

TITLE

**CLAIMS TO RESOURCES AND POSITIVE OBLIGATIONS  
UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

Candidate:

**VASSILIKI MARTZOUKOU**

College:

**UNIVERSITY COLLEGE LONDON**

Degree:

**PHD**

**DECLARATION OF AUTHENTICITY**

'I, Vassiliki Martzoukou, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.'

## ABSTRACT

This thesis investigates the question of what claims to resources and positive obligations are inherent in an effective respect for the rights protected by the ECHR. I advance my thesis first by way of a negative argument about where we cannot look for answers: in flawed categorizations and distinctions between different types of rights and duties and in formalistic or conventional interpretations of the ECHR. Instead, I treat this as an interpretive question that invites substantive moral arguments about what the content and extent of such claims may be in light of the principles and values underlying the Convention. I highlight the significant progress but also the inconsistency and uncertainty in the case law of the ECtHR and offer examples that point to the need for a coherent set of principles by which to determine the content and fair scope of positive obligations and claims to resources.

I investigate three different conceptions of the value of liberty as the core value underlying the ECHR. I consider the problems in employing the theories of I. Berlin and J. Raz as the basis for an account of rights and positive obligations. In contrast to these, I develop an interpretation of Ronald Dworkin's integrated conception of the values of liberty and equality, by which his two principles of dignity and the abstract right to equal concern and respect may give rise to rights as fair shares in a just distribution of the available resources. The idea of proportionality, I suggest, so prevalent in human rights theory and practice, cannot answer the question of what is a fair share but points to the central problem of when can individuals challenge a distribution of resources or opportunities as disproportionate, unreasonable or unfair. Besides, I highlight the significant flaws of minimum core and capabilities theories as the basis for construing the content of rights and claims to resources and positive obligations.

As a more attractive alternative, I closely examine Dworkin's theory of equality of resources and defend an interpretation of his hypothetical insurance device as a safety net strategy for determining the content of claims to resources and positive obligations under the ECHR.

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## INTRODUCTION

In this thesis, I aim to shed some moral light on the question of what claims to resources and positive obligations are inherent in an effective respect for the rights protected by the European Convention on Human Rights. In a nutshell, my argument is that substantive moral reasoning and principles of political morality<sup>1</sup> lead us to construe the content of claims to resources and positive obligations as claims to fair shares under a just distribution of resources, in light of an integrated account of the values of liberty and equality as the core values underlying the ECHR rights. The European Court on Human Rights has from the outset acknowledged that real, practical and effective respect for the ECHR rights cannot be confined to negative obligations of non-interference but may entail positive obligations and claims to resources: to take positive steps such as legislative, institutional, social and economic measures, to provide goods, benefits or opportunities. The practice of the Court has made remarkable progress in this field but it is often rightly criticized as overly cautious and incoherent, especially when it assumes that these cases raise complex resource allocation decisions. I believe that the Court's reluctance and incoherence is due to its uncertainty about which principles should determine the content and limits of claims to resources and positive obligations.

The problem is significant and calls for urgent attention as the challenge for the Court and those advocating a proactive role of the state in the protection of human rights becomes all the more complex: advancements in technology, science, medicine or in social morals, attitudes and institutions offer greater potential for improving various aspects of the lives of individuals. The challenge then is that social changes and increase in the availability of new and useful resources goes hand in hand with increased demand to a share of those resources as a matter of ECHR rights. A claim for accommodation of our social environment for people with various forms of disability or claims to be provided with new medicines or medical treatments or with robotic limbs are just some indicative examples from the case law of the Court. On the other hand, the global financial crisis means many countries face extreme scarcity of resources, while their people, more so than ever, claim protection of their basic social and economic entitlements against a backdrop of a dramatic change of circumstances in their lives. Dealing with these claims in a piecemeal fashion raises justified concerns of either undue restraint or rights-inflation. I will

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<sup>1</sup> By principles of political morality I mean principles that define how we should treat others and have a prominent role in determining what opportunities and resources people are rightfully entitled to have. Ethics, on the other hand, governs how one must live her own life. See R Dworkin, *Justice for Hedgehogs*, (Belknap, Harvard, 2011), p. 371. I discuss this further in Chapter 3 of this thesis.

argue that we must draw the principles necessary for assessing these claims from an integrated interpretation of the core values underlying the ECHR. That is, from a particular interpretation of the value of liberty in light of the value of equality and Dworkin's fundamental abstract obligation of government to treat all with equal concern and respect.

My thesis takes the following form. I begin by dispelling certain misconceptions around the concept of positive obligations that hinder the development of a principled approach and I establish that the question of what positive obligations are inherent in effective respect invites substantive moral reasoning. Although significant, this move merely opens rather than settles the question. The confusion and restraint of the Court when dealing with what it considers to be difficult resource allocation decisions proves this point: the Court needs a set of clear principles for assessing claims to resources and positive obligations. The interpretive question of what effective respect requires cannot be answered with reference to the notions of effectiveness or the margin of appreciation as this would be circular: we need substantive moral reasons to distinguish between justified rights claims whose content should be determined by the Court and policy issues that should better be left to the margin of appreciation of the national authorities.

For this reason, I then shift the focus of the debate at the intersection between human rights and political philosophy and explore different interpretations of the values of liberty and equality as the core values underlying the ECHR rights. I explore the weaknesses in these alternative interpretations inspired by the work of Isaiah Berlin and Joseph Raz and argue in favour of Ronald Dworkin's integrated account of liberty and equality and the corresponding fundamental principle that the state must treat all with equal concern and respect. My central argument is that, following this principle of political morality, we must construe claims to resources and positive obligations as claims to the fair shares that people would have been entitled to under a just distribution of resources. The debate about the content of positive obligations needs to turn on the question of what constitutes a fair distribution of resources and what claims are justified as claims to fair shares: that is, when they can reasonably challenge the fairness in the distribution of resources within a state as a violation of ECHR rights. My argument concludes that people have justified claims to those resources and positive obligations that ensure the conditions or capabilities for certain choices about their lives: those choices that they would have had were other morally arbitrary circumstances more nearly equal. I suggest that the content and limits of these claims could be determined in a plausible and fair way through Dworkin's hypothetical insurance device. This could operate as a 'safety net' device that estimates fair shares and entitlements based on the level of insurance that an average prudent person would have opted for against the risk of lacking certain conditions and capabilities for choice within the ECHR spheres of freedom granted to her.

As I said earlier, my research and writing for this thesis is located on the intersection between human rights and political philosophy. For this reason, it is crucial for me to acknowledge the limitations of my endeavours and ambitions in this project. To begin with, in this thesis, I have sought to shed moral light on the question of what claims to resources and positive obligations are inherent in an effective respect for human rights. To do so, I have mainly focused on exploring the interpretation of the values underlying the ECHR rights in particular and trying to draw a framework of principles from them to facilitate coherent adjudication of claims to resources and positive obligations. This means that I have focused my study in the context of the ECHR and have not adopted a comparative methodology, e.g. looking at relevant developments and ideas in the Canadian or South African Supreme Court or in the context of the European Social Charter or the UN International Covenants. Also, reference to case law of the ECtHR in this thesis is neither exhaustive nor detailed. My aim with respect to the practice of the Court has been to identify trends in the Court's jurisprudence concerning the interpretation of positive obligations and claims to resources and to highlight the progress and problems in the relevant case law. For this reason, although I have surveyed the relevant case law I discuss only representative examples of established and emerging trends. It is part of my argument in this thesis, that the Court needs a set of principles in order to bring coherence to its practice in this area and, for this reason, my inquiry has focused on identifying and explaining these principles as well as suggesting what their implications may be. Ideas and principles drawn from normative analysis of this kind can then be applied, with necessary adjustments, in any other context with a view to suggest the necessary background theoretical framework for any given national or international legal order.

At the same time, in order to support my argument in this thesis I assume certain positions within deep and controversial debates about the nature of law and interpretation in legal theory and engage in substantive discussion of views and theories in political philosophy, in particular theories of distributive justice. However, my thesis is not intended as a contribution in any of these fields. Although I have made every effort to raise all points that I consider crucial to my thesis, I cannot claim to have covered all of the issues implicated in depth. My aim is much more modest: it is to emphasize the need and centrality of principles of political morality for the interpretation of the ECHR and, in particular, the importance of values of fairness, equality and theories of distributive justice for determining what resources people are rightly entitled to as a matter of rights and freedoms in the ECHR in particular. Of course, I aim to justify my positions in these debates by way of a critical analysis of opposing views, anticipating objections, expanding on the views I support and discussing how they fit with the practice of the ECHR.

### **Claims to resources, positive obligations and the objections of legitimacy and institutional competence**

Given that I treat the question about what claims to resources and positive obligations are inherent in effective respect for the ECHR rights as a question about the content of these rights, I have downplayed the relevance of two other debates to my thesis. The one has to do with the classification of rights as civil and political or social and economic and the nature of rights and duties as negative or positive. The other has to do with the legitimacy and institutional competence of the ECtHR in dealing with claims to resources and positive obligations. I assume that these debates are largely misplaced and I offer here some of the most important reasons that justify this position.

To begin with, although it is true that the ECHR is a civil and political rights instrument this does not necessarily mean that these rights are essentially negative or cost-free and that the normative principles that apply to them may not yield and justify certain socio-economic entitlements – albeit different from those in the context of social rights treaties. In order to justify this position it is not necessary –and is quite possibly wrong– to assume that all international human rights treaties and instruments have the same underlying principles or point and purpose. What we need to argue is that the particular principles that underpin the ECHR as a civil and political rights treaty may entail both negative and positive rights and duties and include elements of social and economic rights. Indeed, as I argue in Chapter 1 of this thesis, if we follow an interpretive approach to the ECHR and employ moral reasoning in order to identify and protect the substance of the ECHR rights in light of its underlying values, then we accept that this kind of reasoning may yield positive obligations and claims to resources as inherent in effective respect for these rights. As the Court put it in the famous *Airey* case, the Convention 'must be interpreted in the light of the present-day conditions' and it is 'designed to safeguard the individual in a real and practical way', so, although it 'sets forth what are essentially civil and political rights, many of them have implications of a social and economic nature', therefore 'the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention'.<sup>2</sup>

Indeed, following the reasoning in *Airey*, the Court has acknowledged the existence of a significant number of positive obligations as inherent in effective respect, has largely

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<sup>2</sup>*Airey v Ireland* (1979-80) 2 EHRR 305.

accepted the indivisibility of civil and political and socio-economic rights<sup>3</sup> and has adopted an 'integrated approach' to the interpretation of the ECHR. That is, it accepts that elements of socio-economic rights may be integrated into the civil and political rights protected by the Convention and that, for this reason, it must be interpreted also in light of other international instruments of human rights protection, be they of civil and political or social and economic rights.<sup>4</sup> However, as I will show in Chapter 2 of this thesis, the ECtHR's reasoning is often restrained or incoherent when dealing with cases that appear to the Court to involve difficult resource allocation decisions. This shows that the question of what socio-economic entitlements may be integrated into the ECHR rights invites a difficult interpretive question which puzzles the Court and triggers objections about the nature of the duties involved, the legitimacy and institutional competence of the ECtHR to decide such matters. In the absence of clear principles to deal with such claims, the Court often leaves them to a wide margin of appreciation of the national authorities. Although a big step forward, it is not enough to proclaim the indivisibility of rights and duties and the collapse of traditional distinctions between civil and political and socio-economic rights or between negative and positive rights or obligations. In my view, in order to be clear and consistent about what indivisibility entails in practice we need to turn to the problem that it poses for the Court: the problem of determining the content of claims brought before it in a principled and coherent manner. Because, it is one thing to say that civil and political rights may entail socio-economic entitlements and another to justify which ones in particular should be integrated into the ECHR rights. This is why my research in Chapters 3, 4 and 5 of this thesis focuses on the values and principles that underlie the ECHR in search of a coherent and plausible normative framework for determining the content of claims to resources and positive obligations.

Besides, this interpretive approach to the ECHR is supported by a largely undisputed argument in the theory of human rights against formalistic conceptions of the nature of rights and obligations and arbitrary classifications between categories of rights. This is the argument that protection of all kinds of rights inevitably involves a mixture of negative

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<sup>3</sup> IE Koch, *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands Under the European Convention on Human Rights*, (Martinus Nijhoff Publishers, 2009). See also S Fredman, *Human Rights Transformed. Positive Rights and Positive Duties* (Oxford University Press, Oxford, 2008), who treats the debate about the justiciability of positive duties as a debate about their content and implications, casting aside formalist categorizations between civil and political and social and economic rights.

<sup>4</sup> For the 'integrated approach' in general see M Scheinin, 'Economic and Social Rights as Legal Rights', in E, Krause and A Rosas (eds), *Economic, Social and Cultural Rights* (Dordrecht: Martinus Nijhoff, 2002), p. 32, and for its application in the ECHR with respect to protecting aspects of labour rights in the context of ECHR rights in light of the International Labour Organization and the European Social Charter, see V Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation', *Human Rights Law Review* (2013), pp. 1-27.

and positive duties, significant cost and resource allocation decisions.<sup>5</sup> Respect for the right to life under the ECHR requires wide-ranging action on the part of the authorities in organizing and undertaking large-scale investigations of unlawful killings or disappearances.<sup>6</sup> The protection of ECHR rights, such as those to bodily integrity, the peaceful enjoyment of one's possessions or the right to respect for one's home or private life require an efficient policing and law enforcement mechanism that entails significant public spending and complex resource allocation decisions. Similarly, the right to a fair trial has significant cost in maintaining a fair and effective system for the administration of justice and the right to vote necessitates the costly undertaking to organize and hold elections that meet demanding organizational requirements of efficiency, transparency and fairness. Notice that all these costly public services are considered essential to guarantee rights that are traditionally referred to as civil and political but evidently depend on resources. And this is not a conceptual but a moral question that is answered with reference to principles of political morality about the best interpretation of the value of liberty and the choices and resources that people are morally entitled to under a reasonably just distribution of resources. The Court has attempted to identify criteria to demarcate the extent of the state's responsibility in respecting the right to life through policing<sup>7</sup> or the right to a fair trial through the provision of fair, independent and impartial judicial procedures. In the same way, it must also try to discover the principles that justify what resources can a disabled or a near-destitute individual claim to be essential for an effective respect for her right to private life.

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<sup>5</sup> For these arguments, see generally H Shue, *Basic Rights. Subsistence, Affluence and U.S. Foreign Policy*, (Princeton University Press, 1980) and C Sunstein and S Holmes, *The Cost of Rights: Why Liberty Depends on Taxes* (W.W.W. Norton & Co, New York, 1999). These, among other, theories of rights debunked the flawed idea, prevalent in human rights theory by then, that civil and political rights can be realized with 'fairly simple legislation', whereas it is impracticable or impossible to realize social and economic rights due to the demands they make on resources. For these arguments against the justiciability of social and economic rights, see M Cranston, *What Are Human Rights*, (Taplinger Publishing, New York, 1973), pp. 66-67. Also H A Bedau, "Human Rights and Foreign Assistance Programs", in P G Brown and D MacLean (eds.), *Human Rights and U.S. Foreign Policy*, (Lexington Books: Lexington, Mass., 1979), pp. 36-37, who argued that the criterion for deciding whether a right is fundamental should be whether it requires resources and wealth that the state cannot provide for its protection.

<sup>6</sup> As to the potentially extraordinary length and cost of an effective police investigation or inquiry one need not look much further than the recently completed multi million pound 'Bloody Sunday Inquiry', which aimed at 'inquiring into a definite matter of urgent public importance, namely the events on Sunday, 30 January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day', see <http://www.bloody-sunday-inquiry.org.uk/>

<sup>7</sup> The criterion that was devised in *Osman v United Kingdom* was that a violation of the right to life would be found if the authorities 'knew or ought to have known' of the 'clear and immediate risk' to life and did not take all the steps that were reasonably expected of them in the circumstances. I will discuss examples in chapter 2 of this thesis.

Now, my position on the debates of legitimacy and institutional competence of the ECtHR in deciding issues with resource allocation implications is closely connected with the arguments discussed in the previous paragraphs. If we accept that all human rights may entail positive obligations and resource allocation decisions then it follows that, in principle, some claims to resources and positive obligations are matters of human rights and fall within the ECtHR's legitimate role. Of course, some aspects of resource allocation are matters of social or economic policy that should better be left to the margin of appreciation of the national authorities –as the ECtHR often reiterates. Nevertheless, it would be wholly circular to distinguish which particular claims fall within this margin of appreciation and outside of the legitimate role of the ECtHR merely with reference to the idea of a margin of appreciation –as it often happens in the practice of the ECtHR. For this reason, I assume that the question of which claims are matters of ECHR rights and which ones are matters of state policy largely rests on the interpretation of the content of the ECHR rights in light of the values and principles of political morality that underlie them. So, if we accept that the point and purpose of the ECHR is to protect certain moral rights of individuals in a practical and effective way then the interpretive task of arguing about the content and requirements of these rights falls, in principle, within the legitimate role of the ECtHR.

Following this, the famous principle behind the doctrine of the margin of appreciation i.e. the principle that the role of the ECtHR is meant to be subsidiary<sup>8</sup> to that of the national authorities, can only be taken to mean that national authorities have a chronological rather than a normative priority<sup>9</sup> in determining what effective respect for the ECHR rights requires. As Article 1 of the ECHR proclaims, national authorities are those primarily entrusted with ensuring the ECHR rights but it is essential for the ECtHR to scrutinize the states' actions and omissions in order to fulfil its legitimate role as the ultimate guardian of these rights in a real and practical way. The whole point of the ECHR is futile if the claims that individuals raise against unfair treatment by their national authorities are ultimately left to the will of those authorities without any substantive justification whatsoever.<sup>10</sup> The ECtHR has a distinctively prominent role in promoting cohesion in the

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<sup>8</sup> The principle of subsidiarity is very common among international law theorists and is often hailed as one of the most important principles underlying the Convention, by word of the former President of the Court R Ryssdall in 'The Coming of Age of the European Convention on Human Rights', *European Human Rights Law Review* (1996), p. 18-29. Note that Protocol 15 amends the Preamble of the ECHR to make special reference to this principle.

<sup>9</sup> For this distinction see G Letsas, *A Theory of Interpretation for the European Convention on Human Rights* (Oxford University Press, 2007), ch. 4.

<sup>10</sup> For an extensive overview of the doctrine of the margin of appreciation see HC Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence*, (Martinus Nijhoff Publishers, 1996) and Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002), who

interpretation and protection of fundamental freedoms<sup>11</sup> and realising the promise of international enforcement of human rights that overcomes national policies and the sovereign will of the states, through the consistent and principled application of the Convention guarantees.<sup>12</sup> Of course, the question is always open for the national authorities or the ECtHR to establish that there is no unfairness or no denial of the moral entitlements of individuals under the ECHR. But this, properly understood, is a matter of principles of political morality about what constitutes unfair treatment or about what claims to resources or positive obligations are justified under the ECHR.

Concerns about the institutional competence of the ECtHR, on the other hand, can be recast once we have set clear principles for determining the content of claims to resources and positive obligations. To be sure, resource allocation decisions raise controversial questions about the fairness of a given distribution of resources, the entitlements of individuals and the positive duties of the state. But the ECtHR often undertakes to resolve other controversial cases, e.g. in relation to sensitive moral issues, by seeking to provide substantive moral reasoning and deliver a principled judgment about what rights people have. If we accept that this is a legitimate interpretive approach then the Court should face any controversial issue in the same way. Of course, resource allocation decisions pose the significant problem of polycentricity:<sup>13</sup> they require a good appreciation and analysis of a broad range of parameters and can have various consequences and implications. So, although in principle they may be part of what we would like the ECtHR to be doing, in practice that could be impossible or risky and compromising our aim to secure the ECHR rights effectively. However, this would be the case if we asked the Court to substitute the national authorities in making resource allocation decisions or to decide what would have

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describes the doctrine of the margin of appreciation as the other side of the principle of proportionality. Also MacDonald, 'The Margin of Appreciation', in R St J MacDonald, F Matcher and H Petzold (eds.), *The European System for the Protection of Human Rights* (1993), who rightly points out that when the Court uses the margin of appreciation doctrine it often does not provide any reasons for or against the applicant's claim itself and therefore ultimately does not give any decision at all on the matter –let alone a justified one. Also, R Singh et. al. 'Is there a role for the "Margin of Appreciation" in national law after the Human Rights Act?' (1999) 1 *European Human Rights Law Review* p. 4.

<sup>11</sup> This feature distinguishes human rights treaties in that it requires interpretation that is sensitive to a different set of values than those underlying other kinds of international treaties. See Bernhardt, 'Thoughts on the Interpretation of Human-rights Treaties', in F Matscher and H Petzold (eds.), *Protecting Human Rights: The European Dimension* (1990), p. 65 and Letsas, *A Theory of Interpretation for the European Convention on Human Rights*, ch. 1.

<sup>12</sup> E Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards', 31 *New York University Journal of International Law and Politics* (1998-1999), p. 844.

<sup>13</sup> For the problem of polycentricity in positive obligations cases under the ECHR see De Schutter Olivier, 'The Protection of Social Rights by the European Court of Human Rights' in Van Der Auweraert P., J Sarkin & Others (eds.), *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments* (Maklu, 2002). Also, for an argument for judicial caution in cases of social and economic rights due to the problem of polycentricity see J King, *Judging Social Rights*, (Cambridge University Press, 2012).

been the optimum or ideally just distribution. Instead, we are asking the Court to make a reasonable and principled judgment about whether there seems to be an unfairness in the particular allocation of resources.<sup>14</sup> In the same way as we ask the Court to decide e.g. about the private and family life rights of homosexuals or post-operative transsexuals we may also expect the Court to determine whether the lack of access to public buildings for people with impaired mobility show that their state treats them with less than equal concern and respect. In both cases, we appeal to the same principles of political morality to work out what people are entitled to, only our arguments are, so far, underdeveloped in the second type of controversial questions.

Besides, if we understand the task of the Court in this way, then we have very good reasons to believe that this kind of judgment can actually better be made by the ECtHR: judges are institutionally required to provide impartial, coherent and reasoned answers about the moral rights and entitlements of individuals, i.e. about their claims that they have been treated unfairly, with less than equal concern and respect. To this end, they must detach themselves from the interests at stake and employ and apply those principles of political morality that could determine the content of claims to resources and positive obligations. At the same time, they can draw technical expertise from the pool of experts available to the Council of Europe and from various other national and international organizations, such as the International Labour Organization, the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment etc. Moreover, note that the ECtHR regularly refers to and relies upon the findings, reports or recommendations of such international organizations, drawing on their technical expertise as well as their interpretive principles to apply in areas where there is an overlap with the issues covered by the ECHR.<sup>15</sup> Besides, national authorities and officials regularly employ experts to assist and consult them in all fields relevant to public policy, e.g. economics, town planning, health administration, energy or environmental issues etc. National courts too rely on expert opinion when confronted with extremely complex and technical matters, such as those arising in patents cases where specialist knowledge of technology or biotechnology and the various effects of patents based on them may be called for.<sup>16</sup> But

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<sup>14</sup> Contrary to Holmes's and Sunstein's argument that 'courts are not in a good position to assess claims that involve resource allocation', in *The Cost of Rights: Why Liberty Depends on Taxes*, p. 96.

<sup>15</sup> On this point see Judge Rozakis' analysis in, 'The European Judge as a Comparatist' (2005) 80 *Tulane Law Review* 257 at p. 268, cited in Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation', p. 539.

<sup>16</sup> On the effect of patent scope decisions and the courts' reasoning on the fine line between patent protection, financial incentives and scientific invention or technological development see RP Merges and RR Nelson, 'On the Complex Economics of Patent Scope', (1990) *Columbia Law Review*, 90: 839. See also, *Association for Molecular Pathology et al v Myriad Genetics Inc, et al*,

ultimately, they use this knowledge to place the facts of the case in a wider context and resolve the individual case by appeal to broader and deeper considerations and principles.

In addition, both the national authorities and the ECHR regularly rely on the informed opinions and evidence submitted to help them reach decisions in all kinds of sensitive and controversial cases with significant budgetary or other social policy implications. In a very recent case, the ECtHR had to decide whether the conditions under which an individual with impairments in her mental capacity was deprived of her legal capacity and was placed under compulsory legal guardianship violated her rights to private and family life.<sup>17</sup> Notice how the Court distinguished the sensitive technical question of the impairment of a person's mental faculties by physicians and the overall assessment of the person's circumstances and the proportionality of the measures to be taken in relation to those circumstances, which should be left to the judge:

'The Court notes that the decision to partly deprive the applicant of her legal capacity relied to a decisive extent on the report drawn up by two psychiatrists. The Court is aware of the *relevance* of medical reports concerning persons suffering from impairment to their mental faculties and agrees that any decision based on an assessment of a person's mental health has to be *supported by relevant medical documents*. However, *it is the judge and not a physician* who is required to *assess all relevant facts* concerning the person in question and his or her *personal circumstances*. It is the *function of the judge* conducting the proceedings to *decide whether such an extreme measure is necessary or whether a less stringent measure might suffice*. When such an important interest for an individual's private life is at stake *a judge has to carefully balance all relevant factors in order to assess the proportionality of the measure to be taken*. The necessary procedural safeguards require that any risk of arbitrariness in that respect is reduced to a minimum...' [my emphasis]<sup>18</sup>

With this example, I aim to highlight the point that expert opinion and knowledge is often necessary but always insufficient on its own to settle questions that reach the courts because these are interpretive questions of political morality, i.e. about the best interpretation of moral and political concepts, values and principles, about the kind of treatment or resources people are entitled to and about what obligations others and the state have towards them. This kind of judgment will always take into account expert opinion and specialist knowledge but will place it in a wider context of the individual's other circumstances, rights and entitlements, notions of reasonable burdens and benefits,

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569 US Supreme Court (13 June 2013), where the US Supreme Court placed the technical matter of which human genes can be patented under the light of a principle that excludes laws of nature, natural phenomena and abstract ideas from patent protection; the Court found, in line with past judicial rulings on similar matters, that disregarding this principle 'would be at odds with the very point of patents which exist to promote creation.'

<sup>17</sup> *Ivinovic v Croatia*, Application no. 13006/13 (18 September 2014)

<sup>18</sup> *Ibid*, para. 40.

fairness, liberty and equality, respect for dignity, regard for other individual or communal goals etc.

The crucial point then is that the ECtHR is not required to deploy all country-specific or comparative social and economic information and knowledge in order to dictate to the national authorities what an optimum or cost-effective distribution or what a universally ideal distribution of resources would be. Instead, what the applicants are asking and what the Court should aim to do is to use all necessary expertise to answer the interpretive question of what is the share of resources that people are entitled to as a matter of ECHR rights, interpreted in light of principles of fairness and equal respect and concern. For this reason, in this thesis, I focus exclusively on the need for such principles, the problems that the lack of them causes in the jurisprudence of the Court and the implications that they have in determining what claims to resources and positive obligations are inherent in an effective respect for the ECHR rights.

### **Thesis overview**

In **Chapter 1 (Positive Obligations in the ECHR: Towards a Better Understanding of the Effectiveness Principle)** I aim to establish that the question of what positive obligations and claims to resources are inherent in an effective respect for human rights is a matter of substantive moral reasoning and must be settled with reference to principles of political morality. I begin by briefly tracing the emergence of the concept of positive obligations in the case law of the Court through the 'effectiveness principle': the idea that the Convention is meant to guarantee rights that are 'real and practical' and not 'theoretical or illusory'. By and large, judges and scholars have accepted that this idea challenges widely assumed distinctions between civil and political and social and economic rights as well as between negative and positive obligations. Still, certain misconceptions about the interpretation of the ECHR and the source of positive obligations persist and hinder the development of a principled approach to these cases. I place them under the heading of 'conventional effectiveness' to connote that all these views assume limitations to the claims to resources and positive obligations based on supposed conventions or agreements. In particular, I explain that it would be circular to rely on the plain meaning of the words of the text or the intentions of the drafters since these give rise to the disagreement in the first place. Following Dworkin, I argue that this disagreement is moral and to resolve it we need to interpret the words of the text and the intentions of the drafters in light of substantive moral arguments about the essence of the rights at stake. I discuss the Court's interpretation of what effective respect requires in light of the present day conditions, as a shift from a conventional reading of the Convention to a moral

understanding of the substance of rights and the corresponding claims to obligations and resources. This 'substantive effectiveness approach' commits us, I argue, to the position that claims to resources or, in general, claims with social and economic implications, are an integral part of the ECHR rights. Of course, from that alone does not follow which claims to resources or positive obligations are inherent in effective respect for the ECHR rights and which are matters of policy that should better be left to the margin of appreciation of the national authorities. To overcome the interpretive limitations of a conventional effectiveness approach does not provide any answers or principles to the question of what effective protection for ECHR rights requires. It merely explains where we cannot look for answers. We may have recast our initial problem as one of substantive political morality but it still remains open as the case law of the Court seems to lack the coherent set of principles by which to resolve it. Before I begin to discuss the values and principles that I believe underpin the ECHR rights I discuss, in the following chapter, examples that are indicative of this weakness in the Court's overall remarkable progress in the field.

In **Chapter 2 (Claims to Resources and Positive Obligations in the Practice of the ECtHR: Progress and Problems)** I aim to highlight the inconsistency in the Court's treatment of claims to resources and positive obligations. I discuss representative examples of two broad categories of cases that represent two different trends in the Court's jurisprudence. The Court has tried to develop certain substantive criteria for deciding what the principle of effectiveness requires in those cases that are closer to traditional functions of the state, such as the administration of justice, the operation of public authorities, the police and the military services. In these cases, I argue, the Court takes into account considerations about the potential socio-economic implications but, nonetheless, proceeds to a substantive examination of the merits of the claims and their limitations. On the other hand, when the Court views the applicants' claims as raising sensitive issues or welfare state responsibilities, it defers the matter to a wide margin of appreciation of the national authorities as supposedly better placed given the resource allocation decisions required. In these cases, the Court's decisions are largely unjustified or with poor reasoning, indicating that it is reluctant to examine any of the questions raised substantively: the question of justification (the fair balance test), the question of interference or even the question of applicability. I argue that this is understandable due to the lack of those principles that could help the Court to distinguish which claims to resources or positive obligations are inherent in an effective respect for the ECHR rights and which are matters of social or economic policy that fall outside of the legitimate role of the Court. From this point on, the focus of my thesis turns to the question of what these principles may be and how they could shape claims to resources and positive obligations under the ECHR.

In **Chapter 3 (Three Concepts of Liberty as the Core Value Underlying the ECHR Rights)** I argue that Ronald Dworkin's integrated interpretation of the value of liberty in light of the value of equality offers the best moral foundation for claims to resources and positive obligations under the ECHR. I advance my argument firstly by way of a critical analysis of two other interpretations of the value of liberty that have been or could be employed to justify the content of human rights and obligations. Firstly, I examine Isaiah Berlin's conception of liberty construed independently of the moral demands of other values, such as equality or social justice. I argue that this is an unattractive theory because it aims to drain an account of liberty from any moral evaluative judgments about what is valuable about liberty or about what freedoms people are morally entitled to in light of principles of fairness or equality. In this way, the continuum of the value of liberty extends between two unacceptable extremes: from a position where people may be considered free in the absence of any resources or conditions that would make their freedom worthwhile and to the opposite end where they may claim *prima facie* freedoms and resources at the expense of the moral rights of others. Given its descriptive nature, I conclude that this theory lacks any principled criteria by which to determine the value and weight of various claims to freedoms and resources and resolve conflicts between these claims and other competing considerations. Besides, I find this account of liberty to be at odds with the practice of the ECHR, which acknowledges certain claims to resources and positive obligations as necessary conditions for the freedoms guaranteed by the Convention to be worthwhile and meaningful.

Secondly, I evaluate Joseph Raz's conception of liberty in light of the value of autonomy. I find that this account of liberty is problematic as a basis for human rights claims as it runs contrary to certain distinctive features of human rights. To begin with, following Raz, liberty is valuable insofar as it serves personal autonomy, which in turn is a particular conception of well-being. The problem is that, in Raz's theory, personal autonomy is understood as a perfectionist and social value. Following this, the state may have wide-ranging positive duties to promote the conditions of autonomy but not those that individuals choose as valuable and consistent with their conception of the good life. Instead, the state may respect and provide only those choices, opportunities and resources that it finds to be conducive to a particular conception of what are good or valuable autonomy options, as pre-determined by sustaining social practices. I argue that, if we relied on this theory, human rights claims under the ECHR could be largely dependent on prevailing social practices and therefore lose their distinctive force as anti-paternalistic guarantees of the moral independence of the individual.

Finally, I explore Dworkin's integrated account of the values of liberty and equality as the core values underlying claims to resources and positive obligations. To begin with,

I reinforce Dworkin's position that the task of identifying the meaning and requirements of values is an interpretive task that rests on moral judgments about what is good or worthwhile about them. Following this, it makes best moral sense to try to construe the values of liberty and equality in light of each other rather than assume that they conflict: whether these abstract values cohere or conflict is not a matter of fact but, again, a matter of moral judgment that we cannot avoid but should better face with an interpretive spirit. In this vein, I argue that the best moral conception of the value of liberty encompasses the ways in which we believe people ought to be free, based on other moral judgments about what people are entitled to according to a fair and equitable distribution of resources. To discuss the implications that such an interpretation of these values can have as a moral basis for human rights claims I develop an interpretation of Dworkin's two fundamental principles of dignity that bring together the demands of the values of liberty and equality: firstly, the principle of equal concern for the objective moral worth and importance of each individual's life and, secondly, the principle of special, personal responsibility of each individual for making the ethical choices that bring success and value in her own life. I argue that these principles entail both rights as trumps against impermissible considerations but also rights as fair shares in the distribution of freedoms, opportunities and resources. Following this, I suggest that equal respect requires that we grant individuals certain inviolable spheres of freedom of choice but that equal concern demands that we also pay attention to any morally arbitrary circumstances pertaining within these spheres of freedom. The question, then, of the content of claims to resources and positive obligations turns on the question of what constitutes a fair distribution of resources, i.e. which disadvantageous circumstances would it have to mitigate and what conditions for the exercise of these freedoms should it aim to ensure.

Against the theoretical framework set out in Chapter 3, I move on in **Chapter 4 (Three Approaches to the Content of Claims to Resources and Positive Obligations under the ECHR)** to assess the relevance and merits of three different approaches that have been or could be employed to deal with the question of the content of claims to resources and positive obligations. I argue that the doctrine of proportionality is used in ways that are either inappropriate or inadequate to provide a principled framework for determining the content of claims to resources and positive obligations. In particular, I reinforce the view that cost-benefit analysis is an inappropriate way of conceiving of the idea of proportionality or balancing as it echoes a utilitarian outlook that is incompatible with human rights adjudication: it underestimates the special weight and force that should be given to crucial moral considerations and especially the moral rights of the individuals involved. On the other hand, I assess the view that we should use the doctrine of proportionality as an institutional tool that aims to help the Court assess the content and

limits of claims to resources and positive obligations in light of a theory of rights to autonomy interests. I accept that the test of proportionality may be used as a judicial tool that can serve the institutional concerns of conducting the reasoning process with clarity, transparency and certain conditions of legitimacy.

Still, I argue that the suitability and success of proportionality as an institutional tool depends on what principles we feed into it. In the absence of any principles whatsoever, the proportionality or balancing assessment is ad hoc and therefore risks being arbitrary and incoherent. If, on the other hand, we rely on a theory of rights to autonomy interests then we face two problems. If we determine those autonomy interests with reference to which ones are valuable according to a particular conception of well-being then we run the risk of perfectionism that I argue against in chapter 3. If, in order to avoid this, we allow for a wholly subjective account of autonomy interests from the point of view of the agent then we may end up with an account of *prima facie* rights to pretty much everything and with no clear principles as to how we can weight or prioritize them at a later limitations stage. To the contrary, I argue that the moral concern behind the idea of proportionality is better served by egalitarian principles that determine a fair and equitable distribution of resources and opportunities within a society, i.e. principles that can answer the question of what claims to resources and positive obligations are justified claims to a fair share and do not impose an unreasonable burden on others. For this purpose, I assess two egalitarian approaches that have been widely used in international human rights theory and practice to justify what claims to resources people are entitled to under an equitable distribution of resources.

The minimum core approach, I argue, justifies rights and obligations to a minimum content share of resources and opportunities on the basis of the importance and urgency of the needs of individuals, irrespective of any account of responsibility they may have for their inability to serve these needs and independently of any cost that satisfaction of those needs may impose on others. In this way, it treats as inherently unfair distributions that may not necessarily be unfair and imposes obligations for the satisfaction of those needs irrespective of any consideration about whether the burden that these entail for others is reasonable. I examine two alternatives to this. If we adopt a low threshold of survival needs as a minimum core, we still may face the same problem of justification in countries that are in conditions of extreme scarcity of resources. In more affluent societies, such as most Member States of the ECHR, this would cover too little to be of any relevance and use for the point and practice of the Convention. On the other hand, if we determine the minimum core anywhere above that threshold to serve some fundamental needs at a level of sufficiency then we would need a principle that could justify which claims it is fair to assign priority to at the expense of others. Besides, even in this case, the

justification problem persists and the principles of equal concern and respect is violated if some are receiving unfair shares of resources to pursue their life plans at the expense of others.

Despite its great appeal, I argue that the capabilities approach mainly developed by Amartya Sen and Martha Nussbaum, also fails to provide a defensible interpretation of the fundamental principle of equal concern and respect as a basis for claims to resources and positive obligations. Although it assigns a very proactive role to the state in equalizing people in their capabilities to achieve functionings it rests on welfarist notions and interpersonal comparisons and is, therefore, open to the criticism of subjectivism and of the inability to determine the relative weight and priority between the different capability sets of individuals. If, in order to avoid this, it relies upon a list of specific functionings as central to the well-being of all individuals, it runs the risk of perfectionism and it undermines the special responsibility that individuals should have for determining what adds value to their lives. For these reasons, I argue that the best interpretation of the capabilities approach aims to turn egalitarian concern and action to those personal and impersonal resources that are necessary to achieve various functionings. Although I agree with the view that this interpretation causes the capabilities approach to collapse into a theory of equality of resources I suggest that in this way the significant insights of capabilities theorists may complement the application of equality of resources in a real world context, such as that of the ECtHR practice. I explore this possibility further in Chapter 5.

In **Chapter 5 (Claims to Fair Capabilities through Equality of Resources)** I argue that Dworkin's theory of equality of resources too aims to mitigate the disadvantageous circumstances that individuals find themselves in and provide a safety net of minimum conditions necessary to render freedoms and rights meaningful. In particular, I suggest that Dworkin's equality of resources interpreted in light of his two principles of dignity best accommodates both respect for individual choices and personal responsibility but also concern for the morally arbitrary circumstances that unfairly influence what choices individuals are actually left with. I reinforce Dworkin's emphasis on the importance of individuals' responsibility for their choices in a fair distribution of resources: one should be the author of one's life plan but cannot expect others to bear the cost of realizing that life plan. I argue that the egalitarian critics who view this emphasis on personal responsibility as harsh and unforgiving underestimate the role of Dworkin's hypothetical insurance device in ensuring the conditions that allow individuals to assume this responsibility for their lives. In this way, a distribution of resources is fair and shows equal respect and concern for all because not only is it sensitive to the choices of individuals but it also mitigates the impact of disadvantageous circumstances by compensating those who

suffer from them. Of course, given that in real life it is impossible to distinguish whether a particular disadvantage can be attributed to choices or circumstances we need an alternative strategy to transfer this ideal theory model in a real world context.

I defend Dworkin's strategy: instead of asking what people need according to a particular conception of well-being, the hypothetical insurance device aims to compensate people based on what premium a prudent insurer would have deemed reasonable to spend from her overall resources in order to insure herself against the risk of suffering from various forms of disadvantage or loss of choices. I argue that this strategy best applies the fundamental requirement of equal concern and respect: it does not measure or compensate disadvantage based on personal preferences and needs or a particular conception of well-being but transforms it into an interpretive exercise that primarily requires moral reasoning. In particular, I explain that in order to bring the hypothetical insurance device from ideal theory to the real-world context of human rights adjudication we need to make justified moral assumptions about what kind and level of insurance and for which forms of disadvantage would a prudent insurer have deemed inherent in an effective enjoyment for the freedoms granted to her. This kind of safety net, I suggest, offers a principled basis for judging claims to resources and positive obligations against a universal fundamental moral standard of equal concern and respect but would, at the same time, have the flexibility to determine the kind and level of protection and compensation depending on the social and economic conditions in different countries.

To this end, I argue that the work of capabilities theorists in identifying and analysing the various forms in which disadvantage appears in the real world can offer significant insights for the application of an ideal theory to a real world context realm, such as the practice of the ECtHR. My final point then is that any attempt to determine unfair disadvantage in the distribution of resources will have to refer to capabilities and functionings as personal or impersonal resources but the question whether or not they warrant compensation in the form of justified claims to resources and positive obligations will be answered through the hypothetical insurance device and not with reference to a list of capabilities or functionings that are deemed important for the well-being of individuals. In this sense, I suggest that we should be looking to determine claims to resources and positive obligations as claims to fair capabilities, i.e. those conditions for the effective enjoyment of the ECHR freedoms that an impartial criterion of fairness towards individuals entails: to be treated with equal concern and respect.

## CHAPTER 1

### POSITIVE OBLIGATIONS IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS: TOWARDS A BETTER UNDERSTANDING OF THE EFFECTIVENESS PRINCIPLE

*Introduction:*

*The effectiveness principle and the emergence of the concept of positive obligations*

Right from the outset, the ECtHR has challenged the classic liberal conception of civil and political rights merely as limitations to state interference. The Court's case-law has established that the ECHR does not merely impose negative obligations, that is obligations to abstain from interference with the free exercise of rights. To the contrary, the Court has interpreted the Convention as giving rise also to positive obligations, usually described as obligations to take positive steps for the protection of human rights through various forms of action.<sup>1</sup> This approach is significant because it challenges the understanding of the Convention rights as essentially negative rights<sup>2</sup>, calls for a proactive role of the state and allows the possibility of state liability for the omission to take adequate or appropriate legislative or organisational but also institutional, social and economic measures for the protection of the Convention rights.

