considered by Mowbray, above note 2, as authority for the proposition that Article 2 may be invoked in circumstances when a state 'fails to meet its own declared standard [of healthcare provisions] … in a life threatening case' and 'tantalisingly' as suggesting that 'Article 2 may also require the provision of a minimum level of health by a member State.' While this minimum level will vary from state to state due to the reluctance of judges to second-guess the allocation of scarce resources and the divergent economies of many member states, Mowbray does suggest that the state's role will also extend to the regulation of private sector medical treatment providers (*Calvelli and Ciglio* v. *Italy*, Judgment of 17 January 2002, CEDH 2001-I. See Mowbray, above note 2.

82 Application No. 6563/01, Admissibility decision, 21 March 2001.

the Respondent State cannot be said in the special circumstances of the present case to have failed to discharge its obligations under Article 2 by not paying the remaining 30% of the drug price.'[83]

Moreover, there is little in the jurisprudence to suggest the willingness of the Court to explore different aspects of the fundamental right to life, such as the psychological and physical integrity of claimants or the protection of human dignity, as suggested by Judges Jambreck and Ward, who formed the minority in *Guerra* v. *Italy*.[84] Significantly however, creative developments of the kind proposed by the minority in *Guerra* have taken root in different quarters. Thus, not only has the Court recognised that a stark injunction to protect human dignity, implicit in Article 3 and immanent in all the ECHR rights, may require states parties to take positive steps to meet the health and welfare needs of vulnerable claimants,[85] but it has also been recognised that the right of respect for physical and psychological integrity, which lies at the heart of the complex right in Article 8 ECHR, may give rise to positive obligations to meet the health and welfare needs of claimants suffering from a disability and in need of medical treatment[86] or even shelter.[87] Thus, it is notable that in complaints of failure to protect individual health and welfare interests, though recognising that Article 2 is engaged, the Court has preferred to decide cases on the basis of Article 3 or 8.

3.2 The Promise of Article 3: Respect for Human Dignity

Violations of Article 3 have increasingly been recognised by the ECtHR in complaints of state failure to provide conditions of existence that satisfy the fundamental right of all humans to be treated with dignity in relation to their basic needs, including the need for shelter.[88] Moreover, although a positive duty to meet medical and other welfare needs of vulnerable individuals has most frequently been found in the context of prison or police custody, it has also been recognised beyond those areas of governmental responsibility that a failure to make provision for vulnerable claimants suffering from disabilities may, in humanitarian cases of sufficiently acute need, constitute infringements of Article 3.[89]

However, clearly not every type of indignity suffered amounts to degrading or inhuman treatment within the meaning of Article 3. The yardstick is said to be 'a minimum level of severity' which is relative to the duration of the treatment, its

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[83] Id., at 5 See also *Scialaqua* v. *Italy*, Application No. 34151/96, Admissibility decision, 1 July 1998, where the applicant who was diagnosed as requiring a liver transplant was treated privately by alternative treatment and unsuccessfully reclaimed the cost of his life-saving medical treatment from the state.

[84] In his concurring opinion in *Guerra* v. *Italy* (1998) 26 EHRR 359, Judge Jambrek expressed the view that 'protection of health and physical integrity was closely associated with the right to life (at 387).

[85] See the discussion of Article 3 below.

[86] See, for example, *Valentina Pentiacova and Others* v. *Moldova*, Application No. 14462/03, Admissibility decision, 4 January 2005. The applicants, who suffered from chronic renal failure, complained about the failure of the state to provide comprehensive haemodialysis treatment. The Court acknowledged that the Convention does not provide a right to free medical healthcare but was prepared to accept that Article 8 was applicable to the facts. However it also stressed that the state enjoyed a particularly wide margin of appreciation, stating that 'While it is clearly desirable that everyone has access to a full range of medical services and drugs, the lack of resources means that there are unfortunately in the Contracting states many individuals who do not enjoy them, especially in the case of expensive treatments.' Further, in dismissing the claim under Article 8, the Court underscored the great improvement that dialysis would bring for the applicant's private and family life but found that Moldova had struck a reasonable balance between the competing interests of the applicant and the community as a whole.

[87] For a discussion of the scope of Article 8 in relation to a bundle of social rights, see below.

[88] See, for example, *Moldovan and Others* v. *Romania* (No. 2), Application Nos. 41138/98 and 64320/01, Judgment dated 12 July 2005, concerning the Haderini pogrom (carried out with police complicity) in which the applicants homes had been destroyed, as a result of which they lived in appalling conditions for ten years, suffering very detrimental effects on their health and well-being. In conjunction with the racial discrimination that they suffered, this constituted an interference with the applicants' human dignity and amount to degrading treatment and a breach of Article 3.

[89] *O'Rourke* v. *United Kingdom,* Application No. 39022/97 (unreported), Judgment of 26 June 2001, where the Court recognised that, although a failure to provide shelter does not by itself amount to degrading or inhuman treatment, it has not ruled out the possibility that such a positive obligation might arise.

physical and mental effects and in some circumstances the sex, age and state of health of the victim – a standard applied both in determining whether treatment falls into the categories of inhuman or degrading treatment and in distinguishing between those types of treatment and torture.[90]

In the case of *Pretty* v. *UK*,[91] the Court had the opportunity to consider the scope of the positive obligation to refrain from the types of maltreatment prohibited by Article 3. In the first instance, the Court observed that 'it is impossible by a single definition to embrace all human conditions that will engage Article 3'. Nevertheless, drawing on previous case law, it concluded in summary that

> Ill-treatment prohibited by Article 3, is that which 'attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering' or which 'humiliates or debases an individual showing lack of respect for, or diminishing his or her human dignity' or 'arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.[92]

Thus, in the context of prison detention (where indignities are likely to be exacerbated by the deprivation of liberty), the Court has found positive breaches of Article 3 in cases of failure to provide adequate food or recreation,[93] suitable physical conditions of detention or appropriate medical care to detainees, even where the suffering has been endured for a relatively short period of time.[94] For example, in *Peers* v. *Greece*,[95] the Court found an infringement of Article 3 in that the complainant was obliged to share a one-person cell with another inmate, to use the cell toilet in the other's presence and to suffer the deprivation of natural light and ventilation. Further, in reaching this conclusion, the Court commented that, although the applicant had been subjected to these conditions for a relatively short period of two months, the authorities had taken no positive steps to improve them during that time.

It has also been made clear by the Court that, although an intention to debase is a factor to be taken into account in determining whether treatment is 'degrading', the absence of such a purpose cannot conclusively rule out a finding that there has been a violation of Article 3. Thus, in *Price* v. *UK*,[96] where the applicant, a Thalidomide victim with severely impaired mobility, was committed to prison for seven days for contempt of court, the ECtHR considered that 'to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard and unreachable, and is unable to go to the toilet and keep clean, without the greatest of difficulty, constitutes degrading treatment contrary to Article 3'.[97] Therefore, while recognising that the applicant's degradation was not due to any intention to debase her, the majority concluded that the failure of the prison to meet her individual physical and medical needs constituted an infringement of Article 3.