The very first article of the ECHR declares that the fundamental obligation of the High Contracting Parties is to respect human rights, which is further defined as the obligation 'to secure to everyone within their jurisdiction the rights and freedoms' enshrined in the Convention. But is the obligation 'to secure' any different from the obligation 'to respect' human rights? What is the nature and extent of the States' obligation to respect and secure human rights? As early as 1968, in the well-documented *Belgian Linguistics Case*, the Court for the first time acknowledged a positive obligation with reference to the 'principle of effectiveness', or else, the general aim of the Contracting Parties 'to provide effective protection of fundamental human rights' through the medium of the Convention.<sup>3</sup> Over the past fifty years the ECtHR has gradually established<sup>4</sup> that the whole Convention must

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<sup>1</sup> For an extensive survey of the Court's case-law on positive obligations see A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (Hart Publishing, 2004).

<sup>2</sup> The Court itself has not admitted to this wholeheartedly though and still today refers to the rights enshrined in the Convention as 'essentially negative', ever since the first such reference in the *Case 'Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium' v Belgium (the 'Belgian Linguistics Case')*, (1968) 1 EHRR 252 para. 7. This was the first case where a positive obligation of the state was identified, albeit as an exception to the 'essentially negative' character of most of the Convention's provisions.

<sup>3</sup> '*Belgian Linguistics Case*', Section I, B at para. 5.

<sup>4</sup> And the Committee of Ministers has reaffirmed in *Guaranteeing the Effectiveness of the ECHR*, Collected Texts, Directorate General of Human Rights, Council of Europe, 2004. Particularly the 'Declaration of the Committee of Ministers: Ensuring the Effectiveness of the Implementation of

be interpreted in light of the general obligation under Article 1 'to secure' the ECHR rights and the idea that states must protect rights in a 'real and practical way' so there may be positive obligations 'inherent in effective respect' for human rights<sup>5</sup>. In the literature, this came to be known as the effectiveness principle.<sup>6</sup>

Even though there is no disagreement as to whether effective protection for the Convention rights may as well entail positive obligations, there is still no coherent method for identifying their source and scope.<sup>7</sup> It is often argued that the Convention embodies a limited number of 'express' but might as well give rise to 'implied' positive obligations. This distinction often conceals uncertainty as to what is the source of positive obligations: are we to focus on the plain meaning of the words of the text or focus on the intentions of the drafters or the consensus within the international community? If this is so, then are all other obligations that might be interpretively derived from the text actually not included therein, are they unstated, unenumerated, new obligations, judicially created by discretion often on the verge between the proper judicial function and a self-asserted quasi-legislative role?<sup>8</sup>

By and large, the ECtHR has rejected this approach to the interpretation of the ECHR in favour of an evolutive interpretive method, setting aside historical and majoritarian conceptions of the Convention's provisions, reading it as a *living instrument* that must be interpreted in light of present-day conditions,<sup>9</sup> focusing on how to make best moral sense of the abstract concepts embodied in the text<sup>10</sup> and looking for their point and substance in light of principles derived from an interpretation of the values that underlie the ECHR.<sup>11</sup>

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the ECHR at National and European Levels' (12 May 2004), where they reaffirmed the central role of the Convention 'as a constitutional instrument of European public order.'

<sup>5</sup> See *Marckx v. Belgium* (1979) 2 EHRR 330, *Airey v. Ireland* (1979-80) 2 EHRR 305, *Artico v. Italy* (1981) 3 EHRR 1 for the first references to the idea of positive obligations as inherent in effective respect.

<sup>6</sup> The 'effectiveness principle' is not a new principle in international law; for an early account of how this principle influences the interpretation of treaties see H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *British Yearbook of International Law* 48. For an early discussion of the principle of effectiveness in the context of the ECHR and positive obligations in particular see JG Merrills, *The Development of International Law by the European Court of Human Rights*, (Manchester University Press, 1993 2<sup>nd</sup> edition).

<sup>7</sup> In a concurring opinion in *Stjerna v. Finland*, (1997) 24 EHRR 194, Judge Wildhaber – former President of the Court – admits that the jurisprudence of the Court on positive obligations is 'established but still somewhat incoherent'.

<sup>8</sup> P Van Dijk, 'Positive Obligations' Implied in the European Convention on Human Rights: Are the States Still the 'Masters' of the Convention?' in M Castermans, F van Hoof and J Smith (eds.), *The Role of the Nation-State in the 21st Century*, (Kluwer Law International, 1998) p. 17-33.

<sup>9</sup> *Tyrer v. United Kingdom* (1978) p. 15, para. 31

<sup>10</sup> For the distinction between concept and conception see J Rawls, *A Theory of Justice* (Oxford, 1999), p. 5 and R Dworkin, *Law's Empire* (Hart Publishing: 1986), p. 90-101.

<sup>11</sup> See G Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford University Press, 2007), and his more recent articles 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', (2010) *European Journal of International Law*, Vol 21, No. 3, pp. 509-

However, judges and scholars often appear overly cautious especially when applying this method of interpretation in order to determine the limits of the quest for effectiveness and identify the source and scope of positive obligations inherent in effective respect. Generally, the ECtHR has incorporated the concept of positive obligations well within its jurisprudence. One of the general definitions that the Court has used for the concept of positive obligations is that they require member states 'to take action in contrast to the negative obligations that require member states 'to refrain from action.'<sup>12</sup> The Court also often notes that the boundaries between these two types of obligations 'do not lend themselves to precise definition' and should be examined in light of the *same principles* when investigating into their existence and scope or the reasons that could justify their violation.<sup>13</sup> Besides, as judges and scholars point out, a claim may be presented in a negative or positive way: the right to family life gives rise to a negative obligation not to refuse a family reunion or a positive obligation to grant the authorization in order to make the family reunion possible.<sup>14</sup>

Still, it is not surprising that uncertainty and restraint appear in the Court's decisions particularly where evolutive interpretation leads to a reading of the ECHR that could give rise to obligations to provide goods, benefits or opportunities and to facilitate the enjoyment of rights through potentially costly social and economic measures or through controversial decisions in morally sensitive issues. In these areas, various concerns are expressed. For instance, some worry that the states may be held responsible for not discharging obligations that they have not agreed upon, have not anticipated or consider too burdensome to fulfil.<sup>15</sup> Others, warn that the Court's creativity in the quest to enhance effectiveness may go so far as to 'rewrite' the Convention, and that the ECtHR as an international court might be going beyond what can be regarded as interpretation and well into the realm of policy-making by exercising discretion.<sup>16</sup> Especially so when it attempts

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541 and 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', in A Follesdal et als (eds.), *The European Court of Human Rights in a National, European and Global Context*, (Cambridge University Press, 2012)

<sup>12</sup> Judge Martens, dissenting opinion in *Gul v. Switzerland* (1996), para. 7.

<sup>13</sup> See *Gul v. Switzerland* (1996) 22 EHRR 93, para. 38, *Keegan v. Ireland* (1994) 18 EHRR 342, para. 49 and *Kroon & Others v. Netherlands* (1995) 19 EHRR 263, para. 31 and most cases thereafter. Also, Judge Martens, dissenting opinion in *Gul v. Switzerland*, at para. 8.

<sup>14</sup> *Ibid*, para. 7. For examples on how other classifications may be made to appear either as negative or positive see O De Schutter, 'The Protection of Social Rights by the European Court of Human Rights', pp. 226-227.

<sup>15</sup> See P Van Dijk who, in an early discussion of positive obligations' cases, distinguished between 'express' and 'implied' positive obligations in 'Positive Obligations' Implied in the European Convention on Human Rights: Are the States Still the 'Masters' of the Convention?' in M Castermans, F van Hoof and J Smith (eds.), *The Role of the Nation-State in the 21st Century*, (Kluwer Law International, 1998) pp. 17-33.

<sup>16</sup> A Mowbray, 'The Creativity of the European Court of Human Rights', (2005) *Human Rights Law Review* 5:1, pp. 57-79, at p. 68 and 79. In the Court's case law similar concern was reflected in the initial reaction to the use of such an interpretive method by Judge Sir Gerald Fitzmaurice in

to delineate obligations that have far-reaching socio-economic implications<sup>17</sup> or attempt to confirm advances in morals before they have been firmly established.<sup>18</sup>

My aim in this chapter is to dispel these common misconceptions around the concept of positive obligations and the principle of effectiveness in the context of the ECHR. Firstly, I will draw attention to the flaws of a 'conventional effectiveness approach': the question of what positive obligations are inherent in effective respect for the ECHR rights and what the limits of the quest for effectiveness should be cannot be settled with reference to any form of agreement derived from the plain meaning of the text, the original intentions of the drafters or the consensus or the common practice and conditions among member states. To the contrary, I argue in favour of a 'substantive effectiveness approach': we should treat the effectiveness principle as an interpretive question that invites substantive moral reasoning with reference to the values underlying the Convention and the substance of the rights at stake. Of course, I do not mean to imply that the quest for effectiveness should have no limits but only to argue that it is the interpretive role of the ECtHR to set any such limits with reference to the substance of the ECHR rights and not the other way around.

### 1. Conventional effectiveness approach

Generally, judges and scholars alike view the creativity of the ECtHR through evolutive interpretation as legitimate and beneficial for the development of human rights law. However, some call for cautiousness and restraint when they believe that the boundaries of legitimate interpretation are crossed and the Court may be inappropriately making policy decisions in its attempt to provide a desirable outcome for the individual, especially in cases concerning the existence and scope of positive obligations<sup>19</sup> or in areas where

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his dissenting opinions in *Golder v. United Kingdom* (1975) 1 EHRR 524 and *Marckx v. Belgium*, by Judge Vilhjamsson in *Airey v. Ireland* – where he had famously said that ‘the war on poverty cannot be won through broad interpretations of the Convention’ – and among others, in the decisions of *Johnston & Others v. Ireland* (1987) 9 EHRR 203, on whether the right to found a family (art. 12) entails an obligation to provide also access to a dissolution of marriage. These cases will be discussed later in the text.

<sup>17</sup> Matscher, ‘Methods of Interpretation of the Convention’ in MacDonald, Matscher and Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993), p. 69-70.

<sup>18</sup> See Mowbray, ‘The Creativity of the European Court of Human Rights’, at p. 68 and 79, who notes that creativity is welcome as long as ‘judicial innovation’ does not go so far as to ‘rewrite’ the Convention.

<sup>19</sup> Such concerns are expressed by Mowbray, ‘The Creativity of the European Court of Human Rights’, Van Dijk, ‘Positive Obligations’ Implied in the European Convention on Human Rights: Are the States Still the ‘Masters’ of the Convention?’. In the case law see the early reaction to an evolutive interpretation of Judge Sir Gerald Fitzmaurice in his dissenting opinions in *Golder v. United Kingdom* and *Marckx v. Belgium*, by Judge Vilhjamsson in *Airey v. Ireland*, as well as the judgment of the ECtHR in *Johnston & Others v. Ireland*, and more recently, *Pretty v. United*

they want to assert a wider margin of appreciation and greater reliance of the Court on the existence of consensus. In particular, some wonder whether the legal basis of positive obligations is 'express textual requirements of the Convention' or whether they are 'implied judicial creations'.<sup>20</sup> These concerns about the limits of the effectiveness principle are misplaced to the extent that they echo formalist and originalist ideas about legal interpretation that are at odds with the practice of the Court, the interpretive methods and principles that it has developed so far in light of the point and purpose of the Convention. For schematic purposes only, I will place all these ideas under the umbrella of a 'conventional effectiveness approach': the question of what positive obligations effective respect requires can be settled with reference to the plain meaning of the words or the original meaning of the text (originalism),<sup>21</sup> or the idea of consensus or common ground. The common feature of these different ideas about interpretation is that they treat the question of what effective respect requires as a matter of convention or agreement and do not acknowledge that it calls for substantive moral reasoning. This is the reason that I contrast this approach with the 'substantive effectiveness approach' discussed in section B.

#### A. Ordinary meaning, express and implied positive obligations

To begin with, a distinction between express and implied positive obligations is misleading when it implies that only a few express positive obligations can be found in the Convention in a clear and uncontroversial way without the need of interpretation.<sup>22</sup> This view also suggests that any implied positive obligations are an extension of the scope

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*Kingdom* (2002) 35 EHRR 1 and *Dickson v. United Kingdom* (2008) 46 EHRR 41. These cases are discussed later in the text.

<sup>20</sup> Thus pointing to a potentially controversial exercise of judicial discretion to promote choices that supposedly belong to the policy-making competence of the Member states. See above n. 19.

<sup>21</sup> Originalism may take the form of textualism, i.e. the view that what is crucial is the meaning that the text had at the time of adoption in 1950 or the form of intentionalism, where we are supposed to focus on the concrete intentions of the drafters of the Convention. For originalist theories in the American constitutional theory see A Scalia, "Originalism: The Lesser Evil", 57 *Cincinnati Law Review* 862, R Bork, *The Tempting of America*, (Sinclair-Stevenson 1990), Lyons, 'Constitutional Interpretation and Original Meaning', (1986) 4 *Social Philosophy and Policy* 85.

<sup>22</sup> Examples of provisions that give rise to 'express' positive obligations are usually thought to be the right to inform an arrested person of the reasons for arrest (Art. 5 (2)), to bring promptly before a judge detained suspects in order to determine bail or stay on remand (Art. 5 (3)), to determine the civil rights and obligations as well as criminal charges against individuals in a fair trial within a reasonable time and with a public judgment (Art. 6 (1)), to provide detailed information about accusations to charged individuals (Art. 6 (3)(a)), to provide free legal assistance to impecunious individuals facing serious charges (Art. 6 (3)(c)), to provide free interpretation services to defendants who cannot understand the language of the domestic court (Art.6 (3)(e)), the right to an effective remedy before a national authority (Art. 13) and the right to free elections under specific conditions as they are laid out in Art. 3 Protocol I of the Convention.

of the Convention by means of judicial discretion.<sup>23</sup> What is misleading about this distinction is that it often carries with it a concealed false assumption about the source of these obligations. Namely, express positive obligations are thought to be included in the Convention itself because they are supposedly easily identified in the plain or ordinary meaning of the text. On the other hand, implied positive obligations are commonly considered as new obligations, created through the exercise of judicial discretion in order to fill gaps where the Convention appears to be silent and thus they represent an extension of the scope of the Convention in light of the effectiveness principle but often at the verge of legitimate interpretation.<sup>24</sup>

To be sure, certain cases are indeed easy in the sense that we can identify a positive obligation with minimal reference to any substantive reasons that justify why this obligation is included in the meaning of the text. But this is not because the language is so plain and clear that requires no interpretation at all, or else, that the wording of the text alone gives away the meaning of the provision without recourse to any interpretive choice being made on the part of the judge. Rather, it is almost always the case that, in both cases, what judges put forward is nothing but an interpretation of what they consider essential or inherent in an effective respect for the right at stake. Only, in the supposedly easy or clear cases that interpretation is so widely acknowledged and undisputed that often remains unvoiced. In other words, easy cases are easy because the substantive reasons that we have for resolving them are so strong and generally undisputed that we do not even need to mention them. A case is not easy because the language is so explicit and concrete that

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<sup>23</sup> For the distinction between express and implied positive obligations and the assumption that implied obligations are an extension of the scope of the Convention in the search for effectiveness, that we should treat with cautiousness and restraint see Van Dijk, 'Positive Obligations' Implied in the European Convention on Human Rights: Are the States Still the 'Masters' of the Convention?' at p. 17 and pp.32-33 and p. 22 where he argues that implied positive obligations may be read in the Convention by utilizing the effectiveness principle, but that this 'reading in' could at times 'result in the creation of a completely new obligation, detached from the text of the provision'. Similarly argues Mowbray, 'The Creativity of the European Court of Human Rights', p. 68 and 79. Also, Melchior argues that many of the provisions of the Convention entail primarily negative obligations of non-interference as this 'clearly emerges from a *literal reading* of these provisions' and any other positive obligations are not conventional but may be inferred by necessary implication depending on whether the Court decides to 'be restrictive or on the contrary adopt the broad view', see M Melchior 'Rights Not Covered by the Convention' in Macdonald et al. (eds.), *The European System for the Protection of Human Rights* (Kluwer, 1993), p. 597-599. And C Droege, *Positive Verpflichtungen der Staaten in der Europaeischen Menschenrechtskonvention* [:Positive Obligations of States in the European Convention of Human Rights] (Berlin: Springer, 2003), Summary in English, pp. 379-392, where the author finds (at p. 387) the limits of positive obligations in the historic and systematic interpretation as well as in the wording of the specific provision so that the Convention will not be interpreted 'in a sense that would contradict their very wording and thereby render the jurisprudence arbitrary.'

<sup>24</sup> For instance, Mowbray considers that for the Court to decide in *Pretty v. United Kingdom* that states have a positive obligation to facilitate assisted suicide 'would have required the Court to undertake a significant, and controversial, extension of the scope of Convention obligations beyond its authority'. See Mowbray, 'The Creativity of the European Court of Human Rights', p. 68.

mere linguistic analysis and no substantive reasoning or interpretation is necessary to identify its meaning.<sup>25</sup> To put it schematically, what is often implied is the method for identifying an inherent positive obligation and not the positive obligation itself. So, when we 'find' implied positive obligations in the ECHR, it is because in the particular case there is greater substantive disagreement about what the law requires and therefore the method and reasoning for making a choice needs to be voiced.

To illustrate the point, I will provide some examples that show how, contrary to this assumption, even cases concerning straightforward provisions have prompted the Court to reflect on what was presumed by the respondent government to be obvious. This shows that interpretation is latent even in the apparently easy cases of express positive obligations and the Court articulates this interpretation only when there is a challenge to a supposedly clear provision.

In *De Wilde, Ooms and Versyp* (well-known as the 'Vagrancy' cases)<sup>26</sup> one of the early cases identifying the need for the state to undertake positive action, the applicants surrendered themselves to police as vagrants, were brought before police courts and were ordered to be detained 'at the disposal of the government' for up to two years. The ECtHR had to decide whether the proceedings before the police courts satisfied the requirements of Article 5 para. 4 for the right to access to a *court* for the speedy determination of the lawfulness of a person's detention. The government argued that it was clear that the applicant's rights had not been violated since the applicants were brought before police courts. The wording of the text, they claimed, does not mention what kind of court is appropriate for the protection of the right to have the lawfulness of one's detention determined, so, police courts fit the requirement of the Convention.

However, the Court was not satisfied with this and considered whether the summary procedure offered to the applicants in the police courts could afford enough protection for their vital interest, which was the determination of the lawfulness of their detention. So, even though the case could have appeared as an easy one, concerning a rather concrete and explicit provision, the Court elaborated on the concept of the right to access to a court and considered the substantive reasons why the police courts would not offer the protection required by Article 5. It concluded that the summary procedure before the police courts did not have sufficient judicial features

'to give to the magistrate the character of a "court" within the meaning of

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<sup>25</sup> For critical discussion of the assumptions behind the distinction between easy and hard cases and particularly of the positivist thesis that such a distinction necessarily leads to judicial discretion see R. Dworkin, 'The Model of Rules II' in *Taking Rights Seriously*, pp. 68-71, as well as his *Law's Empire*, p. 353-354.

<sup>26</sup> *De Wilde, Ooms and Versyp v. Belgium* (1979) 1 EHRR 373

Article 5(4) when due account is taken of the seriousness of what is at stake, namely a long deprivation of liberty attended by various shameful consequences.<sup>27</sup>

Similarly, in the also seemingly easy case of *Artico*,<sup>28</sup> the Court had to consider the supposedly express obligation of Article 6 (3)(c) to provide an impecunious individual facing a criminal charge with legal 'assistance'. The Court reflected on what it was exactly that the applicant was entitled to: the provision's purpose was to ensure actual assistance through legal advice and representation and this obligation could not be discharged by mere nomination of an assistant. The Italian Court of Cassation had appointed a lawyer to represent Artico in his appeal, as he had requested. The lawyer declined to act in behalf of Artico claiming that other commitments and ill-health prevented him from undertaking this task. The Italian court repeatedly denied to replace the appointed lawyer and Artico was left to represent himself in criminal proceedings. In the case before the ECtHR, the Italian Government claimed that there was no such right and subsequently no obligation guaranteed in the Convention, i.e. a right to have an appointed lawyer *replaced* if she is not willing or capable to act. Rather, it is the right to have a lawyer appointed as such that the provision guarantees. The Court dismissed this formalistic argument by referring to the purpose of the Convention to guarantee rights that are practical and effective:

'The ECtHR recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; ... Article 6 (3)(c) speaks of "assistance" and not of "nomination". Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill...If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. Adoption of the Government's restrictive interpretation would lead to results that are unreasonable and incompatible with both the *wording* of sub-paragraph (c) and the structure of Article 6 taken as a whole; in many instances free legal assistance might prove to be worthless.'<sup>29</sup>

The ECtHR here mentions that a restrictive interpretation would have an unreasonable outcome. That is, the duty of 'assistance' could not possibly be exhausted in mere nomination of a lawyer, without the public authorities showing any concern and action to ensure that the nominated person for legal assistance is physically and mentally capable of providing legal representation and advice and is actually doing so. The Court considered that extra steps were essential for the right to be protected effectively since the

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<sup>27</sup> Ibid, para. 79.

<sup>28</sup> *Artico v. Italy* (1981) 3 EHRR 1, see above p. 13-14.

<sup>29</sup> Ibid, at para. 33.

purpose of the provision is to serve the interests of justice<sup>30</sup> through a fair trial where all parties are represented efficiently. So, the relevant authorities should have taken all those steps necessary to ensure that the nominated assistant could provide actual assistance and replace him if he was unwilling or unable to do so. The government's formalistic interpretation was rejected then because the Court invoked the substantive reasons relating to the interests of justice in a fair trial, which suggested that the government's proposed interpretation was contrary to the meaning and purpose of the very wording of the provision and would render the right to free legal assistance illusory or worthless.<sup>31</sup>

Both of these examples, highlight the point that a case may be easy because it is not very difficult to justify which one of the competing substantive arguments is the most compelling and justified and not because there are no competing arguments as the language settles the issue without any need for providing reasons for one or the other decision.<sup>32</sup> Disagreement may appear both at the core (the easy cases) and the periphery (the hard cases) of all of the Convention's provisions and all implicated parties, including the Court, cannot rely on linguistic analysis but must provide substantive arguments for resolving this disagreement.<sup>33</sup> The fact that certain provisions of the Convention provoke little or easily resolved disagreement about their content does not mean that they do not require interpretation and that their requirements are obvious to the parties and the Court by a perusal of the plain meaning of the text. Reflection upon the possible interpretations of the concepts found in the Convention is sometimes an easy task that requires little justification for the choice made by the Court. It is a choice between competing interpretations of the purpose and content of the law that needs to be sustained by substantive reasons, no matter how obvious.

Besides, note that the fact that although some terms and concepts appear today to be clear and unambiguous they were not always uncontested and might as well become contested in the future. It is quite possible that concepts whose interpretation appears to be settled now will still pose difficult issues of interpretation for the Court in different circumstances. This is largely contingent upon the moral and political outlook of our societies at different points in time. Consider how once settled concepts (such as fair trial, court, reasonable detention, access to court and representatives) have become contested

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<sup>30</sup> Note that Article 6 (3)(c), stresses that free legal assistance for someone who cannot provide for himself should be made available 'when the interests of justice so require'.

<sup>31</sup> *Artico v. Italy*, para 33.

<sup>32</sup> The method we use then in easy cases is the same we also apply to hard, more controversial cases where the level of abstraction will pose 'at least some doubt whether the statute would be better performance of the legislative function read one way than another', see Dworkin, *Law's Empire*, p. 353.

<sup>33</sup> G Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', (2004) *European Journal of International Law* 279.

again under the pressure of the threat of terrorism. This should serve as a reminder that today's easy cases were once hard or may become hard again in future.

Finally, it would beg the question to argue that the wording of the text itself points to one or another choice since this often gives rise to the disagreement in the first place even in previously settled, easy cases. Equally, a choice is required in hard cases where the interpretations offered are more controversial and the reasons to justify them will be widely and deeply contested. But this does not inevitably lead the Court to transgress the limits of its legitimate role. If we accept that disagreement is pertinent in legal practice and indicates that it is an interpretive practice then judges' choices in hard and controversial cases are as much legitimate as they are in easy cases.<sup>34</sup> Or maybe not?

If supposedly easy cases like these may give rise to disagreement then how should we approach those ECHR provisions that have a declaratory form and are framed in abstract terms, such as the provision of Article 2 that 'everyone's right to life shall be protected by law'?<sup>35</sup> Even more, how are we to decide what are the requirements of respect for family and private life (Article 8)? The sceptics' fear is that when the Court will come across these vague terms within the Convention it will have to exercise discretion<sup>36</sup> by making choices in order to determine what their meaning is and create new obligations that are not expressly included in the text.<sup>37</sup> The sceptic's worry is that this may lead the Court to read into the Convention social rights and entitlements that do not belong in this document or impose obligations, which the member states did not intend to include originally.<sup>38</sup> In sum, everyone acknowledges that the Convention rights must be practical and effective and that we should not approach the text in a formalistic way that would leave rights empty statements. Nevertheless, as some judges and scholars argue, the Court should be cautious

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<sup>34</sup> R Dworkin has famously argued, against the 'plain fact' view of law, that both easy and hard, more controversial, cases call for interpretation. See R. Dworkin, *Law's Empire* (1986), ch. 1. For a defence of the view that the existence of legal disagreement in the context of the ECHR – instantiated by the autonomous concepts- makes it inevitable for the Court to make choices in interpretation that do not amount to judicial discretion but are the very task of applying the law of the Convention see Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' and his *A Theory of Interpretation for the European Convention on Human Rights* (OUP, 2007) ch. 2, especially pp. 53-55.

<sup>35</sup> Similarly, that of Article 3 that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment, the right to freedom of thought, conscience and religion (Article 9), the right to freedom of expression (Article 10), the right to freedom of peaceful assembly and to freedom of association with others (Article 11), the right to marry and to found a family (Article 12), the right to education (Protocol I, Article 2).

<sup>36</sup> De Blois, 'The Fundamental Freedom of the European Convention of Human Rights' in R Lawson and M De Blois (eds.), *The Dynamics of the Protection of Human Rights*, (Dordrecht, London: Nijhoff, 1994), p. 51.

<sup>37</sup> P Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism', (1998) 19 *Human Rights Law Journal*, p. 2.

<sup>38</sup> L R Helfer, 'Consensus, Coherence and the European Convention of Human Rights', 26 *Cornell International Law Journal* (1993) p. 135. See also Van Dijk, above n. 5.

of the limits as to how far interpretation can go in order to achieve the desirable outcome of effectiveness, especially in the most controversial cases with far-reaching implications.

## B. An Originalist Approach

An originalist approach would be to suggest that when we seek to set limits to the quest for effectiveness and resolve disagreement about what positive obligations are inherent in effective respect for the ECHR rights we should look for the meaning that the text had at the time of enactment (textualism) or to the original intentions of the drafters (intentionalism).<sup>39</sup> As I will explain in the following section, the Court and commentators have largely rejected such an approach to the interpretation of the ECHR but some exceptions still appear sporadically mainly in cases of positive obligations.

In one of these rare examples, in *Johnston & Others v Ireland*, the Court refused to read in the provision of Article 12 for the right to marry, an obligation on the part of the state to make divorce legally possible. The Court decided that the preparatory works 'disclose no intention to include in Article 12 any guarantee of a right to have the ties of marriage dissolved by divorce' and set a limit to the living instrument' approach:

'It is true that the Convention and its Protocols must be interpreted in the light of the present-day conditions (...) However the Court cannot by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate.'<sup>40</sup>

The Court refused to interpret the 'right to marry' in Article 12 as imposing on the states a positive obligation to make divorce legally possible on the basis that the ordinary meaning of the words and the preparatory works are contrary to such an interpretation. The weakness in this view is, as explained earlier, that it fails to acknowledge the interpretive question we are faced with, which is whether marriage is best understood as an insoluble or as a voluntary union among individuals who should be free to choose to dissolve it. Instead the Court determined the ordinary meaning of the words 'right to marry' only in light of the drafters' particular conception of the concept and value of marriage.

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<sup>39</sup> Brest, 'The Misconceived Quest for the Original Understanding', 60 *Boston University Law Review* (1980), p. 207-8. Also see references above in n. 21. Such an approach is suggested by Van Dijk who presumes that certain positive obligations cannot be inferred from the text because the concepts found there are often open-ended and debatable and that when the Court derives them from the text these obligations are new and judicially created because they 'have not been willingly and knowingly subscribed to by the Contracting States when ratifying the Convention', see Van Dijk 'Positive Obligations' Implied in the European Convention on Human Rights: Are the States Still the 'Masters' of the Convention?', p. 33.

<sup>40</sup> *Johnston & Others v. Ireland*, para. 52-53.

Scholars who call for cautiousness and limits to the effectiveness principle<sup>41</sup> and argue that the drafters intended to make only a limited, 'first step' by guaranteeing some civil and political rights,<sup>42</sup> invoke the Vienna Convention on the Law of Treaties (VCLT) and the principles of interpretation that it sets out in Articles 31 and 33 in support for an originalist approach:

#### Article 31

##### General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the *light of its object and purpose*.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

#### Article 32

##### Supplementary means of interpretation

- Recourse may be had to supplementary means of interpretation, including the *preparatory work* of the treaty and the circumstances of its conclusion, in order to *confirm* the meaning resulting from the application of article 31, or to *determine the meaning* when the interpretation according to article 31:
- (a) leaves the meaning ambiguous or obscure; or
  - (b) leads to a result which is manifestly absurd or unreasonable.

However, notice that these rules of treaty interpretation do not necessarily prescribe an originalist approach, as they place a primary role to the object and purpose of the treaty to be interpreted.<sup>43</sup> Now, as to the object and purpose of the ECHR in particular, nothing within the wording of it excludes the possibility that the drafters had an abstract as well as a limited goal in mind. That is, they may as well have had an abstract goal to lay down

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<sup>41</sup> Merrills, *The Development of International Law by the European Court of Human Rights*, p. 119-122

<sup>42</sup> Van Dijk, 'Positive Obligations' Implied in the European Convention on Human Rights: Are the States Still the 'Masters' of the Convention?', p. 17.

<sup>43</sup> See Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', p. 514, who also rightly argues that it is the substantive arguments about the object and purpose of a treaty that will determine which intentions of the drafters are crucial and not the other way around.

moral principles as the foundations on which the future generations could build and always update the requirements of effective human rights protection. This could be the underlying idea in the speech of M. Robert Schuman in Rome in 1950:

'This Convention which we are signing is not as full or as precise as many of us would have wished. However, we have thought it our duty to subscribe to it as it stands. It provides *foundations* on which to base the *defence of human personality against all tyrannies and against all forms of totalitarianism*.'<sup>44</sup>

But finding hints like this – or contrary to this – in the preparatory works of the Convention does not necessarily determine or confirm the object and purpose of the ECHR and the meaning and requirements of its provisions (as article 32 of the VCLT prescribes). It would be circular to argue that we should focus on the specific or the abstract intentions of the drafters because this is what they intended us to do: we need to make our choice as to which intentions count based on reasons outside of the drafters' intentions.<sup>45</sup> Because the fact that the Convention contains a provision that calls for the right to respect for private and family life does not in itself preclude the possibility that it was the concept rather than the particular understanding, the conception that the drafters had of the concept that we are supposed to show fidelity to. It is one thing to agree that we must show fidelity to what the drafters say and quite another to give effect to their particular interpretation or conception of the concepts that they used.<sup>46</sup> Neither is it enough for us to argue that we should focus on the abstract concepts because the language of the text is abstract – as in fact is the language of the Convention – although it might be a reason in favour of such an interpretation. Instead, we need substantive reasons for believing that this is the way to show our respect for what the Convention grants and requires. Just as a sergeant who is asked to take the most experienced men on patrol<sup>47</sup> and is supposed to choose for his own reasons which men would carry out the role most effectively, we may consider the ECtHR too as an institution that is bound by an obligation to discover the interpretation of the text

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<sup>44</sup> Sixth Session of the Committee of Ministers, Rome November 1950. See J G Merrills and A H Robertson, *Human Rights in Europe, A Study of the European Convention on Human Rights*, (4th edition, 2001) p. 5. [my emphasis]

<sup>45</sup> R Dworkin, 'The Forum of Principle' in his *A Matter of Principle* (Clarendon Press, Oxford: 1985), p. 52-54. On this point about the interpretation of the ECHR see Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', p. 536-538.

<sup>46</sup> See R Dworkin, *Freedom's Law. The Moral Reading of the American Constitution*, (Harvard University Press, Cambridge, Massachusetts, 1996) p. 10, for the argument that history is only relevant in order to establish what the drafters intended to say and not in order to find out what other intentions they had, i.e. what they intended the interpretation and effect of what they said to be.

<sup>47</sup> R Dworkin, 'The Model of Rules II' in *Taking Rights Seriously*, (Duckworth: London, 1977), p. 69

that will secure human rights in the most effective way.<sup>48</sup> Following this line of argument, when we seek to determine what positive obligations are inherent in effective respect we need to set aside formalist and originalist approaches to the text and construct moral arguments about the substance of the right at stake. In the following section, I examine the development of this approach to the interpretation of the effectiveness principle.

## 2. Substantive effectiveness approach

### A. Living instrument approach and evolutive interpretation

The Court made the first remarkable step away from a conventional effectiveness approach quite early in its jurisprudence, in the landmark *Golder v. United Kingdom* case.<sup>49</sup> The applicant claimed that he had a right to consult a solicitor with a view to initiating libel proceedings against a prison officer, even though Article 6(1) determines the right generally as an entitlement to a fair and public hearing – 'the right to a fair trial' as its title proclaims. The government denied the existence of a right of *access* to court due to the lack of an explicit provision: the applicant would be entitled to a fair trial *if* he reached the court but there was no obligation on the part of the state to allow or facilitate his access to court. The ECtHR decided in favour of the applicant that a 'right to access' is 'inherent' in the right stated by Article 6 and that this right. Therefore, the obligation of the state to secure that right, the Court explained, is not an 'extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6(1) read in its context and having regard to the object and purpose of the Convention'.<sup>50</sup> The reference made here is to the VCLT principles for treaty interpretation, which the Court applied in a different way than a conventional effectiveness approach would have suggested: the language of the text did not 'necessarily refer only to proceedings already pending' but could as well apply to the present case.

Most importantly, the Court noted that the object and purpose of the Convention, as determined also by the Preamble to the ECHR, refers to the 'common heritage of political traditions, ideals, freedom and the rule of law' and therefore requires the Court to stress that 'in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to courts'.<sup>51</sup> As a result, because the denial of the right to access

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<sup>48</sup> In this sense the Court is subject to the 'rigorous demand' that an agent is subject when instructed to meet an abstract standard by deciding for her own substantive reasons what meets that standard, 'which is of course a different question from the question of what some person – any person – thinks meets the standard', see R Dworkin, *Justice in Robes*, (Harvard University Press, 2006), p. 124.

<sup>49</sup> *Golder v. United Kingdom*, (1975) 1 EHRR 524.

<sup>50</sup> *Ibid*, para. 36.

<sup>51</sup> *Ibid*, para. 34.

to court would have serious consequences for the rule of law, the court concluded that this right is 'inherent' in the right to fair trial (Article 6 para. 1) and explained that this is not an 'extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 read in its context and having regard to the object and purpose of the Convention'.<sup>52</sup> It is worth noting here that the Court did not consider it necessary to resort to supplementary means of interpretation, as the Vienna Convention (Article 32) allows when the meaning of the provision after the application of the general rule (Article 31) is left 'ambiguous or obscure'. The Court found this interpretation to be based on the very terms, on the very wording of the provision contrary to the government's contention that the silence of the text means that the drafters wanted to exclude this right from the ambit of this provision.

The next significant development took place when the Court tied the notion of effectiveness with that of respect found in the provision of Article 8 of the Convention, i.e. that 'everyone has a right to an effective respect for his private and family life.' The idea of 'effective respect' introduced a different understanding of the state's fundamental obligation to secure the ECHR rights. In *Marckx v. Belgium*, the Court had to decide whether the right to respect for the family life of an unmarried mother and her child born out of wedlock had been violated by Belgian legislation that recognized immediately as family ties only those created within marriage. The applicant argued that by not endorsing the maxim 'mater semper certa est' the legislation put 'illegitimate' families – those created outside wedlock – in the unfavourable position of having to establish through various legal procedures the status of a family, something which was automatically recognized to 'legitimate' families. In that way, the applicant claimed that her right to respect for her family life had not been respected (Article 8) and she had been discriminated against (Article 14) because the state did not automatically accept her family ties with her biological child whereas this was the case for married mothers and their children. The Court decided that there had been a violation of the applicant's rights on the basis that the object of the right to respect for one's private and family life may essentially be that of protecting the individual against arbitrary interference but that it

'does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations *inherent* in an effective respect for family life'<sup>53</sup>

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<sup>52</sup> *Ibid*, para. 36.

<sup>53</sup> *Marckx v. Belgium*, at para. 31, as well as *Airey v. Ireland*, at para. 32, *X and Y v. Netherlands*, (1986) 8 EHRR 235 at para. 23 and a long sequence of other judgments with regards to the right to respect for private and family life.

The Court also relied on the finding that significant change had taken place in the understanding and endorsement of the distinction between 'legitimate' and 'illegitimate' families, as indicated by the 'evolution of rules and attitudes'<sup>54</sup> in modern societies. However, this was of minor importance because the decisive reason was that it had discovered something that, as in the *Artico* case, was essential to the very nature of the right at stake, an obligation that was inherent in an effective respect. This choice was not justified on the basis that the member states seemed at that time to have endorsed a new positive obligation in their domestic legislations, which would have been indicative of a common ground in legislative policy. On the contrary, the Court made this choice because it found this obligation to be inherent, built-in the substance of the right to family life as protected in the text of the Convention.

This case is important for two reasons: the first is that it sets the effectiveness principle as the bedrock of the concept of positive obligations and the second that it ties it with the 'living instrument approach' in order to identify what obligations might be 'inherent in an effective respect.' The method that helped the Court discover this inherent obligation was that it put the concept of family in the light of the present-day conditions and found that the way that modern societies understand this concept does no longer leave room for a distinction or differential treatment between 'illegitimate' and 'legitimate' families:

It is true that, at the time when the Convention of 4 November 1950 was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the 'illegitimate' and the 'legitimate' family. However, the Court recalls that this Convention must be interpreted *in the light of present-day conditions* (Tyrer judgment of 25 April 1978, Series A no. 26, p. 15, para. 31).<sup>55</sup>

The Court's approach to the interpretation of the Convention 'in light of the present-day conditions' had been introduced in the earlier *Tyrer*<sup>56</sup> case where the Court famously decided that the corporal punishment inflicted by policemen on juveniles on the Isle of Man amounted to degrading punishment within the meaning of Article 3 of the Convention. That was because the 'nature and context of the punishment itself and [the] manner and method of its execution'<sup>57</sup> did not meet the 'commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.'<sup>58</sup> In this case, the Court looked at the development of a different common standard, which lowered the threshold for considering a punishment as degrading and therefore agreed with the

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<sup>54</sup> *Marckx v. Belgium*, at para. 40-41.

<sup>55</sup> *Ibid.*, para. 41.

<sup>56</sup> *Tyrer v. United Kingdom*, (1978) 2 EHRR 1

<sup>57</sup> *Ibid.*, para. 31.

<sup>58</sup> *Ibid.*, para. 32.

applicant that such a practice could no longer be tolerated. The Convention as a 'living instrument...cannot but be influenced by these developments'<sup>59</sup> and must to depart from any interpretation that fixes the meaning of degrading punishment at the time of enactment.

Perhaps the most remarkable example of an application of the effectiveness principle in light of the living instrument approach for the identification of a positive obligation has been the famous case of *Airey v. Ireland*.<sup>60</sup> The Court decided that Ireland had violated Mrs Aireys' right for effective access to the courts in order to obtain a decree of separation from her violent husband by failing to provide her with legal aid in civil proceedings, which was found to be essential under the particular circumstances. The government's objections were based on the argument that no system of legal aid for civil proceedings was available in Ireland and that Article 6 para.3 of the Convention only granted a right to free legal representation in criminal proceedings. Therefore, according to the government, the applicant was supposedly free to represent herself – which was permissible in her case before the High Court – or to employ a lawyer by her own means. Judge Thor Vilhjalmsson put forward a famous objection in his dissenting opinion, where he complained that 'the war on poverty cannot be won through broad interpretations of the Convention.'<sup>61</sup> In the same vein, the Commission's and the government's view was that the Convention should not be interpreted so as to promote social and economic developments. However, the Court decided that the state was liable because it had not taken into account the inability of the applicant to exercise effectively her right to access to courts due to her lack of sufficient means:

'despite the absence of a similar clause [i.e. similar to paragraph 3(c) concerning legal aid in criminal proceedings] for civil litigation, Article 6 para. 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court'<sup>62</sup>

Remarkably, for the first time the Court made also the following significant statement by saying that it was

'aware that the further realisation of social and economic rights is largely dependent on the situation – notably financial – reigning in the State in question. On the other hand, the Convention must be interpreted in the light of the present-day conditions...and it is designed to safeguard the individual

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<sup>59</sup> Ibid, para. 31.

<sup>60</sup> *Airey v. Ireland*, (1979-80) 2 EHRR 305.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid, para 26.

in a real and practical way...Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social and economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.<sup>63</sup>

This is a powerful restatement of the principle that a positive obligation may be found to be within the meaning of the text, when the Court can justify that it is essential or 'indispensable' to what we think today is required by the Convention in the particular case.<sup>64</sup> So, the Court seems to be saying, if a social or economic entitlement proves to be indispensable for the effective exercise of a right then this is not an extensive reading of the Convention but it is an interpretation that gives real meaning to the essence of the right, as it is actually found within the text of the Convention. In other words, the applicant in this case was not asking the Court to create a general right to legal aid in civil proceedings over and above what the text provides in Article 6 for criminal proceedings. To the contrary, she was claiming that in her particular circumstances *but also for anyone who cannot have effective access* to the courts due to the lack of financial means *there is a right* to be provided with the means that would guarantee effective access to the courts. This is to say that *there is an obligation* already there within the meaning of the right of access to court (Article 6 para.1) and is indispensable to an effective respect of the right not of those who can afford to access the courts but of the applicant and all of those who cannot. The concern of the Court was not to recognize the existence of an obligation of the state to provide free legal assistance for everyone in civil proceedings; the Convention provides legal aid in criminal proceedings for specific reasons, such as the fact that the personal liberty of the individual is at stake. The Court here was concerned with ensuring the effective protection of the right of access to court for those who would be unable to use this right in any meaningful way without legal aid.

In the same spirit, the Court found that effective respect might entail positive obligations, which could as well 'involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between

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<sup>63</sup> Ibid.

<sup>64</sup> This decision has been reaffirmed in the more recent case *P C & S v. United Kingdom* (2002) 35 EHRR 31, again concerning the effective protection of the right of access to court. This time, besides the principle of effectiveness the Court added that also the principle of fairness required that the applicant receive the assistance of a lawyer, *ibid*, para. 95. This could be seen as an attempt by the Court to stress that it wishes to reach the best possible understanding of the essence of the right and its requirements.

themselves.<sup>65</sup> By identifying positive obligations in this area the Court does not aim to assume a paternalistic, overprotective role or create a 'right to security' but merely to provide effective protection for what a right already guaranteed in the Convention requires in the particular instance.

In subsequent judgments, the ECtHR has developed the living instrument approach as a clear rejection of formalism and originalism as well as a turn towards a 'moral reading' of the Convention in light of the values that underlie it.<sup>66</sup> Firstly, the Court has declared as irrelevant for the interpretation of the Convention the lack of clear intentions of the drafters about what falls within the scope of its provisions and has recognized the existence of rights and obligations that the drafters appear to have not envisaged.<sup>67</sup> A step further and even contrary to the drafters clearly expressed concrete intentions was made in *Young, James & Webster*, where the Court had to decide whether the legal requirement that all employees of certain class become members of a particular trade union – the 'closed shops' in Britain – was compatible with freedom of association under Article 11 of the Convention. The applicants did not want to join the union and claimed that the relevant provision should be understood as embodying a negative freedom of association as well, that is a right not to join a union and not to suffer any negative consequences – such as dismissal – when deciding not to join. The argument of the Government was that this right 'had been deliberately excluded from the Convention.'<sup>68</sup> The Court found that their dismissal constituted a violation of the Convention, even though the government cited evidence from the preparatory works that it was undesirable to introduce into the Convention a rule under which no one could be compelled to belong to an association. However, remarkably, the Court did not consider this to be the decisive factor but gave greater weight to the argument that such a practice would strike at the very substance of the concept of freedom of association that the Convention is designed to guarantee:

'Assuming for the sake of argument that...[it] was deliberately omitted from and so cannot be regarded as itself enshrined in, the Convention, it does not

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<sup>65</sup> See among others, *X and Y v. the Netherlands*, *Osman v. United Kingdom*, (1998) 29 EHRR 245, *Edwards v. United Kingdom*, (2002) 35 EHRR 19.

<sup>66</sup> See Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, chs. 2 and 3 and more recently in his 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', suggesting a 'moral reading' of the ECHR drawing on Dworkin's 'moral reading' of the American Constitution in Dworkin, *Freedom's Law. The Moral Reading of the American Constitution*.

<sup>67</sup> *Matthews v. United Kingdom*, (1999) 28 EHRR 361, the Court in this case was considering whether Article 3 Protocol 1 – right to free elections 'in the choice of the legislature' – applies to the European Parliament and declared that 'the mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention', at para. 39.

<sup>68</sup> *Young, James & Webster v. United Kingdom*, (1983) 5 EHRR 201. This is a much statement stronger than that made in the *Johnston* case where the Court said that there was no indication of a right to divorce being included.

follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Article 11 as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee.<sup>69</sup>

Secondly, following up from the reasoning in *Tyrer* and *Marckx* that first established the living instrument approach, a significant development towards a moral reading of the Convention takes place in *Dudgeon*.<sup>70</sup> In this case, the Court noted that the change in the member States' treatment of homosexual behaviour signifies a better conception of the right to family and private life that made the penalization of homosexuality in Northern Ireland an unacceptable treatment of homosexuals and violated their rights under Article 8 para. 1 of the Convention:

'As compared with the era when the legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied'<sup>71</sup>

Notice how the Court contrasts the restricted conception of homosexual behaviour of the past with the newer understanding of it: treating the Convention as a living instrument means identifying not just the most recent but also the best understanding of the value at stake. This is a very good example that illustrates the point that turning to the best possible interpretation here means turning to the one that comes closer to the moral truth about the interpretive questions that the Convention's provisions pose.<sup>72</sup>

This shift towards substantive moral reasoning and away from a conventional understanding of the states' obligations based on the ECHR is gradual and with frequent retreats, especially when applicants argue for the existence of positive obligations in sensitive moral issues. In such cases, the Court usually finds that national authorities are

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<sup>69</sup> *Ibid*, para. 55.

<sup>70</sup> *Dudgeon v. United Kingdom*, (2002) 34 EHRR 61.

<sup>71</sup> *Dudgeon v. United Kingdom*, para. 60. More recently, the Court in *Rantsev v. Cyprus and Russia*, (2010) 51 EHRR 1, decided that trafficking, although not expressly mentioned in the wording of Article 4, should fall within the meaning of 'slavery', 'servitude' or 'forced and compulsory labour'.

<sup>72</sup> Letsas rightly emphasizes that the Court here refers to this interpretation as a better one (rather than different or modern one), thus signifying a shift towards a moral reading of the ECHR. See Letsas, as above in note 66.

better placed to decide these issues and leaves the matter to a rather wide margin of appreciation. The Court also often retreats from a substantive examination of the moral requirements of effective respect in positive obligations cases with socio-economic implications on the basis that such cases involve resource allocation decisions that national authorities are also better placed to decide. I believe this is largely due to the difficulty in addressing the distributive justice questions that these cases pose rather than due to any appeal to the idea of consensus or common ground. To make this point clear I will examine these cases separately in chapter 2 and in the following section focus only in those that reveal a tension between a conventional (based on consensus) and a moral, evolutive interpretation of the Convention. Besides, it is part of my wider argument in this thesis, that we must first clear the way of all flawed limitations to the interpretive quest for effectiveness, including an appeal to consensus, and then welcome and address the distributive justice issues raised by claims to resources and positive obligations.

### **B. Consensus, Common Ground and Substantive Moral Arguments**

Echoing concerns expressed in particular in the context of positive obligations cases, the Court has often retreated from a dynamic interpretation of the Convention in light of present day conditions and the values that underlie it. This has usually happened where the Court considered that there is no ‘common ground’ or ‘consensus’ between the Member States of the Council of Europe about the meaning of a provision and allowed for a wide margin of appreciation of the national authorities to determine the requirements of the text and thus each state’s positive obligations. Such were the cases concerning the legal status and rights of transsexuals.<sup>73</sup> In these cases, the Court had repeatedly denied the existence of a positive obligation by pointing to the diversity of practices and the lack of common ground amongst member states rather than looking at whether there were substantive moral reasons to justify such an obligation as indispensable to an effective respect for private life.

In *Rees v. United Kingdom*, the first of a series of judgments concerning the positive obligation of the state for the official recognition of post-operative transsexuals the applicant was claiming that the British authorities had a duty to amend his birth certificate to reflect his new, post-operative identity as a male and not inform third parties of that change. The Court relied on the remark it had first made in *Abdulaziz, Cabales and Balkandali* just a few months earlier.<sup>74</sup> When there is no common ground on the

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<sup>73</sup> *Rees v. United Kingdom*, (1987) 9 EHRR 56, *Cossey v. United Kingdom*, (1991) 13 EHRR 622, and *X, Y and Z v. United Kingdom*, (1997) 24 EHRR 143.

<sup>74</sup> *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 EHRR 471.

requirements of 'respect', the positive obligations arising from Article 8 cannot extend into an area where diversity of practices pertains and consensus is meagre, which is an area where the states should enjoy a wide margin of appreciation. In the Court's words, the reason for this is that

'the notion of 'respect' is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case.'<sup>75</sup>

The Court admitted that several states had made steps towards recognizing the obligation that the United Kingdom had allegedly failed to fulfil, that is, they had given transsexuals the option of changing their personal status to fit with their newly gained identity. However, the Court found that, in the present case, the law appeared to be in a 'transitional stage', as these states had provided for such an option 'subject to conditions of varying strictness and retained a number of express reservations' whereas in some states the option did not even exist.<sup>76</sup>

Four years later, in *Cossey v. United Kingdom*, the Court gave an identical judgement, as it found that the applicant's claim and circumstances were not distinguishable from those of *Rees* noting also that there had been 'no significant scientific developments that had occurred in the meantime'.<sup>77</sup> The crucial point of disagreement between the majority and the minority was, in both cases, whether there had been a clear scientific or societal development that was already reflected in the legislation and policy of the majority of states. It was only another eight years later, in *Sheffield and Horsham v UK*,<sup>78</sup> that the minority opinion was significantly strengthened but also diverted its focus from the inquiry about common ground towards more substantive considerations. Yet again, the majority disregarded a thorough comparative study submitted by the non-governmental, human rights organisation, Liberty, as well as the fact that only four out of thirty-seven states did not provide for the option of amendment of birth certificates of post-operative transsexuals. Instead, the majority restated its hesitation to impose, what it considered to be, a controversial obligation to undertake a particular social policy. It said that the applicants had not shown that since *Cossey* there had been

'any findings in the area of medical science which settle conclusively the doubts concerning the causes of the condition of transsexualism...' and

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<sup>75</sup> *Rees v. United Kingdom*, p. 37.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Cossey v. United Kingdom*, para. 40.

<sup>78</sup> *Sheffield and Horsham v UK*, (1999) 27 EHRR 163.

...'As to the legal developments in this area...the survey [submitted by Liberty] does not indicate that there is yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled to reveal his or her pre-operative gender.'<sup>79</sup>

Interestingly though, it appears that the minority did not focus its criticism merely on the issue of common ground but stressed that there is something wrong about the way the right to gender re-assignment is conceived by the majority:

‘...It is *no longer possible, from the standpoint of Article 8* of the Convention and in a Europe where considerable evolution in the direction of legal recognition is constantly taking place, *to justify a system* such as that pertaining in the respondent State, *which treats gender dysphoria as a medical condition, subsidises gender re-assignment surgery but then withholds recognition of the consequences of that surgery thereby exposing post-operative transsexuals to the likelihood of recurring distress and humiliation.*

For the above reason we consider that respect for private life under Article 8 imposes a positive obligation on the respondent State to amend their law in such a way that post-operative transsexuals no longer run the risk of public embarrassment and humiliation...<sup>80</sup>

Unfortunately, these substantive considerations about what effective respect for the new identity of post-operative transsexuals entails did not prevail in this case. Nevertheless, similar considerations were eventually adopted in a unanimous decision of the Grand Chamber in *Christine Goodwin v. United Kingdom*. In this case, the Court stressed that practical and effective respect for the rights granted is of crucial importance, and that this kind of respect requires a certain degree of consistency in responding to any 'evolving convergence as to the standards to be achieved.'<sup>81</sup> This is expressed in the following terms:

‘...The Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long process of transformation which the transsexual has undergone...The coherence of the administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out under Article 8 of the Convention...Where a State has authorised the treatment and surgery...financed or assisted in financing the operations...it appears

<sup>79</sup> Ibid, paras 56 and 57.

<sup>80</sup> Ibid, Joint Partly Dissenting Opinion of Judges Bernhardt, T. Vilhjalmsson, Spielmann, Palm, Wildhaber, Makarczuk and Voicu. My emphasis.

<sup>81</sup> *Christine Goodwin v. United Kingdom*, (2002) 35 EHRR 18, para. 74. See also the identical *I v. United Kingdom*, (2003) 36 EHRR 53 and *Van Kuck v. Germany*, (2003) 37 EHRR 51.

illogical to refuse to recognise the legal implications of the result to which the treatment leads.<sup>82</sup>

The Court considered the government's argument – and indeed its own previous ruling in *Sheffield and Horsham* – about the lack of a common approach among the Contracting States on the repercussions of the legal recognition of a change of sex for other areas of law. Notably, it explained that, according to the principle of subsidiarity, states do enjoy a certain degree of margin of appreciation in resolving the legal and practical problems posed in this case, because it is primarily for the Contracting States to secure rights and adopt the measures that would resolve these problems. The lack of a common approach and the existence of a diversity of practices were deemed 'hardly surprising'<sup>83</sup> though, and of less importance<sup>84</sup> in the particular case, where the Court went on to argue that the applicant's claim is such that cannot be left to the margin of appreciation of states:

‘...In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.

...Having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention...’<sup>85</sup>

Note the contrast: when the Court refers to the official recognition of the post-operative transsexuals' new identity it speaks of their *right* to personal development and to physical and moral security. Whereas, when it refers to the repercussions that might arise in other areas of law it talks of 'legal and practical problems' and 'measures that would resolve these problems' all of which could<sup>86</sup> fall within the margin of appreciation of states and in which issues diversity could be sustainable. In this way, it clearly establishes that to have one's actual identity – in the case of transsexuals, their post-operative identity – respected

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<sup>82</sup> Ibid, para. 78.

<sup>83</sup> Ibid, para. 85.

<sup>84</sup> For the argument that, following up from *Marckx v. Belgium*, this is a first of a series of judgments that moved away from placing decisive weight on the absence of established consensus and now often interprets the Convention in light of evidence of even emerging consensus or common values found in international law materials and substantive moral reasoning, see Letsas, 'The ECHR as a Living Instrument. Its Meaning and Legitimacy', p. 7-12.

<sup>85</sup> Ibid, paras 90 and 93.

<sup>86</sup> Depending on their nature, even some of those should not be left to the states' margin of appreciation for reasons similar to those mentioned here -but this is another matter.

in the same way that others' is respected in society is a matter of right that needs to be decided on grounds other than the existence of consensus or a common practice. In the Court's own words, the applicant's claim to have her identity respected 'cannot be regarded as a matter of controversy requiring the lapse of time' to be resolved. For, we no longer accept this to be a matter that falls in the margin of appreciation of states, as we no longer accept that certain individuals should be denied their right to personal development and full enjoyment of their identity as an essential feature of their right to private life guaranteed by Article 8 ECHR.

In *Goodwin* the Court appears to accept that although 'the notion of respect is not clear-cut' this should not necessarily lead to a wide margin of appreciation of the national authorities. More specifically, the lack of consensus or a common approach in a particular matter need not mean that there is no right at stake and the case should be understood as policy matter that should better be left to the discretion of the national authorities. Instead, it makes better sense to suggest that, when we say that respect is not clear-cut, we merely acknowledge that it will not be easy to ascertain what rights and positive duties effective respect entails. Besides, as I explained earlier in this chapter, the fact that the notion of respect or of a particular provision or concept is not clear-cut does not leave room for judicial discretion but leads to unavoidable choices in substantive reasoning and interpretation. The Court did not elaborate on this but it points to other reasons for finding a violation: e.g. when the denial to some individuals of the freedom to develop and fully enjoy their identity, a freedom enjoyed by others in society, is incoherent, illogical and unjustified.<sup>87</sup>

After this significant judgment though, the Court did not follow the same path in equally controversial issues but, again, considered that the lack of a common approach or consensus meant that it ought to treat the matter at stake as a matter of policy rather than an ECHR rights issue.

For example, in *Frette v. France* Mr Frette applied for an authorisation by the Social Services, which is a prerequisite in order to initiate the procedures for adoption of a child in France. During this process, he disclosed that he was homosexual and, as he claimed before the ECtHR, he was subsequently denied authorisation –and, effectively, the opportunity to be considered for adopting a child– on the impermissible grounds of his 'choice of lifestyle'.<sup>88</sup> In particular, he argued that the relevant national legislation –which otherwise provided substantive criteria for deciding on the eligibility– was applied in a discriminatory way by the Social Services in his case. Because the authorities provided

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<sup>87</sup> Ibid, paras 78 and 90.

<sup>88</sup> *Frette v. France* (2004) 38 EHRR 21, para. 13.

only unsubstantiated and insufficient reasons for the rejection of his authorisation, which he claimed was 'implicitly and exclusively based on his sexual orientation'<sup>89</sup> and therefore violated his rights under Articles 8 and 14 ECHR. The Court accepted that the decision of the national authorities was based decisively on his avowed homosexuality<sup>90</sup> and therefore interfered with his freedoms. Still, a very narrow majority vote of 4-3 found that this interference was justified. Firstly, because it was in pursuit of the legitimate aim of the protection of the health and rights of children. Secondly because it was proportional, in light of the fact that it was 'indisputable that there is no common ground on the question', 'no uniform principles on these social issues'<sup>91</sup> and that the 'scientific community...is divided over the possible consequences of a child's being adopted by one or more homosexual parents.'<sup>92</sup>

The dissenting opinion of three judges criticised the majority's finding that the protection of the child's rights and freedoms could be established as a legitimate aim in the particular case as the government had failed – even in the opinion of the Conseil d'Etat – to refer 'to any specific circumstance that might pose a threat to the child's interests.'<sup>93</sup> Most significantly, the minority opinion concluded that the lack of reference and detailed substantive analysis of any evidence of the potential danger posed to children when adopted by homosexuals against a consideration of the situation of the particular individual concerned, effectively amounted to an absolute bar to adoption by homosexuals which was not proportionate and a violation of the rights protected under Articles 8 and 14 ECHR. With this final remark, the three judges object to the unsubstantiated and superficial examination of the requirement of legitimate aim and of the test of proportionality, which, as they argue, necessarily involves a substantive assessment of the realities of the case and the reasons that support one or the other interpretation.

For instance, the Court took into account the report submitted by the UK government in *Smith and Grady v. United Kingdom*, which suggested that 'the presence of known or strongly suspected homosexuals in the armed forces would produce certain behavioural and emotional responses and problems, which would affect morale, and, in turn, significantly and negatively affect the fighting power of the armed forces.'<sup>94</sup> Examining this study gave the Court the opportunity to rightly dismiss it on the basis that the views and attitudes expressed in it represented 'a predisposed bias on the part of a heterosexual majority against a homosexual minority' and therefore that the existence of such views

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<sup>89</sup> Ibid para. 26.

<sup>90</sup> Ibid para. 32, 37.

<sup>91</sup> Ibid para, 41.

<sup>92</sup> Ibid para, 42.

<sup>93</sup> Ibid, dissenting opinion of Judges Sir Nicholas Bratza, Fuhrmann and Tulkens.

<sup>94</sup> *Smith and Grady v. United Kingdom*, (1999) 29 EHRR 493, para

and attitudes could not ‘of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants’ rights.’<sup>95</sup> Even though this decision dismissed the use of this majoritarian preference as a reason that could justify interference with individual freedoms it left open the possibility that if it was supported by other reasons it could play a role in justifying interference.<sup>96</sup> Apart from that, it is also concerned with a rather different situation than the one in *Frette* where the issue was not a policy argument – like in *Smith and Grady*, about the effectiveness of the armed forces – but one of principle, that is whether the rights of others would be endangered or compromised in any way. In this harder case, the Court had to assess whether the reasons for the differential treatment imposed a prejudicial majoritarian preference on the individual – here, the predisposition, suspicion or uncertainty of the majority about the parental suitability of homosexuals – but also that the measures taken are necessary in order to ensure the effective enjoyment of the rights of others. The dissenting judges rightly complained that by failing to address these issues, the majority did not substantively examine the proportionality of the interference with the applicant’s freedom but considered the national authorities better placed to do so.

Equally restrained is the Court’s approach in finding the application of *Parry & Anor v. United Kingdom* as inadmissible: the applicants, a female and a male-to-female post-operative transsexual were put in a quandary<sup>97</sup> by the legislation adopted to regulate the granting of gender recognition certificates. They wished to remain married after the gender reassignment treatment but also to have the new identity of the applicant officially recognized by the national authorities – as required after the decision of the ECtHR in the *Christine Goodwin* case. In particular, the applicants claimed that the state had indeed taken positive steps following that previous ruling, but that the measures taken still fell short of complying fully with the requirements of Articles 8 and 12 ECHR. That is, whereas they did provide for official recognition of transsexuals who were single or wished to terminate their marriage<sup>98</sup> they did not offer the same protection for the freedom of choice of other transsexuals who would wish to remain married. The Court acknowledged that it ought to examine whether the state had failed to comply with ‘a positive obligation to ensure the rights of the applicants through the means chosen to give effective legal recognition to gender re-assignment.’<sup>99</sup>

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<sup>95</sup> Ibid para. 97.

<sup>96</sup> The idea that such preferences should be altogether excluded will be discussed later in Chapters 3 and 4.

<sup>97</sup> *Parry and another v. United Kingdom*, Application no. 42971/05, Judgment of 28 November 2006.

<sup>98</sup> And of course for those who wished to marry someone of the opposite sex – after reassignment.

<sup>99</sup> *Parry and another v. United Kingdom*.

Still, the Court reiterated that the notion of 'respect' in Article 8 ECHR is not clear cut and that therefore, especially as far as it concerns the positive obligations inherent in it, the margin of appreciation of states is wider than in other cases. Following this, it noted that English law does not permit same sex marriages but provides for civil partnerships, which would give the applicants an alternative viable option of giving to their relationship a legal status akin to that they enjoyed in marriage. For these reasons, the Court concluded that the effects of the system had not been shown to be disproportionate, and that a fair balance had been struck in the circumstances (taking into account that this is an area where the states enjoy a wide margin of appreciation) and consequently dismissed the application as manifestly ill-founded.

The applicants' claim with respect to the right to marry was also dismissed on the basis that Article 12 ECHR and English law do not allow same sex marriages and no positive obligation of the state to provide such an option can be interpretively derived from the Convention. The Court relied on its precedent in *Rees* but also on the lack of a common approach among the states to argue, once more, that 'Article 12 of the Convention...enshrines the traditional concept of marriage as being between a man and a woman' and that the granting of such a right to same sex couples in some particular states was an extension of this right and not a right that 'flow[s] from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950.' The applicants claimed that part of the essence of the right enshrined in Article 8 was to be able to continue to remain married, since they chose to form their relationship through this institution for its particular historical and social value and remained faithful to this belief irrespective of the changes in their lives. With a touch of irony, the Court replied that 'the applicants have referred forcefully to the historical and social value of the institution of marriage which gives it such emotional importance to them; it is however that value as currently recognised in national law which excludes them.'<sup>100</sup> With these statements, the Court assumed that the value of marriage is to be determined by the national legislation and the views of the majority. Individual views and choices that do not conform to the majority's understanding can be excluded from the value of marriage. Finally, with this comment, the decision concluded that the matter fell within the state's margin of appreciation, as it did not impair the very essence of the applicants' right to marry. In fact, the Court found that the 'sensitive moral choices concerned and the importance to be attached in particular to the protection of children and the fostering of secure family environments' were relevant factors that even outweighed the applicants' claim that the only way they could effectively exercise their rights was impaired.

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<sup>100</sup> Ibid.

Looking closer at this exchange, we see that, in the Court's view, the state had no obligation to provide the applicants with an option of retaining their marriage as this obligation was not found to be within the scope of Article 12 but only pointed to an alternative way of formulating their relationship. Note, however, that what the Court points to is an altogether different right that the applicants could exercise - namely the right to enter a civil partnership – and not an alternative way of exercising the right whose violation they were claiming. Aside from this distracting move, no justification is actually given to the argument that the very essence of the right to marry was not impaired. Despite an initial statement that the matter cannot be left entirely to the margin of appreciation of the Contracting States, the Court did not engage in any substantive discussion of the essence of the right and the value that underlies it. Instead, it allowed the national authorities and, effectively, the majority's perception of the value and nature of the institution of marriage to determine the essence and content of the right to marry. Against this outlook, Dworkin powerfully argues that we offend the abstract right of individuals to be treated with equal concern and respect (and any more specific rights that flow from it) when we exclude them, without any weighty moral justification, from the continuous process of the evolution of the meaning and content of values (such as that of marriage) only to protect and impose a majoritarian conception of these values.<sup>101</sup> In a truly free society, Dworkin explains, these values belong to everyone and to no one save only when particularly weighty moral reasons warrant an exception.<sup>102</sup>

On the same question of same-sex marriage, the Court has followed this restrained approach in two more recent cases. In both *Schalk and Kopf v Austria* and *Hamalainen v Sweden*,<sup>103</sup> the Court acknowledged the heavy personal burden and hard choices that the legal framework in their countries imposed on spouses whose marriage was no longer considered valid, when one of them proceeded to full legal recognition of their new gender identity after gender-reassignment operations. However, the Court restated its position that '... Article 8 of the Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage ... the regulation of the effects of a change of gender in the context of marriage falls to a large extent, though not entirely, within the margin of appreciation of the Contracting State.'<sup>104</sup> The Court relied decisively on the fact of the diversity of practices pertaining and the lack of a European

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<sup>101</sup> See R. Dworkin, *Is Democracy Possible Here?* p. 87-89. I will return to the point about the rights that flow from an interpretation of the abstract right to be treated with equal concern and respect later on in this thesis, in chapters 3, 4 and 5.

<sup>102</sup> Dworkin, *Is Democracy Possible Here?* p. 87-89.

<sup>103</sup> *Schalk and Kopf v Austria* Application no. 30141/04 (22 November 2010) and *Hamalainen v Sweden* Application no. 37359/09 (16 July 2014)

<sup>104</sup> *Hamalainen v Sweden*, para. 71.

consensus on the matter either on allowing same-sex marriages or on how to deal with gender recognition in the case of a pre-existing marriage.<sup>105</sup> Based on this, it concluded that national authorities should enjoy a wide margin of appreciation both with regards to the decision whether or not to enact legislation on legal recognition of the new gender of post-operative transsexuals and to the rules laid down to achieve a balance between the competing public and private interests involved.<sup>106</sup> The options that the applicants were left with were either to proceed to full legal recognition of their new identity but divorce, or to remain married but tolerate the inconvenience caused by the male identity number or convert their marriage into a registered partnership.<sup>107</sup>

The three dissenting judges objected that, given that 'a particularly important facet of an individual's existence or identity is at stake' the decision of the Court should not have been influenced decisively by the lack of consensus and common practice or the protection of morals.<sup>108</sup> This is an argument away from consensus and towards the moral truth about the substance of the right at stake. But significantly, the minority opinion also highlighted another important issue: that it is 'highly problematic to put two human rights – in this case, the right to recognition of one's gender identity and the right to maintain one's civil status – against each other.'<sup>109</sup> Notice also, that the applicants were Evangelical Lutherans and therefore divorce was not really a choice for them, as it would contradict their strongly held religious convictions. What the three dissenting judges are effectively saying is that this is also an unfair choice: no matter what they choose, one of their rights will be impaired. And this, to their mind, is an excessive burden for the applicants to bear given also that the couple's continued marital relationship despite full new gender recognition would not influence or impair in any way others from exercising or enjoying their ECHR rights.<sup>110</sup> The dissenting judges' opinion that this interference is not 'necessary in a democratic society' echoes Dworkin's argument that I referred to earlier. No particularly weighty reasons, such as the moral rights of others, warrant this limitation of one of the applicants' rights, by way of an exclusion of these individuals from the value of marriage, that should, in principle, be open to all in a democratic society.<sup>111</sup>

Notice that the examples discussed above raise two especially sensitive moral issues, such as same-sex marriage and adoption by homosexuals. In the also controversial issues

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<sup>105</sup> Ibid para. 74.

<sup>106</sup> Ibid para. 75.

<sup>107</sup> Ibid para. 76, 77, 78.

<sup>108</sup> See the dissenting opinion in *Hamalainen v Sweden* by judges Sajó, Keller and Lemmens, at para. 5 and 10.

<sup>109</sup> Ibid, para. 6,

<sup>110</sup> Ibid, para. 10.

<sup>111</sup> In my opinion, such couples demonstrate the most robust and unwavering attitude of love and commitment, two of the most fundamental pillars of the institution of marriage.

broadly related to the value of life, such as those concerning the beginning and end of life, the Court has taken a similar stance. For instance, the Court still allows a wide margin of appreciation in other sensitive areas such as abortion and assisted suicide.<sup>112</sup> In *Pretty v the United Kingdom*, the Court denied the existence of a positive obligation of the state to permit and facilitate the assisted suicide of a terminally ill woman due to the existence of consensus *against* this practice.<sup>113</sup> In addition, in *Tysiac v Poland*, the Court avoided discussing whether any positive obligation of the state to make abortion legally possible is inherent in an effective respect for that right.<sup>114</sup> Even so, it concluded that the state had violated the applicant's right to respect for her private and family life because it failed in its positive obligation to establish an effective procedure, through which the applicant could have appealed against her doctors' refusal to grant her request for abortion.

Still, it is true that the Court generally seems to be moving from a conventional to a moral reading of the Convention.<sup>115</sup> The Court's reasoning in *Goodwin* signified a remarkable change. This, of course, was based on the Court's long established approach to the interpretation of the Convention as a living instrument and its turn towards substantive moral reasoning. Many other judgments have followed in the same spirit. For instance, the *Frette* judgment, discussed above, was overturned by *EB v France*, with the justification that 'where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8.'<sup>116</sup> Similarly, in *Dickson v United Kingdom*,<sup>117</sup> concerning a policy procedure for providing facilities for artificial insemination to prisoners and in *Hirst v United Kingdom*,<sup>118</sup> concerning the prisoners' right to vote, the Court found that reference to the lack of consensus was not decisive and, instead, assessed and rejected the reasons provided by the governments to justify these policies. In particular, the Court in both cases considered unacceptable the fact that one policy was a blanket ban (*Hirst*) and the other set the threshold so high against the applicants from the outset that it did not allow a proper proportionality assessment of the competing rights and interests (*Dickson*). In addition, on numerous occasions, judges have protested in their dissenting opinions against the majority's unjustified over-reliance on consensus and have argued that the

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<sup>112</sup> Another sensitive area is that of religion where the Court has allowed a wide margin of appreciation of national authorities in *Murphy v Ireland*, (2004) 38 EHRR 13 and *Lautsi v Italy*, (2012) 54 EHRR 3.

<sup>113</sup> *Pretty v. United Kingdom*, para. 54-55.

<sup>114</sup> *Tysiac v. Poland*, (2007) 45 EHRR 42.

<sup>115</sup> Letsas, as above note 66.

<sup>116</sup> *EB v France*, (2008) 47 EHRR 21, para. 91.

<sup>117</sup> *Dickson v. United Kingdom*, (2008) 46 EHRR 41.

<sup>118</sup> *Hirst v. United Kingdom*, (2006) 42 EHRR 41.

existence or lack of a common ground should not be the decisive factor for finding a violation or for leaving the matter to the national authorities' margin of appreciation.<sup>119</sup>

In sum, the Court has largely resisted a conventional effectiveness approach. The development of the living instrument approach, as well as the theory of 'autonomous concepts', indicates that the Court considers that the Convention's provisions are made up of concepts that require interpretation based on substantive moral reasoning about their essence and the principles that underpin them and not based on past or current conventional understanding.<sup>120</sup> In this way, the Court acknowledges that rights cannot be protected effectively if States are allowed to ultimately determine the meaning and obligations that follow from the Conventions' provisions. To the contrary, the Court has accepted that its aim is to ensure substantive effectiveness for the ECHR rights: it favours a 'substantive rather than a formal conception' of the Convention rights, it feels impelled 'to look behind the appearances and examine the realities'<sup>121</sup> of each case, reflect on the value that each right serves, discover and protect its very essence. Moreover, in order to guarantee rights that are 'not theoretical or illusory but practical and effective' may require that the states' sovereign will be set aside.<sup>122</sup> Understood in this way, the principle of effectiveness turns the Court's focus away from a formalistic reading of the Convention and into the realm of substantive reasoning that may potentially surpass the understanding that national authorities have of the what obligations are inherent in an effective respect for the ECHR rights.

Even more so and inspired by the same principles, the Court's practice with regards to the 'autonomous concepts' in the Convention reaffirms the idea that we cannot rely upon the sovereign will of the states to define the meaning and requirements of the rights that they are expected to guarantee. It should be upon the Court to determine the meaning of the rights that the Convention grants to individuals or the specific obligations that it imposes on states and then decide whether states have respected these rights and discharged these obligations. Crucially, it ought to do so independently of the states' interpretation of these provisions in their domestic legal system because to allow the

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<sup>119</sup> For instance see the discussion above of the minority opinions in *Frette v France* and in *Hamalaynen v Sweden*, but also the dissenting opinion in *Schalk and Kopf v Austria*, where judges Rozakis, Spielmann and Jebens argued that the existence or not of common ground is only a subordinate basis for the application of the margin of appreciation. For judge Rozakis's separate opinions see G Letsas, 'Judge Rozakis's Separate Opinions and the Strasbourg Dilemma' in D Spielmann, M Tsirli, P Voyatzis (eds.), *The European Convention on Human Rights: A Living Instrument, Essays in Honour of Christos L. Rozakis* (Bruxelles, Bruylant, 2011).

<sup>120</sup> See Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR '.

<sup>121</sup> *Adolf v Austria* (1982), para. 30.

<sup>122</sup> *Engel and Others v. The Netherlands* (1976).

contrary could 'lead to results incompatible with the object and purpose of the Convention, which is to protect rights that are not theoretical or illusory but practical and effective'.<sup>123</sup>

Finally, I take it that this interpretive approach to the ECHR and the principle of effectiveness is not only justified but also essentially tied with the moral foundations of human rights as counter-majoritarian: their content should be determined with reference to substantive moral principles because these are independent of the will of the majority.<sup>124</sup> This is crucial, not only with respect to negative claims of non-interference, but also when seeking to determine the rightful claims of individuals to resources, i.e. those resources that they are entitled to as a matter of rights, rather than as a matter of policy that can be left to the majoritarian decision-making.

But this interpretive approach is not followed consistently in the case law on positive obligations in particular. Recall, a wide margin of appreciation is often granted to the national authorities often with poor justification, due to the lack of consensus. The difficulties are even greater when the Court assumes that there are significant resource allocation implications. I believe, this is not so because the Court really wants to place significant weight on the idea of consensus or because it believes that the ECHR rights cannot entail positive obligations. This has to do more with the reluctance to tell the government how to act, what social policies to institute or legislative changes to make, or how to make resource allocation decisions. In turn, it has to do with the nature of obligations, i.e. the fact that claims to positive obligations are claims to resources that raise questions about *how much and what kind of resources* people are *entitled* to as a matter of what effective respect for the substance of the ECHR rights requires.<sup>125</sup> This is why, I turn the focus of this thesis to the progress and problems in determining the content of claims to resources and positive obligations in the Court's practice and then in theory.

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<sup>123</sup> The quote is from *Chassagnou & Ors v. France*, (1999) 29 EHRR 615 and is cited by Letsas in 'The Truth in Autonomous Concepts: How to Interpret the ECHR' as an affirmation of the rationale behind the theory of autonomous concepts.

<sup>124</sup> Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, chs. 2 and 3. I discuss this issue further in chapter 3 of this thesis.

<sup>125</sup> Note this is also the problem with adjudication in social and economic rights.

## CHAPTER 2

### CLAIMS TO RESOURCES AND POSITIVE OBLIGATIONS IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS: PROGRESS AND PROBLEMS.

So far, I have observed that the Court has resisted a 'conventional effectiveness' approach to the ECHR: it has long abandoned a formalistic and originalist approach to the question of what effective respect for the ECHR requires. Furthermore, I have shown that the Court is gradually turning to a 'substantive effectiveness' approach: it seeks to develop an account of what positive obligations are inherent in effective respect for the ECHR interpreted as a 'living instrument'. Following this observation, I have sought to reinforce the view that the question of what is essentially required in order to guarantee rights that are practical and effective is an interpretive one. This interpretive question must be answered with reference to substantive moral arguments, derived from principles of political morality and the values underlying the Convention. I demonstrated that, although the Court has generally moved towards such an interpretive approach in many areas of its case law, it is markedly more cautious in the context of positive obligations cases. This is understandable, I argued, since claims to resources and positive obligations call for interpretive judgments that are closely related to issues of distributive justice. For this reason and due to the absence of principles that could help to determine the content of such claims, the Court's practice in this area of the case law is still largely incoherent.

In this Chapter, I use a schematic categorization to discuss typical examples of groups of cases that highlight the inconsistency in the Court's treatment of claims to resources and positive obligations. The first group includes claims that are the least controversial because they relate to the traditional functions of the state. In these cases, the effectiveness principle mostly takes precedence over competing considerations or objections of legitimacy and institutional competence. Then I examine a second group of cases dealing with more sensitive issues: those that relate more closely to welfare state responsibilities and have potentially significant implications of social and economic nature. These claims appear to be competing for limited scarce resources against each other, as well as against the public interests of the community. The Court automatically treats some of these claims as matters of state policy, for which the state is better placed to decide and declares them inadmissible. In other cases, the Court attempts to resolve the supposed conflict of interests in a balancing exercise, which, in the absence of clear principles to guide the process, is often left to a wide margin of appreciation of the national authorities.

The purpose of this chapter is to highlight the problems in these trends in the Court's case law. My aim will be to suggest that the Court's reluctance to deal with those claims that appear to have socio-economic implications is due to the lack of a clear set of principles, by which to develop a coherent account of positive obligations inherent in effective respect.<sup>1</sup>

### **1. Progress: The Traditional Claims and the Principle of Effectiveness: Traditional State Functions and Procedural Obligations**

The claims that raise little controversy about the scope and extent of the states' positive obligations are those related to the most traditional state functions, such as the application of criminal law, the operation of the police and security forces and the administration of justice. In particular, these claims usually arise in the context of the right to life (Art. 2), the right to liberty and security (Art. 5), the right to access to court and to a fair trial (Art. 6) and the right to an effective remedy before a national authority for alleged violations of the Convention rights (Art. 13).

In this area of the case law, the Court has acknowledged the existence of procedural obligations of the state to protect the right to life, such as the duty to conduct effective investigations of killings and disappearances or the duty to provide effective remedies under Article 13.<sup>2</sup> This duty was first established in *McCann v. United Kingdom*, where the Court stated that '...there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.'<sup>3</sup> During the emergency situation in South-East Turkey in the 1990s a succession of similar complaints were made about the failure of the Turkish authorities to effectively investigate allegations of wrongful killings or disappearances, to which security forces could have been involved. The Court soon went beyond *McCann*, by accepting that states have a duty to carry out an effective investigation irrespective of whether the alleged

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<sup>1</sup> In recent years, a growing number of authors point out the flaws in the Court's incremental approach to the positive duties and the normative content of ECHR rights. Among others, see E Palmer 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', *Erasmus Law Review*, Vol. 2, Issue 4 (2009), p. 397-425 and S Fredman, *Human Rights Transformed. Positive Rights and Positive Duties*, especially ch. 1.

<sup>2</sup> For a detailed account of the relevant case-law see A Mowbray, 'Duties of Investigation Under the European Convention on Human Rights' (2002) 51 *International and Comparative Law Quarterly* 435. For more recent cases see: Van Dijk and others (eds.), *Theory and Practice of the European Convention on Human Rights*, (Intersentia, Antwerpen, Oxford, 2006), pp. 367-386.

<sup>3</sup> *McCann v. United Kingdom*, (1995) 21 EHRR 97, at para 161.

perpetrator was an agent of the state: the mere knowledge of a killing is enough to give rise to such positive obligations.<sup>4</sup>

While dealing with a series of similar complaints, the Court further specified the content of procedural duties based on a generic obligation to conduct effective investigation and found violations whenever the authorities had failed to deal promptly and adequately with individuals' complaints about the wrongful acts of the security forces. This was so, in particular, when the authorities had not put in place guarantees of impartiality and independence, had not responded promptly to allegations, had not allowed public scrutiny of investigations, had not interviewed those implicated, had accepting at face value the evidence submitted by the alleged perpetrators and had attributed the alleged actions to groups, such as the PKK, on the basis of inadequate evidence.<sup>5</sup> The Court also broadened the scope of these obligations by accepting the responsibility of the state to conduct an effective investigation in cases involving missing persons, that is, even when it had not been conclusively established that they had been unlawfully killed.<sup>6</sup>

The Court has also recognised the existence of procedural obligations of states for the protection of the right to liberty and security of person (Art. 5) and the right of access to court and to a fair trial (Art. 6).<sup>7</sup> In this context, the Court has sought to identify and safeguard the fundamentals of the rule of law and protect the individual against arbitrariness.<sup>8</sup> A common feature between these cases and the previously discussed cases on procedural obligations is that the Court's decision about whether the procedures are effective is based on criteria about the necessity and suitability of the measures that are in

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<sup>4</sup> *Ergi v Turkey*, (2001) 32 EHRR 18, paras 82-85.

<sup>5</sup> See Van Dijk, *Theory and Practice of the European Convention on Human Rights*, p. 372 and the cases cited there. See also C Buckley, 'The European Convention on Human Rights and the Right to Life in Turkey' (2001) 1 *Human Rights Law Review* 35.

<sup>6</sup> *Cyprus v Turkey*, (2002) 35 EHRR 30. For a commentary of the judgment see L G Loukaides, 'The Judgment of the European Court of Human Rights in the Case of *Cyprus v Turkey*' (2002) 15 *Leiden Journal of International Law* 225.

<sup>7</sup> Such as the duties to inform detainees of the reasons for their arrest (Art. 5(2)), to bring detainees arrested on suspicion of having committed an offence promptly before a judge (Art. 5(3)), to provide access to a court for the speedy determination of the lawfulness of a person's detention (Art. 5(4)), the obligation to determine civil and criminal cases within a reasonable time (Art. 6(1)), to inform charged persons of the detailed nature of the accusations made against them (Art. 6(3)(a)), to provide impecunious individuals with free legal assistance when the interests of justice so require in criminal proceedings (Art. 6(3)(c)), to provide charged persons with the assistance of an interpreter if they do not understand or speak the language used in court (Art. 6(3)(e)).