The reasoning in cases such as *Price* is therefore important, since it demonstrates that, disengaged from the political minefield of psychiatric care, where the ECtHR has been particularly reluctant to impose positive obligations to provide access to appropriate medical care,[98] it may now be prepared draw a direct correlation between the extent of an individual's disability and the positive obligations of states parties to provide services tailored to her health and welfare needs. Let us turn then to the question raised in the introduction to this article: how far does the positive obligation in Article

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90 *Ireland* v. *United Kingdom* (1979-80) 2 EHRR 25, at para. 162.

91 (2002) 35 EHRR 1.

92 Id., at para. 52.

93 In *Dougoz* v. *Greece*, Judgment of 6 March 2001, (2002) 34 EHRR 330, the detention centre in which the applicant, a Syrian national, had been held for eighteen months was severely overcrowded; One hundred detainees were held in twenty cells; there were inadequate facilities for heating, sanitation food, recreation and contact with the outside world. The Court concluded that serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which the applicant was detained in such conditions, amounted to degrading treatment under Article 3.

94 *Hurtado* v. *Switzerland* A.280A (1994).

95 *Peers* v. *Greece* (2001) 33 EHRR 1192.

96 (2002) 34 EHRR 1285.

97 Id., at para. 24.

98 See *Aerts* v. *Belgium*, Application No. 25357/94, Judgment dated 30 July 1998. The Court was critical of the appalling standards in the psychiatric wing, but there was no evidence that the failure to provide psychiatric care had an adverse effect on the applicant's mental health in violation of Article 3.

3 require the taking of measures to protect vulnerable individuals from degradation and suffering (caused by the deprivation of elementary needs) outside the prison gates, that is to say, beyond circumstances where individual freedom and personal autonomy are so fundamentally threatened?

3.2.1 Developing the Normative Content of Socio-Economic Rights: Beyond the Prison Gates?

Outside the context of compulsory detention, few complaints have come before the Strasbourg organs alleging that a failure to provide for the health or welfare needs of vulnerable claimants has constituted a breach of Article 3. Nevertheless, the Court made it clear in *Z* v. *UK*,[99] a case where young children for many years suffered neglect, including physical and mental abuse, at the hands of their parents (non-state actors), that positive measures may be necessary to protect individuals from degrading and inhuman circumstances of the kind prohibited by Article 3 in cases where authorities know that there is a real risk of such an occurrence. Moreover, two frequently cited cases heard by the Court during the past decade have been widely viewed as authority for the proposition that states parties may be liable for violations of Article 3, in *extreme* circumstances, where there is a real risk that degradation and suffering are likely to be exacerbated by the failure of states parties to provide for the elementary health and welfare needs of individuals in their jurisdictions.

In the first of those cases, *D* v. *United Kingdom*,[100] the applicant relied on an important line of authority, following *Soering* v. *UK*,[101] in which the ECtHR had demonstrated its willingness to extend the concept of a state's responsibility beyond its borders[102] by interpreting Article 3 as including a prohibition on extradition or deportation, in cases where there is a risk that an individual would face a sufficiently serious risk of ill-treatment if returned to another state. The applicant in *D*, a drug dealer from St Kitts with an extensive criminal record, was suffering from AIDS. Following a proposal by the UK government to return him to his country of origin, where there was generally a very low standard of healthcare and where treatment and ancillary support for AIDS sufferers was virtually non-existent, he complained to Strasbourg that the decision to deport him constituted a violation of Article 3.

Thus, in a hearing, which took place when the applicant was in the final stages of his illness, influenced by such factors as the imminence of his death, the lack of sanitation in the hospital in St Kitts and the fact that there may not even be a bed for him there, the Court concluded that the proposed deportation amounted to violation of Article 3. The Court was clear that 'aliens subject to expulsion are not entitled to remain in a state for the sole purpose of continuing to benefit from medical, social or other forms of assistance', but concluded that 'in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake it must be concluded that the

[99] (2001) 34 EHRR 97. In *Z* v. *UK*, a network of relevant domestic authorities – the social services schools and the police – had failed to protect young children who suffered severe neglect and abuse over many years at the hands of their parents.

[100] *D* v. *UK* (1997) 24 EHRR 423.

[101] See above at note 58.

[102] See also *Chahal* v. *UK* (1997) 23 EHRR 413; *Vilvarajah* v. *United Kingdom* (1991) 14 EHRR 248; *Jabari* v. *Turkey*, Application No. 40035/98, Judgment of 11 July 2000. Starting with *Soering* in 1989, in a series of cases, the ECtHR has interpreted Article 3 as including an absolute prohibition on extradition or expulsion where there is a sufficient risk that the complainant will face serious ill-treatment if returned to another state, thereby demonstrating the willingness of the ECtHR to extend the concept of state responsibility beyond a state's own borders.

implementation of the decision to remove the applicant must be a violation of Article 3'.[103] Moreover, the 'very high threshold' established in D's case, has recently been confirmed by the ECtHR in *N* v. *UK*.[104]

In that case, the applicant was a Ugandan national due to be returned to Uganda after her asylum claim had been rejected. She had been diagnosed with AIDS on her arrival in the United Kingdom, and, as a result of the free anti-retroviral medication that she had been receiving from the NHS, she was in a stable condition with a good prospect of remaining well for many more decades. At the same time, however, there was strong evidence that if she were deported to Uganda it would be highly unlikely that she could afford to pay for her treatment (even though it was generally available and highly subsidised). Thus, it was accepted by the House of Lords that once denied the level of medical care she had been receiving in the United Kingdom, after a period of acute physical and mental suffering, early death would follow. Thus, it was recognised that, in light of advances in the treatment of AIDS, the reality of the choice facing the authorities was to allow the patient to be sustained by expensive medical care in the United Kingdom for the rest of her life or by deporting her to Uganda to precipitate an immediate decline in health and shortly after that her death. The claimant then turned to Strasbourg.

While accepting that the quality of the applicant's life and her life expectancy would be affected if she were to be returned to Uganda, the Grand Chamber found against the applicant by fourteen votes to three, observing that in contrast to D's position, she was not yet critically ill and that the 'rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment support and care, including help from relatives must involve a certain degree of speculation',[105] particularly as AIDS treatment was evolving world-wide. Moreover, in response to criticism by the House of Lords of a lack of principled direction from the ECtHR on the issue, the Grand Chamber made an important general comment:

> … Advances in medical science together with social and economic differences between countries entail that the level of treatment available in the contracting state and the country of origin may vary considerably… Article 3 does not place an obligation on the contracting state to alleviate such disparities through the provision of free and unlimited healthcare to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place to great a burden on the contracting state.[106]

In the second case, *O'Rourke* v. *UK*,[107] the applicant was a vulnerable individual who on coming out of prison was provided with temporary accommodation pending a decision by the local authority as to whether he was eligible for housing as a homeless person. Following his eviction by the authority from temporary accommodation, he lived rough on the streets for fourteen months, eventually complaining to Strasbourg that his eviction and the subsequent failure to provide him with accommodation constituted violations of Articles 3 and 8 ECHR. The Court did not consider the suffering that followed his eviction to have reached the requisite level of severity to engage Article 3.