<sup>8</sup> So it has interpreted these provisions as entailing an obligation of authorities to account for those detained (*Kurt v Turkey*), to take measures to safeguard them against death or disappearance whilst in custody (*Cyprus v Turkey*), to provide special procedural safeguards in order to protect the interests of persons with mental disabilities (*Winterwerp v the Netherlands*), to provide actual and not nominal legal assistance (*Artico v Italy*), etc.. For a detailed account of the relevant case-law see Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (Hart Publishing, 2004), chapters 4 and 5.

place and not about the outcomes of those procedures. Recall that, in the cases discussed earlier, the Court inquired about the existence of guarantees for a prompt, adequate, independent and impartial examination of complaints of killings or disappearances. Here too, the Court considers certain fundamental institutional and procedural requirements as obligations of measures to be taken rather than results to be achieved.<sup>9</sup> In particular, it seeks to establish whether the measures and procedures in place are of the *kind* that one could reasonably expect them to be as essential features of the rule of law.<sup>10</sup>

Besides, notice that in the discussion about what constitutes adequate or appropriate guarantees of effective investigation, the potential financial cost of the institutional, procedural or operational measures and duties required has never been invoked by the respondent governments. No consideration of the potential cost involved has ever prevented the Court from scrutinizing the states' conduct or from finding a violation. Nowhere in the relevant case law does a respondent government attempt to deny or limit responsibility by arguing that such extensive duties of investigation could have social and economic implications and that they are, for this reason alone, matters of policy that should better be left to the discretion or margin of appreciation of the national authorities. The Court always substantively examines whether the procedures and policies in place meet certain standards and only leaves the choice of specific measures to the discretion of national authorities. In this context, judges and governments rarely invoke the potential budgetary or social policy implications as a reason to limit, let alone to deny, the existence of obligations for effective investigation.

The need to invoke budgetary or social policy considerations appears in cases where applicants claim state duties to undertake various preventative measures for the protection of individuals that are more open-ended in nature. The Court always substantively scrutinizes the applicants' claims, as it does in cases such as those discussed above but the extent of responsibility of the authorities regarding preventative measures is more difficult to determine. In this area of the case law, we notice that the Court has sought to develop certain criteria for delimiting these potentially extensive and costly positive duties. In particular, such are the cases concerning the extent of *protective* policing measures aimed at safeguarding the right to life against the risk posed by police officials or private parties. In several instances, both the majority and the large minority opinions thoroughly

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<sup>9</sup> This expression was used earlier in *Plattform 'Arzte fur das Leben' v Austria* (1991) at para 34, a case concerning the obligation of the state to protect a demonstration from anti-demonstrations in order to guarantee the effective protection of the right under Art. 11. For a more detailed analysis of the nature of those essentials of an effective investigation see *Kelly and Others v The United Kingdom* (2001) at paras 95-97.

<sup>10</sup> A special reference to the importance of certain guarantees for the rule of law was made in *Kelly and Others v The United Kingdom*, at para 97.

examined whether the authorities had failed to protect the life of individuals effectively due to the lack of appropriate rules and procedures.

For example, the Court investigated whether the planning and operational choices of the authorities showed 'a lack of appropriate care in the control and organisation' of an arrest operation, which resulted in the death of three suspected terrorists and whether the bad planning of the operation rendered the use of lethal force unavoidable.<sup>11</sup> They examined whether the authorities had taken appropriate care to minimise recourse to lethal force in the planning and control of a domestic hostage rescue operation<sup>12</sup>. They considered whether the authorities' overall operational structure included clear guidelines and training for the use of firearms by officers, in order to avert the risk of random use of force in police pursue operations.<sup>13</sup> The principle that features throughout the applicants and judges' reasoning in these cases is that the object and purpose of the Convention is to make safeguards of the right to life (Art. 2) practical and effective and that this requires scrutinizing the national police authorities' choices of rules, guidelines, procedures, planning and operation.<sup>14</sup>

Wider disagreement about what satisfies the standard of effectiveness is generated by claims for protective measures against threats to life posed by private parties, rather than state officials. In these cases, the Court has had to refine its reasoning in order to decide which omissions could count as violations of ECHR rights. In the most significant example, the frequently cited *Osman* case,<sup>15</sup> the Court had to decide whether police in London had failed to discharge their obligation to take preventative operational measures to protect Mr Osman and his son. Their lives were at risk from the criminal acts of a teacher, who was obsessed with the young boy. In this instance, the Court took a step beyond basic rule of law responsibilities, such as the basic obligation to enact and implement criminal law prohibitions of murder or conduct effective investigations.<sup>16</sup> The question here was the extent of state responsibility to avert threats to life and bodily integrity. The Court acknowledged that this was a difficult question given the 'difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.'<sup>17</sup> However, the Court did not consider the case to be a matter of state policy and did not leave it to the margin of appreciation of the national authorities. Instead, it sought to identify a criterion that

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<sup>11</sup> *McCann*, at para 212.

<sup>12</sup> *Andronicou and Constantinou v Cyprus* (1997)

<sup>13</sup> *Makaratzis v Greece* (2004)

<sup>14</sup> See *McCann, Ergi, Andronicou and Constantinou and Makaratzis*.

<sup>15</sup> *Osman v The United Kingdom* (1998).

<sup>16</sup> See A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, at p. 16.

<sup>17</sup> *Osman*, para 116.

would help it clarify what effective protection of the right to life requires in similar cases. This criterion came to be known as the *Osman* test: the obligation to take preventative measures 'must be interpreted in a way which does not impose an *impossible or disproportionate burden* on the authorities' and a violation will be established if the applicants 'show that the authorities did not do all that could be *reasonably expected* of them to avoid a *real and immediate risk* to life of which they *have or ought to have* knowledge.'<sup>18</sup>

Subsequent case law has regularly evoked and applied this principle in relation to fatal accidents attributed to dangerous activities, which raise issues of state responsibility, such as the operation of a chemical plant very close to people's homes<sup>19</sup> or the testing of atmospheric nuclear weapons in the presence of ignorant servicemen in the area.<sup>20</sup> In general, the *Osman* test has informed the interpretation of the regulations that must govern the licensing, setting up, operation and security of dangerous activities, as well as the minimum conditions of any investigation into the cause of the loss of life that is allegedly related to such activities.<sup>21</sup> The Court has even used this principle in order to determine whether authorities had taken all measures expected of them to protect the life of vulnerable individuals in their care<sup>22</sup> or to prevent harm from the abusive or neglectful behaviour of others.<sup>23</sup>

Notice that in *Osman*, the Court has admitted that not every claimed risk to life or personal integrity can entail for the authorities a positive obligation to take measures to prevent that risk from materialising.<sup>24</sup> Instead, the Court developed the criterion of 'real and immediate risk to life' that authorities 'knew or ought to have known' and incorporated in it the concern about the potential resource allocation implications of such measures. According to this criterion, the authorities are under an obligation to take only those measures that, on the one hand, could avert a known, real and immediate risk but, on the other hand, are reasonable and not impossible or disproportionate given the availability and proper allocation of resources. The crucial feature of this test then is that the decision

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<sup>18</sup> *Ibid.* My emphasis.

<sup>19</sup> *Guerra and Others v Italy* (1998) 26 EHRR 357.

<sup>20</sup> *McGinley and Egan v United Kingdom* (1999) 27 EHRR 1, *L.C.B v United Kingdom* (1999) 27 EHRR 212.

<sup>21</sup> *Oneriyildiz v Turkey* (2004) 39 EHRR 12, para 149. As well as the public's right to information about the potential dangers of such activities, see also *Guerra*, at para 60.

<sup>22</sup> Such as prisoners from their dangerous cellmates in *Edwards v United Kingdom*, (2002) 35 EHRR 19 at paras 54-56 or against the risk of committing suicide whilst in custody in *Keenan v United Kingdom* (2001) 33 EHRR 913 at paras 90-93.

<sup>23</sup> E.g. by putting in place legislation that effectively deters against serious breaches of the personal integrity of vulnerable individuals in *A v United Kingdom* (1999) 27 EHRR 611 or by removing children from their neglectful or abusive domestic environment in *Z v United Kingdom* (2002) 34 EHRR 97 and *E v United Kingdom* (2003) 36 EHRR 31.

<sup>24</sup> *Osman*, para 116.

about what measures or resources are inherent in effective respect is not pre-empted by an objection about the potential socio-economic implications. To the contrary, concern about these implications may be part of a broader argument about the reasonableness or the unfairness of the allocation of resources. This, I note, is not a decision about outcomes to be achieved, as the Court itself put it, but a decision about the kind of treatment afforded to individuals, i.e. the level of concern and respect shown for individuals through the measures and policies adopted.<sup>25</sup>

Indeed, in a series of judgments concerning the conditions of detention the Court places great emphasis on the 'lack of respect for the applicant' that the particular conditions amount to,<sup>26</sup> or the special respect, concern and further obligations owed to children<sup>27</sup> or to individuals with mental or physical disabilities.<sup>28</sup> In all these cases, the Court has found that the lack of certain minimal conditions of sanitation, nutrition,<sup>29</sup> cell size and recreation, ventilation and medical care, or the lack of care to adapt living conditions to

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<sup>25</sup> In this sense, the positive obligations or measures that we can reasonably expect the authorities to undertake are 'conduct-based' rather than 'result-based'. For this point see also FC Ebert and RI Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the *Osman* Test to a Coherent Doctrine on Risk Prevention?' (2015) *Human Rights Law Review* 15 (2), pp. 343-368, at p. 347.

<sup>26</sup> *Peers v Greece* (2001) 33 EHRR 51 at para 75. Similar are the cases of *Kudla v Poland* (2002) 35 EHRR 11 and *Dougoz v Greece* (2002) 34 EHRR 61, *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2. Also, the ECtHR has found a violation of Article 3 ECHR for the conditions in police detention centres in Greece that are meant to be used temporarily but are actually used for long periods of time, despite the fact that they lack the appropriate conditions, see *Kaja v. Greece*, Application no. 32927/03 (27 October 2006), *Siasios & Ors v. Greece*, Application no. 30303/07 (4 June 2009), *Ibram v. Greece*, Application no. 39606/09 (25 January 2011), *Lica v. Greece*, Application no. 74279/10 (7 July 2012).

<sup>27</sup> For instance the Court has found that states violated the applicants' rights under Article 3 because they failed to provide conditions of detention that respected the applicants' dignity and humanity and did not take into account their particular needs and vulnerability as minor asylum seekers in detention. See *Mahmundi and Others v Greece*, Application no. 14902/10 (31 July 2012), *Popov v France*, Application Nos. 39472/07 and 39474/07 (19 January 2012), where the Court found that the conditions (in dangerous iron framed beds for adults, without play areas or activities, and in an insecure and hostile atmosphere) in which the applicants' children had been obliged to live with their parents in a situation of particular vulnerability heightened by their detention were bound to cause them distress and have serious psychological repercussions. Significantly in *Muskhadzhiyeva and others v. Belgium*, Application no. 41442/07 (19 January 2010) the Court stressed that the extreme vulnerability of a child was paramount and took precedence over the status as an illegal alien.

<sup>28</sup> *Grimailovs v Latvia*, Application no. 6087/03 (25 June 2013), where the Court stressed that the State could not absolve itself from its obligation to ensure adequate conditions of detention adapted to the special needs of prisoners with physical disabilities by shifting the responsibility to cellmates, *Asalya v Turkey*, Application No. 43875/09 (15 April 2014), *Helhal v. France*, Application No. 10401/12 (19 February 2015), *Vincent v France*, Application no. 6253/03, (24 October 2006), *Price v United Kingdom* (2002) 34 EHRR 53, *Keenan v United Kingdom* (2001) 33 EHRR 913.

<sup>29</sup> In *Herman and Serazadishvili v. Greece* Application nos. 26418/11 and 45884/11 (24 April 2014), the Court noted that the amount of 5,87 euros per day for food and drink is not enough for the appropriate nutrition of a person living in temporary accommodation for months and, therefore, fails to provide the conditions showing respect for her dignity.

the particular needs of people with disabilities amounts to inhuman and degrading treatment.

Crucially, the Court has declared that objections about the 'lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention.'<sup>30</sup> It seems to me that this statement relies on an assumption about the unfairness of leaving a human being in such conditions. In particular, it is the assumption that a fair allocation of even scarce resources would have ensured certain minimal conditions and that failure to provide them demonstrates lack of concern for the most basic humane treatment of individuals. I believe this assumption is justified in the context of the Council of Europe, as it seems implausible for states members of the Council of Europe to claim that they are unable to meet conditions such as those described above, while fulfilling at the same time other equally fundamental obligations. I will return to this argument in Chapter 5. Still, not all cases allow such a straightforward argument. In fact, when a claim appears to raise sensitive issues with potentially far-reaching social and economic implications it becomes more difficult for the Court to distinguish between justified rights-claims and matters of policy that should better be left to the national authorities. It is to these more controversial cases that I now turn.

## **2. Problems: The Sensitive Claims and the Margin of Appreciation: Claims Closer to Welfare State Responsibilities**

The common feature of this broad category of claims is that they raise issues that appear to be closer to welfare state responsibilities and that, for this reason, the ECtHR treats them with a smaller or greater degree of cautiousness and restraint. To be sure, in recent years, the Court has taken significant steps towards securing the procedural conditions for a fair distribution of various socio-economic entitlements, such as social security benefits, based on the ECHR rights.<sup>31</sup> This has been achieved through an interpretation of the right

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<sup>30</sup> *Poltoratskiy v Ukraine* (2004) 39 EHRR 43 at para 148.

<sup>31</sup> See Palmer, 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', pp. 419-425 and O M Arnardóttir, 'Discrimination as a Magnifying Lens: Scope and Ambit Under Article 14 and Protocol 12', in Brems Eva, Gerards Janneke (eds.), *Shaping Rights in the ECHR by the European Court of Human Rights*, (Cambridge University Press, 2013), pp. 567-599, who, though, notes that this practice may open the floodgates of wide-ranging claims and obligations and suggests that we rely on the notion of the margin of appreciation as a 'gatekeeper' to achieve the appropriate balance in the relevant case law. Without denying that some issues do belong to the states' margin of appreciation in designing social and economic policies, Palmer is right to point out that the Court needs to follow up with these developments in a more principled manner and on the basis of a normative framework, rather than relying on a fluctuating margin of appreciation.

to access to a fair trial by an independent and impartial tribunal for the determination of civil rights and obligations or of criminal charges (Art. 6(1) ECHR) to also cover public law disputes about social security or welfare benefits.<sup>32</sup> This development is important in that it offers vulnerable individuals a fair chance in challenging any decisions or procedures that deny them or deprive them of housing or other social security benefits. At the same time, Article 14 on the prohibition of discrimination has been used to ground obligations to give fair access to social benefits, i.e. access in a non-discriminatory way<sup>33</sup> but also to ensure that state policies did not have an indirect discriminatory and disadvantageous impact on certain individuals or groups.<sup>34</sup> These developments are, of course, welcome but their significance is limited to procedural matters of fair access to socio-economic entitlements and a requirement that any limitation or differential treatment (or indirect effect) will be based on an 'objective and reasonable' justification.<sup>35</sup> Of course, whether a justification is objective and reasonable will be a matter of contention and the Court often grants a very wide margin of appreciation in cases that it deems to be closer to socio-economic policy.<sup>36</sup> The question of where the line should be drawn is not at all clear as the Court often decides these cases in an ad hoc basis, in the absence of clear criteria of reasonableness or fairness.

For instance, the criteria for what constitutes 'fair' decision-making in accommodating or respecting the particular housing needs of individuals are not entirely clear. Although it is a positive development that the Court placed great emphasis on procedural safeguards, which ensure that there will be no manifest error in appreciation of choice and implementation of planning and housing policies, this an area where states are generally granted a very wide margin of appreciation. In these cases, the Court does not usually provide a principled justification for this wide margin of appreciation and often leaves unanswered the substantive questions raised by the applicants in these cases.

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<sup>32</sup> See for instance *Salesi v. Italy* (1993) 26 EHRR 187 and *Tsfayo v. the United Kingdom*, Application no. 60860/00, (14 November 2006).

<sup>33</sup> In *Gaygusuz v. Austria*, (1997) 23 EHRR 364, *Koua Poirrez v. France*, (2005) 40 EHRR 2 and *Stec v. the United Kingdom*, Applications nos. 65731/01 and 65900/01, (12 April 2006), the ECtHR decided that claims to contributory benefits are analogous to the pecuniary rights of contributors in private funds and therefore may be considered as 'possessions' to be protected under Article 1 of Protocol No.1 which guarantees that every person is entitled 'to the peaceful enjoyment of his possessions'. Taken together with Article 14 ECHR the states had an obligation to secure those benefits to non-nationals as well.

<sup>34</sup> See *D.H. & Others v. Czech Republic*, (2008) 47 EHRR 3, where the Court placed great emphasis on the fact that a state policy had an indirect but disproportionately prejudicial impact on a particular group (Roma children were usually placed in special rather than ordinary schools).

<sup>35</sup> As established in the relevant case law and in Article 1 of Protocol 12 to the ECHR.

<sup>36</sup> See for instance *Carson & Others v. the United Kingdom*, (2010) 51 EHRR 13 about the UK policy to limit index-linked pensions to residents only.

For example, in *Buckley and Chapman*,<sup>37</sup> the applicants claimed that the state's planning policy had an indirectly discriminatory and disproportionate effect on them in particular, as Gypsies. The authorities refused to grant them planning permission to live in a caravan on land that they owned. They based their refusal on a policy regulating the use of land, which aimed at preserving the environmental value of the particular sites. The applicants' claim was that the state had an obligation to mitigate the disadvantageous or unfair impact that this policy had on particular individuals out of respect and concern for their particular circumstances and needs as Gypsies. Settling in caravans was the only way in which these particular individuals could use the land that they owned for their housing needs, in a way that was consistent with their culture. The Court acknowledged that the authorities ought to provide alternative sites for them to relocate, however it failed to address what seems to be an important moral question: whether the options that the applicants were left with, after implementation of the policy, were fair or feasible. The Court dismissed their claim assuming it was based on a much wider claim to be provided with a home. Instead, it could have tried to identify criteria or principles about which alternative options for accommodation are acceptable and fair for Gypsies that have to relocate.

In a similar way, the ECtHR allows a wide margin of appreciation and is reluctant to scrutinize those cases that either appear to be closer to the heart of state sovereignty, such as immigration cases, or those that seem to entail difficult resource allocation decisions. The Court usually finds that national authorities are better placed to deal with such claims. I identify two problems in the Court's practice in these areas of the case law: circularity and arbitrariness. I will briefly explain these problems before I turn to examples from the case law to illustrate the point.

Firstly, it is circular to attempt to distinguish which obligations are inherent in effective respect for the ECHR rights and which are matters of social or economic policy that should fall within the states' margin of appreciation, with reference to the notion of effectiveness or the margin of appreciation. These notions are parts of our question so they cannot be used to answer it. Recall that our question is precisely this: which positive obligations are a matter of effective respect for ECHR rights and which are matters of policy that should

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<sup>37</sup> See *Buckley v. the United Kingdom*, (1997) 23 EHRR 101, and *Chapman v. the United Kingdom*, (2001) 33 EHRR 399. Later, in *Connors v. the United Kingdom*, (2005) 40 EHRR 9 the Court found that forced eviction was imposed on the applicant from a local authority caravan site was not sufficiently justified, especially given the serious prospect of homelessness, and the summary procedure followed lacked the appropriate procedural safeguards. Similarly, in *McCann v. the United Kingdom*, (2008) 47 EHRR 40, the Court decided that eviction constituted an interference with the applicants' right under article 8 ECHR that was not proportionate and necessary in a democratic society because the proportionality of removing a person from home was not assessed, as it should, by an independent tribunal.

fall within the states margin of appreciation? Our response to this problem cannot be that a positive obligation is not inherent in an effective respect for an ECHR right because it falls within the margin of appreciation of the national authorities. By bringing her case to the ECtHR, the applicant challenges this position and argues that her claim raises a human rights issue that the Court is institutionally responsible to scrutinize. Therefore, the Court needs to provide a substantive and principled justification for dismissing the applicant's claim and accepting the governments' case for leaving the matter within their margin of appreciation.

This Court's reasoning is circular, in the way described above, especially in cases that appear to have far-reaching resource allocation implications. In such cases, the Court often accepts the governments' argument that they are 'better placed' to assess the particular social and economic conditions and priorities and allows a wide margin of appreciation without further justification. In other words, the Court endorses the objection that the diversity of practices or conditions as a sufficient argument in the debate about the limits of judicial review and the proper institutional arrangement between the Court and the national authorities and declares these cases as inadmissible. On the other hand, if it does examine the complaint substantively, it usually grants a particularly wide margin of appreciation, again, without adequate justification.

However, a properly justified decision about what should or should not be left to the states' margin of appreciation would have to be based on substantive arguments about the content of the ECHR rights, on the one hand, and the scope of judicial review on the other. The Court could draw this argument from a principled account of what socio-economic entitlements are inherent features of the ECHR rights.<sup>38</sup> Besides, it is institutionally responsible to supervise the implementation of the ECHR rights; therefore, it must also justify any decision to classify a matter as one of state policy rather than one of ECHR rights. A mere allusion to the potential social policy or budgetary implications is not sufficient to justify the Court's decision not to scrutinize a claim: these implications are a feature that other more traditional civil and political rights claims also share, as I argued in the Introduction to this thesis. Recall also that the Court itself has established that it considers the point and purpose of the Convention to be to guarantee rights that are

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<sup>38</sup> This in turn will have to rely on a coherent set of moral principles that underpin human rights in general and the nature of ECHR rights in particular. See Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, p. 83. This means that positive obligations and socio-economic entitlements under the ECHR will have a *different* justification and content than those under other e.g. social or economic rights instruments and not necessarily that there can be *no* socio-economic entitlements in the ECHR altogether. Therefore, the challenge (that I take up in the following chapters in this thesis) is to provide a coherent account and justification of the nature and extent of these claims.

'practical and effective'<sup>39</sup> and has identified several positive obligations or socio-economic entitlements as inherent features of an effective respect for ECHR rights. To serve this purpose, the Court cannot rely on the notion of effectiveness as it lacks any normative content and therefore cannot serve as a principle guiding the Court's decisions. Instead, it needs to seek those principles that will help it justify which claims to resources and positive obligations are inherent in the ECHR rights and, in this way, distinguish them from matters of socio-economic policy. As I tried to show in the previous section, the Court has sought to develop criteria for determining what positive duties effective respect entails in those cases that are closer to traditional state functions. Consistency requires that it should attempt to approach more sensitive and controversial claims in the same way. Nevertheless, a closer look in representative examples of claims with socio-economic implications in particular reveals a second problem, namely that of arbitrariness.

In particular, minority judges and scholars criticize the Court's use of the proportionality or fair balance test employed in the context of articles 8-11 ECHR as arbitrary and inconsistent, especially in positive obligations cases. In the second paragraph of articles 8-11, the ECHR acknowledges a tension between apparently conflicting rights or between rights and other legitimate public aims and sets forth certain criteria for resolving this tension and for justifying limitations and interferences with these freedoms. The freedoms enshrined in the first paragraph of these articles may be limited following a two stage inquiry: firstly, 'in accordance with the law' and, secondly, only when this 'interference' is justified as 'necessary in a democratic society', or else, proportional to the specific legitimate reasons or aims, on which the state has based some action or omission. The relevant limitations here are those that are necessary 'for the protection of the rights and freedoms of others' and in the interests of 'the economic well-being of the country' (the latter only in art. 8).

The proportionality test serves a reasonable idea. Namely, given the scarcity of resources, a government will have to consider the content and limits of claims to resources and positive obligations, e.g. in accommodating the needs of people with disabilities in light of its various other obligations. It will have to determine these duties keeping in mind its responsibility to meet the demands of other individuals or of the community as a whole in health care or in having a functioning and effective judicial system, adequate policing and crime prevention. In this process, the Court must produce well-justified judgments, as is expected of any court. All decisions about the extent and limits of claims to resources need to be justified by a coherent set of principles about the content of ECHR rights and

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<sup>39</sup> First mentioned in *Airey v Ireland* and reaffirmed regularly thereafter.

about what distributions of goods, benefits or opportunities show respect or disregard for them.<sup>40</sup>

However, as it happens with other sensitive issues,<sup>41</sup> claims with potential socio-economic implications are more difficult for the Court to decide than the more traditional claims examined in the previous section. As a result, the Court is often very restrained when dealing with these cases. It dismisses claims to resources and positive obligations based on an ad hoc and often intuitive, rather than reasoned evaluation of the supposedly competing interests.<sup>42</sup> In what follows, I will discuss characteristic examples of positive obligations cases, where the Court regularly conducts the proportionality test in the absence of clear principles that could resolve the tension between apparently competing claims to resources in a consistent manner.<sup>43</sup> This will then open the way to explore the values underlying the ECHR in search of a more principled approach.

### *The fluctuating margin of appreciation and the inadmissible cases*

The first set of cases where we the Court faces difficulties are those relating to the claims of aliens to remain in the territory of a Member State and avoid expulsion to countries where they may be at a real risk of suffering inhuman or degrading treatment (Article 3 ECHR). As mentioned in the previous section, the Court has accepted that Article 3 does not merely entail government responsibility to abstain from and prevent inhuman and degrading treatment intentionally inflicted by public authorities. It has established that 'the suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can

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<sup>40</sup> This, as I will argue in Chapters 3 and 5, turns on the more fundamental question of what respect for human dignity requires and I will develop an account of positive obligations based on Ronald Dworkin's two principles of dignity.

<sup>41</sup> Such as same-sex marriage or adoption by homosexual couples, the rights of post-operative transgender individuals etc, that I discussed in Chapter 1 of this thesis.

<sup>42</sup> Here I borrow the terms used by Jeremy Waldron, who distinguishes between intuitive and reasoned balancing in his 'Fake Incommensurability: A Response to Professor Schauer', (1993-1994) 45 *Hastings Law Journal* 813. In Chapter 4 of this thesis, I discuss and defend the view that the balancing metaphor is often misleading and that reasoned balancing is better understood as interpretation following substantive moral arguments.

<sup>43</sup> Criticism for arbitrariness in how the Court applies the idea of proportionality also comes from the point of view against 'rights inflation', that is, against an unjustified expansion of the normative content of ECHR rights to include various welfare interests of individuals that are supposedly better based in other social and economic rights instruments. See Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, ch. 6. As I will argue later in this thesis, I agree with this view to the extent that claims are misconstrued as claims to the protection of welfare interests. But in Chapters 3 and 5 I take up the interpretive challenge of justifying claims to resources (not welfare interests) on other principles that cohere better with the values underlying the ECHR.

be held responsible.<sup>44</sup> For instance, the Court has accepted that, in principle, aliens may claim that they are entitled to remain in the territory of a state, in order to continue to receive medical treatment, if they are at real risk of not receiving it at the destination of expulsion and the lack of it would cause them suffering that reaches the threshold of inhuman and degrading treatment of Article 3. However, the Court has not treated these claims in a consistent and principled way.

On the one hand, in the seminal cases of *Chahal* and *Saadi* the Court confirmed the absolute prohibition of Article 3. It categorically denied the governments' suggestion 'that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole.'<sup>45</sup> To the contrary, it stressed that 'since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment.'<sup>46</sup> It then went on to reaffirm the principle that it is 'not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion, in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State.'<sup>47</sup> In these cases, the Court states a clear and firm principle, by which it justifies why it deems the balancing exercise and the test of proportionality to be wholly inappropriate in the context of the absolute prohibition of Article 3. In other words, the idea is that no reasons or emergency circumstances, no matter how urgent or potentially life threatening for others,<sup>48</sup> warrant or excuse inhuman or degrading treatment. The Court acknowledges that the value of human dignity leaves no room for exceptions to the moral imperative never to treat human beings in a degrading way or allow them to suffer inhuman or degrading treatment, irrespective of the benefits or costs that such an absolute principle may entail for other individuals or the community as a whole.

On the other hand, the Court has not applied this principle consistently and this is partly due to the potential socio-economic implications of certain types of claims of aliens to remain in the territory of a Member State and to continue to benefit from medical treatment and other health services. To begin with, the Court in *D v the United Kingdom*,

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<sup>44</sup> *Saadi v Italy*, (2009) 49 EHRR 30, *Pretty v the United Kingdom*, (2002) 35 EHRR 1, *D v the United Kingdom*, (1997) 24 EHRR 423.

<sup>45</sup> *Saadi v Italy*, para 138.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*, see also *Chahal* at para 81.

<sup>48</sup> The Court refers to the right of other individuals to have their life protected from the threat of terrorism or other criminal activity under art. 2

reiterated that aliens 'subject to expulsion cannot, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State.'<sup>49</sup> However, it also reaffirmed the previously established principle that the Member States' right to control the entry, residence and expulsion of aliens must be exercised in light of their obligations under Article 3 ECHR, that is, ensuring that there is no real risk that the individual will suffer inhuman or degrading treatment at the destination country.<sup>50</sup> The Court found that 'in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake,<sup>51</sup> the removal of the applicant was in violation of Article 3. Notice that this statement contains conditions that distinguish this case and necessitate principled judgment: which cases are 'very exceptional' and when are the 'humanitarian grounds against the removal' 'compelling' so that the matter falls outside of the margin of appreciation of national authorities with regards to immigration policy and gives rise to a violation of Article 3? In *D v. the United Kingdom* the Court admitted that the circumstances were very exceptional for the following reasons. The applicant was an HIV AIDS sufferer who was currently 'critically ill' and appeared to be 'close to death', could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.<sup>52</sup> For these reasons, the Court concluded that the applicant was entitled to remain in the United Kingdom and not be expelled to St Kitts, were he faced imminent death in the lack of medical, nursing treatment and other basic support. This foreseeable outcome, according to the decision of the Court, would amount to treatment contrary to the high threshold of Article 3: it would constitute inhuman and degrading treatment.

Since the judgment in *D*, the Court has never found a proposed removal of an alien from a Contracting State to give rise to a violation of Article 3 on grounds of the applicant's ill-health.<sup>53</sup> In *Bensaid v. the United Kingdom*, a case concerning a patient with schizophrenia, the Court relied on, what we may call, a *criterion of certainty* about the applicant's 'real risk' of facing treatment contrary to Article 3.<sup>54</sup> In particular, the Court considered that the risk that the applicant's condition would deteriorate if deported and the risk that he would not receive adequate support or care in the destination country was

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<sup>49</sup> *D v the United Kingdom*, at para 54.

<sup>50</sup> *Ibid*, para 46.

<sup>51</sup> *Ibid*.

<sup>52</sup> *Ibid*.

<sup>53</sup> On the ECtHR's own admission in *N v the United Kingdom*, (2008) 24 BHRC 123, para 34.

<sup>54</sup> *Bensaid v the United Kingdom*, (2001) 33 EHRR 10, para 35. The requirement to establish a 'real risk' coheres with previous case law, e.g. in *Ahmed v Austria*, (1997) 24 EHRR 278, para 39, *D v the United Kingdom*, para 50 and 53 but also the 'real and immediate risk' test applied in *Osman* and similar cases thereafter, as discussed in the previous section.

largely *speculative*.<sup>55</sup> For this reason, it decided that the applicant's deportation was not contrary to the United Kingdom's obligations under Art. 3.

In several subsequent cases,<sup>56</sup> where medical or social care would not be available, or would be significantly inferior, in the country of deportation for the applicant in need of it, the Court has decided that removal would not violate Art. 3 using the following criteria, besides the criterion of certainty. Firstly, it has considered whether the applicant's condition has attained an advanced or final stage at the time of deportation – call this the *finality criterion*. Secondly, it has investigated the prospect of medical care or family support for the applicant in the country of deportation – call this the *prospect criterion*. However, the Court has failed to justify the relevance of these criteria. For instance, it is not at all clear in the Court's reasoning what principle justifies the significant difference in deporting an individual who is at an advanced or final stage of a serious terminal condition, as opposed to deporting her at an earlier stage. This could be a principle that could also help us distinguish and justify which applications could be accepted on the basis of 'compelling humanitarian grounds', such as *D v the United Kingdom*. Besides, it is not clear how scarce the medical and family support and care would need to be before we could conclude that the applicant faces no realistic prospect of obtaining them. Finally, we would need a clear set of principles to determine whether and to what extent (and at what cost) we must hold an individual responsible for securing these valuable resources for herself before the responsibility of the state is implicated. Recall that many relevant cases have been found inadmissible by the Court on the basis that treatment was available at the country of expulsion, albeit at considerable financial or personal cost for the individual.<sup>57</sup> These are normative questions and call for a principled approach, in order to establish a coherent jurisprudence in these matters, i.e. one that avoids the danger of an ad hoc or arbitrary dismissal or finding of a violation on the basis of inadequately justified criteria.

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<sup>55</sup> *Bensaid v the United Kingdom*, para 39.

<sup>56</sup> *Karara v Finland*, (dec.) Application no. 40900/98 (29 May 1998) where the applicant was not in advanced stage of illness, *SCC v Sweden*, Application no. 46553/99 (dec.) (15 February 2000), where treatment was available in the country of expulsion but at considerable cost, *Henao v the Netherlands*, (dec.) Application no. 13669/03 (24 June 2003), where the applicant was not in and advanced stage of illness, medical treatment was available in principle and support was available, *Meho v the Netherlands*, (dec.) Application no. 76749/01 (20 January 2004), *Ndangoya v Sweden*, (dec.) Application no 17868/03 (22 June 2004), where limited medical treatment was available at considerable cost and the applicant was not in advanced stage of illness, *Salkic & Others v Sweden*, (dec.) Application no. 7702/04 (29 June 2004), *Amegnigan v the Netherlands* (dec.) Application no 25629/04 (25 November 2004), where was treatment available at considerable cost and the applicant was not in an advanced stage of illness.

<sup>57</sup> See for instance *SCC v Sweden*, Application no. 46553/99 (dec.) (15 February 2000), *Ndangoya v Sweden*, (dec.) Application no 17868/03 (22 June 2004), *Amegnigan v the Netherlands* (dec.) Application no 25629/04 (25 November 2004).

The recent judgment in *N v the United Kingdom*, illustrates the incoherence in this area of the case law in two ways. Firstly, although the complaint was very similar to that put forward in *D v the United Kingdom*, the Court rejected it without adequate justification. Secondly, in its reasoning, the Court contradicted important principles that it had previously established throughout its case law in this area. The case concerned the claim of *N* who was terminally ill with HIV AIDS and wished to remain in the United Kingdom, in order to continue to receive medical treatment for her acute condition. The applicant claimed that if she were deported back to Uganda, where the medical treatment she needed was scarce and only available at considerable cost, she would not be able to access it and would therefore be subjected to acute suffering and a premature death, conditions that the ECtHR had previously considered as inhuman and degrading treatment. On this basis, she claimed that the decision to deport her was in violation of the obligation of the United Kingdom authorities not to deport an individual to a country where she may be face a real risk of suffering inhuman or degrading treatment. The government responded, and the Court by majority accepted, that the case fell into the category of medical cases that had been rejected numerous times before in the previous years,<sup>58</sup> on the basis that this claim too was not based on 'very exceptional circumstances', such as those presented in the *D* case.

In particular, the Court considered the crucial point to be that the applicant's illness was currently stable. The applicant was currently fit to travel and had not reached 'an advanced or terminal stage', although it was foreseeable and accepted that the treatment she currently received in the United Kingdom was only available to her in Uganda at a considerable cost.<sup>59</sup> Furthermore, the Court accepted that discontinuing the treatment would mean that her condition 'would deteriorate rapidly and she would suffer illness, discomfort, pain and death within a year or two'.<sup>60</sup> Still, the government argued that the applicant's claim to remain in the United Kingdom and receive this treatment was one about 'prolonging life' through access to the country's health and medical services and benefits and not a claim about 'ensuring a dignified death'.<sup>61</sup> Therefore, the Court concluded, this kind of state obligation fell outside of the intentions and purpose of the ECHR and was possibly within the ambit of other international instruments, e.g. those related to the protection of social and economic rights.<sup>62</sup>

The applicant rightly challenged these arguments by pointing out that she had established what the Court's case law on expulsion required, namely that it was reasonably

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<sup>58</sup> See cases in note 56.

<sup>59</sup> *N v the United Kingdom*, paras 22-23.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, para. 24.

<sup>62</sup> *Ibid.*

foreseeable that her expulsion would result in harm and that the harm would reach the threshold of severity of Article 3 treatment.<sup>63</sup> In fact, firstly, she reminded the Court that in domestic proceedings it had been established that the 'foreseeable consequence of the [her] expulsion' would be 'exposure to acute physical and mental suffering, followed by an early death'.<sup>64</sup> Secondly, the applicant challenged the relevance of the finality criterion. She argued that there was 'no conceptual distinction between acute suffering, occasioned by the removal of someone at death's door, who was psychologically prepared for death, and someone who was not so psychologically prepared, having been brought back from the brink of death by treatment which it was proposed to discontinue'.<sup>65</sup> In this way, she suggested that what was crucial was whether rapid deterioration and acute suffering was reasonably foreseeable and not how quickly that foreseeable suffering was likely to follow the expulsion. This is a reasonable objection. Notice that this kind of distinction does not appear to be relevant in other expulsion cases. Besides, the applicant contended that any available treatment in the country of destination was mostly palliative, that it would be impossible for her to cover the cost of her medication and support herself and therefore would quickly relapse into very poor health and suffer from her condition. Finally, she stressed that she would also suffer due to the absence of social and psychological support of any family members or people or organizations, such as those that had helped her in the United Kingdom.

The Court admitted that, if the applicant were deprived of the medical treatment that she was receiving, her condition 'would rapidly deteriorate and she would suffer ill-health, discomfort, pain and death within a few years', and it acknowledged that only half of those in similar need in Uganda received the appropriate medication due to country's lack of resources. However, the Court concluded that although this meant that 'the quality of the applicant's life, and her life expectancy, would be *affected* if she were returned to Uganda' this would not give rise to a violation of her rights under Article 3 of the Convention, because the applicant was not 'critically ill' at the time of deportation.<sup>66</sup> The Court applied the criteria of finality and certainty: what was crucial was the rapidity of the deterioration, which the applicant would suffer and, besides, the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, would involve 'a certain degree of speculation'.<sup>67</sup> The justification that the Court put forward for this decision reversed significant and well-established principles about the interpretation of the Convention as a whole and of Article 3 in particular.

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<sup>63</sup> Ibid, para. 25.

<sup>64</sup> Ibid, para. 26.

<sup>65</sup> Ibid, para. 27.

<sup>66</sup> Ibid, at para. 50.

<sup>67</sup> Ibid.

To begin with, the Court reversed the famous statement made in the *Airey* case that 'whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature.'<sup>68</sup> Notice that in *N* the Court cited the very same paragraph from *Airey* in a different order. It said that 'although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights'.<sup>69</sup> Reversing this statement, the Court did not just rephrase the principle underlying the original statement but, instead, it appears to challenge it. Recall that the Court in *Airey* had explained the underlying principle in this way: 'the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation' and that 'there is no water-tight division separating that sphere from the field covered by the Convention.'<sup>70</sup> My point is that, in the original sequence of arguments, the 1979 Court had sought to widen our conception of the content of ECHR rights by setting aside conceptually flawed distinctions between different types of rights and duties. To the contrary, by reversing the very same arguments, the contemporary Court effectively prioritized these long abandoned distinctions and classifications and applied them, in order to narrow the scope of Convention rights and of state obligations, with no adequate justification. The only argument that seems to explain and support this line of reasoning is the one identified by the strong dissenting opinion, i.e. that finding a violation in this case would set a precedent that could open the 'floodgates' for 'medical immigration'.<sup>71</sup> However, as the minority judges pointed out, this argument is misconceived. I will explain.

Firstly, I will show how the Court's broad interpretation of the applicant's claim in *N* is misguided, as evidenced by comparison with the seminal *Airey* case that was cited and relied upon in *N*. In particular, the Court in *Airey* had clarified that the applicant's claim should not be construed as a general claim for legal aid in civil cases. Instead, the Court had argued, this was a claim for legal aid in civil cases *only* for an individual who finds herself in *those particular circumstances*, i.e. where legal aid is indispensable for a fair representation in court and an effective access to justice. In fact, the Court had dismissed the government's objection that this was tantamount to a claim for free legal aid in civil cases *for all* under Art. 6 of the ECHR<sup>72</sup> and examined whether the particular

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<sup>68</sup> *Airey v. Ireland*, para. 26.

<sup>69</sup> *N v. The United Kingdom*, para. 44.

<sup>70</sup> Judges Tulkens, Bonello and Spielmann point out this omission in their joint dissenting opinion in *N*, at para 6.

<sup>71</sup> See para 7 of the dissenting opinion.

<sup>72</sup> Which could be the content of another right.

circumstances of the applicant meant that she was effectively denied her right of access to justice.

To the contrary, the Court in *N* stated, as a general principle, that 'Article 3 does not place an obligation on the Contracting State to alleviate such disparities [i.e. in the level of treatment available in different Member States] through the provision of free and unlimited health care to *all* aliens without a right to stay within its jurisdiction'. In this way, it did not examine the applicant's *particular* claim, i.e. it did not examine whether the particular circumstances of this applicant entail an obligation under Article 3 not to return her to her home country, in order to avoid exposing her to the risk of suffering inhuman or degrading treatment. The Court construed the applicant's claim to be broader than it actually was and treated it with cautiousness. This, in effect, reversed the principle established in *Airey* and the subsequent case law on positive obligations. Namely, it reversed the principle that claims with social and economic implications are not outside of the scope of the Convention but require an analysis of the scope of each particular right in light of its object, purpose and the essential preconditions for its effective respect in each particular circumstances. Indeed, the three judges' minority opinion drew attention to the fact that the applicant's claim was not one about a general right to free and unlimited healthcare but a much more specific claim based on the particular circumstances. Therefore, they argued, the concern that finding a violation in this particular case could open the floodgates for unlimited claims to health and other social services was misplaced: this precedent would only apply to cases with the same or comparable circumstances.

Secondly, allowing its judgment to be influenced by the policy consideration of opening the floodgates to a great number of similar complaints, the Court also set aside another fundamental principle regarding the interpretation of Article 3. To begin with, as the three dissenting judges pointed out, the majority of the Court inappropriately referred to the proportionality principle as one of the principles drawn from the relevant case law and supposedly applicable in this case. Citing the 1989 *Soering* case,<sup>73</sup> the majority reiterated that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.'<sup>74</sup> However, the minority judges were right to complain that the majority decision muted the fact that, despite that statement, *Soering* had actually established the principle that the prohibition of Article 3 is absolute,<sup>75</sup> - a principle that it reaffirmed in the significant subsequent *Chahal* and *Saadi* cases. In these cases, as I mentioned earlier in this section, the Court had established that there was

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<sup>73</sup> *Soering v. the United Kingdom*, para. 89.

<sup>74</sup> See para. 44 of the *N v. UK* judgment and para. 7 of the dissenting opinion.

<sup>75</sup> *Soering v. the United Kingdom*, para. 88.

no room for a proportionality assessment when a government decision and action to extradite or expel an individual will expose her to a foreseeable and real risk of suffering treatment contrary to Article 3 in the destination country. In these cases, the Court, had clearly rejected the governments' attempts to suggest a balancing exercise between the competing interests of the state for national security or the prevention of terrorism or crime and the right of the individuals concerned not to be treated in a way contrary to Article 3.<sup>76</sup> Let us examine these cases more closely.

In particular, in *Saadi*<sup>77</sup> the Court had challenged the government's suggestion that 'in the field of implied positive obligations the Court [i.e. in previous case law] had accepted that the applicant's rights must be weighed against the interests of the community as a whole.'<sup>78</sup> To the contrary, the Court replied, also citing previous case law, that Article 3 'enshrines one of the fundamental values of democratic societies' and 'unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation.'<sup>79</sup> On this basis, the Court established the principle that 'since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment.'<sup>80</sup>

To the contrary, the Court in *N* seems to have been influenced by proportionality considerations. On the one hand, it accepted that 'it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases.'<sup>81</sup> On the other hand, though, it stressed that 'Article 3 does not place an obligation on a Contracting State to alleviate disparities in socio-economic conditions and the level of treatment between different countries, through the provision of free and unlimited health care to all aliens without a right to stay within the jurisdiction of a Member State', as this 'would place too great a burden on the Contracting States.'<sup>82</sup>

Firstly, as I said earlier, the above statements misconstrue the reach of the applicant's claim and misdirect the focus from the question of a violation of Article 3 to a claim to benefit from a country's health and social services. Also, as the dissenting judges point

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<sup>76</sup> *Chahal v. the United Kingdom*, (1996) 23 EHRR 413 and *Saadi v. Italy*, (2009) 49 EHRR 30.

<sup>77</sup> Reaffirming the earlier *Chahal* judgment.

<sup>78</sup> *Saadi*, para. 120.

<sup>79</sup> *Ibid*, para. 127.

<sup>80</sup> *Ibid*.

<sup>81</sup> *N v. The United Kingdom*, para. 44.

<sup>82</sup> *Ibid*.

out, these statements imply that the Court dismissed this case out of concern for the potential significant cost if waves of other similar applications reached the Court. However, if the minority were right and, indeed, the majority accepted that the applicant would face treatment contrary to Article 3 but dismissed her claim considering the potential socio-economic implications of a decision not to deport her, this contravenes the principle of absolute prohibition established in the case law discussed above. Therefore, quite apart from being hypothetical and unsubstantiated by evidence in the judgment of the Court, this reason for dismissing the case of *N* is primarily contrary to principles established in the jurisprudence of the Court.<sup>83</sup>

Finally, the reasoning in this judgment offered no principled justification as to why it was not enough that the risk of suffering inhuman or degrading conditions was real and foreseeable,<sup>84</sup> in order to class this as a case of 'very exceptional circumstances', following the example of *D v. The United Kingdom*. Instead, the Court did not explain why it dismissed the applicant's claim that it was irrelevant whether deterioration (and suffering) was imminent or not quite so.<sup>85</sup>

What is more important, though, the Court has not justified in *N* (neither in *D*, despite the positive outcome in that case) what differentiates these so-called 'medical treatment' cases, where a violation of Article 3 will only be established in 'very exceptional circumstances'<sup>86</sup> and usually on 'humanitarian grounds' from those cases, where a violation is established solely on the basis that deporting or extraditing the applicant will expose her to the real and foreseeable risk of suffering inhuman or degrading treatment. One argument justifying such a disparity could be that inhuman or degrading treatment in the deportation cases is supposedly evidently attributable to *failure* of the receiving states' national authorities to provide, for example, humane conditions in detention centres and prisons, whereas this is not supposedly the case in the 'medical cases'. However, notice that in the 'medical cases' too, the individual will suffer inhuman and degrading treatment due to *failures* of the state, albeit not as easily and directly attributable to the receiving country's national authorities, e.g. the failure to provide a vital life-saving treatment at a reasonable cost. Now, of course the ECtHR is not expected to alleviate such disparities

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<sup>83</sup> On this point, see also the dissenting opinion at paras 6-9.

<sup>84</sup> Recall that this was the criterion established by the Court in so many other cases in the context of Articles 2 and 3, discussed earlier in this chapter.

<sup>85</sup> Even if this consideration was deemed relevant in order to distinguish this case from *D*, then the Court could have found that the other particular conditions of the case imposed a duty to allow the applicant to remain in the country and continue to benefit from the treatment and social support she was given there. For this argument see V Mantouvalou, '*N v UK: No Duty to Rescue the Nearby Needy?*', (2009) 72 *Modern Law Review*, p. 815-828.

<sup>86</sup> Instead, as I will argue in Chapter 5, the Court ought to determine when applicants have a right to avoid deportation because it is the only *fair* treatment to allow them to remain under the circumstances.

and failures but it certainly is expected to respect and protect the dignity of those within its jurisdiction (irrespective of whether they have a right to remain or not on other grounds) by avoiding exposing them to the real and foreseeable risk attributable to such failures.

The Court's decision in *M.S.S. v Belgium and Greece*<sup>87</sup> supports this argument. In this case, the Court found that, the Belgian authorities ought to have allowed the applicant to remain in Belgium, despite the fact that in application of the 'Dublin II Regulation' they ought to have deported her to the Greek authorities, as the first country of entry to examine her asylum application. In particular, they had an obligation not to deport her because sending her to Greece would expose her to a real risk of suffering inhuman and degrading treatment<sup>88</sup> attributable to the failures of the Greek authorities in the application of their legislation on asylum. Notice that the Court found that this risk that the Belgian authorities ought to have protected her from was not only due to the conditions in detention centres but also due to the impact of the authorities' delays and failures in the application of their asylum legislation: i.e. the living conditions of a vulnerable individual left homeless and unable to cater for her basic needs. That is, in finding a violation in *M.S.S.* the Court placed great emphasis on the fact that the applicant's vulnerable condition as an asylum seeker. But this is also true of the applicants in 'medical cases', at least when they can establish that they are in a critical or terminally ill condition and discontinuing their treatment will result in suffering contrary to Article 3, not necessarily at the time of deportation but even shortly after it.

To sum up, although the Court considers the prohibition of Article 3 absolute, in principle, the case of *N v the United Kingdom* and a series of similar inadmissible cases, demonstrate that the Court is influenced by considerations of the potential social and economic implications and for this reason avoids finding a violation or even discussing the case on the merits.

Quite apart from Article 3 cases, the Court heavily relies on such considerations about resource allocation implications in the context of the right to private and family life (Article 8 ECHR), especially in positive obligations cases, where it also allows national authorities a wide and fluctuating margin of appreciation. To be sure, in recent years, the ECtHR has remarkably developed the notion of private and family life and has broadened the protection offered by Article 8 of the Convention.<sup>89</sup> This now also protects a right to

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<sup>87</sup> *M.S.S. v Belgium and Greece*, (2011) 53 EHRR 2.

<sup>88</sup> Living in inhuman or degrading conditions in detention centres or living as homeless and unable to cater for her basic needs, while waiting for a prolonged period to have her asylum application considered.

<sup>89</sup> For an overview of the development of the relevant case law 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*, pp. 409-427 and generally Koch, *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands*

personal development and the right to establish and develop relationships with other human beings.<sup>90</sup> Furthermore, the Court has noted that the right to private life goes beyond a right to the physical integrity of the person, to embrace various aspects of an individual's physical, moral and psychological integrity as well as the social identity of the person.<sup>91</sup> Finally, it is established by now that the effective enjoyment of many of the Convention rights by disabled individuals may require the adoption of various positive measures and, in particular, that Article 8 is also relevant to complaints requiring public funding to facilitate the mobility and quality of life of disabled individuals.

However, the Court has not yet developed a principled framework as to what kind of positive measures are essential or how much resources may be required in respect of all these obligations, e.g. to facilitate the mobility and quality of life of disabled individuals –and to what extent. The proportionality test is often used as a tool to resolve the tension between these claims, which appear to have more pronounced resource allocation implications, and other considerations. Still, there are many instances where the Court, due to the absence of a principled approach, leaves the proportionality assessment to a wide margin of appreciation of the national authorities.

In general, the lack of a principled approach is evident in claims for access to social or health services, treatments and benefits, other welfare measures, policies or payments. In the context of these cases, as in other sensitive cases discussed in Chapter 1, the Court's standard approach is to recognise that there may be positive obligations inherent in an effective respect for the Convention rights. Nonetheless, it regularly attempts to delimit what it considers as 'far-reaching' or controversial implications of this approach by noting that

'especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.'<sup>92</sup>

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*under the European Convention on Human Rights* (2009), E Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act*, (Hart Publishing, 2007), D Barak-Erez and AM Gross (eds.), *Exploring Social Rights: Between Theory and Practice*, (Oxford: Hart 2007).

<sup>90</sup> *Niemitz v. Germany*, (1993) 16 EHRR 97, at para. 29.

<sup>91</sup> See for instance *Pretty v. the United Kingdom*, *Christine Goodwin v. the United Kingdom*.

<sup>92</sup> First articulated in *Abdulaziz, Cabales and Balkandali v the United Kingdom* (1985) 7 EHRR 471, at para. 67. This statement is also found in *Rees v the United Kingdom* (1987) 9 EHRR 56, *Cossey v the United Kingdom* (1991) 13 EHRR 622, discussed in Chapter 1 of this thesis, where applicants claimed that the right to respect for private and family life under article 8 imposed an obligation on the national authorities to legally recognize their new status after gender reassignment and *X, Y and Z v the United Kingdom*, (1997) 24 EHRR 143, with regards to an obligation to grant

The statement that the notion and requirements of respect are not 'clear-cut' and that due regard must be had to the needs and available resources of other individuals and the community as a whole is not necessarily out of place, as I will argue in detail later in this thesis. However, the above statements carry the danger of relativism or arbitrary fluctuation of the standards of human rights protection, especially so if the search for what effective respect requires is not guided by clear principles but is left to a variably wide margin of appreciation of the national authorities.

Indeed, on the one hand, the Court has accepted that 'the boundaries between the State's positive and negative obligations do not always lend themselves to precise definition'; that 'the applicable principles are, nonetheless, similar' but that in both cases 'regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole and that in both contexts the State is recognised as enjoying a *certain* margin of appreciation'.<sup>93</sup> On the other hand, though, the Court generally differentiates its treatment of negative and positive claims<sup>94</sup> often grants national authorities a significantly *wider* margin of appreciation in positive obligations claims without adequate examination and justification.

In particular, the Court's standard approach in negative obligations cases is to examine first whether a particular state action or omission interferes with or limits one of the freedoms prescribed by the ECHR provisions and then to assess whether this limitation is justified.<sup>95</sup> However, in positive obligations cases, the Court often conflates the question of whether the applicant has suffered a significant disadvantage that falls within the scope

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parental rights to transsexuals. See also *Pretty v. the United Kingdom*, (2002) 35 EHRR 1 at para 15 where the Court significantly held that 'while states may be absolutely forbidden to inflict the proscribed [inhuman or degrading under Article 3] treatment on individuals within their jurisdictions, the steps appropriate to discharge a positive obligation may be more judgmental, 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'.

<sup>93</sup> My emphasis. See for instance *Gul v. Switzerland* (1996) 22 EHRR 93, *Keegan v. United Kingdom* (2001) 33 EHRR 913, *Kroon and Others v. the Netherlands*, (1995) 19 EHRR 263, *Stjerna v. Finland*, (1997) 24 EHRR 194 and many more thereafter.

<sup>94</sup> For this criticism see generally Palmer, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', Warbrick, 'The Structure of Article 8', and De Schutter, 'The Protection of Social Rights by the European Court of Human Rights'. Striking examples of this practice are evident in the Court's reasoning in the inadmissible cases that I discuss below in the text.

<sup>95</sup> Note that I do not necessarily take 'interference' to mean infringement of a right and I do not assume that all complaints before the ECtHR are based on *prima facie* rights. I accept the term (and the two-stage examination of the complaints that the Court follows) for the purpose of the discussion here in a broader sense. That is, in the sense that the applicant seeks to substantiate her claim that a particular state action or omission causes her to suffer a disadvantage and, therefore, that it raises a substantive question about the content of a particular ECHR provision. At a second stage, the state is required to prove that any frustration or disadvantage caused is not unfair or unjustified but proportionate and, therefore, it does not violate the applicant's ECHR rights.

of one of the ECHR provisions with the inquiry about whether the disadvantage was unfair or disproportionate. At the same time though, the Court does not reverse the burden of proof that corresponds to each of these two stages. As a result, quite apart from evidence and arguments to the effect that a particular action or omission causes her disadvantage in the enjoyment of a specific ECHR provision, the applicant has the additional burden to prove that this disadvantage is disproportionate and unfair. As many commentators complain, this approach does not correspond to the two-stage structure of ECHR rights and Articles 8-11 in particular, whereby the state must prove that the actions or omissions that the applicant complains of are justified as necessary in a democratic society for the reasons found in the second paragraph of these articles. This places the applicant in an unfairly onerous procedural position and allows a less stringent review of the substance of the complaint.<sup>96</sup>

Specifically, the decision about whether to examine a claim substantively should depend on whether the applicant has made a strong case that she has suffered a significant disadvantage, which falls within the ambit of one of the ECHR provisions. However, the Court often finds no violation or declares the case inadmissible on the basis that the applicant's claim falls within the state's margin of appreciation. Crucially, unlike the treatment of claims to negative obligations, here, the Court leaves the decision as to whether there has been an interference or disadvantage suffered by the applicant in the first place, to the margin of appreciation of the national authorities. Consequently, it does not scrutinize, as it should, the government's arguments in order to assess whether the action or omission that raises the issue of interference or disadvantage is justified –and for this reason, not a violation of ECHR rights and rightly left to the margin of appreciation of the national authorities.

The differential treatment of negative and positive obligations is evidenced most clearly in a series of claims that the Court has unjustifiably left to the states' wide margin of appreciation or declared outright inadmissible. For example, in *Botta v. Italy* an applicant with impaired mobility complained 'of impairment of his private life and the development of his personality resulting from the Italian State's failure to take appropriate

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<sup>96</sup> See Warbrick, 'The Structure of Article 8', De Schutter 'The Protection of Social Rights by the European Court of Human Rights', p. 225-227, De Schutter 'Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights', in A Lawson and C Gooding (eds.) *Disability Rights in Europe: From Theory to Practice* (Oxford, 2005), pp. 43-44, E Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act*, p. 59-62; J Gerards and H Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights', (2009) *International Journal of Constitutional Law*, Vol. 7, Number 4, pp. 619-653, eps. Section 3; L Lavrysen, 'The Scope of Rights and the Scope of Obligations. Positive Obligations', in E Brems, J Gerards (eds.), *Shaping Rights in the ECHR by the European Court of Human Rights*, (Cambridge University Press, 2013), p. 162-182 who argues that elements of the second stage of legality or proportionality should not enter the first stage of examining the scope of positive obligations.

measures to remedy the omissions imputable to the private bathing establishments', in the resort where he spent his holidays, 'namely the lack of lavatories and ramps providing access to the sea for the use of disabled people.'<sup>97</sup> In particular, the applicant complained that, although Italian legislation required private establishments to provide these facilities for the accommodation of the needs of disabled individuals, the authorities had not taken the steps necessary to enforce this legislation.

The Court first had to determine whether the right asserted by Mr Botta fell within the concept of respect for private life set forth in Article 8 of the ECHR. It recalled that the concept of private life 'includes a person's physical and psychological integrity' and is primarily intended as a guarantee against outside interference in the development of the 'personality of each individual in his relations with other human beings.'<sup>98</sup> Furthermore, the Court noted that, the applicant's claim concerned the existence of positive obligations that might also be inherent in effective respect. Following this, it reiterated that the concept of respect is 'not precisely defined' and that 'regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, while the State has, in any event, a margin of appreciation.'<sup>99</sup>

At this point, the Court for the first time sought to determine the existence and content of positive obligations based on a test or criterion that it also found to be decisive in its past practice. Specifically, it explained that 'the Court has held that a State has obligations of this type where it has found a *direct and immediate link* between the measures sought by an applicant and the latter's private and/or family life.'<sup>100</sup> Notably, the Court explained that older seminal positive obligations cases, such as *Airey v Ireland* and *X and Y v the Netherlands* could be explained by this principle: in those instances, the Court had found a violation on the basis that the states' omission *directly affected* the applicants. Moreover, the Court also cited a more recent example, whereby the harmful effects of pollution caused by the activity of a waste-water treatment plant situated near the applicant's home

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<sup>97</sup> *Botta v. Italy*, (1998) 26 EHRR 241 para. 27.

<sup>98</sup> *Botta v. Italy*, para. 32.

<sup>99</sup> *Ibid*, para. 33.

<sup>100</sup> *Ibid*, para. 34. My emphasis. For a critical discussion of the 'direct and immediate link' test see De Schutter, 'Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights', pp.43-45. Also, given the way the Court introduces this criterion with references to its past case law, Colm O' Cinneide is right to point out that this test seems to be performing the same job as the references to 'state responsibility' do in the Art. 2 and 3 cases, i.e. establishing the need for some element of particular responsibility on the part of the state. See C O' Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights', 5 *European Human Rights Law Review* (2008), at p. 592. Notice, that in Art. 2 and 3 cases the analysis of state responsibility issues have some similarities with criminal law responsibility, in particular with regards to individuals or institutions who have a special relationship of care towards others. The cases examined here pose a different problem for responsibility, as I will discuss further in Chapter 5: responsibility to show concern for a fair distribution of resources.

was considered to have a *direct and disproportionate* impact upon the private and family life of the applicant.<sup>101</sup> Similarly, the Court recalled another instance, when it has considered the *direct effect* of the toxic emissions from a factory on the applicants' right to respect for their private and family life. In that case, it had found that the existence of such a direct effect meant that Article 8 was applicable and that the State had violated this right by not communicating essential information that would have enabled the applicants to assess the risks to their life and health for themselves and their families.<sup>102</sup>

However, the Court decided that no such direct and immediate link could be established in this case and that, for this reason, Article 8 was not applicable. Contrary to previous examples, the Court explained, 'the right asserted by Mr Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life.'<sup>103</sup> It may be true that, in the particular case, the applicant unfortunately failed to construe his claim in the most effective way and to provide convincing arguments to substantiate his claim. At the same time, though, the Court placed undue emphasis on the fact that the applicant claimed a right to access public facilities away from his normal place of residence and during his holidays. On this basis, it was reluctant to acknowledge a positive obligation to implement the legal requirement to make all private beaches accessible for people with disabilities. Notice that, the Court here seems to have misconstrued the applicant's claim as a claim to be facilitated in enjoying interpersonal relations of a broad and indeterminate scope and, therefore, it seems to have assumed that the right claimed was of a 'social nature' and more suitable for adjudication under the 'flexible' machinery of the European Social Charter.<sup>104</sup> Besides, the Court appears to have been also influenced by the respondent government's submission that imposing positive obligations 'to ensure the satisfactory development of each individual's recreational activities' would then entail that states must also 'take into consideration obstacles resulting from the insufficient means of those who wished to take part in such activities.'<sup>105</sup> Again, the Court seems to have accepted the government's comparison and failed to examine whether the applicant's claim could be distinguished from such a hypothetical far-reaching claim. It is one thing to argue that a state has a positive duty to

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<sup>101</sup> *Lopez Ostra v. Italy* (1995) 20 EHRR 277, para. 58.

<sup>102</sup> *Guerra and Others v. Italy*, (1998) 26 EHRR 357, para. 57 and 60.

<sup>103</sup> *Botta v. Italy*, para. 35.

<sup>104</sup> This was the majority's view in the proceedings before the Commission that the Court seems to have accepted. See *Botta*, para. 28.

<sup>105</sup> *Ibid*, para. 29.

facilitate access to public facilities for people with impaired mobility and quite another to argue that the state ought to fund the social life of certain individuals.

To be sure, I do not mean to imply that the Court should have necessarily found a violation in this case. I only want to point to the lack of any form of substantive examination of the applicant's claim that he suffered a significant disadvantage in the enjoyment of his private life. Of course, as I said earlier, the applicant himself failed to frame his claim in this way and support it with appropriate and compelling arguments. Still, it seems to me that to say that the applicant's claim had features of a 'broad and indeterminate scope' was merely descriptive and did not warrant a decision that Article 8 was not applicable. Instead, in order to determine when a claim is too broad or indeterminate to be considered a human rights issue, the Court should have attempted a moral evaluation of the disadvantage, impairment or limitation complained of by the applicant, the possible ways to mitigate it and the extent of state responsibility to do so. This moral evaluation would have to rely on principles that determine what people are rightfully entitled to as a matter of effective respect for their ECHR rights, in light of the principles and values that underlie the ECHR, as I have explained earlier in Chapter 1 and will develop further in the following chapters.

A stronger case for a direct and immediate link was presented to the Court in *Zehnalova and Zehnal v. the Czech Republic*<sup>106</sup> by the physically disabled applicant and her husband, who complained about the lack of access for people with disabilities to public buildings and facilities open to the public in their home town, such as the post office, police station, most specialist doctors surgeries and various lawyers' offices, cinemas and the town swimming pool. They argued that the lack of access to these facilities constituted a violation of their right to respect for their private life: the Czech State had failed to discharge its positive obligations to remove the architectural barriers preventing disabled access to public buildings and buildings open to the public, as the national legislation required. The Court decided that Article 8 was applicable but that a positive obligation to ensure access to the buildings in question may be found to exist 'only in exceptional cases', where the lack of access to these buildings affects the applicant's life 'in such a way as to interfere with her right to personal development and her right to establish and develop relationships with other human beings and the outside world'.<sup>107</sup> Still, in the instant case the Court found again that the applicants' claim was 'too broad and indeterminate' as they 'failed to give precise details of the alleged obstacles and have not adduced persuasive evidence of any interference with their private life'. More specifically, the Court noted

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<sup>106</sup> *Zehnalova and Zehnal v. the Czech Republic* (dec.) Application no. 38621/97 (14 May 2002).

<sup>107</sup> *Ibid*, section A.

that 'the first applicant failed to demonstrate the existence of a special link between the lack of access to the buildings in question and the *particular needs* of her private life.'<sup>108</sup> Finally, the Court held that the applicants failed to dispel the doubts concerning the need to use these buildings on a daily basis and, therefore, failed to establish a direct and immediate link between the measures sought and the applicants' private life. The application was declared inadmissible.

As in *Botta*, in this case too, the Court did not justify why it considered it relevant whether the applicants needed to access the buildings in question on a daily basis. In fact, it seems to contradict the very point of a right to private life and personal development, to inquire what activities people will be involved in on a daily basis, before granting them a right to do so. People with disabilities, in the same way as non-disabled people, need to have access to these public facilities *whenever* they choose to use them and not have to follow patterns of behaviour in order to become entitled to the right to choose. For, suppose that the Court was willing to accept that weekly or monthly use was regular enough to warrant a positive duty to facilitate access. That would still not cover the case of someone making a hobby of watching films one year and then deciding to become more active and take up swimming instead the following year. The Court seems to have gotten the matter the wrong way around. The individual must be in a position to determine if and when she needs to have access to these facilities and be able to do so if and when she chooses to. It should not be left to the authorities to decide who has a justified claim based on an inquiry about her pattern of behaviour and regulate access to public facilities within these limits.

A further interesting point is that the Court in this case, as well as in *Botta*, was reluctant to find that an obligation of the national authorities to take positive steps to ensure compliance with national legislation, concerning access to public facilities, fell within the scope of Article 8. De Schutter is right to point out that this signifies a difference in the treatment of negative and positive obligations: the Court always examines whether the actions of national authorities are 'in accordance with the law.'<sup>109</sup> The effect of this is that, although legislation may impose both negative and positive obligations on the state to ensure respect for the ECHR rights, it seems that the authorities will be granted a significantly wider margin of appreciation in whether and how they will comply with their positive obligations. We can possibly attribute this differential treatment of negative and positive obligations to the Court's concern about the potential socio-economic

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<sup>108</sup> *Ibid.*

<sup>109</sup> See De Schutter, 'Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights', p. 47.

implications of these particular types of cases. Because, notice that, in cases that raise no such concerns, the Court has been willing to establish that states violated ECHR rights when they failed to discharge their positive obligations to effectively enforce criminal or anti-discrimination law.<sup>110</sup> Obviously, the positive obligation to ensure compliance with criminal or anti-discrimination law has seemingly limited resource allocation implications. Similarly, in *Sari and Colac v. Turkey*<sup>111</sup> the Court found that a direct and immediate link was established and found a violation of Article 8, on the basis that the state had failed in its positive obligation to create the appropriate legislative framework in Turkey affording practical and effective protection against *incommunicado* detention. As I tried to show in the previous section, the Court rarely hesitates to find procedural positive obligations relating to the traditional functions of the state in policing, effective investigation and the administration of justice, as falling within the ambit of the ECHR. In these cases, as with the obligation to put in place a legislative framework in *Sari and Colac*, no concern or objection emerges that such positive obligations may be too burdensome or complicated and that, therefore, that the national authorities are in a better position to determine their content. Finally, it is quite significant that, in *Sari and Colac*, the Court did not place the burden of proof on the applicants to establish the link. Instead, it followed the standard approach for negative obligations and examined whether the state could justify the *incommunicado* detention for more than seven days.

The Court's reluctance to follow the same approach in cases relating to the accommodation of the needs of people with disabilities is understandable. In the absence of a set of principles that could help it deal with such claims, the Court will always be cautious about finding that obligations with potentially extensive socio-economic implications fall within the ambit of the Convention.

It is noteworthy that the ECtHR has so far declared inadmissible all of the 'direct and immediate link' test cases with the exception of *Sari and Colac v Turkey*. Strikingly, in some cases the Court has even denied reviewing the applicant's arguments in trying to establish a direct and immediate link. Instead it has deferred this assessment to the wide margin of appreciation of the national authorities, on the grounds that the issues raised involved decisions on the allocation of scarce resources that national authorities are better placed to make.

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<sup>110</sup> See, for instance, *Dordevic v. Croatia*, Application no. 41526/10 (24 July 2012), where the state was found to have violated the applicant's Article 3 and 8 rights by not enforcing existing measures to prevent the persistent harassment of a severely disabled man by youths in his neighbourhood.

<sup>111</sup> *Sari and Colac v. Turkey* (dec.) Application nos 42596/98 and 42603/98, 4 April 2006

For instance, in *Sentges v. the Netherlands*,<sup>112</sup> it is unclear whether the application was declared inadmissible on the basis that no direct and immediate link was established or because the Court decided to leave this question to a wide margin of appreciation of the national authorities. In this case, Sentges, a young sufferer of a muscle degenerative disease was unable to stand, walk or lift his arms, his manual and digital functions were virtually absent and he was completely depended on others for every act he needed or wished to perform, including eating and drinking. The national health authorities denied his request to be provided with a robotic arm specifically designed to be mounted on electric wheelchairs, in order to give disabled people more autonomy in handling objects in their environment. Providing the applicant with the robotic arm would enable him to perform many acts unassisted and without the presence of others. The applicant argued that the right to respect for his private life, as guaranteed by Article 8 of the Convention, entailed a positive obligation of the State to provide him with, or pay for, this valuable device. He relied on previous case law, which has established that the concept of private life, as interpreted by the Court, encompasses the notions of personal autonomy and self-determination, as well as the right to establish and develop relationships with other human beings. He complained that his dependence on others for every single act meant that he was unable to pursue the establishment and development of relationships with other human beings and that his freedom of choice in who to develop relationships with was limited to an unacceptable degree. The robotic arm would increase his severely curtailed level of self-determination as it would make him significantly less dependent on his family and friends. In this way, he would be able to establish and develop relationships with persons for reasons other than dependence. Therefore, he argued that there was a direct and immediate link between the measure sought and his private life.

However, instead of assessing whether the applicant had succeeded in establishing a direct and immediate link, the Court decided to leave this assessment to the wide margin of appreciation of the national authorities. Specifically, it held that, even assuming that in the present case such a special link indeed existed, regard must be had to the fair balance that had to be struck between the competing interests of the individual and of the community as a whole and to the particularly wide margin of appreciation enjoyed by States, especially in issues such as this that involve an assessment of priorities in the context of the allocation of limited State resources. In these matters, the Court stated, the national authorities are in a better position to carry out this assessment than an international court, which should also be mindful of establishing a precedent, at least to some extent. Thus, although the Court acknowledged the very real improvement, which a

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<sup>112</sup> *Sentges v. the Netherlands*, (dec.) Application no. 27677/02 (8 July 2003).

robotic arm would entail for the applicant's personal autonomy and his ability to establish and develop relationships with other human beings of his choice, it found that the state had not exceeded the wide margin of appreciation afforded to it. No substantive reasons whatsoever were given to justify why the applicant's claim fell outside of the normative realm of Article 8 and within the margin of appreciation of the national authorities.<sup>113</sup>

In fact, recall that the direct and immediate link test was devised to help the Court answer the question of whether a particular positive obligation fell within the ambit of the Convention or whether it belonged to the margin of appreciation of the national authorities. It is circular to suggest that it should be up to the national authorities to decide whether a direct and immediate link is established. Besides, as I explained earlier, when the case concerns compliance with a negative obligation the Court never leaves the question of whether the action complained of falls within the ambit of an ECHR provision, to the margin of appreciation of the national authorities. Rather, the Court settles this question first and then proceeds to examine, at a second stage, whether the situation complained of by the applicant constitutes an unfair, disproportionate and unjustified disadvantage. Still, in *Sentges*, the direct and immediate link test was used as complementary to the fair balance test but, eventually, both were deferred to the discretion of the national authorities. Therefore, effectively, the Court dismissed the applicant's claim as inadmissible solely on the basis of its budgetary implications and clearly being mindful of the fact that it could establish a precedent for potentially extensive claims to resources.

Similarly, the Court delivered another poorly justified decision in *Molka v. Poland*.<sup>114</sup> In this case, the physically disabled applicant complained that he could not exercise his ECHR right to vote because he lacked appropriate access to the polling station or an alternative way to cast his vote. The Court, once more, acknowledged that 'the effective enjoyment of many of the Convention rights by disabled persons may require the adoption

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<sup>113</sup> Notice that commentators disagree about whether the Court actually found article 8 to be applicable but not violated or not applicable. See L Waddington, 'Unravelling the knot: Article 8, private life, positive duties and disability: rewriting *Sentges v. Netherlands*', in E Brems (ed.) *Diversity and European Human Rights: Rewriting Judgments of the ECtHR*, (Cambridge University Press, 2012), p. 340-344. This is a common confusion created by the Court's unclear reasoning in these inadmissible cases and, aside from any significance it may have for the applicants, it is crucial if article 14 were to be invoked. Article 14 could be invoked and examined only if another article of the Convention was found applicable. This could possibly lead to better outcomes in these cases because, as some scholars point out, the combination of art. 14 and art. 8 has produced more favourable or at least more substantiated reasoning in positive obligations cases, see Fredman Sandra, *Human Rights Transformed: Positive Rights and Positive Duties*, p. 207 and Palmer, 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', who rightly points out, though that an unjustifiably wide margin of appreciation is granted in article 14 cases.

<sup>114</sup> *Molka v. Poland* (dec.), Application no. 56550/00, 11 April 2006.

of various positive measures' and referred to various texts adopted by the Council of Europe, which stress the importance of full participation of people with disabilities in society, in particular in political and public life. More specifically, the Court accepted that the applicant's involvement in the life of his local community and the exercise of his civic duties was a matter that was relevant to 'the applicant's possibility of developing social relations with other members of his community and the outside world, and is pertinent to his own personal development.'<sup>115</sup> Citing the two previous cases where the direct and immediate link test had been used, the Court restated that, although 'in circumstances such as those in the present case, a sufficient link would exist to attract the protection of Article 8', 'the Court does not find it necessary finally to determine its applicability.'<sup>116</sup> At this point, it reiterated 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 margin of appreciation enjoyed by States in this area. In this case, the Court stressed that the margin of appreciation is even wider, as the issue at stake concerns the provision of adequate access of people with disabilities to polling stations, which must necessarily be assessed in the context of the allocation of limited State resources. Finally, the Court decided that the national authorities are in a better position to carry out this assessment than an international court, because of their awareness of the funds available to provide such access for disabled persons.

Again, no substantive reasons were given in *Molka* to support the decision to defer this matter to the national authorities and not scrutinize it as a potential human rights violation. A mere reference to the socio-economic implications of this claim is not sufficient to justify whether or not there is a direct and immediate link, declare the application inadmissible and not worthy of substantive examination. After all, most of the complaints brought before the ECtHR have budgetary implications. Recall that the Court has established that the ECHR imposes on Member States various costly positive obligations to put in place and run effective crime prevention and investigation mechanisms, as well as judicial systems and prison services. This is not to say that the potential cost of the measure sought by the applicant is irrelevant in determining the extent of state responsibility and the content of any positive obligations imposed. Rather, my point is that the Court must determine this at a second stage, whereas, at a first stage, it ought to assess the impact of the state's omissions on the actual enjoyment of the applicant's freedoms under the ECHR and consider what claims to resources or positive obligations may be inherent in an effective respect for the ECHR rights.

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<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

Besides, I do not aim to argue that any disadvantage or frustration caused is necessarily unfair and a violation of ECHR rights. Neither do I want to suggest that the ECHR provisions entail positive obligations to ensure a particular level of goods, benefits, resources or opportunities. For example, a state that only provides a 70% contribution towards the cost of a drug required to treat an applicant's chronic and life-threatening condition does not necessarily violate her right to life under Article 2 ECHR.<sup>117</sup> Of course, it may be relevant that the applicant is unable to afford the remaining 30%, that his condition has deteriorated and he could face an untimely death. These circumstances should neither be conclusive nor be disregarded: they must be part of a wider argument about whether and to what extent it is fair for one to be supported by the state in such circumstances, given the scarcity of resources and the state's obligations towards other individuals. In *Nitecki v Poland*, the Court found that a positive obligation to fund this treatment *could* be engaged but considered that, in the special circumstances of the particular case, the respondent state could not be said to have failed to discharge its obligations under Article 2 by not paying the remaining 30% of the drug price. The complaint was found inadmissible without any justification as to why this was a reasonable and fair burden for the applicant to bear and one that did not violate his ECHR rights.

Similarly, I do not mean to imply that comprehensive haemodialysis treatment must be available for applicants suffering from chronic renal failure in all Member States as a matter of ECHR rights. Of course, the Court must take into account the fact that any decision to provide such treatments 'amounts to a call on public funds which, in view of the scarce resources, would have to be diverted from other worthy needs funded by the taxpayer.'<sup>118</sup> At the same time, though, it must be in a position to justify whether this is an *expensive* treatment that particular applicants, such as those in *Valentina Pentiacova & Ors v Moldova*, did not have a right to and that the state had struck a fair balance in denying it to them. However, in this case too, the Court decided that the national authorities are in a better position than an international court to carry out the fair balance assessment altogether, 'in view of their familiarity with the demands made on the health care system as well as the funds available to meet these demands' and found the complaint inadmissible.

In sum, my point in discussing these inadmissible cases was to suggest that the Court is uneasy dealing with claims that appear to have potentially extensive socio-economic implications because it has no principles at hand, by which to determine their content and

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<sup>117</sup> See *Nitecki v Poland*, (dec.) Application no. 65653/01, 21 March 2002.

<sup>118</sup> *Valentina Pentiacova & Ors v Moldova*, (2005) 40 EHRR SE23.

limits and fears that it will open the floodgates for unlimited claims to resources and positive obligations. More specifically, even when the Court is willing to accept that one of the ECHR provisions may be applicable, it usually defers the crucial assessment of all relevant considerations to the wide margin of appreciation of the national authorities.

Nevertheless, to decide cases such as those discussed above, the Court would need to rely on substantive arguments based on a clear set of principles about what resources states are under an obligation to provide to show effective respect for ECHR rights and what burden or cost it is fair and reasonable to impose upon others. As I explained in Chapter 1, these are substantive moral arguments and principles of political morality that we must explore and develop in light of the values underlying the ECHR. For this reason, my analysis in the following chapters of this thesis will now turn on an examination of the values of freedom and equality.

**CHAPTER 3**  
**THREE CONCEPTS OF LIBERTY**  
**AS THE CORE VALUE UNDERLYING THE ECHR RIGHTS**

So far, in Chapter 1, I have established that we should treat the ECtHR's 'effectiveness principle' as an interpretive question: the question of what positive obligations are inherent in an effective respect for the ECHR rights cannot be settled with reference to the plain meaning of the text or the original intentions of the drafters. Instead, it invites substantive moral reasoning with reference to the values underlying the Convention. To respond to this interpretive task we cannot simply refer to the notions of effectiveness or the margin of appreciation, as these are part of the question in the first place. In Chapter 2, I highlighted the progress but also the inconsistency in the Court's case law and I offered examples that point to the lack of a coherent set of principles by which to determine the content of positive obligations and claims to resources. I suggested that our interpretive judgments in determining this content must rest on substantive arguments and principles based on an interpretation of the core values underlying the ECHR rights.

This chapter identifies three different conceptions of the value of liberty that have been or could be employed to explain and coherently justify the content and extent of positive rights and provide a principled account of positive duties within the ECHR.

The first, based on Berlin's moral and political outlook, is an understanding of the value of political freedom as an independent value, construed in isolation from the concerns and demands of other values, such as autonomy, equality or social justice. In the first section, I will argue that this approach is not only morally and politically unattractive and counter-intuitive but that it is also at odds with the practice of the ECtHR.<sup>1</sup> In the following section, I explore an alternative conception that is often presented as the most

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<sup>1</sup> Many in political philosophy have challenged Isaiah Berlin's famous distinction between negative and positive freedom and have offered competing interpretations of the value of liberty. See I Berlin, 'Two Concepts of Liberty' first delivered in 1958 as an inaugural lecture and then published in 1959 in a collection of essays under the title *Four Essays on Liberty*, now found in I Berlin, *Liberty* (Oxford University Press, Oxford 2002). See the early response to Berlin's distinction in G C MacCallum, 'Negative and positive freedom' *Philosophical Review* 1967 and a famous early criticism of his negative freedom in C Taylor, 'What's Wrong With Negative Liberty' in A Ryan (ed.), *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (Oxford University Press, 1979). Also see R Dworkin's objection to the idea of a 'right to liberty' in 'What rights do we have?' in his *Taking Rights Seriously* (Duckworth 1977). A partial reformulation of some of Berlin's ideas with a compelling analysis on the value of liberty comes from B Williams, 'From Freedom to Liberty: The Construction of a Political Value', (2001) 30 (1) *Philosophy and Public Affairs* 3. For the republican conception of the value of liberty as a third alternative of 'freedom as non-domination' see Q Skinner, 'The Idea of Negative Liberty: Philosophical and Historical Perspectives' in Rorty, Schneewind & Skinner eds. *Philosophy in History* (Cambridge University Press, 1984) and his 'The Paradoxes of Political Liberty', Tanner Lectures on Human Values (1984). Also in the same strand see P Pettit, *Republicanism* (Oxford University Press, 1997), For an autonomy-based conception of positive liberty see J Raz, *The Morality of Freedom* (Clarendon Press, Oxford 1986).

comprehensive theory of positive liberty, which is a conception of liberty in light of the values of autonomy or well-being. According to this, rights are claims to choices and resources that enhance the individuals' interests in autonomy, as much as possible. This approach, mainly inspired by the influential work of Joseph Raz in political philosophy, is often taken by legal scholars to be the most suitable moral basis for positive rights and duties. In particular, a growing number of human rights scholars suggest that the current practice of the ECtHR is best understood as a concern for the conditions of an agent's autonomy and that the shift towards the recognition of positive rights and duties and socio-economic rights signifies a shift towards an autonomy-based understanding of freedom, human rights and constitutional rights.<sup>2</sup> In section 2, I will highlight the flaws of such an approach and explain why it misses important aspects of the nature, point and purpose of the ECHR rights. In the third section, I develop an alternative conception of positive freedom based on Ronald Dworkin's influential work on the interrelation between the values of liberty and equality. Although Dworkin's famous theory of rights rests on a distinctive interpretation of these values it has mostly been developed or employed in its negative form of 'rights as trumps' against impermissible reasons for state action or inaction. In the final section of this chapter, I suggest that an integrated interpretation<sup>3</sup> of these two values also entails a 'distributive function' of rights, i.e. an account of positive rights and duties as fair shares to measures, goods, benefits or opportunities according to just scheme of distribution of resources.<sup>4</sup>

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<sup>2</sup> See in particular K Moller, *The Global Model of Constitutional Rights*, (Oxford University Press, 2012) and his 'Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights', (2009) *Oxford Journal of Legal Studies*, Vol. 29, No. 4, pp. 757-786, S Fredman, *Human Rights Transformed, Positive Rights and Positive Duties* (Oxford University Press, Oxford 2008) and L Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights' in Y Haec and E Brems (eds.) *Human Rights and Civil Liberties in the 21<sup>st</sup> Century*, (Ius Gentium: Comparative Perspectives on Law and Justice, Volume 30, Springer, 2014), pp. 69-129.

<sup>3</sup> Here I borrow R Dworkin's terms first used in his *Justice for Hedgehogs*, (Harvard University Press, 2011) at p. 368.

<sup>4</sup> An interpretation of the value of liberty in light of the value of equality is also at the heart of the theory of rights of other political philosophers, such as in Amartya Sen's capabilities theory. Of course, providing a coherent account of positive rights and duties depends on the particular conceptions of freedom and equality that one adopts. However, all egalitarian theories share the fundamental premise that the value of political freedom is defined and shaped in light of the value of equality. For the purposes of this Chapter this is enough common ground to start with. At a later stage, I will engage with the alternative conceptions of the value of equality that could also offer different understandings of freedom and different accounts of positive rights and duties. Note that Joseph Raz's theory that I examine here does not share this common ground as it is not an egalitarian theory but a perfectionist theory of freedom in light of the value of autonomy.

## 1. Liberty as an Independent Value

### A. Berlin's value pluralism

Suppose that we follow a theory of rights that flows from an understanding of the value of freedom usually associated with the work of Isaiah Berlin. Scholars very commonly refer to and subscribe to elements of Berlin's writings on the value of liberty but they rarely anticipate or overcome its various problems as a basis for an account of human rights. Crucially, they often overlook the implications of the deeper foundation of Berlin's account of liberty, which is his particular version of value pluralism. According to this, in the world that we encounter in ordinary experience, we see that genuine, objective values are many and that conflicts among them are inescapable and tragic: there is no right choice or solution but always loss of something valuable at any attempt to resolve the conflict.<sup>5</sup> I will explain this before I move on to explore its implications for a theory of freedom and rights based on it.