Moreover, since he was largely considered to be the author of his own misfortune (he had failed to visit a night shelter and indicated his unwillingness to accept temporary accommodation), there would have been no infringement of Article 3 even if it had reached the requisite level of severity. Nevertheless, the Court did accept that, although

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[103] *D* v. *United Kingdom*, at para. 54. As far as this author is aware, only three HIV/AIDS cases have been found admissible since *D*. See *BB* v. *France*, ECHR 1998-VI, 2596, where the Commission decided that deportation of a claimant suffering from AIDS would constitute a violation of Article 3 and France refrained from deportation. In *Tatete* v. *Switzerland*, Application No. 41874/98, Judgment of 18 November 1998, the Commission decided that the case raised complicated issues of fact and law and could not be said to be manifestly ill-founded. The principle in *D* has also been relied on in relation to other serious illnesses. See *Bensaid* v. *UK* (2001) 33 EHRR 205, where the ECtHR decided that deporting a person with severe mental illness could engage Article 3. See also Brems, above note 1, for an exhaustive review of cases (including diagnoses of AIDS an mental illness) where it has been argued (a) that the applicant is not (yet) very ill; and/or (b) that treatment and family support are available in his or her home country (at 141).

[104] *N* v. *UK*, Application No. 26565/05, Judgment of 27 May 2008, applies beyond cases of AIDS, to physical and mental illness generally (Id., at para. 47).

[105] Id., at para. 50.

[106] Id., at para. 44. But compare the strongly dissenting opinion of Judges Tulkens, Bonello and Spielmann.

[107] Application No. 39022/97, Admissibility decision, 26 June 2001.

failure to provide shelter could not of itself amount to degrading and inhuman treatment, a positive obligation to make social provisions of the kind required by the applicant *could* arise in a case of sufficiently acute individual need. Further, it was recognised that, as in the case of *D* v. *the United Kingdom*, compliance with the negative duty in Article 3 could give rise to such positive undertakings in cases where a course of conduct pursued by the state (deportation or eviction) is likely to result in inhuman or degrading consequences for the individual concerned.

In *N* v. *UK*,[108] we have seen that, although it continues to leave a very wide margin of appreciation to national authorities, especially in individual prioritisation disputes over healthcare needs of the kind that arose in *Sentges* under Article 8,[109] the ECtHR no longer baulks at providing answers to some of the most searching resource allocation questions. However, in contrast to the Court's rejection of those prioritisation claims, it would appear that, even though it may not be easy to lay responsibility at the door of the state in cases of severe destitution such as *O'Rourke* v. *UK*, the Convention may require a measure of basic socio-economic provision, in the light of the duty to ensure that rights guaranteed by the Convention are not merely 'theoretical and illusory' but 'practical and effective', *coupled* with the positive obligation under Article 3.

Thus, as we shall see below (regardless of whether so-called positive or negative rights are at issue) under Articles 3 and 8 ECHR, a principled jurisprudence has begun to emerge whereby states may be held responsible for extreme socio-economic deficits in circumstances where it can be shown that there are direct and verifiable links between the conduct of the state or its agents *and* the origins or continuation of conduct that has caused intolerable harm.

3.3 The Promise of Article 8: The Protection of Physical and Psychological Integrity

Article 8 has been primarily associated with the socio-economic right to housing. However, it has become clear that, in order to comply with Article 8, states parties may be required to protect individuals in respect of a broader bundle of social needs.[110] Thus, in addition to a continuing negative obligation not to interfere with the enjoyment of a person's private and family life *and* home, in the case of individuals suffering from a disability, they may be required to take positive steps to provide them with an environment that will facilitate their enjoyment of autonomy and a more independent life.

The Court first considered the extent to which Article 8 gives rise to positive state obligations to make social provision for vulnerable individuals in *Botta* v. *Italy*,[111] a case in which the applicant complained of 'impairment of his private life and the development of his personality', resulting from the Italian government's failure to take appropriate measures to remedy the omissions of the private bathing establishments. The essence of his complaint was that his Article 8 rights had been infringed because of his inability to enjoy a normal social life, 'which would enable him to participate in the life of the community, by the exercise of his essential non-pecuniary personal rights'.[112]

It was recognised in *Botta* that the duty to protect physical and emotional integrity could arise even where there had been no direct interference by the state.[113] However, the Court refused to find that there had been a violation of Article 8 in a case where the right asserted by the applicant (to gain access to beach and sea at a place distant from his normal place of residence during the holidays) 'concerned interpersonal relations of such broad and indeterminate scope that there could be no conceivable direct link

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[108] See above at note 104.
[109] See above at note 54.
[110] In the United Kingdom in the first case in which compensation was granted under the Human Rights Act (HRA) of 1998.
[111] (1998) 26 EHRR 241.
[112] Id., at para. 27.
[113] Id., at paras. 32-33.

between the measures the State was urged to take and the applicant's private life.'[114] However, it was also recognised that, in principle, Article 8 *could* give rise to precisely the type of affirmative duties for which the applicant had argued in cases where it was possible to establish 'a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life.'[115]

In its concurring opinion, the minority of the Commission in *Botta* had agreed that the precise aim and nature of the measures to be undertaken for handicapped people would vary from place to place and that this was an area where a wide discretion would be left to national governments. Moreover, the ECtHR also recalled the more cautious opinion of the Commission's majority, namely that, in the light of the resources necessary to satisfy such a claim, 'the social nature' of the rights at issue rendered them more suitable for protection under the 'flexible' machinery of the ESC.[116]

Since *Botta*, human rights advocates have continued to explore the scope of the obligation under Article 8 to take positive measures to permit disabled people to enjoy autonomy and independence in the wider community. However, in the first of two poorly received test cases, the ECtHR emphasised that 'Article 8 cannot be taken to be generally applicable each time an individual's everyday 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 right to establish and maintain relations with other human beings and the outside world. Thus, in *Zehnalova and Zehnal* v. *the Czech Republic*,[117] where the applicants had complained of their inability to access a number of public buildings in their home town, the ECtHR not only doubted that they needed to do so on a daily basis but also denied any direct and immediate link between the measures sought and the applicants private lives. Article 8 was not applicable and the complaint was inadmissible.

In the later case of *Sentges* v. *the Netherlands*,[118] the applicant, who had seriously impaired mobility due to an acute form of muscular dystrophy, complained that refusal by authorities to provide a robotic arm to be attached to his electronic car (on grounds that regulations for the supply of medical technologies would not cover it) constituted a violation of Article 8. Again the ECtHR doubted that the situation complained of touched the essential core of the applicant's private life. However, the ECtHR stressed that even if it did, this complaint fell squarely into the type of resource allocation disputes where a wide margin of appreciation was left to the authorities themselves to strike a fair balance between the competing interests of the individual and the community; which in this case they had effectively done.

3.4 Beyond Arbitrary Interference: The Right to a Home?

The core idea of respect for the 'home' in Article 8 ECHR has been said to be one of sanctuary against intrusion by public authorities, that is, an essentially negative obligation.[119] However, as we have already seen, there is a wide penumbra of positive

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[114] Id., at para. 35.

[115] Id., at para. 34.

[116] *Botta* v. *Italy*, Proceedings before the Commission, 246-255. For the concurring minority opinion on the application of the margin of appreciation of Judges Liddy, Tune, Pellonpää, Bratza, Sváby, Perenic and Schermers, see 251-252.