To begin with, Berlin insists that the only strictly philosophical method we can use to identify the true nature of values is an analysis that is essentially free of moral evaluations. His concern that we construe mostly descriptive and minimally normative definitions<sup>6</sup> of each value has its roots in a particular philosophical framework: i.e. that the only reliable method of approaching these matters is through the ordinary resources of empirical observation and ordinary human knowledge.<sup>7</sup> These, he argues, give us no *a priori* guarantee that there is such a thing as harmonious truth or state of convergence of values in a single pattern<sup>8</sup> but instead that there is apparent conflict within the truth about matters of value; or else, true statements of value can conflict.<sup>9</sup> In other words, he argues that the values, goals, and ends that individuals set for themselves and pursue in their lives all reflect a plurality of ultimate and objective values that inescapably come into conflict with each other in the private lives of individuals as well as in the social and political realm. Most importantly, a further implication of this outlook is that any attempt we make to

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<sup>5</sup> For an overview of Berlin's philosophy and his value pluralism see J Cherniss and H Hardy, 'Isaiah Berlin', *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Zalta Edward N. (ed.), URL = <http://plato.stanford.edu/archives/fall2014/entries/berlin/>

<sup>6</sup> Bernard Williams argues that Berlin's understanding of values is descriptive but also in some sense 'minimally normative' but I do not see how a value free statement can be normative in any way. See B Williams, Isaiah Berlin entry in the online Routledge Encyclopaedia of Philosophy.

<sup>7</sup> Berlin, *Liberty*, p. 213-214.

<sup>8</sup> *Ibid.*

<sup>9</sup> This image he posits as contrary to the ancient belief that has dominated western philosophy from Plato through to the romantics, who in his view seriously challenged it. Berlin makes this point in greater detail in his essay 'The Lasting Effects', ch. 6 in his *The Roots of Romanticism*, (Pimlico, 2000)

accommodate these conflicting values requires inevitable choices of sacrifice and loss of something genuinely valuable.<sup>10</sup>

Now, this conception of value pluralism does not necessarily exclude the possibility that reason may play a role when we assess the relative weight that these values have in different circumstances at the stage where we seek to determine their limitations and set priorities.<sup>11</sup> However, Berlin argues that we should not allow evaluative judgments at the prior stage, where we identify something as a value. He views any attempt to rationalize the description of values as masking the true will of our empirical self, i.e. our understanding of the world around us through ordinary experience. Appealing to reason rather than ordinary experience, he warns, could potentially subordinate us to an ideal, higher, rational understanding of values that our empirical self does not identify with. This, he argues, underestimates our ordinary experience, our understanding of the world and of what is valuable in life.

Most crucially, Berlin contends that when we are asked to detach ourselves from our ordinary experiences we are also forced to identify ourselves with a hypothetical, metaphysical self, i.e. to choose as valuable only what we would if we were rational agents. And, since it will be difficult for many to determine what their ideal, rational self would choose, we may be forced to identify with the authoritative will of a collective self, such as the political community, which purports to guide our action to the rational and mutually beneficial choices.<sup>12</sup> This metaphysical fission of the self, he warns, is a philosophically flawed and politically dishonest approach. Because it is not truthful to the empirical fact of the plurality, incommensurability and conflict of values and potentially opens the way to coercion in the name of a rational amalgamation of values in a harmonious scheme accepted by all, *qua* rational. So, Berlin fears, in cases where individuals actually experience their values to be in conflict, they will not just have to accept a rational compromise and a loss of what they value. Even worse, they will be

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<sup>10</sup> Berlin, *Liberty*, p. 213-214. At this point Berlin makes no distinction between, on the one hand, what individuals find of value to themselves and the goals and ends they set for their private lives and, on the other hand, political values. This is problematic if one attempts to identify political values in a wholly subjective way that lacks a certain degree of impartiality, which is essential for any plausible and morally attractive theory about political values. For this point see B Williams, 'From Freedom to Liberty: The Construction of a Political Value', (2001) 30 (1) *Philosophy and Public Affairs*, p. 13 and my discussion later in section 3 (B) of this chapter.

<sup>11</sup> See I Berlin and B Williams's reply to G Crowder's claim in 'Pluralism and Liberalism' that according to Berlin's pluralism choices among incommensurable values are 'underdetermined by reason' in 'Pluralism and Liberalism: A Reply', in the exchange published in *Political Studies* (1994), XLI, pp. 293-309, at pp. 306-307. Even in his original essay 'Two Concepts of Liberty' Berlin makes it clear that the choices and compromises that will eventually have to be made among ultimate values will be based on a pragmatic and a rational assessment of which value should take priority in the circumstances.

<sup>12</sup> See K Flikschuh, *Freedom, (Polity, 2007)*, p. 28-36, who explains Berlin's refusal to accept a close connection between freedom and reason.

asked to admit that a rational interpretive analysis of the issues at stake proves that they had misunderstood the true nature and content of certain values in the first place.<sup>13</sup> Berlin foresees a danger in this: specifically, the danger that some kind of authority will claim to be better placed to identify the true content of values and will strive to patronize individuals or even force on them values that they do not identify as their own. To avoid this, he claims, we must see and define values for what they are in empirical reality and not for what we, or (even worse) others, can rationally construe them to be in order to fit together in a largely hypothetical and metaphysical scheme. This is a central point in Berlin's theory of value and his version of liberalism. It is beyond the scope of my thesis to discuss this in depth but I will present and discuss the illustrative example of the values of liberty and equality that Berlin mostly refers to and is also crucial for my thesis.

### **B. Liberty and Equality as Independent Values**

Let us now come to liberty and equality. According to Berlin's outlook, philosophical clarity and political honesty require that we describe and understand the concept and value of liberty, like all other concepts and values, in isolation, i.e. independently of other values such as equality, fairness, social justice, utility, security or happiness. Take Berlin's example of the independent realms of the values of liberty and equality. Following his view, the fundamental sense of freedom is that of negative freedom or *freedom from* interference or obstacles in whatever one may wish to be or do. The content of these claims to freedom are shaped irrespective of any theory of equality, about what people ought to be free to do or be or what they are rightfully entitled to under a theory of social equality and justice or a reasonably just theory about the distribution of resources. So, equality claims to resources, which he places under the concept of positive *freedom to* the conditions for the exercise of negative freedom (including conditions of rationality and socio-economic conditions),<sup>14</sup> would then similarly be construed independently of any other considerations. That is, independently of the cost that these claims may entail for others or any personal responsibility or cost that it would be fair for individuals to bear for their choices and the outcome of their lives (that it would be unfair to transfer to others). In a nutshell: a non-moralized conception of values construed along Berlinian lines means that claims to liberty or equality may encompass a wide range of claims and not only reasonable or rightful claims to liberty or equality, i.e. only those resulting from an interpretation of these values in light of each other.

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<sup>13</sup> Berlin, *Liberty*, p. 212.

<sup>14</sup> *Ibid*, p. 45-47.

Berlin's argument to support this outlook is that it is essential to avert the danger that some authoritarian regime –like those of the past- will strive to determine as supposedly rational, true and ultimate certain conceptions of values and force them upon individuals that do not identify as their own. And the first inconspicuous step towards such gross misuse of power is, in his view, the identification of the independent value and demands of freedom with the demands of other values, such as those of social justice or equality that provide the conditions for its exercise or make it worthwhile. However, notice that, despite Berlin's insistence on a morally neutral account of values, his argument is a moral one to begin with. He suggests that there is something morally wrong or disrespectful about not allowing individuals to choose and follow their own ideals and, therefore, a kind of moral right or requirement to prevent some from forcing her ideals on others –even if this were to her benefit. I will further explain this inconsistency.

Berlin's argument is mainly derived from his interpretation of the words of Kant, Hegel and Rousseau<sup>15</sup> and the historical experience of their misuse by authoritarian regimes that lead to the sacrifice of individual (negative) freedom for the sake of the supposedly 'true' or 'full' freedom, which is blended with a conception of equality or social justice. Nevertheless, such an argument is far from decisive in a *philosophical* quest to discover whether this version of value pluralism and its implications for the relation between the values of liberty and equality are true. Of course, we can and must look to the past to try to make best sense of the use of interpretive concepts, such as liberty and equality. But history alone cannot fix the interpretation of these concepts.<sup>16</sup> That is, the nature, content and conflict (or not) of political values is primarily a matter of substantive moral and political philosophy: it begs the question to assume that values are independent or interdependent without any substantive moral and political reasoning.<sup>17</sup> Besides, we could carefully construe positive liberty in a way that avoids the mistakes of the past and the dangers of authoritarianism.<sup>18</sup>

So, leaving the historical argument aside, I will reveal some of the substantive shortcomings of Berlin's theory of freedom and equality. To begin with, if we understand these values in isolation from each other, conflicts are inevitable and choices are not merely hard but also tragic, as Berlin put it. Any choice we make in determining their content, limits and relative weight will wrong one of the parties involved. That will be the

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<sup>15</sup> For a criticism of Berlin's interpretation of these philosophers and their ideas, see Flikschuh, *Freedom*, pp. 22-36.

<sup>16</sup> R Dworkin, *Justice for Hedgehogs* (2011), p. 350.

<sup>17</sup> See R Dworkin, 'Moral Pluralism' in his *Justice in Robes*, especially p. 112-113.

<sup>18</sup> See A Swift, *An Introduction to Political Philosophy: A Beginners' Guide for Students and Politicians* (Polity Press, 2003), pp. 77-87 and Taylor, 'What's Wrong With Negative Liberty'.

case even if we frustrate far-reaching claims, e.g. to enjoy absolute security, or the most extensive freedom or absolute equality. Indeed, to be consistent with his moral and political outlook Berlin admits that there is tragic loss of something valuable or 'an infraction of liberty' in every single law that regulates human behaviour, be that the 'freedom of parents to educate their children' or the 'freedom of the torturer to inflict pain.'<sup>19</sup> So, the frustration of any kind of claim that individuals consider as instances of their freedom will be deemed as a *prima facie* interference with something valuable. Only at a second stage, he adds, we may find some of these claims as morally abhorrent and decide to restrict them for the sake of other values but this, he insists, 'does not render them genuine freedoms any the less' and does not justify us in so reformulating the definition of freedom.<sup>20</sup>

It is not hard to illustrate how unconvincing and counterintuitive such an interpretation of these values can be. On the one hand, on this account, freedom is restricted when we prevent some from harming others or from stealing or when we tax them in order to fund redistributive schemes required by a theory of equality or social justice. On the other hand, individuals are not able to claim that their freedom is restricted when they lack the conditions enabling them to exercise their rights in any meaningful way, due to poverty, disability or other disadvantage. In this way, the continuum of the value of freedom seems to encompass and extend between two extremes. It extends from some entirely descriptive account of primitive freedom, such as that found in nature, and all the way to a worthless freedom of choice in a society, where there is a complete vacuum of other conditions that could make it useful and valuable.<sup>21</sup> To be consistent with this, would mean that we have to accept that freedom is diminished and individuals are *prima facie* wronged even if they are denied what could, in fact, be even more than a fair share of resources or opportunities. That is, if we classify the act of torture or murder as genuine instances of freedom, then we accept that, no matter how well justified, any interference with the plans of the torturer or murderer denies her something valuable, an opportunity or right that she was *prima*

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<sup>19</sup> See Berlin, *Liberty*, p. 48.

<sup>20</sup> *Ibid.*, p. 48-49. Surprisingly, the same point is made by Moller, 'Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights', at p. 775, who claims to subscribe to a largely moral account of personal autonomy, following Raz, albeit one that also rests on certain elements of Berlin's moral and political outlook. I will return to this contradiction in section 3 of this chapter and later in Chapter 4.

<sup>21</sup> Such a 'primitive' account of freedom derives from Thomas Hobbes's *Leviathan*, chs. 14 and 21, and is at the basis of purely descriptive accounts of (negative) freedom, i.e. those aiming to keep it free from moral evaluations about the value of options, choices, opportunities or limitations and frustrations. For a strictly descriptive or 'physicalist' account of freedom whereby all physically possible actions are relevant for freedom see H Steiner, *An Essay on Rights*, (Wiley-Blackwell, 1994) and his 'Individual Liberty' in D Miller (ed.) *The Liberty Reader*, (Edinburgh University Press, 2006), pp. 123-140. Also, for an account of 'pure' negative freedom MH Kramer, *The Quality of Freedom*, (Oxford University Press, 2003).

*facie* entitled to. The objection that torturing or murdering others does not fall within the scope of their freedoms is impermissible, according to Berlin's theory. On the other hand, following Berlin's outlook, individuals would not be able to argue that it is unfair for them to be left alone, within a formal framework of potentially wide-ranging freedom of choice, but where they suffer from natural, social or economic conditions that deprive them from any realistic opportunity to exercise this choice. If they argue that the distribution of resources and opportunities in society leaves them with less than a fair share, then we would have to consider this as an equality or social justice-claim and not as a genuine freedom-claim. Following Berlin's distinction between freedom and the conditions of its exercise, that separates the demands of freedom from the demands of other values any claims to the conditions that make freedom meaningful and worthwhile would be dismissed as freedom or rights claims and classified as social policy claims to equality or social justice.

It is deeply misguided to argue that both of these extremes of the continuum can be thought of as genuine instances of freedom as a political value. Both Bernard Williams and Ronald Dworkin –who have divergent views on the rest of the debate, as I will explain below- at least agree to a certain crucial point. They agree that we need to be able to justify with a certain degree of impartiality what is *worthwhile or right*, in order to classify it as an instance of a *political* value, of freedom or equality, or indeed as a value of any kind.<sup>22</sup> The fact that something may feel desirable or good from the point of view of the individual concerned is not sufficient for anyone else or the society as a whole to consider it as a value. Only an objective evaluation can determine the weight of a choice, preference, attitude or goal and help us decide on the priority or urgency that we should assign to it in the allocation of other rights and entitlements.<sup>23</sup> That is why we do not normally understand the *mere wish and ability* to kill or steal as instances of political freedom, whose restriction is necessary because it conflicts with other values. In other words, we consider that the frustration or loss felt by the individual is not morally significant, because nothing bad is being done and no one is wronged if these so-called freedoms are denied.<sup>24</sup> In fact, in these cases we would say that this ability or wish is not even a value at all, let alone a political value. To the contrary, adopting an 'internal perspective about what adds value to one's life' leads us to a wholly subjective and unattractive account of the political value of freedom. Because this conception of freedom implies that even immoral activities such as murdering or torturing would be considered as *prima facie* within the rightful

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<sup>22</sup> See Williams, 'From Freedom to Liberty, The Construction of a Political Value', p. 12, Dworkin, *Justice in Robes*, p. 115.

<sup>23</sup> TM Scanlon, 'Preference and Urgency' (1975) 72 *Journal of Philosophy* 655.

<sup>24</sup> However, see discussion later in the text about the debate between Williams and Dworkin.

sphere that one is entitled to control.<sup>25</sup> It seems to me that, to put all these claims in a balancing exercise at a second stage of limitations debases and misguides the hard interpretive work of exploring the true meaning and the requirements of political values such as freedom and equality. This interpretive task should focus on what it is that we value, what we think is worth allowing, respecting, ensuring or providing. I will return to this in the following section.

Similarly, to take this objection one step further, we may argue that merely designating certain spheres of freedom (in private life, in family life, in access to justice) is not worthwhile and valuable in any way, if no concern is shown for the conditions or ability of the individual to actually exercise any choice within these spheres. Contrary to what Berlin tried to argue, it is not plausible to draw a sharp distinction between freedom and the conditions for its exercise. Berlin's apparently watertight distinction is conceptually flawed and morally unattractive, because we cannot construe a plausible or meaningful conception of freedom without any reference to arguments about what individuals are rightfully entitled to. I will explain.

Jeremy Waldron<sup>26</sup> and G.A. Cohen<sup>27</sup> eloquently exposed the paradox of construing liberty in a purely negative way, insulated from the concerns of other values, especially the values of equality, fairness or social justice. In particular, Cohen highlighted the essential connection between freedom and money: law enforcement officials will have to physically prevent a poor person from getting hold of goods or using services without paying for them. So, although Berlin invites us to consider such cases as a lack of means or conditions of freedom, this physical restriction actually constitutes an interference with negative freedom, as Berlin defines it, i.e. freedom from interference. Therefore, impecunious individuals are not actually free, in the way Berlin assumes they are, to acquire what they cannot pay for, without suffering an interference with their freedom. Of course, one would object that this is a justified interference. Nevertheless, recall that following Berlin's morally neutral definition, the argument that we may be justified in

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<sup>25</sup> See Moller 'Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights', p. 775 Moller directly cites Berlin to adopt this problematic conception of control and ties with it the idea of 'prima facie' rights to everything, free from moral evaluations, which need to be evaluated, balanced against each other and limited at a second stage. He further defends this account of freedom and argues it is an advantage of the proportionality analysis that it invites this 'rights inflation' as the only check to arbitrary or unjustified state action in his most recent 'Proportionality and Rights Inflation' in G Huscroft, BW Miller and G Webber (eds.) *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, (Oxford University Press, 2014), pp. 155-172. I discuss this again in Chapter 4.

<sup>26</sup> J Waldron, 'Homelessness and the Issue of Freedom' in his *Liberal Rights* (Oxford University Press, 1993).

<sup>27</sup> GA Cohen, 'Freedom and Money', in GA Cohen, *On the Currency of Egalitarian Justice and Other Essays in Political Philosophy*, (Otsuka Michael ed.) (Princeton NJ: Princeton University Press, 2011), pp. 166-199.

imposing restrictions should not influence whether we call something as an instance of genuine freedom.

In a similar way, Waldron eloquently proves as 'simply false' the 'familiar claim', which he attributes to Berlin and Hobbes, namely that, 'in the negative sense of "freedom," the poor are as free as the rest of us – and that you have to move to a positive definition in order to dispute that.'<sup>28</sup> In particular he reveals that homeless individuals who lack the conditions or resources necessary (i.e. a home) to make choices or perform actions that they are legally permitted to perform, such as wash, sleep, cook are not free in the sense Berlin assumes that they are, i.e. free from interference. In fact, although they actually are legally permitted to and physically able to make these choices or perform these actions they can only do so by breaking other laws, such as those of private property. Therefore, in any attempt to exercise their freedom, they, too, will be subject to physical restriction by law enforcement officials, i.e. to interference with their negative or formal freedom. Again, under a morally neutral definition of freedom the objection that our private property laws render this interference justified does not refute the point that this is interference with freedom as Berlin defines it and not just lack of conditions of equality or social justice. To say that this is not really interference would take us beyond a descriptive definition of freedom and would entail a moral interpretation of this value in light of other values.

In this sense, both theorists argued that those who lack certain resources that are essential conditions for choice, also lack freedom, in the way described by Berlin: *freedom from* deliberate interference by other individuals. And to the extent that freedom, as Berlin wanted it, is construed as a value independently of any consideration about whether such interference is justified, then it would follow that the homeless or poor also lack negative and not just positive freedom or the conditions for the exercise of negative freedom. To avoid or overcome this conclusion we need to resort to what Berlin wanted to exclude from the first stage of constructing our understanding of values: we need moral evaluative judgments about what is worth allowing, protecting or providing.

My point in the previous paragraphs was that following Berlin's approach consistently is unattractive and untenable: freedom means nothing of value without certain conditions for its exercise, which are an essential part of it. Although the law grants certain freedoms to all, the law or other social and economic arrangements, which society puts in place, have a different impact on different people and a devastating impact on certain individuals in particular. This often means that some effectively have no choices available to them, so their freedom is worthless, or they can only exercise their formal freedom by breaking

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<sup>28</sup> Waldron, 'Homelessness and the Issue of Freedom', pp. 318-322.

the law. In other words, social, economic or institutional arrangements, as well as power structures, unavoidably influence the distribution of freedom, not only in the positive but also in the negative sense favoured by Berlin and a political community must bear some responsibility for the structural disadvantage that these cause to certain individuals or groups.<sup>29</sup> Therefore, a modest conclusion is that *certain* complaints about the lack of resources are essentially connected with claims to liberty, because, without certain conditions, freedom of choice becomes morally unattractive and worthless as a moral and political value. Of course, this conclusion does not settle but merely opens the normative debate as to which claims to resources are essential features of claims to specific rights and freedoms.

*A value-neutral conception of liberty as the basis of rights and claims to resources*

This understanding of the value of liberty is not only morally problematic. It also offers an unconvincing answer to our initial normative problem: to explain and justify which claims to resources belong, as rights-claims, to the institutional context of the Convention and should be decided by the Court. If we understand claims to resources as separate claims to the social and economic *conditions* for the *exercise* of freedom, and not as freedom-claims themselves, they would be, according to this theory, demands of the values of equality or social justice. This means that they would not be considered as claims to protect freedom as such but as claims to judicially extend the scope of the Convention freedoms to achieve other desirable goals.<sup>30</sup> The idea of 'effectiveness' that the Court often refers to would be seen, according to this theory, as a matter of social and economic policy and not as a matter of legal rights and freedoms. Then it would appear that the only institutionally appropriate solution for the Court would be to allow a wide margin of appreciation to the national authorities to decide whether and to what extent they will ensure an 'extension' of the scope of the Convention, especially in controversial claims with potentially far-reaching socio-economic implications. The practice of the ECtHR in the inadmissible cases that I examined in Chapter 2 would then be justified.

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<sup>29</sup> See Williams, 'From Freedom to Liberty: The Construction of a Political Value', p. 8-9 and p. 21.

<sup>30</sup> This is the fear expressed by Judge Vilhjalmsón in the famous 1978 *Airey* case discussed in chapters 1 and 2, that we cannot fight poverty through broad interpretations of the ECHR but also more recently by those who warn that reading certain positive obligations in the ECHR should not 'extend' the scope of the Convention in such a way that its provisions are 'rewritten', see Mowbray, 'The Creativity of the European Court of Human Rights', p. 57-79. This also seems to be the idea behind the Court's decision to allow a particularly wide margin of appreciation on the basis that certain cases involve resource allocation decisions.

However, notice that this conception of liberty as the basis of ECHR rights would miss an important feature of the applicants' claims.<sup>31</sup> Specifically, on closer inspection, their complaint is that they are suffering a serious and unfair disadvantage in the distribution of resources or opportunities: they complain that the current legal, social and economic arrangements unfairly hamper their *freedoms* under the ECHR. They are not merely frustrated or inconvenienced by a lack of *ability to exercise* their freedom but also claim that this is a significant moral harm:<sup>32</sup> that, in lacking certain conditions or abilities, they are not treated as they are *entitled* to be treated, as a matter of the freedoms and rights granted by the ECHR. When referring to positive obligations as inherent in effective respect, the Court itself appears to reject a value-neutral conception of freedom. Notice that it attempts to justify these positive obligations on arguments about what is the essence of a particular freedom or what is worth protecting about it and would be lost or diminished, if the state did not secure certain enabling conditions that it considers indispensable for that freedom to be worth anything at all. In this way, the Court acknowledges that these conditions are essential features of the freedoms guaranteed by the ECHR and not the separate concerns of public policy, which should better be left to the margin of appreciation of the national authorities. Of course, this does not resolve the question of which conditions are essential or inherent features of the ECHR freedoms but merely opens the way to explore it through alternative theories.

## 2. Liberty in Light of the Value of Autonomy

An increasing number of human rights scholars seek for a more promising basis for positive rights and duties in a conception of the value of liberty that is richer than that offered by Berlin and construed not in isolation but in light of other values, such as that developed by Joseph Raz, in light of the value of personal autonomy.<sup>33</sup> Indeed, on a quick perusal, this approach appears to have much to offer to human rights discourse. Unlike that of Berlin, Raz's theory of rights is not based upon a value-neutral understanding of liberty: to the contrary, he acknowledges that a linguistic, value-neutral definition of liberty does not have any normative force and therefore cannot settle moral questions, such as what rights people have and what obligations these impose on others. As Raz puts

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<sup>31</sup> In some cases, applicants themselves frame their own claims in a way that misses or misrepresents this point.

<sup>32</sup> Here I borrow the term used by Dworkin in his *A Matter of Principle*, 'Principle, Policy, Procedure', p. 80.

<sup>33</sup> See Fredman, *Human Rights Transformed, Positive Rights and Positive Duties*, p. 23-25 and Moller, 'Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights'.

it, conceptual analysis 'cannot answer the questions of which liberties are valuable, what counts as a restriction or interference with a person's freedom and how to judge when considerations of freedom conflict with other considerations.'<sup>34</sup> If we are to follow a consistent moral and political outlook, he argues, we can only solve these problems with reference to moral principles and arguments.<sup>35</sup>

For this reason, Raz develops a conception of the value of freedom in light of the values of autonomy and well-being. Rights and duties are grounded on the intrinsic desirability of the well-being of individuals<sup>36</sup> and they go hand in hand with a conception of law and government as a source of liberty, rather than as a potential threat to it. That is, government is supposed to promote freedom and not merely sit back and avoid interfering with it.<sup>37</sup> In particular, it must strive to enable its subjects to enjoy greater freedom by enhancing the conditions for their autonomy, which further allows them to advance their well-being. Raz regards the concern for creating and expanding the conditions of autonomy as the 'core of the liberal concern for liberty'<sup>38</sup> and considers liberty and rights valuable insofar as they serve positive freedom and autonomy.<sup>39</sup> In this context, I understand the difference between freedom and autonomy as one between the ideal and the conditions to achieve it: autonomy as a particular interpretation of well-being is a moral and political ideal and freedom (both negative and positive) is instrumental in achieving this aim. Such an approach appears to some commentators<sup>40</sup> to be promising as a basis for grounding positive duties. However, on closer inspection, it raises various points of concern that those endorsing it often underestimate.

### *The value of autonomy*

To begin with, I will draw attention to Raz's understanding of the value of autonomy that plays a key role in his version of liberalism and his conception of freedom and rights. Raz's value of autonomy appears to be linked with the same fundamental ideal as all other accounts of this value within the liberal tradition: that individuals should be the authors of their lives by making choices that control or shape their life at least to some degree.<sup>41</sup> So, in line with other liberal thinkers, such as Kant, Mill, Berlin, Rawls and Dworkin, Raz appears to place considerable weight on the importance of individual choice and the idea

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<sup>34</sup> Raz, *The Morality of Freedom*, p. 16.

<sup>35</sup> *Ibid*, p. 15.

<sup>36</sup> *Ibid*, p. 190.

<sup>37</sup> *Ibid*, p. 18-19.

<sup>38</sup> *Ibid*, p. 203-207.

<sup>39</sup> *Ibid*, p. 410.

<sup>40</sup> See Fredman and Moller as above note 33.

<sup>41</sup> Raz, *The Morality of Freedom*, p. 369.

of control over one's life. However, right from the outset in his major work in political philosophy, *The Morality of Freedom*, he is eager to detach himself from this core liberal strand and offer an alternative version of liberal values, such as personal autonomy and political freedom. In particular, Raz's analysis of the value of autonomy has two distinctive features that mark it apart from all other liberal interpretations of it: it is understood as a social and perfectionist value. I will first describe key points of these two features and then explain how they give rise to various points of concern for using a Razian account of autonomy as a basis for human rights claims.

### **A. Raz's Conception of Autonomy as a Perfectionist and Social Value**

#### *Autonomy as a Perfectionist Value*

To begin with, Raz's first point of criticism targets liberal neutrality, namely, the central idea shared by most liberals, that the state should remain neutral between rival conceptions of the good life.<sup>42</sup> The idea of state neutrality is central to the liberal tradition because it embodies the fundamental liberal concern for toleration. Liberal neutrality advocates argue that individuals must be free to shape and follow their own conception of the good life, according to their own political, religious, cultural and ethical views. The point of neutrality, they say, is for individuals to be able to live a life that they can endorse and not one that is forced upon them in a way that shows lack of respect for their choices or concern for their circumstances.<sup>43</sup> To that end, the state should avoid making political decisions and adopting policies that favour any particular conception of what is good or valuable in life and must not use its coercive powers to promote or enforce it upon individuals.

Ronald Dworkin, for instance, considers the idea of neutrality as a constituent principle of the political morality of liberalism. He argues that this principle ensures that all individuals are treated as equals,<sup>44</sup> which means that it shows respect for the special responsibility that each individual has for discovering and following her particular conception of the good life and does not allow her to be subordinated to other peoples' coercive choices.<sup>45</sup>

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<sup>42</sup> For an overview of liberal neutrality see G F Gaus, 'The Moral Foundations of Liberal Neutrality', in T Christiano and J Christman (eds.) *Contemporary Debates in Political Philosophy*, (Wiley-Blackwell, Oxford, UK, 2009)

<sup>43</sup> I will return to discuss this in length in the last section of this chapter and in Chapter 5 of this thesis.

<sup>44</sup> Dworkin, *A Matter of Principle*, p. 191.

<sup>45</sup> Dworkin, *Sovereign Virtue*, p. 154-155 and Dworkin, *Justice for Hedgehogs*, p. 368-369.

Similarly, in Rawls's theory of justice as fairness, citizens' basic claims to social resources and the constitutional essentials do not depend on 'their complete conception of the good': people's entitlement to these basic goods must not be determined in relation to their divergent views, goals, loyalties and their incommensurable conceptions of what is good or valuable in life.<sup>46</sup> Instead, Rawls suggests, these claims must be founded on a 'public conception of justice' that judges these claims 'in terms of a partial conception of the good, rooted in the objective needs of citizens as free and equal.'<sup>47</sup>

To the contrary, Raz criticizes the principle of neutrality as an incoherent and unattractive political ideal. His conception of freedom and autonomy is rooted in a theory of political perfectionism, which entails that the state may endorse and promote a particular conception of the good. Following a perfectionist moral and political position, it is within the state's legitimate role to use paternalistic measures and policies, in order to create the conditions of autonomy. In particular, Raz argues that the state has the right and duty 'to create morally valuable opportunities, and eliminate repugnant ones.'<sup>48</sup> A perfectionist outlook entails that the evaluation of which are the conditions of autonomy or what constitutes morally valuable or repugnant opportunities is primarily entrusted to the state. Crucially, the problem with perfectionism is that it allows the state to use various coercive means, in order to implement the policies and decisions that the community, and not each individual for herself, finds to be conducive to autonomy. Raz denies that coercion can legitimately be used to promote autonomy and well-being. But Waldron is right to point out that, although Raz may denounce the use of criminal punishment as a direct form of coercion, he endorses the use of other means, which often amount to coercion in many respects, such as taxation, subsidies and the removal of options.<sup>49</sup> Indeed, the indirect impact of taxation may be much more crucial for the distribution of resources and opportunities in society.

Besides, although Raz acknowledges that coercion is normally an insult to the person's autonomy, he considers it as a matter of degree rather than an all-or-nothing concept: a person can still lead an autonomous life despite 'a single act of coercion of a not too serious nature.'<sup>50</sup> This seems to be in contrast with the idea of moral independence, or even more so, with the idea of integrity that requires an attitude of unfailing respect for

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<sup>46</sup> J Rawls, *Justice as Fairness: A Restatement*, (Belknap, Harvard, 2001), p. 151. On neutrality see also p. 153 note 27.

<sup>47</sup> Ibid.

<sup>48</sup> Raz, *The Morality of Freedom*, p. 417.

<sup>49</sup> J Waldron, 'Autonomy and Perfectionism in Raz's *Morality of Freedom*', (1988-89), 62 *South California Law Review*, p. 1142-1152.

<sup>50</sup> Raz, *The Morality of Freedom*, p. 156.

the inviolability of the person.<sup>51</sup> Of course, Raz acknowledges the importance of moral independence as a distinct condition of autonomy.<sup>52</sup> Specifically, he accepts that coercion and manipulation subject the will of one person to that of another and, in this way, violate autonomy because they treat others as objects, rather than as autonomous persons.<sup>53</sup> Still, notice that for Raz, the fact that coercion and manipulation reduce options is just a 'natural fact' that 'has become the basis of a social convention' and that such conventions allow for exceptions.<sup>54</sup> Namely, he does not attribute any moral dimension to coercion and manipulation: he observes it as a social event and a social convention that neither serves nor disrespects any stringent moral requirement. Let us develop these ideas further.

In particular, Raz explains that coercion by an ideal perfectionist state does not express an insult to autonomy on two conditions: firstly, if individuals are granted adequate rights of political participation and secondly, if it is guided by a public morality expressing concern for individual autonomy.<sup>55</sup> This implies that there is nothing wrong with perfectionist and paternalistic policies, as long as they are decided collectively, they are compatible with respect for autonomy<sup>56</sup> and enhance the individual's ability to lead an autonomous life.<sup>57</sup> There is a troubling hidden tension in this widely shared intuition. It is the long-standing tension between respect for *autonomy* as moral independence or freedom of choice and the ideal of an *autonomous life* as a particular conception of well-being. The tension arises when some prioritize the ideal of an autonomous life and wish to serve and promote it through means, which others find offensive to a conception of autonomy as moral independence. How do liberal theorists account for this tension?

Whereas a perfectionist would consider freedom of choice as merely instrumental to well-being, most liberals, such as libertarians and liberal egalitarians, consider freedom of choice as valuable in itself. They believe that the state compromises this valuable freedom of choice when it uses its coercive force to divert it towards choices that reflect a conception of the good that is other than the chooser's. In fact, advocates of liberal neutrality see any such interference by the state as an actual denial or violation of

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<sup>51</sup> By 'unfailing respect' here I mean that failure to respect will necessarily entail a special moral harm to the person and not merely a compromise of her autonomy. I explain this in the following paragraphs. For the idea of integrity, of moral independence, moral equality and the inviolability of the person see B Williams, 'A Critique of Utilitarianism' in *Utilitarianism, For and Against*, and J Rawls, *A Theory of Justice*, p. 3 and 24-30, T Nagel, 'Personal Rights and Public Space', (1995) 24 (2) *Philosophy and Public Affairs*, p. 83.

<sup>52</sup> That is distinct from and not reducible to the other two conditions of autonomy: appropriate mental abilities and an adequate range of available options. See Raz, *The Morality of Freedom* p. 372.

<sup>53</sup> *Ibid*, p. 378.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid*, p. 157.

<sup>56</sup> *Ibid*, p. 423.

<sup>57</sup> Fredman endorses this view in *Human Rights Transformed*, p. 16-18.

autonomy that inflicts some kind of moral harm or injury to the person, which cannot be justified by any supposed benefit to her or to others. Of course, even the most consistent advocates of neutrality allow for certain 'soft' paternalistic measures or policies but it is crucial that their justification is based on significantly different reasons.

For instance, many liberals such as Dworkin, would accept laws and policies of 'surface paternalism', e.g. compulsory education and mandatory seat belts, because these policies do not deny people the power to make their own decisions about matters of ethical foundation, neither do they depend on an ethical justification and choice about the personal virtues that a good life reflects.<sup>58</sup> This kind of justification is accepted by liberals because it allows only those paternalistic measures and policies that protect the conditions for the ethical independence of the person. On the other hand, a perfectionist theory also justifies or even *requires* the adoption of all further measures and policies that are seen as protecting or promoting a specific conception of personal autonomy or some communal good.<sup>59</sup> The notable difference is on the kind of treatment or attitude towards individuals. The liberal neutralist allows paternalistic political decisions that may influence how people can and should live, as redistributive taxation and civil rights acts do, but do not violate authenticity because they are not justified on the assumption that they will make the lives of individuals ethically better or serve some collective good.<sup>60</sup> As Dworkin puts it, we cannot escape influence by the ethical culture around us but we must resist domination in the form of government picking out worthy from unworthy options for us to make available or promote.<sup>61</sup> Notice here the underlying crucial distinction between ethics and morality. Ethics involves all the decisions about how to live one's life and here we ought to respect people's special responsibility for these decisions and allow our ethical environment to be created organically, through the free choices of all people and not through political majorities imposing their decisions on everyone.<sup>62</sup> Morality is prior to ethics in politics as it defines what opportunities and resources people are rightfully entitled to and determines what rights they have to liberty.<sup>63</sup>

On the contrary, a perfectionist account of autonomy allows the state to promote a particular conception of the good life and, in this way, usurps the responsibility of

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<sup>58</sup> See Dworkin, *Justice for Hedgehogs*, p. 336-337 and 368-371.

<sup>59</sup> For a clear statement of the view that an action that infringes people's autonomy is justified by the need to protect or promote the autonomy of those people *or of others*' [my emphasis] see Raz, *The Morality of Freedom*, p. 425. Note that this theory allows the infringement of one person's autonomy for the sake not just of that person only but also for the protection or even more generally the promotion of other people's autonomy.

<sup>60</sup> See Dworkin, *Is Democracy Possible Here?*, (Princeton University Press, 2006), p. 76-77.

<sup>61</sup> See Dworkin, *Justice for Hedgehogs*, p. 211-212.

<sup>62</sup> *Ibid*, p. 371.

<sup>63</sup> *Ibid*, p. 371.

individuals to choose what makes their life valuable and successful. Furthermore, a perfectionist state justifies decisions about the exclusion or permission of options and the allocation of all kinds of resources and opportunities based on arguments about their ethical benefit to the lives of individuals or the common culture.<sup>64</sup> Now, as much as this sounds counter-intuitive for a mainstream liberal it is a reasonable viewpoint under a perfectionist theory such as Raz's. In order to understand Raz's defence of this position we need to relate it to his deeper commitments to the non-individualistic nature and source of values that reveal further points of concern about his perfectionist account of freedom and autonomy.

### *Autonomy as a Social Value*

Most major liberal thinkers consider the value of personal autonomy as essentially related to the significance or value of freedom of choice. In other words, they think that personal autonomy is compromised whenever individual choice is interfered with. As mentioned earlier, Raz breaks with this long tradition as, in his moral and political outlook, the value of freedom of choice is merely instrumental to that of personal autonomy and not intrinsically valuable. More broadly, he considers that the value of freedom is nothing more than the value of personal autonomy, which in turn is 'a particular conception of individual well-being that has acquired considerable popularity in western industrial societies'<sup>65</sup>. In the previous section, I explained how this introduces a form of perfectionism in Raz's theory of personal autonomy and freedom: the state is required to provide and enhance the conditions of autonomy and well-being. In this process, it may favour a particular conception of what is good or valuable in life, even at the expense of the divergent ethical views that individuals may hold. But quite apart from the liberal neutralists' objection that I discussed earlier, there is a further crucial point that I wish to raise here. It is Raz's understanding of the value of personal autonomy as a social value.<sup>66</sup>

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<sup>64</sup> If this distinction is right then one is not really offering a perfectionist account of personal autonomy and freedom if she limits the justified/legitimate interference with the person merely to a list of goods that are considered as essential for the existence and the physical integrity of the person. This could well be accepted by a traditional liberal neutralist, only with a different justification. Either a theory endorses all measures that both ensure and enhance personal autonomy and suffers the liberal critique to perfectionism or it offers nothing different from a mainstream liberal theory.

<sup>65</sup> Ibid. p. 369.

<sup>66</sup> For Raz's critique of liberal individualism see Raz, *The Morality of Freedom*, p. 165-263, for his thesis of the dependence of personal goals and values on social forms and social practices in particular see pp. 307-313, also J Raz, *The Practice of Value*, (Oxford University Press, 2003), p. 15-36, and Flikschuh, *Freedom*, p. 141-166.

To be more specific, in Raz's perfectionist account of liberalism, personal autonomy derives its value from the normative aspects of a particular social context, i.e. that of western industrial societies.<sup>67</sup> This means that, for Raz, these normative aspects, which constitute reasons for action, are found in the world and, more specifically, in a particular social context, i.e. they are not created by the will and choices of reasoning individuals.<sup>68</sup> So, although he takes the value of personal autonomy to be an intrinsic value, namely a reason for action for its own sake, he nonetheless suggests that it is merely 'reason-infused' and not created by individual human reason and choice.<sup>69</sup> That is, individuals reason about values and justify them based on how they influence their lives but they are not the creators of value. Moreover, in the recent development of his 'social dependence thesis' the value of autonomy appears to be dependent upon the social context: the value of personal autonomy, as all other values, comes into existence through 'sustaining social practices' rather than individual reason and choice.<sup>70</sup> According to this thesis, goals and options emerge in practices pertaining in the social context and are endowed with meaning in the social realm. Forms of marriage, political participation or the exercise and regulation of a profession are made available as options in a society that has already developed the relevant forms and individuals come to appreciate and value them through habituation, rather than rational deliberation.<sup>71</sup> Following this outlook, the value of individual choice is reduced to picking among autonomy options that have emerged and are largely pre-determined as good or valuable through social practices.

Libertarians or liberal egalitarians would rightly object that the moral significance of individual choice is seriously depreciated if, as Raz suggests, governments 'endorse measures which encourage the adoption of valuable ends and discourage the pursuit of bad ones,'<sup>72</sup> especially so, if what is a valuable goal or not depends so fundamentally on social forms and practices. Because, accepting social practices, rather than human reason, to be the source of value, undermines the universal appeal of morality and seems to open the way for social relativism.

Raz denies the charge of conventionalism and social relativism by arguing that not all social forms and practices that emerge are valuable just because they have emerged.<sup>73</sup> His defence is futile. In particular, he is bound to invoke the ideal of well-being as a criterion for which social practices are valuable and worthy of promotion by the perfectionist state.

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<sup>67</sup> See Flikschuh, *Freedom*, at p. 144-148.

<sup>68</sup> J Raz, 'Explaining Normativity: Reason and the Will', in *Engaging Reason*, (Oxford: Oxford University Press, 1999), p. 90, cited in Flikschuh, *Freedom*, at p. 146.

<sup>69</sup> Flikschuh, *Freedom*, at p. 147.

<sup>70</sup> Raz, *The Practice of Value*, p. 19-25.

<sup>71</sup> Raz, *The Morality of Freedom*, p. 310-313.

<sup>72</sup> *Ibid*, p. 423.

<sup>73</sup> Raz, *The Practice of Value*, p. 25-27.

But then, it would be circular to suggest that the social forms and practices that emerge are valuable insofar as they contribute to human flourishing if no independent substantive moral criterion –other than the social forms and practices themselves- is offered for judging human flourishing and well-being. For this reason, this thesis seems self-defeating in the context of a perfectionist theory but also contrary to the central liberal tenet that individuals are the source of value and not the common culture of a given community or social context.<sup>74</sup> Still, despite being unconvincing, the social dependence thesis explains and serves the 'richer account' of non-individualistic freedom and personal autonomy that Raz advocates. Of course, as Flikschuh points out, this ends up being hardly recognizable as a liberal account of personal autonomy.<sup>75</sup> And it certainly carries with it significant implications when it underlies a theory of rights based on interests in personal autonomy.