[117] Application No. 38621/97, Admissibility decision, 14 May 2002. In *Zehnalova*, the applicant partners, one of whom was disabled, sought to distinguish their case from *Botta*, because the complaint related to their home town and everyday facilities, such as the post office, police station most specialist doctors surgeries and the town swimming pool. They argued that the lack of access to these facilities impaired their mobility and ability to enjoy autonomy and a normal life in the community. Clements and Simmons have suggested that had the applicants focused their application more precisely on details of the impact of the state failure on their private lives, it might have forced the ECtHR to scrutinise the scope of the social care duty in greater detail. See above note at 1, at 426.

[118] See above at note 54.

[119] Harris, O'Boyle and Warbrick, above note 38, at 376. See complaints against Turkey concerning the burning of houses by security forces, where the ECtHR found that the destruction of the applicants' homes and properties constituted particularly grave and unjustified interferences with the their right to respect for

connotations in the idea of respect for 'home *and* private life'.[120] Further, it is clear that the state will facilitate the right to live in one's home rather than merely protect it against interference as an existing property right.[121] Nevertheless, although there are positive state obligations to protect against 'home deprivation' *and* its consequences in many contexts,[122] the ECtHR has attempted to set justiciable boundaries around the gargantuan social problem of homelessness in Europe by using the well-known mantra that 'there is no right to a home.' Thus, in *Chapman* v. *UK*,[123] the ECtHR familiarly stated that

> while it is clearly desirable that every human being have a place where he or she can live in dignity and which she can call home, there are unfortunately in the Contracting States many persons who have no home. *Whether the state provides funds to enable every one to have a home is a matter for political not judicial decision*.[124]

Nevertheless, the statement that there is no right to a home sits uneasily with the development in *Marzari* v. *Italy*,[125] the first case in which the ECtHR clearly stated that, although not creating a right to a home *per se*, the positive duty in Article 8 to respect private family life did not absolve the government of all responsibilities in respect of housing needs.

Thus, in *Marzari*, the Court recognised that

> Although Article 8 does not guarantee the right to have one's housing problems 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.[126]

Further, in determining whether the interference complained of was necessary in a democratic society, the Court stressed that the applicant's medical condition was particularly relevant to his need for accommodation, as the applicant had to be hospitalised as a consequence of his living in a camper van after his eviction. Moreover, although the ECtHR found no violation of Article 8 in *Marzari*, in performing the exercise of appreciation, as in *Botta*, it took the important step of recognising that, in the case of a person suffering from a disability, the burden of justifying the refusal of accommodation under Article 8(2) might be greater than in other cases.

However, in *Chapman* v. *UK*,[127] one of several UK gypsy cases, which concerned an interference with the applicant's Article 8 interests caused by a failure to grant her planning permission to live in a caravan on her land,[128] eight members of the ECtHR

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their home, private and family life. See also *Selcuck and Asker* v. *Turkey* (1996) 26 EHRR 477. The positive state obligations under Article 8 may also relate to the right to 'adequate housing', although it appears from the case law that these obligations rest more clearly on the 'private and family life' components of Article 8 than on the specific reference to 'respect for home'. Thus, case law on environmental protection (the duty to protect against severe pollution) can extend further to ensuring adequate housing. See *Lopez Ostra* v. *Spain*, above note 65. State obligation in this area may include the provision of alternative accommodation. See *Fadeyeva* v. *Russia*, Application No. 55723/00, 9 June 2005.

120 The essential ingredient of family life is the right to live together so that family relationships may develop normally. See *Marckx* v. *Belgium*, above note 31; *Powell & Rayner* v. *UK*, above note 69, which concerned a duty to protect a person's home and family life from the negative interference of environmental pollution.

121 See *Howard* v. *UK*, Application No. 10825/84, 52 DR 198 (1987). See also *Cyprus* v. *Turkey*, Application Nos. 6780/74 and 6950/75, where the Commission dealt with the denial to Greek Cypriots of access to their homes in the North of Turkey under Article 8 and Article 1 of Protocol No. 1.

122 See, for example, *Moldovan and Others* v. *Romania (No. 1)*, Application Nos. 411138/96 and 64320/01, Judgment dated 5 July 2005. It has been suggested that 'this is best described as a remedial right – to compensate for deprivation of housing'. See Clements and Simmons, above note 1, at 413.

123 2001-I; 33 EHRR 399.

124 Id., at para. 99G.

125 Admissibility decision, 4 May 1999 (1999) 28 EHRR.

126 Ibid, at 179.

127 See above at note 123.

128 In the United Kingdom, there has been a series of cases, starting with *Buckley* v. *the United Kingdom*, Application No. 20348/92, where it has been alleged that land development controls have unfairly discriminated against Gypsies, with the result that almost 30% of them are technically homeless. Further, it has been argued that controls, which make it particularly difficult to obtain permission for the stationing of a caravan, constitute a form of indirect discrimination. Secondly, complainants have argued that the legitimate state action has had a disproportionate (if unintended) socio-economic effect and that either

recalled in a strong dissenting opinion that, although the essential object of Article 8 is to protect the individual against arbitrary action by public authorities, there may in addition be positive obligations inherent in an effective 'respect for private and family life and home'. In addition, they noted that positive duties to respect a person's home might arise even in cases where there has been no state interference of the kind identified in *Chapman*. Thus, in considering whether the applicant's eviction served a 'pressing social need', referring to the judgments in *Marzari*[129] and *Botta*,[130] the minority recalled that 'where there is a direct and immediate link between the measures sought by an applicant and the latter's private life, positive obligations may be imposed on states'.

Since *Chapman*, the ECtHR has demonstrated that, in sensitive 'housing' cases concerning the legitimacy of interference (rather than of the state's failure to provide housing), the Strasbourg Court will not routinely fall back on the wide margin of appreciation associated with domestic resource allocation issues or issues of general housing policy. Thus, in *Connors* v. *United Kingdom*,[131] which concerned the legality of a gypsy's forced eviction from a local authority caravan site, on the grounds of the alleged misbehaviour of his extended family, the ECtHR modified its position in *Chapman*: in *Connors*, weighty reasons of public interest would be required to justify the very severe interference with the applicant's Article 8 rights, namely eviction and homelessness resulting in very detrimental effects on his and his family's health and education, circumstances that had not existed in *Chapman*.[132]

Accordingly, in *Connors*, the ECtHR stated that 'a margin of appreciation must inevitably be left to the national authorities', which 'by reason of their direct and continuous contact with the vital forces of their countries, are, in principle, better placed than an international court to evaluate local needs and conditions'.[133] However, on the issue of proportionality, the Court stated that although in general 'it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention'.[134] The margin will therefore vary 'according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the aim pursued by the restrictions'.[135] It will 'tend to be *narrower* where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights'.[136]

By contrast, however, a wide margin of appreciation is more likely to be applied in contexts such as planning, in so far as 'the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies'.[137] Thus, 'in spheres such as housing, which play a central role in the welfare and economic policies of modern societies' (particularly in cases where Article 1 of Protocol No. 1 is in play), the legislature's judgement as to what is in the general interest will generally

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the scheme should be amended to make it possible for them to find their own accommodation or the state should take responsibility for its provision. A third argument was added in *Chapman*, namely that there was a need for special consideration to be given to the cultural life of Gypsies, both in the regulatory planning framework and in arriving at decisions in specific cases. The Court considered that the margin of appreciation was being measured by reference to 'an emerging international consensus amongst the contracting States of the Council of Europe, recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle' (para. 93).

129 See above at note 125.

130 See above at note 111.

131 [2004] ECHR 223, Judgment of 27 May 2004.

132 In *Connors*, the applicant and his family had lived on a local authority caravan site for thirteen years. Following their eviction due to the alleged misbehaviour, the family were forced to move on continuously and the stress led to the break down of the applicant's marriage. In finding a violation, the ECtHR emphasised the lack of procedural protection for Gypsies in comparison to the local authority reviews of anti-social behaviour on local authority housing estates. Although the applicant denied the allegations, he had no opportunity to challenge them in court.

133 Id., at para. 82.

134 Id., at para. 81.

135 *Gillow* v. *United Kingdom*, A.104 (1986) 11 EHRR 335, at para. 55.

136 *Connors*, above note 131, at para. 82.

137 Id., at para.82.

be respected, 'unless that judgement is manifestly without reasonable foundation'.[138] It is also possible to distinguish cases such as *Mellacher* v. *Austria* (founded on Article 1 of Protocol No. 1) from disputes founded on Article 8, which was said uniquely to 'concern 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'.[139]

Moreover, the ECtHR has emphasised that, even where general social and economic policy considerations arise under Article 8, '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'. In *Connors*, the 'eviction of the applicant and his family … was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights'. It could not be regarded as justified by a 'pressing social need' or 'proportionate to the legitimate aim being pursued'. Accordingly, there had been a violation of Article 8.

In the United Kingdom, there is a palpable tension between the use of eviction as a legitimate tool for the management of depleted social housing stock and the *effective* protection of the right to respect for the home in Article 8 ECHR. This tension had not been directly addressed in *Connors*. In the later case of *McCann* v. *UK*,[140] the ECtHR was therefore asked to consider whether the applicant's eviction from his home (which served a legitimate aim and had been conducted in accordance with relevant legal procedures) constituted an interference with his right to respect for his home.[141] As in *Connors*, the central question was therefore was whether, in the applicant's case, the interference was *proportionate* and necessary in a democratic society.[142] Significantly, the ECtHR held that it was not, suggesting that domestic law must always permit the proportionality of removing a person from his or her home to be assessed by an independent tribunal (which is currently not the case in the United Kingdom) if it is to comply with Article 8.[143]

Despite the potential of the positive obligation in Article 8 to protect vulnerable individuals even in respect of housing needs, strategic case law has continued to reflect a bias towards claims involving negative interference with the enjoyment of an existing home. Although regrettable, this is not surprising. Here, perhaps more than in any other area of social need, we see the jurisprudential limits of a judicial approach that is defensively rooted in the negative positive dichotomy of rights, rather than in a normative framework according to which questions of state responsibility are examined in the light of the nature and extent of threats to rights and the extent to which the state or its agents can be said to be responsible for the deficit.

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[138] Id., at para. 82.

[139] The ECtHR cited *Pretty* v. *UK*, above note 71, and *Christine Goodwin* v. *UK*, Application No. 28957/95, ECHR 2002-VI, para. 90.

[140] Application No. 19009/04, 13 May 2008.

[141] Mr McCann and his wife were joint secure council tenants. Mrs McCann was re-housed by the council on the grounds of domestic violence. At the council's instigation, she signed a notice to quit (without realising that this would bring the joint tenancy to an end). Mr McCann sought to transfer the tenancy to his own name but was duly evicted.

[142] The ECtHR refused to accept the UK government's contention that the *Connors* decision was to be confined only to cases involving Gypsies or where applicants sought to challenge the law itself rather than its application in their particular case.

[143] Notably, however, the UK House of Lords has decided to depart from the judgment in *McCann*, arguing that it was based on a fundamental failure to understand the complexities of English housing law and therefore need not be followed in the domestic courts. See *Doherty and others* v. *Birmingham City Council* [2008] UKHL 57.

4 Articles 6 and 14: Towards the Fair Distribution of Socio-Economic Entitlements in Member States?

Thus far, our review of cases has focused on the potential to protect broadly framed, open-textured rights of the kind enshrined in Articles 11-12 ICESCR 'to an adequate standard of living of everyone for himself and his family' or 'to the right of everyone to the highest attainable standard of physical and mental health'.[144] By contrast, the development of the fair trial right in Article 6 and the non-discrimination provision in Article 14 has been coupled with attempts to gain access to substantive rights with an economic component (of the kind enshrined in Article 9 ICESCR (social security)) or other substantive rights, such as property and education, both of which are protected in the ECHR itself. Thus, in the following review of cases, we find a tension between the role of the ECtHR in promoting the notion of socio-economic rights as possessory individual entitlements and its more recent use of a more open-textured principle of equality, coupled with the Strasbourg principle of proportionality, to achieve fairness in the distribution of public goods.

4.1 Article 6 ECHR: Access to Administrative Justice in Social Security Claims

We have already seen how the right to free legal assistance as a 'social' dimension of the right to a fair trial was first emphasised by the ECtHR in *Airey*.[145] Since then, moreover, the ECtHR has continued to recognise that the specific guarantees protected by Article 6, such as the right to an oral hearing or legal aid, can be crucial in assisting disadvantaged individuals to gain access to assistance that might otherwise be denied in criminal proceedings.[146]

However, it is well known that Article 6 does not apply to all proceedings – only to those concerning the 'determination of civil rights and obligations' or 'a criminal charge' – and that in interpreting these concepts the ECtHR has given them 'autonomous meanings' that in many cases depart from their meanings in domestic law. Thus, gradually, the scope of the concept of 'civil rights and obligations' in Article 6 has been widened to encompass a right of access to courts or tribunals in public law disputes over most discretionary socio-economic entitlements. For example, even though the right to health insurance benefits under social security schemes is treated as a public law right in the Netherlands, in *Feldbrugge* v. *the Netherlands*,[147] it was held to constitute a civil right within the autonomous meaning of Article 6(1).[148]

Moreover, the ECtHR has held that the formal principle of equality of treatment dictates that Article 6 should apply even in cases where a socio-economic benefit is derived from a discretionary, non-contributory form of public assistance granted unilaterally by the state[149] and where the cost is fully borne by the public purse without any link to a private contract of employment.[150] Thus, in *Salesi* v. *Italy*,[151] the definition of a civil right was said to cover social security or welfare benefits regarded as 'sufficiently

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144 See above at note 9.

145 See above at note 5.

146 Article 6(3)(c) guarantees the right to a person charged with a criminal offence to have access to practical and effective legal assistance. See *Lundevall* v. *Sweden*, Application No. 38629/97, 12 November 2002; *Sallomonsson* v. *Sweden*, Application No. 38978/97, 12 November 2002; *Miller* v. *Sweden*, Application No. 55853/00, 8 February 2005.

147 (1986) 8 EHRR 245.

148 See also *Konig* v. *Germany* (1978) 2 EHRR 170. The ECtHR concluded that the right to practice medicine in West Germany was a civil one. The fact that the medical profession did not provide a 'public service' in Germany was taken into account in reaching this conclusion.