### **B. An Autonomy-Based Conception of Freedom and Rights**

The conception of the value of autonomy that Raz develops has significant implications in his understanding of the value of freedom and a theory of rights and duties based on it. Clearly, his theory aims to defend a perfectionist concept of political freedom,<sup>76</sup> whereby positive freedom, the 'real' or 'richer' account of freedom, is identified as the 'capacity for autonomy' and negative 'freedom from coercive interferences' is seen as merely instrumental to the latter and valuable only so far as it serves positive freedom and autonomy.<sup>77</sup> But what is the place of rights in such a theory of freedom and autonomy?

Under Raz's theory of rights, a certain aspect of the well-being (an interest) of individuals gives reasons or grounds for holding others to be under a duty but the existence or extent of these duties depends on the absence of conflicting considerations of greater weight. In particular, Raz defines rights in the following way:

'X has a right if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.'<sup>78</sup>

Soon after, he explains that the existence and content of rights and corresponding duties depends on the force and weight of the reasons that justify the interests of individuals. Whether these reasons are 'sufficient', as the definition requires, to ground rights and duties will depend, in turn, on the force and weight of conflicting considerations:

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<sup>74</sup> C Korsgaard, in 'The Dependence of Value on Humanity', in *The Practice of Value*, pp. 63-85.

<sup>75</sup> Flikschuh, *Freedom*, p. 155.

<sup>76</sup> Raz, *The Morality of Freedom*, p. 16.

<sup>77</sup> *Ibid*, p. 409-410.

<sup>78</sup> *Ibid*. p. 166.

'Which duties a right gives rise to depends partly on the basis of that right, on the considerations justifying its existence. It also depends on the absence of conflicting considerations. If conflicting considerations show that the basis of the would-be right is not enough to justify subjecting anyone to any duty, then the right does not exist.'<sup>79</sup>

Following this theory, rights and duties are both conditional and a matter of degree:<sup>80</sup> the decision about whether a given interest requires others to do something and exactly what or how much (thereby justifying a right to certain resources or opportunities) largely depends on the absence or the lesser weight of conflicting considerations of any kind.

Now, following this theory, duties generated by rights are conceived of as open-ended requirements for the most extensive protection possible of various interests in autonomy, as long as no competing considerations limit their scope. So, trade-offs and balancing become an essential feature of rights reasoning and adjudication. This is so because the arguments about the content of rights perceived in this way are potentially very broad claims that need to be demarcated and have no special moral force: they can be limited or even overridden by other weighty claims, based on other interests of individuals or the community as a whole.<sup>81</sup> There is a tension then, in this theory of rights, between the considerations that justify the existence of would-be rights with all other weighty interests and considerations. Both kinds of claims appear to have a potentially ever-expansive nature and this entails that those who arbitrate between them will have to balance the competing interests and seek to adjust each claim's tendency to maximize the promotion of the interest on which it is based. This happens because this theory of rights grants no special moral force, urgency or priority to certain claims but, instead, treats them on a par with all other considerations.

Following this outlook, a question such as that arising under the ECHR, of what obligations are inherent in effective respect, or else, what effective respect requires, becomes inversely related to the various conflicting considerations of other individual or communal interests. That is, the protection and resources that individuals are entitled to are ever expanding but only to the extent that no restrictions happen to be raised by competing interests and considerations. I will explain what is problematic in this approach.

At first glance, this approach seems to offer a dynamic account of claims to resources. In fact, the idea that liberal governments ought to introduce laws and social policies that

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<sup>79</sup> Ibid, p. 183.

<sup>80</sup> Ibid, p. 156 and 183-186.

<sup>81</sup> Such as those found in the 'limitation clauses' of articles 8-11 ECHR: interference with the Convention rights is justified when 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 and crime, for the protection of health or morals or for the rights and interests of others.

protect and enhance people's interests in autonomy and well-being naturally attracts those who advocate a more proactive role of the state with more extensive welfare responsibilities towards its citizens. Nevertheless, it is crucial to note that, under a social and perfectionist conception of personal autonomy as that defended by Raz, the state would only be under a duty to promote those interests that it deems conducive to autonomy and well-being given the prevailing social forms and structures. True, Raz's theory allows the possibility that a state could adopt a 'non-indigenous' value, i.e. a value derived from another social context, and then it would be under a duty to adopt all relevant value-sustaining practices, create the conditions for all the relevant interests and rights, therefore prompting broad-scale social change.<sup>82</sup> However, notice that in a perfectionist and non-individualistic account of freedom and rights this process could only be initiated by the state and then influence the options and rights available to individuals and not the other way around. An individual could not claim a government duty to make available an option, benefit or opportunity that has not yet emerged as good or valuable in social practices and is not adopted or endorsed by the perfectionist state as contributing to human flourishing and autonomy. Raz notes that individuals may transcend the forms available in social practices (possibly in the private sphere) but he does not seem to acknowledge the existence of any corresponding strong rights-claims to resources, options or opportunities against the state. For this reason, many liberals would again object that such a theory of rights would be paternalistic or relativistic, creating only those options that the state or prevailing social structures find morally valuable, eliminate those they consider repugnant,<sup>83</sup> limit or override those they deem less significant, all such evaluations based on a sociological rather than thoroughly moral assessment.

Instead of an open-ended account of autonomy interests, some theorists suggest a list of specific but universally shared key or fundamental interests for the well-being of individuals as grounds for rights claims and correlative duties to a minimum degree that enables agency or ensures a minimum worthwhile or decent life.<sup>84</sup> This approach supposedly avoids most problems associated with perfectionism, since it focuses on, what are assumed to be, essential interests of all humans. At the same time, it aspires to offer an account of what the core content of claims to resources and socio-economic entitlements could be.

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<sup>82</sup> Flikschuh, *Freedom*, p. 147-148.

<sup>83</sup> Raz, *The Morality of Freedom*, p. 417.

<sup>84</sup> All these purposes are presented as the minimum conditions of the same ideal of autonomy or well-being. See S Meckled-Garcia, 'Giving Up the Goods: Rethinking the Human Right to Subsistence, Institutional Justice and Imperfect Duties', (2013) *Journal of Applied Philosophy*, Vol. 30, No. 1, pp. 73-87.

Still, these theories too are grounded on some idea of the essential preconditions of well-being, therefore pre-empting the individual choice of what the core of well-being consists in. Notice the contrast between these theories and Rawls's justification of his 'constitutional essentials', as 'the political and social conditions that are essential for the adequate development and full exercise of the two moral powers of free and equal persons', i.e. the capacity of individuals for a sense of justice and a conception of the good.<sup>85</sup> Here, the constitutional essentials are preconditions for the individual to choose her own conception of the good and not for a particular conception of well-being: claims to these preconditions (resources, goods, opportunities) in each respective theory are bound to have not only a different justification but also a different content.

Moreover, these theories advocate that states have duties to ensure a list of fundamental interests to a minimum degree necessary for a worthwhile life or decent life solely on the basis of the importance of these interests for the well-being of individuals. Crucially, they propose that we determine this minimum content independently of any consideration or criterion or principle about the reasonable cost or burden that fulfilling these duties may impose on others.<sup>86</sup> However, such a principle is not only necessary to resolve the practical problems that arise in adjudication before a human rights court, such as the ECtHR. A principle that determines what is a reasonable burden is also a condition of justice of the decisions of social institutions that have the power and responsibility to allocate resources and burdens. Because, as much as certain minimum goods appear to be important for the fundamental needs and interests of all human beings, it would be unreasonable and unjust if the cost of fulfilling them required others to dedicate their lives entirely to this cause. So, although these theories aspire to offer a plausible and widely acceptable account of claims to resources (and the minimum core content of socio-economic rights and duties) they beg our initial, crucial normative question of how much resources (goods, benefits, opportunities) one is *entitled to or justified* to demand from others and why.<sup>87</sup>

The ECtHR frequently seeks to base its decisions on such a principle of reasonable burdens and benefits. For instance, the Court often requires that any positive obligations of the state to protect the right to life under Article 2 of the ECHR must be interpreted in

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<sup>85</sup> Rawls, *Justice as Fairness: A Restatement*, p. 45.

<sup>86</sup> See Meckled-Garcia, 'Giving Up the Goods: Rethinking Human Rights to "subsistence", institutional justice, and imperfect duties'.

<sup>87</sup> Kai Moller advocates a variation of an autonomy-based conception of positive liberty, based on an account of autonomy interests that is individualistic but not perfectionist, in an attempt to avoid the criticism raised above in K Moller, 'Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights' (2009) 29 *Oxford Journal of Legal Studies*, No. 4, 757-786. This approach is problematic and unattractive for reasons that I will discuss later in Chapter 4.

a way which does not impose 'an *impossible or disproportionate burden* on the authorities' and that a violation will be established if the applicants 'show that the authorities did not do all that could be *reasonably expected* of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.'<sup>88</sup> However, in more controversial cases, the Court has not employed a similar principle. I will briefly discuss the implications that a theory that does not depend on such a principle or criterion would have for the practice of the ECtHR.

### *The ECHR practice*

Following a conception of the ECHR rights, such as that discussed in the previous section, it appears reasonable that the Court in controversial cases, with potentially far-reaching socio-economic or policy implications, would consider the national authorities institutionally better placed and more competent to assess and prioritize the competing interests and ultimately decide the level or degree of protection. Because it would be difficult for the Court to assess the appropriate balance if the interests of individuals are on a par with a wide range of competing considerations, without any clear principles as to how to set their relative weight and priority. As it often happens in the Court's case law, those cases that invoke more complicated disagreement about what resources or opportunities individuals are entitled to are deemed to require a political rather than judicial resolution. This argument from the point of view of proper institutional arrangement mainly rests on the assumption that the protection of rights-interests of individuals is always potentially at the – greater or lesser – expense of the interests of the

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<sup>88</sup> My emphasis. This principle that came to be known as the 'Osman test' was first formulated in *Osman v. the United Kingdom* (1998), a case concerning the obligation to take preventative operational measures to protect individuals, whose lives were at risk from the criminal acts of another individual. Subsequently, it has regularly been evoked in similar cases, e.g. in relation to fatal accidents arising out of dangerous activities that fall within the responsibility of the state, such as the operation of a chemical plant very close to people's homes (*Guerra and Others v Italy* (1998)) or the testing of atmospheric nuclear weapons in the presence of ignorant servicemen in the area (*McGinley and Egan v United Kingdom* (1998), *L.C.B v United Kingdom* (1998)), as well as the minimum conditions of any investigation into the cause of the loss of life that is allegedly related to such activities (*Oneryildiz v Turkey* (2004), para 149). Similarly, in cases relating to the right to be informed about the potential dangers of state activities, see also *Guerra*, at para 60), and finally in order to determine whether authorities had taken all measures expected of them to protect the life of vulnerable individuals in their care (such as prisoners from their dangerous cellmates in *Edwards v United Kingdom* (2002) at paras 54-56 or against the risk of committing suicide whilst in custody in *Keenan v United Kingdom* (2001) at paras 90-93) or to prevent harm from the abusive or neglectful behaviour of others (E.g. by putting in place legislation that effectively deters against serious breaches of the personal integrity of vulnerable individuals in *A v United Kingdom* (1998) or by removing children from their neglectful or abusive domestic environment in *Z v United Kingdom* (2001) and *E v United Kingdom* (2002)). See Chapter 2 for an analysis of the relevant cases.

majority.<sup>89</sup> For this reason, it is supposedly politically sensitive and needs to be assessed by those who know and represent the needs and concerns of the national majority better. Following such an outlook, it would seem natural for the Court to allow a narrow or wide margin of appreciation depending on the anticipated implications of the recognition of a positive obligation. Let me explain this further.

If claims to resources in the ECHR are claims to whatever provides the most extensive protection and promotion of interests that constitute conditions of autonomy, then these claims will conflict with the similar claims of other individuals and those of the community as a whole -a consequence similar to that of a value-neutral conception of freedom. Furthermore, freedom as autonomy, in Raz's own words, will be a matter of degree: claims to the protection of interests, to be provided with more options and conditions of autonomy, will have to be balanced against each other and against communal goals. They will only ground rights, if they outweigh competing considerations - which is, again, an effect similar to that of the Berlinian conception of freedom and rights. To conduct the balancing exercise in this way, may prove to be a very complex and inappropriate task for the Court to undertake since, under Raz's theory of freedom, the perfectionist ideal of autonomy is a social rather than an individual matter. This would mean that the Court would have to allow public attitudes and culture to determine what options and forms of life are valuable, and, therefore, which ones ground rights and duties.<sup>90</sup> Recall also that, according to Raz, some important options and conditions of autonomy are 'social' in nature, or else, they are 'collective goods.'<sup>91</sup> This would lead the Court either to allow collective goods to outweigh and counterbalance individual interests or to defer most controversial or difficult cases to the margin of appreciation of the national authorities.

Now, one could claim, following Raz, that an ideal perfectionist state would have considered as valuable and worthy of protection those autonomy options that a liberal state would consider fundamental too and that the only difference between the two theories lies in that a perfectionist one would seek to further advance autonomy by promoting additional options or conditions of autonomy. However, we have a good reason to be sceptical about this, otherwise, appealing and proactive outlook. In particular, the problem with perfectionism is that there is no guarantee that the state will value and protect those

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<sup>89</sup> On the point that the methods of balancing used by the ECtHR wrongly assume that human rights provisions benefit only the claim-holder at the expense of a majority and that all important concerns that are put to the balancing test have a common currency see Basak Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions', (2007) *Human Rights Quarterly* 29, pp. 251-270, at p. 269.

<sup>90</sup> Raz, *The Morality of Freedom*, p. 162.

<sup>91</sup> *Ibid*, p. 206.

options that other liberal theories value and protect. That is, the perfectionist state is not constrained by any moral considerations with the special force that liberalism attributes to rights and there is no guarantee that it will get these policy decisions and choices right. Rather, this will be merely contingent upon social attitudes and practices, on which Razian analysis of autonomy and the rights and duties corresponding to it rely. This means, of course, that it could decide that, although such options are worthy of some respect, they do not have the moral force or urgency to take priority in the allocation of resources.

A common problem with both theories that I examined in this Chapter is that they use the term 'right' to mean something so weak that it needs further qualification before it can be fixed as a justified claim that imposes obligations. This happens because neither Berlin's nor Raz's theory distinguishes some of these claims as rights in a strong sense –claims with a special distributional character (that outweigh competing considerations), such that it is wrong as a matter of principle to interfere with them or deny them to someone without some special grounds.<sup>92</sup> What we need in order to give rights –and obligations- this special strong character is a compelling justification and explanation of what people are entitled to and why: a justification that would make them immune to most ordinary competing considerations. We need arguments that explain why something morally bad or wrong is done if these rights are not recognized, why certain fundamental principles are violated if people are treated in this way.

However, as I explained earlier, a descriptive conception of liberty, such as that advocated by Berlin, is hostile to this kind of argument. Because it assumes that the only philosophically valid and politically honest account of freedom is one that is independent of (rather than deriving from) any evaluative judgments about what people are entitled to, or else, independent of what is right for them to have, to claim and enjoy under a theory of distributive justice.

On the other hand, an interest-based theory of rights such as Raz's does not place any special weight on any claims or on any of the infinite ways in which individuals' interests may be served and their autonomy promoted. Notice that, in such a theory, the state may have a wide range of positive duties to promote the interests of individuals in, what it considers to be, the conditions of autonomy, to the extent that it considers appropriate. However, this theory does not necessarily grant individuals any strong claims, such as specific rights correlative to any of these duties in particular. Furthermore, recall that for

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<sup>92</sup> Dworkin *Taking Rights Seriously*, p. 188.

interest-based claims are put on a par and in a balancing exercise with all sorts of other conflicting considerations before they can qualify as strong rights.<sup>93</sup>

So far, I have tried to illustrate certain crucial weaknesses of these theories of rights and the morally unattractive features of the theories of freedom and autonomy on which they rest. In the following section, I will present Ronald Dworkin's theory of liberty in light of equality, as an alternative basis for claims to resources.

### 3. Liberty in Light of Equality:

#### Dworkin's Integrated Conception of Liberty and Equality

##### A. Political Values as Moral Values

Dworkin's moral and political philosophy is a useful contrast to both Berlin's value pluralism and his conception of freedom, as well as to Raz's social and perfectionist theory of freedom as autonomy.<sup>94</sup> Unlike Berlin, Dworkin believes that the definitions and analyses of key political concepts and values that we construct are all moral: i.e. they consist of evaluative judgments and interpretive arguments. The outlook that Dworkin attacks is the general 'Archimedean' view, shared by Berlin and many other legal and political philosophers, that arguments about what values, such as liberty or equality, are second-order descriptions of a practice observed from an independent level of pure philosophical, conceptual inquiry.<sup>95</sup> This 'meta-ethical' level is supposedly elevated above the first-order level of the social practice itself in which political concepts and values feature and function, i.e. that of political or legal discourse. In the practice of moral, political and legal discourse, so the argument goes, substantive moral arguments must be employed to decide whether redistributive taxation or the prohibition of torture is either wicked or justified by the value of liberty; that is to say, we do not understand these concepts unless we understand them in a morally evaluative way. But the argument that liberty means being free from interferences in choosing one's own ends is a matter of value-neutral, conceptual analysis.

However, Dworkin argues,<sup>96</sup> it is mistaken to think there is a distinction between these two levels of discourse. Moral arguments about the meaning and content of values, such

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<sup>93</sup> Raz, *The Morality of Freedom*, p. 183.

<sup>94</sup> I raise and discuss specific points of Dworkin's criticism on Berlin's value pluralism and on perfectionism in the previous section.

<sup>95</sup> So this view is 'Archimedean' because it suggests that we can and need to step outside of the realm of political morality and stand on another level, neutral to it, in order to define the concepts that feature in the practice of political morality. See generally Dworkin, 'Hart's Postscript and the Point of Political Philosophy', in his *Justice in Robes*, ch. 6.

<sup>96</sup> *Ibid.*, pp. 140-186.

as liberty, equality or autonomy, are often central in ordinary political and legal disagreements. When we disagree about the level of taxation necessary to fund policies for disadvantaged individuals, we invoke evaluative arguments about whether such redistributive taxation is justified based on the values of equality, liberty or social justice, properly understood. Also, no such arguments can ever be neutral to the legal or political disagreements because 'description' is bound to be an expression of a moral evaluative judgment. For, take the argument that respect for freedom to choose one's own ends requires government to be neutral between different conceptions of the good life. This is not a neutral, conceptual argument based on a description of empirical reality, i.e. of a supposed 'fact' that people pursue different values, ideals and goals. Rather, it is itself a moral argument: namely, the argument that the values of liberty and equality require that we not force upon individuals any ideals of the community or other authority. Besides, not even the argument that people have different ideals is in any important sense descriptive. Because, unlike describing natural, empirical facts and phenomena, to identify something as a value is a moral argument in itself: moral arguments rule out some ideals or goals as non-valid or depraved in the first place. The contemporary moral and political philosophers' debt for this argument is to Kant and Hume, for establishing that values are not empirical but moral entities that we discover through rational deliberation and argument and cannot derive them from empirical facts.<sup>97</sup>

Berlin does not directly challenge this powerful and widely acknowledged thesis. It is puzzling how he circumvents it and argues that it is possible and preferable to keep evaluative judgments about moral truth and value outside of the philosophical analysis of values. One way to understand this position is to attribute it to Berlin's conception of truth and reason and his 'fear of the totalitarian menace':<sup>98</sup> he is eager to exclude from politics the use of reason to appeal to an ultimate, overarching, monist truth about matters of value by fear that this opens the way to oppression. Specifically, as I explained earlier in this chapter, Berlin fears that an appeal to reason carries the danger that an authority may seek to force individuals to abandon their empirical understanding of their goals and values to conform to what reason supposedly identifies as a valuable goal or way of life. To be sure, he is right that individual choice is oppressed when government justifies its actions and policies in the name of a particular ideal or conception of the good but that is only a danger in a perfectionist type of liberalism, such as that advocated by Raz. To the contrary, though, people are not oppressed when their government makes political decisions based

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<sup>97</sup> In his *A Treatise on Human Nature* Hume finds the deduction of an 'ought' from an 'is' 'altogether inconceivable' (T3.1.1.27).

<sup>98</sup> C Taylor, 'What's Wrong With Negative Liberty' in A. Ryan ed., *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (OUP 1979).

on the best moral understanding of the values at play and without denying individuals the freedom to make ethical choices for themselves. This kind of justification for political decision making, i.e. one based on the best moral understanding of the values at play, includes an appeal to the true meaning and content of these values but this appeal to reason and truth differs significantly from the one Berlin accused as potentially oppressive. I will explain this point further in the following paragraphs.

In fact, Dworkin's moral and political philosophy rests on such a unified account of values, moral truth and interpretation. He argues that questions such as whether justice requires universal health care are moral, as he says, 'all the way down': there is no neutral, metaphysical, non-evaluative plane on which we can stand to decide what is right or true in such matters. Any stance we take is moral. As Stephen Guest insightfully observes, all of Dworkin's philosophy (moral, political and legal) relies on and is unified by an acceptance of Hume's principle that we cannot derive an 'ought' from an 'is'.<sup>99</sup> Questions of rightness or wrongness and of how things ought to be cannot be answered only with reference to descriptive facts. Ultimately, they depend on an interpretation of these facts through evaluative arguments. We can only rely upon substantive moral arguments and our value judgments about liberty or equality or justice are true in virtue of the substantive case that we can make for them.<sup>100</sup> Notice that, for Dworkin, we do not establish truth by matching our conceptions of values with any special moral entities found in a second-order philosophical plane. Neither do we rely on social conventions and forms to establish whether there is enough consensus: our evaluative judgments can be true no matter how many supporters they have. Instead, Dworkin argues, truth is a matter of the best moral argument or interpretation that can be made for the values at stake and, for this reason, we do not have to admit to conflicts of values, such as those assumed by Berlin, unless we have exhausted our interpretive attempt to construct an integrated account of these values.<sup>101</sup> And why do we need to construe an integrated account of our moral values? Because to defend our particular conception of a value in a non-circular way we must draw on other values beyond itself and provide an account of how they all fit together: we seek the true meaning of values within morality itself rather than rely on another philosophical realm, where knowledge about values supposedly comes from.<sup>102</sup> This is so, Dworkin explains, because we aim for coherence and integrity in the interpretation of values, not for its own sake but because it makes best moral sense to attempt to construe

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<sup>99</sup> S Guest, *Ronald Dworkin*, 3<sup>rd</sup> edition, (Stanford University Press, 2013), at vii and p. 11. See also T Nagel, 'Ronald Dworkin: The Moral Quest', in *New York Review of Books*, 21 November 2013 Issue.

<sup>100</sup> Dworkin, *Justice for Hedgehogs*, p. 7-12 and p. 17.

<sup>101</sup> *Ibid.*, p. 11 and his *Justice in Robes*, p. 162.

<sup>102</sup> *Ibid.*, p. 7.

values in light of each other rather than independently of one another. A closer look at such an integrated account of the values of liberty and equality will clarify these points and open the way for a different basis for human rights claims to resources.

### **B. Liberty and Equality Integrated**

Dworkin denies the popular view in political philosophy that values conflict and that there is damage or loss in any decision that favours one value at the expense of others. Of course, he does not deny the actual frustration that individuals might feel in cases of apparent compromise. Nevertheless, he resists the conclusion that such compromises signify a tragic loss of the kind that Berlin describes in his defence of moral pluralism, i.e. the theory that there are as many ultimate and objective values as individual goals and ideals. For Dworkin this is mistaken and, to prove the point, he attacks the widely assumed position made famous by Berlin, namely, that every constraint or regulation of freedom is a sacrifice of liberty; possibly a justified one for the sake of other values but still a *prima facie* loss of something valuable.

At this point, Dworkin rightfully challenges Berlin's claim that something of value is lost and sacrificed whenever we interfere with people's plans and actions by pointing to a distinction between a mere frustration and a wrongful interference with one's plans and pursuits.<sup>103</sup> No doubt, taxation, criminal legislation or traffic regulations all frustrate many individuals but it is counter-intuitive to identify these as restrictions to liberty, if it is implausible to argue that they impose something that wrongs those affected in some way. In this sense, he denies that there is a general right to liberty.<sup>104</sup> Now when can we say that a particular decision or policy does not just frustrate an individual but also wrongs her?

Some cases raise little disagreement: hardly anyone would argue that we wrong someone, if we deny her option to drive at maximum speed in any direction or to injure, kill or abuse others. Allowing these options would seriously endanger or directly harm the moral rights of others and would eventually have the opposite effect of making us all equally unfree. An account of the value of liberty that does not take this into account clearly lacks the degree of impartiality necessary to be called a value in the first place. As Bernard Williams has forcefully argued, an account of freedom as primitive freedom, identified with a mere ability to do whatever one wishes, lacks the necessary degree of impartiality to be identified as a political value: it can only serve as a reason for action for

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<sup>103</sup> Dworkin, 'Moral Pluralism' in his *Justice in Robes*, also *Justice for Hedgehogs*, p. 364-368.

<sup>104</sup> Dworkin, 'What Rights Do We Have?' in *Taking Rights Seriously*.

the particular agent and not for anyone else.<sup>105</sup> As Williams explains, 'the notion of a political value implies an impartial standpoint to determine the priority of different agents' desires, a standpoint which is not given simply by the idea of each person's desires.'<sup>106</sup> So, no plausible or morally attractive theory of rights can rest on this account of liberty: it is counter-intuitive to argue that one has even a *prima facie* right to harm the moral rights of others.

In other cases, it may be less clear whether the moral rights of others are harmed or even involved: restrictions on the use of property or income are among the most controversial ones. For instance, if we consider redistributive taxation as an impairment of the freedom to use our income according to our life plans and goals then we have to accept that a government will constantly have to make trade-offs between this freedom, so defined, and the demands of equality or social justice, e.g. for a universal health care system or for various other benefits for disadvantaged individuals or groups. Moreover, we have to accept that, while making those trade-offs, any decision will inevitably harm or wrong some of those involved, either the taxed or the beneficiaries. This outlook assumes that, at the bottom of such disagreements, there is no right answer and no right decision and that for this reason people will have to accept the wrong or loss that trade-offs and choices as an inherent feature of politics and adjudication.<sup>107</sup>

However, as Dworkin reveals,<sup>108</sup> this outlook assumes, rather than argues, that these are the correct definitions of liberty and equality. It further begs the question of whether these values are actually independent of one another, and thus prone to conflicts, or interdependent. It offers no substantive argument as to why we should accept such counter-intuitive conceptions of these values, other than the empirical claim that this is how we see and experience these values in the world around us. Still, the only non-circular way to argue for one or the other conception is through substantive moral reasoning and there is no such thing as a neutral observation of political concepts and values from a non-evaluative plane, as I explained earlier. In other words, in order to decide whether frustration also amounts to some special moral wrong or harm, we need to rely on an interpretive argument that shows what is good or worthwhile about liberty or equality. Otherwise, there seems to be no point and value in thinking that values present themselves

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<sup>105</sup> See Williams, 'From Freedom to Liberty: The Construction of a Political Value', (2001) 30 *Philosophy and Public Affairs*, p. 13.

<sup>106</sup> *Ibid.*, p. 24.

<sup>107</sup> Dworkin, 'Moral Pluralism' in his *Justice in Robes*. Lorenzo Zucca adopts this approach in his *Constitutional Dilemmas, Conflicts of Fundamental Legal Rights in Europe and the USA* (OUP, 2007) and for this reason accepts a corresponding image of balancing among constitutional rights, whereby choices and trade-offs between competing rights and other legitimate goals are made in an ad-hoc basis. I argue against this idea of balancing in Chapter 4 of this thesis.

<sup>108</sup> Dworkin, in 'Moral Pluralism' in his *Justice in Robes*, pp. 105-116.

to us in this way. Rather than accept definitions that concede to interpretive failure in advance, we should aim for integrity and coherence: since we do not find our conceptions of values in nature but *in the realm of morality*, we should seek conviction and as much coherence as we can command through the most *morally* compelling conceptions of liberty and equality.<sup>109</sup> So, if we adopt Dworkin's suggestion to view the value of liberty as the freedom to do whatever you like as long as you respect the moral rights of others,<sup>110</sup> then we need a theory about what moral rights people have. This, in turn, will help us determine whether something significant has been lost or whether a significant wrong or an infringement of liberty has taken place. Before I move on to discuss Dworkin's integrated conception of liberty and equality and his theory of rights that flows from it there is one last hurdle to overcome.

As I explained this far, Dworkin's theory relies on an assumption that the only morally significant way in which individuals are harmed is when they are wronged. However, Bernard Williams forcefully argues that there may be other ways in which individuals are harmed or feel great loss and sacrifice of their values.<sup>111</sup> For instance, when the state allows critical or satirical expression some individuals or groups feel that their interests in their religious or ethical beliefs are harmed significantly. Similarly, any given political or judicial decision that involves the allocation of scarce resources, such as medical care or disability benefits, will grant relief to some but cause frustration to the interests of others in legal aid or policing. Such issues regularly appear before the ECtHR and raise ongoing debates among judges and scholars, mainly about the lack of a principled approach to these issues. These debates demonstrate that it is important how the Court justifies its decisions based on clear principles and not only which party's interests it upholds. Still, in issues that arise in the wider political context, Williams argues, some are bound to feel that they suffer a significant loss and that they are making a sacrifice of something valuable no matter how well we interpret the values in question, trying to make them all morally attractive and mutually supporting.<sup>112</sup> In the realm of political opposition and argument in particular, Williams insists, it is not respectful to our political opponents to tell them that their conception of their values is confused and that another should prevail because it is the right one. Instead, he argues, the only way to respect them is to take their perceived loss seriously irrespective of our moral approval or not. We can better do this by telling them that a compromise was made by the competent political authority because

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<sup>109</sup> Ibid. My emphasis.

<sup>110</sup> Ibid.

<sup>111</sup> B Williams, 'Liberalism and Loss' in M Lilla, R Dworkin and R Silvers (eds.), *The Legacy of Isaiah Berlin*, (New York Review of Books, 2001) and in particular the discussion at pp. 125-127. Also see his 'From Freedom to Liberty, The Construction of a Political Value'.

<sup>112</sup> Ibid.

it was a necessary decision justified on various reasons –rather than because their claim was not deemed rightful according to a particular conception of the values in question.<sup>113</sup>

Of course, with respect to the value of liberty, Williams disagrees with Bentham and Berlin who consider every law as an infraction of liberty: he views this as a restriction of primitive freedom –freedom as an ability or capacity- and not as a restriction of freedom as a political value.<sup>114</sup> As I explained earlier, he acknowledges that primitive freedom does not contain the necessary degree of impartiality to be considered a value at all. No intelligible claim can be made that primitive freedom be respected, protected or extended by others and it is not good in itself, but merely possibly good for the individual concerned not to have her primitive freedom frustrated by others.<sup>115</sup>

However, Williams argues that the notion of rightful liberty, such as that suggested by Dworkin, implies a juridical conception of an agreed authority entrusted to decide on the correct interpretation of the values at play and the rightfulness or wrongness of given claims -but this is not common ground among all participants in the political realm.<sup>116</sup> 'Governments, parties, political actors, and complainants,' Williams insists, 'are not justices or advocates contributing their various inputs to the unfolding interpretation of what they all agree to be a unitary text' or an 'on-going framework for decisions,' such as 'the institutional protocols of the Supreme Court.'<sup>117</sup> Instead, he suggests, we constantly have to reinvent the on-going political framework that contains conflicts of liberty and equality and we contribute to this process by acknowledging that, when individuals are coerced in the name of a right that they do not identify with, they perceive this as a loss of some valuable liberty.<sup>118</sup> Dworkin is right to resist this criticism: in any context, when people defend their conception of their values, they do so because they believe that it is the right one. If this is true, then a political decision could offend them more by disregarding this part of their argument, rather than by announcing what it considers to be rightful claims in liberty. In particular, if we undermine their ability to recognize that their convictions could be false then, in this way, we also disrespect their ability to form any true convictions in the first place. Besides, a decision that is based on the best moral justification that can be employed to support and prioritize a particular interpretation of the values at play would always be open to re-evaluation, in light of more convincing arguments. Recall that, in Dworkin's theory, an appeal to truth and integrity in our

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<sup>113</sup> Williams, 'From Freedom to Liberty: The Construction of a Political Value', p. 14.

<sup>114</sup> *Ibid.*, p. 14.

<sup>115</sup> *Ibid.*, p. 12.

<sup>116</sup> Williams, 'Liberalism and Loss'.

<sup>117</sup> B Williams, 'Conflicts of Liberty and Equality' in his *In the Beginning was the Deed*, (Princeton University Press, 2005), pp. 115-127, at p. 126.

<sup>118</sup> *Ibid.*, especially pp. 122-127.

framework of values is an appeal to 'conviction and as much coherence as we can command.'<sup>119</sup> This means that truth lies in the best moral arguments that we can find as the foundation of our convictions but, also, that our convictions may change and we may find coherence in alternative interpretations of concepts and values in light of fresh arguments and ideas.

Besides, this point is consistent with and reinforced by Dworkin's understanding of political values, such as liberty and equality, as interpretive concepts that are best understood in light of each other and not in isolation –a process of substantive moral reasoning all the way down, as explained in the previous section. For example, in the absence of shared criteria about whether taxation limits our liberty or whether it is required by equality, we make sense of our disagreement only by assuming that liberty and equality are essentially contested,<sup>120</sup> interpretive concepts, whose meaning we understand best when we tie them to deeper and more abstract values and ideals.<sup>121</sup>

To sum up, in this section, I defended a moral and political outlook whereby political values such as liberty and equality are best understood in light of each other and not in isolation. In particular, I defended a dynamic conception of liberty in light of the value of equality and argued against an understanding of it as an independent value or as instrumental to autonomy or well-being. I explained that an integrated account of the values of liberty and equality encompasses the ways in which we believe people ought to be free, having taken into account the demands of equality, fairness and social justice. This entails that judgments about what counts as a restriction, loss or lack of freedom depend on a prior theory about what people are entitled to according to a fair and equitable distribution of resources. If they derive from such a theory, rights have the potential of being fair but also much stronger claims: they can be absolute without being rigid, because they are determined through a process that has already taken into account the fair demands of others and those of the community as a whole. I will develop this idea in the following section and explain why I believe this is the most morally attractive and fitting interpretation of the values of liberty and equality as the core values underlying the ECHR rights and justifying claims to resources and positive obligations based on them.

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<sup>119</sup> Dworkin, *Justice in Robes*, p. 162.

<sup>120</sup> That is, concepts that cannot be specified in detail in advance of normative debates about their purpose and normative point, i.e. about the reasons for us to use them as guiding principles. See W Connolly, 'Essentially contested concepts in politics', Chapter 1 in his *Terms of Political Discourse*, 2nd edition (Princeton, NJ: Princeton University Press, 1983)

<sup>121</sup> Dworkin, *Justice for Hedgehogs*, p. 367.

**C. Rights as Trumps and Rights to Fair Shares:  
The Fundamental Requirements of Equal Concern and Respect**

Following an integrated account of liberty and equality, rights and duties derive from the fundamental and abstract obligation of government to treat all individuals under its jurisdiction with equal concern and respect. This general moral obligation brings together our fundamental intuitions and concerns about liberty and equality. Dworkin further analyses it in two principles of dignity, the first more closely related to equality and the second to liberty. Firstly, the principle of the equal objective moral worth and importance of each individual's life and, secondly, the principle of special, personal responsibility of each individual for making the ethical choices that bring success and value in her own life (the principle of ethical independence).<sup>122</sup>

It is difficult to argue that any plausible political theory could deny these abstract principles that delineate the broader moral outlook that Dworkin calls 'ethical individualism.'<sup>123</sup> Given the fact that government enjoys a monopoly in the exercise of extensive coercive power, it must satisfy certain moral conditions for the legitimate use of this power: to exercise this power in a justified way and demand obedience it must treat all those under its jurisdiction with equal concern and respect. No theory could provide a plausible justification for the use of the state's coercive power in a way that treats some individuals or groups with contempt or with less than equal respect and concern, based, for example, on their race, sex, religious or political beliefs. Such a theory would have to rely on arguments about the inferiority of certain individuals or groups or about the supposed stronger rights or interests or benefit of others in treating them with contempt. But, as I argued earlier, such arguments would be indefensible as principles of political morality, as they are bound to express a merely subjective standpoint: no one could argue that it is an objective moral imperative to treat others with contempt. For these reasons, the abstract principle of equal concern and respect is common ground among all plausible political theories. Of course, different theories suggest different interpretations of how best to understand and apply these abstract principles.

Now, Dworkin's theory of rights was initially premised upon this connection between legitimacy and the abstract principle of equal concern and respect. According to his interpretation this abstract moral requirement grounds rights that 'trump' or block

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<sup>122</sup> See Dworkin, *Is Democracy Possible Here?*, p. 9-21, also in his *Justice for Hedgehogs*, chs 16-19. 'Do Liberty and Equality Conflict?', in Barker P. (ed.) *Living as Equals* (Oxford University Press, 1996)

<sup>123</sup> Dworkin, 'Do Liberty and Equality Conflict?' p. 42.

impermissible reasons and considerations as the basis for government action.<sup>124</sup> The theory of rights as trumps, as the best interpretation of the abstract right to be treated with equal concern and respect, also developed as a response to utilitarianism. The idea is that the purpose of rights is to block those considerations that contain hostile external preferences: preferences that one should suffer disadvantage in the distribution of goods or opportunities if others think he should have less because of who he is or is not or if others care less for him than they do for other people.<sup>125</sup> In Dworkin's later work, rights are not only connected with an interpretation of the requirement for equal concern and respect as a rejection of utilitarianism and the blocking of external preferences from the justification of political decisions. In his seminal work in political philosophy, *Sovereign Virtue*, Dworkin developed a more positive aspect of the requirement that government treat all with equal concern and respect: namely, the principle of equal respect for the special responsibility of each individual for how her life turns out requires that individuals are free to choose and pursue their own ethical values. Indeed, there is a normative connection here: civil and political rights are essential for ensuring that people will be free to make these choices for themselves and this determines the fairness of Dworkin's overall theory about the fair distribution of resources and opportunities in society.<sup>126</sup>

At this point though, it seems to me that Dworkin's theory also warrants a shift in the idea of rights from a merely defensive, reason-blocking to a positive, distributive outlook, better described as rights to fair shares in a just distribution of resources, be they goods, benefits, choices or opportunities. I will discuss the implications of this view, in light of Dworkin's theory of equality of resources, in length in Chapter 5. For now, I only want to draw attention to the general point that, apart from that mentioned in the previous paragraphs, there is a further normative connection between rights and the fairness of Dworkin's theory of an equitable distribution of resources. I will explain.

Dworkin's theory claims to be a fair theory for the distribution of resources on the basis that it allows those differences in the distribution of resources that reflect the free *choices* of individuals and seeks to mitigate the effect of morally arbitrary *circumstances*

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<sup>124</sup> R Dworkin, 'Rights as Trumps' in J Waldron (ed.) *Theories of Rights*, (Oxford: Oxford University Press, 1984), 153. About whether Dworkin's theory is accurately portrayed as a 'reason-blocking' theory see the exchange between R. Pildes, 'Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism' (1998) 27 *Journal of Legal Studies*, 725; J Waldron, 'Pildes on Dworkin's Theory of Rights', (2000) 29 *Journal of Legal Studies*, 301; R Pildes, 'Dworkin's Two Conceptions of Rights' (2000) 29 *Journal of Legal Studies*, 209.

<sup>125</sup> Dworkin, 'Rights as Trumps', p. 161. For the distinction between internal and external preferences and the reasons why the latter are incompatible with equal concern and respect see Dworkin, *Taking Rights Seriously* ch. 12.

<sup>126</sup> Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, p. 116. I will focus on Dworkin's theory of equality of resources in Chapter 5 of this thesis.

that we have no control over, such as natural disasters, disability or the lack of talent.<sup>127</sup> I believe that this distinction reveals a further normative connection between rights and the fairness of this scheme of distributive justice. Specifically, if fairness requires granting rights to ensure that individuals can make some choices for themselves it also requires rights to those essential conditions that make the rights to such choices realistic and not illusory –as the ECtHR’s effectiveness principle requires- due to factors outside of the individual’s control. My point is then that an integrated account of liberty and equality, expressed in Dworkin’s two principles of dignity, entails the state’s obligation to show both respect for the freedom of individuals to exercise choice and concern for the circumstances that may unfairly annihilate, diminish or impede the effective exercise of choices. In Dworkin’s words this is

‘...an undeniable tenet of fairness: that a society comes closer to treating people as equals when it adds, to the choices they have, choices they would have had were circumstances more nearly equal’<sup>128</sup>

In sum, I believe that Dworkin’s further development of the two principles that flow from the abstract ideal of equal concern and respect, suggests that the idea of rights as trumps that block impermissible considerations captures the anti-utilitarian and reason-blocking character of rights but it is only part of the wider picture of what equal concern and respect requires. In particular, treating people with equal concern and respect is not fully ensured through the blocking of external and hostile moralistic preferences –which are the most commonly cited types of impermissible consideration, especially in the case law and literature on civil and political rights.

Following this analysis, claims to resources and positive obligations need to be construed and justified as claims to (no more but also no less than)<sup>129</sup> a fair share of resources, rather than as claims to whatever would promote or serve the effective enjoyment of certain interests or further freedom in a descriptive sense, as described earlier in this chapter. The debate about the content of positive obligations needs to turn

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<sup>127</sup> Most theories of distributive justice accept, modify or are based on a rejection of the distinction between choice and circumstance. The locus classicus is Rawls, *A Theory of Justice*, p. 74-75 and 102, TM Scanlon, 'The Significance of Choice', in S McMurrin (ed.), *The Tanner Lectures on Human Value*, vol.viii (University of Utah Press, Salt Lake City, 1988), pp. 151-216, esp. p. 185-201 and Dworkin *Sovereign Virtue*, chs. 2 and 7 and his 'Equality, Luck and Hierarchy', (2003) *Philosophy & Public Affairs*, Vol. 31, No. 2, pp. 190-198, at p. 192. Both Rawls and Dworkin deem distributive shares as fair only if they are not influenced by factors that are morally arbitrary and both of their theories accommodate this distinction, and the related idea of responsibility for choice, albeit in different ways. I will discuss this in length in Chapter 5.