149 *Salesi* v. *Italy* (1993) 26 EHRR 187.

150 Where a pension is linked to employment, even to employment in the civil service, the ECtHR has held *a fortiori* that Article 6 will be engaged. See *Lombardo* v. *Italy* (1992) 21 EHRR 18, at paras. 14-17; *McGinley and Egan* v. *United Kingdom* (1999) 27 EHRR 1, at para. 84.

151 See above at note 149.

well defined to be analogous to rights in private law' and to be of 'economic significance to the claimant'.[152] Since the features of private law claims predominated, the right to social security benefits was a civil right within the meaning of Article 6.[153]

However, the approach of the ECtHR to remedying the failure of the Convention to afford rights of due process in public law disputes has been problematic. In many jurisdictions, including the United Kingdom, the requirement of a 'full hearing' under Article 6 disturbs existing models of administrative dispute resolution and the public private jurisdictional divide. Thus, seeking a flexible accommodation in the case of *Bryan* v. *UK*,[154] the ECtHR concluded that 'full jurisdiction' in public law disputes means jurisdiction to deal with the case as the nature of the decision requires, in accordance with the dictates of 'democratic accountability, efficient administration and the sovereignty of Parliament'.[155] Problematically, however, there is no clear guidance as to how the criteria enunciated in *Bryan* are to be applied in national jurisdictions. Thus, for example, in the United Kingdom, there has been intense litigation concerning the limits of the right to a 'full hearing' in administrative disputes over discretionary socio-economic entitlements,[156] culminating in the recent case of *Tfsayo* v. *United Kingdom*.[157]

Tfsayo's case concerned the application of Article 6 ECHR to a decision by a housing benefits review tribunal to refuse payment of housing benefit to a non-English-speaking asylum seeker, because she had failed to show 'good cause' why she had not submitted her renewal claim on time. On her complaint to Strasbourg, the ECtHR decided that the tribunal had been in breach of Article 6, irrespective of whether the claimant had had access to a traditional judicial review hearing on appeal. In her case, the ECtHR insisted that intricately linked to the councillors' manifest lack of independence was the 'limited control' that could be exercised by the reviewing court:[158] It did *not* have jurisdiction to rehear the evidence or to substitute its own views as to the applicant's credibility. Nor indeed did it have the power to order the decision to be taken by a different body. This meant 'that there was never a possibility that the central issue of the applicant's credibility would be determined by a tribunal that was independent of one of the parties to the dispute. Accordingly, there had been a violation of Article 6(1)'.[159]

On the facts in *Tfsayo*, in seeking to give effect to rights that were 'real and not illusory', the ECtHR concluded that there had been an infringement of the claimant's right to a fair and impartial hearing. However, if the ECtHR's approach to the interpretation of Article 6 in that case is accepted in the United Kingdom, it could mean that disputes of fact can no longer be determined internally at first instance: the existing supervisory structure is inadequate to guarantee an impartial determination of all aspects of the dispute. The decision therefore threatens to disrupt established internal administrative procedures for the allocation of welfare entitlements that have long been regarded in the United Kingdom as hedged by sufficient safeguards to satisfy the guarantees in Article 6.

The right to administrative due process has often been regarded as one of the most important avenues for the protection of socio-economic rights of the vulnerable and marginalised.[160] However, in the incremental extension of Article 6 to public law

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[152] *Ringeisen* v. *Austria (No. 1)* (1971) 1 EHRR 455.

[153] This was despite a powerful dissent from seven members of the court, who said that the distinctions between public and private law were being eroded in a way that would cause great uncertainty.

[154] (1996) 21 EHRR 342.

[155] Per Lord Hoffman in *Begum (FC)* v. *London Borough of Tower Hamlets* [2003] UKHL 5, at paras. 35 and 43.

[156] In *Runa Begum* v. *Tower Hamlets London BC (Runa Begum)* [2003] UKHL 5; [2003] 1 All ER 689-800, the House of Lords held that administrative burdens and other societal costs associated with constitutional entitlements to a full evidentiary hearing should legitimate a more limited form of adjudication in disputed claims to discretionary welfare benefits.

[157] Application No. 60860/00, 14 November 2006.

[158] Under the system as it applied, the hearing had taken place before a tribunal that consisted of members of the same local authority that would be required to pay 50% of the benefit awarded in the event of a finding in the applicant's favour.

[159] Id., at paras. 46-49.

[160] The access to justice movement in the United Kingdom was spearheaded by M. Cappelletti and had

disputes, we see very clearly the disadvantages of a jurisprudence that has not developed according to abstract principles and standards but, in the case of Article 6, by analogy with private law dispute resolution, where very different principles, procedures and standards apply.

4.2 Article 14: The ECtHR Approach to the Fair Distribution of Social Security Benefits

It is well known that, in contrast to more sweeping provisions in many written constitutions and human rights instruments (most notably the very broad formulation of the Fourteenth Amendment to the US Constitution),[161] Article 14 has been restricted in two ways. First, the substantive arena in which discrimination is forbidden has been restricted to the 'enjoyment of the rights and freedoms set forth in [the] Convention'. Secondly, the *grounds* upon which discrimination is forbidden have been restricted to 'any ground such as [the specified grounds] or other status'.[162] Thus, Article 14 imposes a duty on the state and public authorities acting within the scope of Convention rights not to discriminate on the listed grounds or on the grounds of 'other status', unless the discrimination can be justified.[163]

Nevertheless, the ECtHR has attempted to overcome those restrictions by at times avoiding the 'ambit' discussion altogether – by treating some discriminatory acts as violations of Article 3[164] or Article 8 ECHR[165] – while in other cases bringing allegations of discriminatory treatment, for example in the distribution of social security benefits, within the ambit of Article 14. Thus, in *Gaygusus* v. *Austria*,[166] the ECtHR confirmed that, by analogy with the proprietary right of a contributor to a private pension fund, a claim to contributory benefits in the Austrian municipal system was a possession, thereby grounding the complaint within Article 14 taken together with Article 1 of Protocol No. 1.[167] Moreover, relying on that approach in the case of *Koua Poirrez* v. *France*,[168] the ECtHR decided that difference in treatment with respect to entitlements to social benefits between French nationals (or nationals of a country having signed a reciprocity agreement) and other foreign nationals was not based on any 'objective and reasonable' justification. The Court therefore concluded that the government's refusal to allow the applicant, an Ivorian national, to claim disability benefits constituted a breach

a bias towards collective group action. See M. Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobs-Merrill 1971).

[161] Cf. also Article 26 ICCPR, which has a much stronger free-standing text than Article 14. See above at note 21.

[162] Article 14 states: '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.' Cf. Article 1 of Protocol No. 12, which has been formulated by the Council of Europe to apply to 'any right set forth by law', thereby notionally extending its territory very widely.

[163] Although those limitations have to some extent been addressed by the adoption of Protocol No. 12, many member states, including the United Kingdom, have failed to ratify the Protocol. As of July 2008, it had been ratified by just seventeen states, although a further seventeen had signed it.

[164] *Moldovan and Others* v. *Romania (No. 2)*, above note 88 (racial discrimination); *Price* v. *UK* above note 96 (disability discrimination).

[165] Article 8 (the right to respect for private and family life) has been successfully invoked in a series of cases concerning discrimination against gay men and lesbians and persons who have had gender reassignment. See *Christine Goodwin* v. *UK*, above note 139. See also the discussion of indirect discrimination in the Gypsies cases in note 128 and related text.

[166] In *Gaygusuz* v. *Austria*, Application No. 17371/90, ECHR 1996-IV, 1129, a Turkish man who had worked in Austria for ten years had been refused the social benefit of an advance on his pension in the form of emergency assistance on the grounds that it could only be claimed by Austrian citizens. The ECtHR concluded that this was discrimination under Article 14, read in conjunction with Article 1 of Protocol No. 1.

[167] Article 1 of Protocol No. 1 provides: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

[168] (2005) 40 EHRR 34 at 45, at para. 37.

of Article 14 taken in conjunction with Article 1 Protocol 1.[169] '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 to be compatible with the Convention'.[170]

Although there are many jurisdictions, including a number of new accession countries, where, like in the United Kingdom,[171] contributions to the social security fund are regarded as hardly distinguishable from general taxation,[172] this difficulty has been surmounted in Strasbourg by means of a technical argument to the effect that although a claim to a social security benefit is a possessory right falling within the ambit of Article 1 of Protocol No. 1, it differs from purely private law rights to the extent that it does entitle the claimant to 'anything in particular'.[173] Thus, the recent admissibility decision in *Stec* v. *UK*,[174] in which the ECtHR extended the ambit of property rights to include any social security payment, was confirmed by the Grand Chamber in 2007,[175] thereby deciding that, despite their non-contributory nature, such benefits are invariably governed by the non-discrimination principle.

Until recently, Article 14 jurisprudence was overwhelmingly devoted to a formal equality model. Thus, although it has allowed for stricter standards of scrutiny in 'suspect classes' of discrimination, such as sex and most recently race,[176] the ECtHR focused primarily on the extent to which there was a difference in treatment of analogously placed persons and situations before seeking to determine whether the difference served a legitimate aim and was proportionate. However, a more nuanced approach has developed in social security case law, as demonstrated in the Court's recent decision in *Carson* v. *UK*.[177] That case concerned the general policy of the United Kingdom to pay index-linked pensions to residents while refusing to up-rate in the case of pensioners abroad. The ECtHR emphasised the importance of a wide margin of appreciation in cases involving social security systems (specifically pensions), referring also to the 'very wide margin, which the state enjoys in matters of socio-economic policy'. However the ECtHR also stressed the importance of justification and did not suggest that the courts should abnegate their reviewing role – where the state's policy is not rational a national

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169 The applicant was of Ivorian nationality but resident in Paris and adopted by a French national.

170 The ECtHR relied on *Gaygusuz* v. *Austria*, above note 166, where, by contrast, the right to payments had been linked to the nature of the contributory system. But see the dissenting opinion of Judge Mularoni, who, distinguishing the instant case from *Gaygusuz* on the grounds that it involved non-contributory benefits for disabled people, argued that, although there had been no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1, there had been a violation of Article 14 taken in conjunction with Article 8. See *Koua Poirrez*, above note 168, at para. 46. See also *Stec* v. *UK*, above note 6, at para. 53 'If … a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements.'

171 See *R (on the application of Carson)* v. *Secretary of State for Work and Pensions (Carson)* [2005] UKHL 37, at para. 12.

172 [2005] UKHL; [2005] 4 All ER 545-672.

173 See *Jankovic* v. *Croatia* (2000) 30 EHRR CD 183.

174 Application Nos. 67531/01 and 65900/01, 12 April 2006. Thus, in *Stec* v. *UK*, the ECtHR held by sixteen votes to one that there had been no violation of Article 14 taken together with Article 1 of Protocol No. 1 in respect of the cessation of Reduced Earnings Allowance (REA) at different ages for men and women: 'If … a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements.' See *Stec* v. *UK*, above note 6, at para. 53.

175 As noted by Judge Borrego Borrego in his concurring judgment, by widening the notion of possessions to include welfare benefits and by establishing a link between Article 14 and Article 1 of Protocol No. 1, the ECtHR has by implication secured 'the entry into force of Protocol No. 12 in a very important sphere (social security benefits) in respect of a Contracting Party which had not even signed Protocol 12'.

176 See, for example, *Timishev* v. *Russia* (2005) 44 EHRR 76.

177 Application No. 421845/05, 4 November 2008 (unreported) The case concerned the general policy of the United Kingdom to pay index-linked pensions to residents while refusing to up-rate in the case of pensioners abroad, unless resident in countries having reciprocal agreements with the United Kingdom.

court may say so.[178] Moreover, the ECtHR recently spelled out in *Stec* that a difference of treatment that is prima facie discrimination under Article 14 can be justified in cases where it is intended to correct 'factual inequalities'.[179]

In contrast to this progress, however, we have also seen that limitations in the drafting of Article 6 and 14 have to some extent hampered the Convention's evolution as an instrument for the principled resolution of disputes concerning the fair distribution of socio-economic entitlements in member states. In the case of Article 6, emphasis on a formal conception of equality, directed at the assimilation of public and private law claims, has left little room for the development of a Convention jurisprudence focused on what due process may require when discretionary socio-entitlements are withheld from vulnerable and dependent individuals in need.

Moreover, as we have seen in the context of Article 14, a formal conception of equality has similarly encouraged the ECtHR to focus more closely on the artificial extension of the range of substantive socio-economic rights covered by the Convention than on efforts to address issues of socio-economic deprivation more holistically through the development of a substantive model of equality in the Convention jurisprudence.

4.3 Towards a Jurisprudence of Substantive Equality in the ECHR rights: the Promise of Article 14?

Dissatisfaction with the ECtHR's approach to the application of Article 14 has recently been tempered. Since the case of *Thlimmenos* v. *Greece*,[180] small steps have been taken to tackle the problem of indirect discrimination through the application of Article 14. For example, in the admissibility decision of *Hoogendijk* v. *Netherlands*,[181] the Court accepted that an apparently neutral decision to terminate the availability of certain disability benefits had a differential impact on men and women and, although justified, held that it fell within the meaning of discrimination under Article 14. Since then, moreover, in the important case of *D.H.* v. *Czech Republic*,[182] founded on Article 14 taken together with Article 2 of Protocol No. 1, the ECtHR accepted that 'a difference in treatment' under Article 14 may take the form of disproportionately prejudicial effects of a general policy or measure, which though couched in neutral terms discriminates against a group'.[183] Thus, reaching beyond the approach to direct discrimination established in the *Belgian Linguistics Case (No. 2)*[184] and followed in subsequent cases, the Grand Chamber accepted that in cases of indirect discrimination it was necessary for the ECtHR to adapt its previous case law on evidence.

In *D.H.*, eighteen applicants, all members of the Roma community, claimed that they had been victims of indirect discrimination with respect to the right to education. They relied on Article 1 of Protocol No. 2. They pointed to the significant under-representation of Roma children in their locality at 'ordinary schools', arguing that Roma children tended to be placed in 'special schools' for intellectually less able children, receiving

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178 Id., at para. 81. Moreover the ECtHR has specifically recognised that the margin of appreciation can cover the sort of nuanced judgments that states may have to make when determining cut-off dates for entitlements to benefits.

179 See *Stec* v. *UK*, above note 6. The differences in pensionable ages of men and women in the United Kingdom was meant to address the economically disadvantaged position of women.

180 In *Thlimmenos* v. *Greece*, Application No. 34369/97, 6 April 2000, which concerned the use of the applicant's previous conviction for refusing to wear a military uniform (on the grounds of conscientious objection) in order to exclude him from the chartered accountants profession, the ECtHR held that the state's failure to distinguish his case from that of more serious criminal offences from which it was 'significantly different' meant that Article 14 taken together with Article 9 had been violated.

181 Application No. 58641/00, (2005) 40 EHRR.

182 See above at note 3.

183 Id., at para. 184.

184 Based solely of the residence of their parents, certain French-speaking children were refused access to French-language schools situated in six localities on the edge of Brussels that were subject to special language status. The ECtHR held that there had been a violation of Article 14 together with Article 2 of Protocol No. 1: a similar restriction would not have applied to Dutch-speaking children in an analogous situation.

an inferior education with inevitable consequences for their life chances thereafter.[185] However, the claim was not that the regime governing school selection and allocation was deliberately discriminatory by *requiring* separate school arrangements. Rather, it occurred indirectly, through the manner in which the legislation was applied. The Grand Chamber upheld the applicants' claim, concluding by a majority of thirteen votes to four that there had been a violation of Article 14, read in conjunction with the right to education. However, critical to this outcome was the novel and powerful stance that the ECtHR adopted in relation to the burden of proof imposed on the Czech authorities and the fortuitous use of statistics authored by the Council of Europe bodies and the UN Committee on the Elimination of Racial Discrimination.[186]

Historically, applicants have encountered what has often been an insuperable difficulty in indirect discrimination cases, namely that the ECtHR has required allegations to be proved beyond reasonable doubt. However, in reversing the Chamber judgment,[187] the Grand Chamber held that if an applicant had established (if necessary by advancing statistical evidence) that a practice had a disparate racial impact, then the burden shifted to the state to demonstrate a just cause for the difference in treatment. Moreover, with the burden of proof placed upon it, the Czech government was unable to persuade the Court that there was an objective and reasonable justification for the overtly disadvantageous situation. The ECtHR accordingly held by thirteen votes to four that there had been a breach of Article 14, taken together with the right to education.

Thus, encouraged by the Court's stance in D.H. on statistics and the burden of proof, there is room for a degree of optimism that Article 14 may become a more effective tool against indirect discrimination in the accessibility of socio-economic entitlements. Nevertheless, it remains to be seen how far the Court will go in applying the new tests and the range and authority of statistical evidence that will be necessary in cases of indirect discrimination.

At this point, there is nothing to suggest a bolder move by the ECtHR towards the use of Article 14, coupled with positive duties in Articles 3 and 8 ECHR, to make social provision for disadvantaged individuals and families living at the margins of existence without adequate support for their needs.

5 Conclusion

Recent commentaries have focused on the willingness of the ECtHR (irrespective of the negative-positive orientation of rights) to examine the scope of state obligations to make basic social provisions, under Articles 3 and 8 ECHR, in the light of such factors as the degree of culpability for socio-economic deficits and the severity of the destitution at issue.[188] Nevertheless, we have seen that, despite the well-recognised conceptual inadequacy of the positive-negative dichotomy of rights, its pervasive influence continues to be strongly reflected in the ECtHR's jurisprudence, especially in socio-economic complaints concerning access to basic socio-economic provisions. Thus, on

[185] The applicants produced a survey which revealed that in their region 1.8% of non-Roma children were placed in special schools, compared to 50.3% of Roma children. *D.H.* v. *the Czech Republic*, above note 3, at para. 90.

[186] This is an important extension of the ECtHR's willingness to rely on other instruments in its interpretation of ECHR rights.

[187] Application No. 53725/00, 7 February 2006.

[188] See Clements and Simmons, above note 1, at 412-413. In a review of the case law under Articles 3 and 8 ECHR, the authors have usefully identified a robust set of criteria according to which, in cases of severe destitution or socio-economic deprivation that is directly or indirectly attributable to state failure, the Court is prepared to examine the state's responsibility, primarily in terms of its obligations under Articles 3 and 8 ECHR. The authors identify such cases, such as the Haderini complaint, above note 88, as lying at the 'severe end of the scale' where it was alleged that the state itself was directly culpable for the complainants' homelessness. A second category of cases demonstrates substantial socio-economic disadvantage for which the state is only indirectly responsible, for example where legitimate state action has had a disproportionate (albeit unintended) consequence on an individual or group. See *Buckley* v. *UK*, above note 128 (where a regulatory function may give rise to discrimination against particular groups the ECtHR may scrutinise the proportionality of the scheme).

the one hand, the ECtHR has reminded us that the steps needed to discharge a positive obligation under Article 3 may be 'more judgemental' and more prone to variation from state to state than in cases of negative infliction of harm. On the other hand, we have seen that despite the well-recognised potential under Article 8 to protect vulnerable individuals even in respect of housing needs (*Marzari*), strategic case law (*Connors* and *McCann* v. *UK*) continues to reflect a bias towards claims involving negative interference with the enjoyment of an existing home. Indeed it is in the vexed area of housing needs that we most clearly see that the ECtHR has failed to embrace fully a theory of positive obligations, according to which questions of state responsibility are examined in the light of the nature and extent of threats to rights and the extent to which the state or its agents can be said to be responsible for the deficit.

However, we have also recognised that issues of constitutional propriety relating to the adjudication of such resource intensive rights are no less problematic in international courts than on the domestic plane. On the one hand, therefore, we have accepted the difficulties of determining the proportionality of a state's failure to provide for the needs of vulnerable individuals in the jurisdiction where competition or lack of resources lie at the very heart of the complaint. On the other hand, we have argued that a crucial aspect of the Court's constitutional role *vis-à-vis* that of national authorities is the promotion of common values and standards of respect for human dignity and personal integrity in a growing family of European democratic states. Thus, we have suggested that recent cases, such as *N* v. *UK*, which was founded on Article 3, reflect a welcome development in the willingness of the ECtHR to address fundamental questions about the limits of state responsibility to make social provision for vulnerable and needy individuals living in the jurisdiction. Throughout this article we have argued that the incremental reflexive approach of the ECtHR to the development of positive obligations has failed to keep step with the emergence of a more principled approach, where positive obligations are determined in accordance with universal fundamental standards of dignity, equality and personal autonomy inherent in the Convention rights. Moreover, we have also seen that limitations in the drafting of Articles 6 and 14 ECHR have similarly triggered an expansive approach to the interpretation of the rights. Thus, regrettably, the ECtHR has focused more closely on the artificial extension of the substantive socio-economic rights covered by the Convention than on efforts to address issues of socio-economic deprivation more holistically through the development of a substantive model of equality or due process in public law disputes. Therefore, despite recent progress towards a more substantive concept of equality, limitations in the drafting of Article 6 and 14 have inhibited the Convention's evolution as an instrument for the principled resolution of disputes concerning the fair distribution of socio-economic entitlements in member states.