<sup>128</sup> Dworkin, *Sovereign Virtue*, p. 334.

<sup>129</sup> As I tried to show earlier in this chapter, theories of rights that are based on Berlin’s or a Raz’s moral and political outlook, either allow claims to more than a fair of resources or confine claims to less than a fair share of resources.

on the question of what constitutes a fair distribution of resources and what claims have this special distributional character: that they reasonably challenge the fairness in the distribution of resources within a state.

To begin with, it is not enough to say that a decision about the distribution of resources can only be challenged when external and hostile moralistic preferences have been used as a justification for the disadvantage that some individuals are suffering. This is not to say that the fact that some individuals are disadvantaged or suffer is inherently unfair but only that there might be other reasons that make the distribution –and their disadvantaged position- unfair. For instance, a distribution could be unfair if no concern is shown for the actual choices that individuals are left with within certain spheres of formal freedom or if their actual freedom is diminished to the extent that their capacity to make choices and assume responsibility for their own lives is virtually denied. This is the case when no concern is shown for the circumstances that some individuals find themselves in. Still this is not to say that a particular range or quality of choices should be available in order to guarantee a minimum level of satisfaction of basic needs or basic conditions of agency or well-being or autonomy.<sup>130</sup> But only those that can reasonably be argued to be a fair share considering the community's available resources. Or else, those choices that we can reasonably assume that individuals would have had under a fair scheme for the distribution of resources.

Notice, however, that Dworkin views human rights as grounded on the abstract right to be treated as a human being whose dignity fundamentally matters. This abstract basic human right, Dworkin explains, is 'a right to an attitude', i.e. to be treated by government in a way that shows a good-faith attempt to implement an intelligible interpretation of the responsibilities associated with respecting the dignity of those in its power.<sup>131</sup> Now, this may be taken to suggest that government is not really required to remedy all injustices but merely to make a good-faith attempt in trying to identify or deal with them. Indeed, Dworkin clearly notes that a failure to strike the correct or fully just interpretation and application of these responsibilities does not constitute a violation of human rights.<sup>132</sup> Still,

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<sup>130</sup> I argue against this interpretation of equal concern and respect later in Chapter 4 of this thesis.

<sup>131</sup> See Dworkin, *Justice for Hedgehogs*, p. 335-336.

<sup>132</sup> Dworkin, *Justice for Hedgehogs*, p. 335. Earlier in that chapter, Dworkin also argues that this criterion distinguishes human rights from political rights against government, which may be violated by good-faith but failed attempts to comply with what dignity requires. He bases this distinction on the value that he takes to underlie the practice of human rights in general, i.e. the value of legality: the exercise of states' coercive powers is legitimate only when they respect fundamental moral conditions, such as to treat all its members with equal concern and respect. On this point, see the recent contribution by Letsas, in 'Dworkin on Human Rights', *Jurisprudence* (forthcoming 2014) and his *A Theory of Interpretation of the European Convention on Human Rights*, ch. 1, who argues that it would be a restrictive interpretation of the values that underlie the practice of the ECHR (at least, and of other areas of human rights more generally). It is beyond the scope of my research to discuss this point further. For the purposes of my thesis, I will assume that,

Dworkin also notes that the question whether a government makes a mistake in good-faith and not in bad-faith, i.e. in disregard or contempt for the dignity of individuals, is an interpretive test and not a matter of subjective intentions and motivations.<sup>133</sup>

Following this, it seems to me that there may be quite a few instances of injustice that may be indicative of not just a failure to achieve full social justice but of indifference or contempt for some people's dignity –especially when morally arbitrary circumstances are such that they lack the essential conditions for choice and responsibility, as explained above. Besides, equality of resources includes the essential mechanism for mitigating the effect of these circumstances, through a hypothetical insurance device, which as Dworkin admits, is aimed at securing those essential conditions without which a state cannot proclaim that it shows respect for people's dignity or that it governs according to a good-faith, intelligible interpretation of equal concern and respect.<sup>134</sup> In other words, my point is that the hypothetical insurance device is meant to integrate the principle of responsibility with the principle of equal moral importance. That is, respect for personal responsibility requires not just respect for the ethical independence of individuals but also concern to ensure the conditions for the exercise of choice and responsibility, for which a prudent insurer would have insured herself. I will develop this argument further in Chapter 5 of this thesis.

For now, I will conclude this chapter with a note on how this theory of rights fits with the practice and the object and purpose of the ECHR. To begin with, I agree with the view that it captures the deontological, anti-utilitarian<sup>135</sup> and anti-perfectionist<sup>136</sup> character of ECHR rights. In particular, the purpose of the ECHR is best understood as aiming to establish certain moral standards regarding what governments may not do to those under their authority and protect the moral integrity, personality and independence of individuals. If this is true, then it should not be interpreted in a way that would allow states to reduce individuals into mere figures of a utilitarian calculus that would put their rights on a par with impermissible reasons and considerations in government action, such as the hostile external preferences of others. This would deny them the personal responsibility

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given that the test is interpretive, many injustices indicate bad faith in the sense that Dworkin wants it in order to conclude that a violation of human rights has taken place. Therefore, we may say that based on the abstract, general human right to equal concern and respect states have a human rights obligation to ensure the minimum conditions of fairness in the distribution of resources, the most important of which is to mitigate the impact of morally arbitrary circumstances in their lives. This conclusion is supported by Dworkin's explanation of this test as interpretive in *Justice for Hedgehogs*, p. 335-339. I explain this in the main text.

<sup>133</sup> Dworkin, *Justice for Hedgehogs*, p. 335-336.

<sup>134</sup> For the connection between the requirements of equal concern and legitimacy see Dworkin, *Is Democracy Possible Here?*, chapter 4, especially pp. 118-121.

<sup>135</sup> Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, p. 99-105 and ch. 1.

<sup>136</sup> See my discussion of perfectionism earlier in this chapter.

and freedom to make choices that determine the value and success in their own lives. To ask individuals to sacrifice that freedom and adopt an 'impartial' point of view for the sake of a greater benefit is a straightforward attack on the individual's integrity: she is alienated from the convictions that she mostly identifies herself with and no form of utilitarian arrangement includes, in principle, any guarantees that this will be avoided.<sup>137</sup>

Besides, in a significant number of cases the ECtHR has established that individuals belonging to usually targeted groups, due to their race, sex, sexual orientation, religious or political beliefs, should not suffer disadvantage in the distribution of goods, benefits or opportunities on the basis of the moralistic preferences of the majority.<sup>138</sup> Similarly, the Court's reference to the need to balance claims to resources and positive obligations with other legitimate aims such as the 'rights and interests of others' or the 'economic well-being of the country'<sup>139</sup> must not be interpreted as a call for utilitarian calculation.

Instead, under an integrated account of liberty and equality references to balancing must be interpreted as a call to determine the content claims to resources and positive obligations in light of the moral rights of others in resources and opportunities. Although in both cases rights are determined in light of other considerations, the crucial difference is that, following an integrated account of liberty and equality, rights may only be determined in light of permissible considerations. Following this, rights will be strong, unconditional and absolute claims but that does not mean that the content and requirements of positive obligations and claims to resources will be determined in disregard of other individual or communal goals. It only means that any such other considerations must be filtered through principles of fairness - and not utilitarian calculation - before they can influence what one can claim as a fair share of the community's resources.<sup>140</sup>

Finally, notice that, although the abstract moral standard is universal, as we want human rights standards to be, it still leaves room for variation given that its specification requires an interpretive judgment. In other words, we must rely on moral evaluative arguments to assess particular political decisions and policies in light of the principles of dignity that require equal concern for the fate of all and full respect for personal responsibility. And this interpretive judgment will be more accurate if it is sensitive to

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<sup>137</sup> Two of the most famous attacks on utilitarianism, which have focused on the fact that it undermines moral integrity and individuality come from Rawls, *A Theory of Justice* and Williams, 'A Critique of Utilitarianism' in J.J.C. Smart and B Williams (eds.), *Utilitarianism: For and Against* (Cambridge University Press, 1973), see in particular p. 115-118.

<sup>138</sup> See Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, ch. 6.

<sup>139</sup> These and other legitimate aims, like the protection of morals, are found in the second paragraph of articles 8-11 ECHR.

<sup>140</sup> For this argument, see Waldron, 'Pildes on Dworkin's Theory of Rights', p. 301-307.

different economic conditions and political and cultural profiles and histories.<sup>141</sup> In this way, we could accommodate concerns of institutional arrangement between the ECtHR as an international court and a certain margin of appreciation of the national authorities as those primarily entrusted with the protection of the ECHR rights. However, this interpretive judgment and any margin of appreciation cannot be fixed by the above empirical considerations alone: as I stressed earlier, moral evaluative arguments will be necessary to justify whether a health or education policy shows a good-faith effort in one country and maybe contempt in another one.<sup>142</sup>

In Chapter 5 of this thesis, I will defend an account of claims to resources and positive obligations based on a particular interpretation of Dworkin's two principles of dignity. But first, in Chapter 4, I will examine, against the backdrop of these two principles of dignity, three different approaches that attempt to provide a principled framework for the ECtHR to adjudicate on claims to resources and positive obligations.

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<sup>141</sup> Dworkin, *Justice for Hedgehogs*, p. 338-339. Taking into account such considerations is also essential for the prudent insurer test in Dworkin's hypothetical insurance device, see Dworkin, *Sovereign Virtue*, p. 318.

<sup>142</sup> Dworkin, *Justice for Hedgehogs*, p. 350.

**CHAPTER 4**  
**THREE APPROACHES TO THE CONTENT OF CLAIMS TO RESOURCES**  
**AND POSITIVE OBLIGATIONS UNDER THE ECHR**

**Introduction**

So far, I have defended the view that the question of what positive obligations are inherent in the ECHR rights invites an interpretation of the core values that underlie the ECHR and the practice of the ECtHR. In the previous chapter, I examined three conceptions of the value of liberty, a central value underlying the ECHR rights. I argued that Ronald Dworkin's integrated conception of the values of liberty and equality is the most morally attractive and also one that best fits with the practice of the ECtHR. In particular, the analysis of Dworkin's work that I offered revealed how his two principles of dignity and the abstract right to equal concern and respect give rise to, both, rights as trumps that block impermissible considerations, as well as rights as fair shares in a just distribution of the available resources. I further suggested that claims to positive obligations are best understood as claims to a fair share of the community's available resources.

The question that follows from this is what constitutes a fair share of the available resources and what are the principles of a just distribution of resources. To proceed with this question, we need to look at theories of distributive justice, that is, theories that stipulate the resources and opportunities a government should make available to people it governs.<sup>1</sup> However, when looking at these theories, we must bear in mind that the realm of social justice and moral rights is not necessarily identical to that of legal rights and human rights in particular. For instance, a government that departs from the political agenda presented in its electoral campaign or a government that fails to bring about full social justice does not necessarily violate human rights. To identify human rights claims with claims to full social justice would do a disservice to the protection of human rights. It would make it very difficult for courts to adjudicate on these claims and for governments to realize them. In turn, this approach would significantly weaken these claims and deprive them of the urgency and moral force that we want rights claims to have.

On the other hand, we do need to think of the realm of social justice as completely distinct from that of human rights. After all, many human rights documents, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), have been drafted to address certain aspects of social justice. In the previous chapter, I argued that the realm of the ECHR

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<sup>1</sup> Dworkin, *Justice for Hedgehogs*, p. 2.

rights too can be understood as protecting those minimum conditions that are essential for any defensible scheme of distributive justice and that these conditions can be demarcated by Dworkin's two principles of dignity –with a twist.

Many would raise the objection that tying ECHR rights adjudication to theories of distributive justice will raise complex questions about the proper allocation of resources that an international court is not institutionally competent to decide.<sup>2</sup> My suggestion that claims to resources under the ECHR should be understood as claims to a fair share of the available resources aims to narrow down what initially might appear as extensive social justice claims. Still, the ECtHR must be able to answer the question of what constitutes a fair share in a principled manner –in order to overcome any objections of institutional competence or charge of arbitrariness and incoherence.

In this chapter I explore how three different approaches could provide such a principled framework for the ECtHR to adjudicate on claims to resources. I begin by discussing the different uses of the doctrine of proportionality, which is increasingly used in the context of human rights and the ECHR in particular, and explaining why some uses are inappropriate and others inadequate to provide a principled framework for determining the content of claims to resources. I then move on to discuss how the two theories that are endorsed widely in the field of human rights, i.e. the minimum core approach and the capabilities theory, both carry significant flaws and fail to respect fully Dworkin's two principles of dignity. Still, I identify certain elements of both of these theories that express a valid and important concern to be taken into account in human rights adjudication. In the following Chapter 5, I suggest a way to incorporate some of these elements into an interpretation of Dworkin's theory of equality of resources.

### **1. Proportionality and the Question of Distributive Justice**

The pertinent question that runs through this thesis is how much and what kind of resources is an individual entitled to claim in the form of positive obligations of the state for the protection of ECHR rights. Following up the discussion from chapter 3, I explained in the introduction to this chapter that I treat this as a question of distributive justice and, in particular, as a question about what one can claim as a fair share of resources given a

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<sup>2</sup> Indeed, as highlighted in Chapter 2, this is the objection that governments most often raise before the ECtHR, an objection that very often leads the Court to leave the case to the margin of appreciation of the national authorities as better placed to decide. Others would further object to the infusion of moral or political theorising into what they believe could be a strictly legal method of adjudication. I have already dealt with this objection in Chapter 1 and argued that there can be no such thing as a purely legal approach to such matters: the endeavour is interpretive and all arguments raised are substantive moral, evaluative judgments.

theory about the just distribution of a society's available resources.<sup>3</sup> Quite apart from the relevant heated debates about the principles of distributive justice in political philosophy, judges and scholars around the world have increasingly relied on the doctrine of proportionality as a structured test to review which limitations to the applicants' claims are justified or which violate a human right.<sup>4</sup> In the context of the ECHR, when reviewing whether state action or omission violates a particular human right, the Court first examines whether that action or omission constitutes an interference with a Convention right and then whether it is justified: it will be justified if it is proportional to a legitimate aim that the state wants to serve with a decision or policy realised through action or omission.

The doctrine of proportionality is most often discussed in literature in relation to so-called 'negative rights' or claims against state interference and the most widespread conception of it is linked to the idea that such claims cannot be absolute but have to be balanced against individual or communal interests and considerations, with which they are often in tension. Similarly, the prevalent image of claims to positive obligations too is one of tension and often conflict that can only be resolved through some sort of balancing. Although the principle of proportionality and the idea of a fair balance has appeared in the ECtHR's case law on positive obligations as early as 1968,<sup>5</sup> only recently have some scholars begun to argue for its usefulness as a tool for delineating the content of social and economic rights and positive duties in particular.<sup>6</sup> No doubt, the idea and practice of

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<sup>3</sup> Some scholars attribute the theoretical difficulty in determining which positive duties correspond to the ECHR rights to the difficulty in establishing 'conceptual proximity' between rights and duties in these kind of cases. See Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights', p. 71. And others dismiss the Court's use of tests such as the 'direct and immediate link' test discussed in Chapter 2 on the basis that they fail to establish conditions of proximity, see D Xenos, 'The human rights of the vulnerable', (2009) 13 *International Journal of Human Rights*, p. 598 and more generally his *The Positive Obligations of the State under the European Convention of Human Rights* (Abingdon: Routledge, 2012). As I have highlighted in Chapter 2 and argued in detail in Chapters 2 and 3 this connection or proximity is a moral one, so the question of proximity or link between rights and duties cannot be settled with any factual or conceptual analysis but rather it requires substantive moral reasoning about a matter of distributive justice: i.e. about what rights and resources people are morally entitled to in light of the values underlying the ECHR. Chapters 4 and 5 of this thesis take on the challenge of approaching this question as one that raises issues of political morality and distributive justice.

<sup>4</sup> See generally Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) ch. 2, A Barak, *Proportionality. Constitutional Rights and their Limitations*, (Cambridge University Press, 2012), M Klatt and M Meister, *The Constitutional Structure of Proportionality*, (Oxford University Press, 2012), A Stone-Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008–09) 47 *Columbia Journal of Transnational Law* 72, Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, (Intersentia, 2002).

<sup>5</sup> *Belgian Linguistics Case*, I(B), para 5

<sup>6</sup> X Contiades A Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Adjudication' (2012) *International Journal of Constitutional Law* 10 (3), pp. 660-686 and their more recent 'Socio-Economic Rights, Economic Crisis and Legal Doctrine: A Reply to David Bilchitz', (2014) *International Journal of Constitutional Law* Vol. 12 No.3, pp. 740-746. Notice that although other scholars suggest using the proportionality doctrine, they assume that some theory or principles will have to be fed into it in order to yield correct and fair

proportionality is well established across multiple national and international jurisdictions.<sup>7</sup> Tracing the current debate between proponents and critics of proportionality, I wish to explore further its relevance and value in deciding which claims to resources and positive obligations are justified under the ECHR. My aim will be to raise and discuss the question of what institutional and moral concerns the idea of proportionality expresses. In addition, I will discuss whether it can help the Court to address and resolve the distributive justice question that I claim to be at the heart of claims to resources in positive obligations cases.

In the literature so far, serious criticism has been raised<sup>8</sup> against the prevalent image of conflict and balancing that lies at the heart of the idea of proportionality. Critics attack the very idea of balancing as incompatible with and hostile to human rights on the basis that it places rights on a par with any kind of individual or communal interests. In this way, they argue, the balancing exercise deprives rights of any distinctive features and, in particular, their special moral importance and normative priority over other individual interests or collective goals and societal benefits and welfare. As a result, the critics warn, balancing and proportionality disregard the moral analysis that is essential in order to discover and interpret the moral rights and principles that ground human rights and open the way to utilitarian or cost-benefit analysis. To prove their point, critics refer to numerous cases where the Court has found justified and proportional the state's interference with (and ban of) forms of expression on the basis that the majority considered them offensive and blasphemous. Let us investigate whether this criticism is justified.

To be sure, judges and scholars often fail to acknowledge why and how cost-benefit or utilitarian analysis is incompatible with human rights or fail to see how their arguments

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outcomes. As I argue later in this section, I believe it is a problematic feature of their proposal that these two authors make no such reference to any substantive arguments. As I will explain later, it is one thing to argue against a particular theory as underpinning the proportionality test and quite another to claim that it can perform its function in the absence of any theory whatsoever.

<sup>7</sup> See above n. 4.

<sup>8</sup> See G Webber, 'On the Loss of Rights' in G Huscroft, B W Miller and G Webber (eds.) *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, (Oxford University Press, 2014), pp.123-154, who argues that appeal to proportionality detaches rights from moral evaluations of what 'is right'; D Kyritsis, 'Proportionality as a Constitutional Doctrine', (2014) *Oxford Journal of Legal Studies*, Vol. 34, No. 2, pp. 395-415; G Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, ch. 4 and his 'Rescuing Proportionality', in Cruft, Liao and Renzo (eds), *Philosophical Foundations of Human Rights*, (OUP forthcoming, 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2346836](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346836); D Bilchitz, 'Socio-Economic Rights, Economic Crisis and Legal Doctrine', (2014) *International Journal of Constitutional Law* Vol. 12 No.3, pp. 710-73; G Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179, O Ferraz, 'Poverty and Human Rights' (2008) *Oxford Journal of Legal Studies*, Vol. 28, No. 3, pp. 585-603, S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law*, pp. 468-493; J Fleming, 'Securing Deliberative Democracy' (2004) 72 *Fordham Law Review* 1435.

are prone to slide into this kind of analysis. As a theory, utilitarianism goes against the very idea of human rights as moral rights: utilitarian calculation treats interests protected by rights on a par with any other interest, seeing in them no particular moral significance or force. In a utilitarian sort of balancing, the decision that produces the maximum possible utility or preference satisfaction will be deemed rightful, even if this outcome is produced at a significant cost for a particular individual. The problem with this theory is that, if it serves to maximize utility, no burden or cost for the individual is considered excessive and no treatment is regarded as disrespectful of the dignity or integrity of the person or a moral wrong. I believe most proponents of the proportionality principle would resist this outlook for the nature of rights and the balancing exercise. Hardly anyone would consider morally justified a policy to impose organ donations on some in order to save others or a policy to cut short the life of those diagnosed with a terminal illness in order to save public funds. For utilitarianism, though, there is no such thing as an unreasonable burden or sacrifice, as anything can be demanded of the individual, so long as it serves the ultimate moral standard: to maximize overall utility. If most of us would protest against such examples, this is because we tacitly or overtly acknowledge that human rights rest on moral rights derived from non-utilitarian moral principles, which place special moral force and priority on the kind of treatment or respect owed to individuals and the idea of the inviolability and distinct importance of each human being.<sup>9</sup>

In a similar way, cost-effectiveness analysis fails to explain and justify whether an action or omission is morally permissible or whether it constitutes a moral wrong or harm to the individual. In fact, cost-benefit analysis is not concerned at all with moral rights and wrongs, or worse, it does not even acknowledge their existence: in such an analysis what counts as a cost or a benefit is not a moral question and no rights can 'trump' or block decisions based on cost-benefit analysis. Still, just like against utilitarian calculation, most would protest against a cost-benefit decision or policy if that entailed torture, inhuman or degrading treatment or disrespect for other moral rights of individuals. This means that most accept the significance of moral principles in helping us discern and justify whether a certain treatment, burden, or cost imposed on an individual is morally permissible, whether it imposes an excessive sacrifice or whether it constitutes a moral wrong, in that it violates the dignity and moral rights, hence also the human rights of that individual.

Indeed, in a classic and least controversial example, most would outright reject torturing suspected criminals to extract information or confessions. Similarly, even in a more controversial example, many would be puzzled about a policy to double the number

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<sup>9</sup> See Williams 'A Critique of Utilitarianism', Rawls, *A Theory of Justice*, p. 3 and 24-30, Nagel, 'Personal Rights and Public Space', p. 83. See also my discussion in Chapter 3, section 2 (A).

of prisoners detained in prisons. They would ask whether, by doing so, the living conditions within prisons would fall below a certain standard, they would debate about what that standard should be, considering the impact it has on prisoners but maybe also the cost it involves for the society as a whole to maintain a particular standard of detention conditions. In the same way, when debating about the resources that should be spent on the accommodation of the particular needs and rights of people with disabilities or on the treatment of certain health conditions, our reasoning and assessment process always involves arguments about moral rights and duties, as well as reasonable burdens. Our assessment of whether a decision or policy violates someone's human rights can never be a matter of morally neutral cost-benefit analysis. In all cases, more or less controversial, in order to assess an action, decision or policy, we deem crucial certain moral considerations and especially the moral rights of any individuals involved. Following this line of argument, any application of a proportionality test should always rest on substantive moral reasoning that cannot be substituted by cost-benefit analysis and should not be replaced by utilitarian calculation. For these reasons, we have compelling reasons for discarding any accounts of proportionality with utilitarian or cost-benefit connotations.

However, a balancing or proportionality test need not take the form of utilitarian or cost-benefit analysis.<sup>10</sup> The idea that claims to goods, benefits or opportunities should not be absolute but have to be limited does not necessarily mean that these limits should be placed with reference to the satisfaction of the preferences of the majority or a crude calculation of costs and benefits, individual and societal.<sup>11</sup> To begin with, there are good examples in the ECtHR case law where, although the Court used the metaphor of balancing, it actually provided substantive arguments to justify and uphold several rights of individuals against the preferences of the majority.<sup>12</sup> This shows that the proportionality test may be justified as a valuable institutional tool to the extent that it produces considerable right outcomes.<sup>13</sup> That is, if it helps courts around the world and most notably the ECtHR, to address important institutional concerns: e.g. to provide a structured, transparent and meticulous judicial review of the complex question of whether a certain state action or omission justifiably interferes with individual freedoms. On this basis, some commentators have recently argued that we should not rush to equate the proportionality test or the very idea of balancing with the largely discredited approach of a utilitarian and

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<sup>10</sup> Letsas, 'Resquing Proportionality'.

<sup>11</sup> Instead, we have very good reasons to believe that rights should be construed in light of relational values such as equality and fairness. See my final section of chapter 3 and following paragraphs here in Chapter 4.

<sup>12</sup> For instance, *Dudgeon v UK*, *Modinos v Cyprus*, *Goodwin v UK*, *I v UK*, *E.B. v France*, *Hirst v UK*.

<sup>13</sup> Letsas, 'Resquing Proportionality', p. 14-15 and 'The Scope and Balancing of Rights: Diagnostic or Constitutive?'; similarly Kyritsis, 'Proportionality as a Constitutional Doctrine'.

cost-benefit analysis.<sup>14</sup> While we have very good reasons to dismiss this kind of reasoning as inappropriate in the realm of human rights, as I explained earlier, the idea of proportionality need not be reduced to that kind of reasoning. Instead, a different understanding and use of it could possibly serve principles of justice.

Still, critics of proportionality have good reasons to be sceptical about whether we can avoid associating the use of balancing or proportionality tools with utilitarian or cost-benefit analysis, as there are quite a few well-documented cases, where the Court appears to have resorted to this kind of reasoning. For instance, the Court has relied on the perceived offence to the religious feelings or the moralistic preferences of the majority to justify restrictions on the right to freedom of expression.<sup>15</sup> Similarly, it has declared as inadmissible several cases involving positive duties of the state, without substantive examination and with a mere reference to the *supposed* high cost that they *may* entail for others.<sup>16</sup> However, we could as well attribute many wrong decisions on the fact that the proportionality test, and balancing at the final stage of it, is often conducted on an ad hoc basis and in a vacuum of substantive principles, i.e. with no guidance as to which considerations are morally and institutionally relevant and how they should weigh in the balancing.<sup>17</sup> Discussion then must focus on filling this vacuum.

Recent scholarly contributions by proponents of the proportionality principle endorse the arguments against cost-benefit and utilitarian analysis and employ arguments drawn from non-utilitarian theories of rights (liberal or perfectionist) to resolve the tension between rights and determine the limitations of rights.<sup>18</sup> In fact, many argue that proportionality is not devoid of moral analysis but that it is a better, clear and structured

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<sup>14</sup> Letsas, 'Rescuing Proportionality', p. 15.

<sup>15</sup> See Letsas, in 'Rescuing Proportionality' and Tsakyrakis, 'Proportionality: An Assault on Human Rights?' who cite for example *I.A. v Trukey*, *Otto-Preminger*, *Muller v. Switzerland*, *Murphy v Ireland*.

<sup>16</sup> Such as the inadmissible cases discussed in Chapter 2. In fact, in these cases the Court does not even consider the proportionality or balancing test itself: it assumes that it will involve complex resource allocation decisions and that there is nothing about these that an international human rights court can review. Of course, some aspects of resource allocation are matters of policy for the national authorities to decide but certain human rights issues will also arise in this as in all forms of government (through actions or omissions) and will have an impact on the distribution of resources, so we cannot deny review of state actions or omissions with reference to the resource allocation implications alone. I will develop this point later. Here I merely wanted to note that the Court finds that these claims raise no human rights issue with sole reference to the supposed significant financial cost involved.

<sup>17</sup> Letsas, 'Rescuing Proportionality', p. 15.

<sup>18</sup> Most notably see K Moller, 'Proportionality: Challenging the Critics' *International Journal of Constitutional Law* (2012), Vol. 10, No. 3, pp. 709-731 and his *The Global Model of Constitutional Rights*, as well as M Kumm, 'Political Liberalism and the Structure of Rights: On The Place And Limits of the Proportionality Requirement' in S Paulson and G Pavlakos (eds), *Law, Rights, Discourse: Themes of the Work of Robert Alexy* (Hart Publishing 2007) 131; I Porat, 'The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law' (2006) 27 *Cardozo L Rev* 1393; also cited by Kyritsis, 'Proportionality as a Constitutional Doctrine', p. 7.

kind of moral analysis, provided that it is underpinned by a morally attractive theory of rights that best fits with and explains the practice of human rights adjudication.<sup>19</sup>

As I discussed in Chapter 3, many human rights scholars are drawn to interest based theories of rights and seek to interpret the idea of proportionality and apply the proportionality test based on arguments drawn from such theories. For instance, Moller suggests an account of the idea and test of proportionality, in light of a well-developed, modified version of an interest based theory of rights.<sup>20</sup> Following Joseph Raz's interest theory of rights, his account also grounds rights on individual interests in well-being or autonomy that are weighty enough to impose duties on others. It focuses on the actions and personal resources that are important for leading an autonomous life but departs from Raz's theory in that it adopts a first person perspective as to what is important for leading an autonomous life: whatever is important from the point of view of the self-conception of the agent. In this way, Moller aims to avoid Raz's perfectionism and the criticism attached to it:<sup>21</sup> individuals, and not the state, dictate which interests are conducive to autonomy. In fact, following Moller's theory, individuals may demand protection of their personal autonomy interests through *prima facie* rights to everything, from trivial activities, such as feeding the birds, to evil acts, such as murder or paedophilia.<sup>22</sup> All these interests are then balanced against other interests and considerations at the limitations stage of rights, where substantive moral reasons may now be invoked by the state to justify the interference with what, otherwise, falls within the sphere of freedom that individuals are *prima facie* entitled to control. In this respect, Moller's account of the proportionality test is not a completely morally neutral enterprise, like cost-benefit analysis. Besides, he takes care to distinguish it from utilitarian calculation as well.<sup>23</sup> At the same time, the supposed added advantage of this approach, compared to a perfectionist one, is a commitment to neutrality. It purports to allow –at least at the first stage- no room for moral evaluation of what is a worthwhile life or what qualifies as an autonomy interest: it counts

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<sup>19</sup> See Moller, as above in note 18, who suggests that he adopts such an interpretive approach to the ECHR.

<sup>20</sup> K Moller, 'Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights', (2009) *Oxford Journal of Legal Studies*, Vol. 29, No. 4, pp. 757-786, as well as his most recent 'Proportionality: Challenging the Critics' and his most developed theory in *The Global Model of Constitutional Rights*.

<sup>21</sup> See my analysis earlier in Chapter 3.

<sup>22</sup> K Moller, 'Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights', p. 775. Moller persists in this account of a 'comprehensive model' of rights that incorporates an infinite range of interests as *prima facie* rights, be they inconsequential or outright immoral and finds this 'rights inflation' is required by proportionality analysis and justified as the best means to ensure that state action is justified, in 'Proportionality and Rights Inflation' in Huscroft, Miller and Webber (eds.) *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, pp. 155-172. Notice how this closely follows Berlin's conception of freedom as I discussed in detail in Chapter 3 and suffers from the same criticism.

<sup>23</sup> *Ibid.*

as instances of a person's autonomy even those interests that are not necessarily connected to a person's 'well-being'.<sup>24</sup> Some may also consider it an advantage of this theory that the generic right to autonomy grounds an open-ended range of *prima facie* rights, which may also include socio-economic claims and thus explain a much greater volume of human rights practice of the ECtHR and other jurisdictions as well. Although I cannot discuss Moller's work in great detail here, I will only highlight some of what I believe to be fundamental flaws in his approach to rights and the proportionality test.

Firstly, Moller's account of autonomy interests and corresponding rights and duties rests on a morally unattractive conception of freedom and autonomy. In particular, his self-conception approach to autonomy aims to provide a neutral understanding of autonomy in that no moral filter is applied to the value of the self-conceptions people hold:<sup>25</sup> the value and weight of the autonomy interests that serve and further one's self-conception are judged from the point of view of the agent. So, following this approach, any individual interests ground *prima facie* rights to anything that is of value to a particular individual and others have a corresponding duty to protect and further these rights and interests or provide a justification for frustrating them or limiting their scope. Now, although speaking in terms of personal morality we may allow an 'internal' perspective about what adds value to one's life, in the realm of political morality it is implausible to assign any moral weight to claims to rights or interests that lack any degree of impartiality or objective evaluation. The subjective preferences to murder or eat steaks every day can maybe fall under an account of primitive freedom but not under an account of freedom as a moral and political value.

As much as these preferences are strong or worthwhile as exercises of autonomy from the point of view of the agent,<sup>26</sup> they can only ground moral rights and duties that are worth protecting and taking into account in the distribution of resources and opportunities if supported by moral arguments about what we owe each other;<sup>27</sup> about whether not assigning any weight to a particular interest would constitute a moral wrong;<sup>28</sup> and about whether respecting or promoting certain interests would impose a reasonable burden on others.<sup>29</sup> Besides, liberal neutrality, properly understood, requires, rather than precludes, this kind of moral evaluation. To acknowledge one's self-conception as valuable or to assign any normative value and weight to one's interest in murdering or pursuing hugely

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<sup>24</sup> Ibid, p. 774-776.

<sup>25</sup> Ibid, p. 775.

<sup>26</sup> Ibid, p. 775 n. 45

<sup>27</sup> Scanlon, 'Preference and Urgency' (1975), 72 J Phil, p. 655

<sup>28</sup> Dworkin, *Justice in Robes*, p. 114-115.

<sup>29</sup> For a similar criticism to Moller's account of rights to autonomy see Kyritsis 'Proportionality as a Constitutional Doctrine', p. 11-15.

expensive tastes is a moral position in itself and to call these *prima facie* rights, whose limitation requires justification, is certainly not a neutral position for a court to take.

On the other hand, if, as Moller argues, we employ moral reasoning at the balancing stage to discard such interests and preferences, what is the point of elevating them to the status of a right in the first place? Does it not detract from the force that we want rights to have in moral and legal discourse if they include –even *prima facie*- trivial, immoral or implausible claims and hold institutions accountable when frustrated?<sup>30</sup> Most crucially, if we do employ moral reasoning at the balancing stage, in order to assess the weight of various interests, then we have to accept that this should be a moral task all the way down: either interests and preferences have some independent and objective moral value or weight (i.e. independent from that conferred upon them by the agent) or not. Accepting that we need moral evaluation to determine their weight requires us to begin with such arguments in the first place.

The only way that one could circumvent this objection would be to argue that allowing 'definitional generosity'<sup>31</sup> in the first stage serves to ease the strain of political opposition in a society, by giving those who feel that their projects have been frustrated and their freedom curtailed an institutional, judicial explanation and justification. This mitigates their sense of loss and frustration.<sup>32</sup> That is, by providing a stage of review and explanation or justification of any interference with autonomy interests that individuals find important for their self-conception we do not give them independent moral weight, we only publicly acknowledge the importance they have for the individuals concerned. Although Williams might be right that in politics it is better to address our opponents with such generosity,<sup>33</sup> I believe the same does not hold for human rights adjudication. Because, both parties enter the realm of justice arguing about and seeking to establish whether a moral right or wrong has been done to the individual and not whether and how much a decision of compromise (such as is often the case in politics) affects some individuals.

Leaving aside the problems with the particular theory of rights that Moller develops, we may as well appreciate the benefits of a sophisticated analysis of proportionality as a structure that guides judges through the reasoning process about whether a policy does

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<sup>30</sup> For this point see also Ferraz, 'Poverty and Human Rights', pp. 591-594. Along similar lines also Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, ch. 4 and pp. 117-119 in particular.

<sup>31</sup> Tsakyrakis, 'Proportionality: An Assault on Human Rights?', p. 480.

<sup>32</sup> For this point also see Kyritsis who characterises it as a 'legitimation function' of the proportionality test, in the sense that it reassures both sides that their interests are given equal and careful consideration, thus making any loss suffered by one of the involved parties more palatable.

<sup>33</sup> Williams, *In the Beginning was the Deed*, p. 115-127. Williams's analysis is deeper than the institutional/legitimation argument mentioned above. It rests on certain assumptions about the nature of values and the possible conflicts between them that I discuss in Chapter 3.

(not) respect rights, or as a sort of checklist for all the points that need to be reviewed and justified.<sup>34</sup> More specifically, proportionality as a constitutional doctrine aims at effective and legitimate judicial protection of human rights and for this reason, it addresses various institutional concerns: concerns of clarity, transparency as well as concerns of proper institutional design such as the allocation of responsibilities between various branches of power.<sup>35</sup> For what it is, i.e. a diagnostic institutional tool, the proportionality test is justified if it actually serves these concerns and to the extent that it produces largely right outcomes.<sup>36</sup>

On the other hand, this institutional role and justification of the proportionality test is seriously depreciated if there is evidence in the courts' practice that it is misleading and produces a significant amount of incoherent or wrong outcomes. For, take the practice of the Court in deriving positive duties and socio-economic entitlements from civil and political rights. Although ground-breaking steps have been made in certain groups of cases in this field since the 1960s the Court has always been quite perplexed and incoherent when dealing with other groups of cases that appear to raise more complex resource allocation issues.<sup>37</sup>

Quite apart from the unattractive features that it has as a theory of rights, Moller's approach does not seem to fit as well as he suggests with the practice of the ECtHR. Moller may be right to identify a tendency in the practice of the ECtHR to recognize more rights, and to interpret existing rights more broadly, such as in positive obligations cases mentioned above. However, there is also growing restraint driven by the concern, widely shared by judges and governments, to limit the influx of cases with significant social and economic policy implications. It seems unlikely that a theory, which grants *prima facie* rights to all conditions of autonomy judged from a wholly subjective point of view and with no reference to principles of what is fair for one to demand of others, will help the Court to conduct the balancing exercise in an effective and coherent manner. True, Moller's account of autonomy interests can offer an expansive platform for rights-claims to socio-economic entitlements and rights with horizontal effect. Still, it would also need to provide a principled way of determining the reasonable burdens that may be imposed on others, in order to adjust the weight of competing interests and define their limits.

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<sup>34</sup> Kyrtsis, 'Proportionality as a Constitutional Doctrine', p. 19.

<sup>35</sup> *Ibid*, p. 17-18.

<sup>36</sup> For the argument that the proportionality test is a diagnostic institutional tool and the distinction between diagnostic and constitutive tests see G Letsas, 'The Scope and Balancing of Rights: Diagnostic or Constitutive?', in Eva Brems & Janneke Gerards (eds), *Shaping Rights: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press (2013), pp. 38-64.

<sup>37</sup> Such as the provision of health care, social security benefits and housing or the accommodation of the needs of people with disabilities. See my Chapter 2.

Because, without objective criteria or principles (independent of the preferences of the agent) about what duties or burdens it is reasonable to impose on others in the service of our interests, any balancing exercise is highly likely to be incoherent or even unfair. Although Moller acknowledges the necessity of this and offers an account of proportionality analysis that encompasses moral reasoning,<sup>38</sup> his theory does not clearly point to any such principles.<sup>39</sup>

For this reason, as well as for others that I will develop in the following paragraphs, I suggest that we need to turn to theories that better accommodate the idea of reasonable burden and fairness in the allocation of resources and opportunities. Specifically, we need to turn to theories of rights that are anchored in a broader theory of distributive justice, i.e. a theory that stipulates the resources and opportunities a government should make available to people it governs.<sup>40</sup> Our aim should be to incorporate certain distributive justice principles within a theory of rights, which would underpin our conception and application of proportionality as an institutional tool.

As I explained in the previous chapter, I will not turn to perfectionist theories, as I believe they are incompatible with the point and purpose of human rights. Also, in this section, I provided arguments against an approach, such as that suggested by Moller. I explained how this aims to circumvent the objections against perfectionism but suffers from other significant flaws as a theory of rights and lacks any reference to distributive justice principles. For all these reasons, I suggest that we had better turn to egalitarian theories, such as those of John Rawls and Ronald Dworkin. These theories stipulate that the only rights granted and duties imposed are those allocated under a fair distributive scheme of the society's available resources<sup>41</sup> and are grounded on an abstract moral right to be treated by the state with equal concern and respect.<sup>42</sup> The distinctive feature of such

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<sup>38</sup> Moller, 'Proportionality: Challenging the Critics', p. 716.

<sup>39</sup> To be sure, Moller, in his *The Global Model of Constitutional Rights*, offers a well-developed theory of balancing in four stages and four different types of balancing that operate as 'consecutive circles': autonomy maximizing, interest balancing, formal balancing and balancing as reasoning. This is definitely a move away from simplistic accounts of the idea of proportionality and towards structured moral analysis. However, I believe that Kyritsis is right to point out that it is not at all clear firstly, why this moral analysis does not apply at the first stage at all but has to come in a second wave and, secondly, what principles or objective criteria in particular will determine the relative weight of competing autonomy interests, in a way that transcends the first-person perspective. On this point, see Kyritsis, 'Proportionality as a Constitutional Doctrine', pp. 6-7 and 14-15.

<sup>40</sup> Dworkin, *Justice for Hedgehogs*, p. 2.

<sup>41</sup> In Rawls's terms, such a theory grants only those rights to individuals and places only such duties on others that are allocated under a fair system of social co-operation between free and equal citizens, see J Rawls, *Justice as Fairness: A Restatement*, (Belknap, Harvard, 2001).

<sup>42</sup> Dworkin, *Justice for Hedgehogs*. Various egalitarian distributive justice theories, such as prioritarianism, sufficientarianism and the capabilities approach, have been developed as variants or modifications of Rawls's or Dworkin's theories and as better interpretations of this abstract requirement to treat people with equal concern and respect and I will defend my preferred

liberal egalitarian theories of distributive justice is that they appeal to relational cooperative values such as fairness, equal concern and respect and reciprocity in justifying any claims to rights or duties.<sup>43</sup> What one can claim is determined after a fair distributive scheme is set up and not before or independently of it. The question of the precise content of a fair share, or a reasonable claim to resources is the subject of an ongoing debate in political philosophy. Nevertheless, Dworkin's abstract moral requirement that all individuals must be treated with equal concern and respect is widely considered as common ground between all plausible theories of distributive justice. Dworkin further analyses this moral requirement in his two principles of dignity: the state must show concern for the equal importance of the lives of all individuals but it must also respect each one's special responsibility for her own life. In order to understand the implications of this abstract moral requirement, we need to investigate the general fundamental features of a fair distribution of resources and of reasonable or fair shares to resources under such theories.

As I explained in chapter 3, equal concern and respect requires the state to treat as irrelevant or impermissible considerations such as sex, race, sexual orientation, religious or political beliefs, when it makes decisions or adopts policies that affect the distribution of resources. That is, unless they affect the distribution of resources or opportunities in a positive way, e.g. in order to protect vulnerable or disadvantaged individuals or groups. If an individual suffers disadvantage in the allocation of goods, resources or opportunities based on such grounds, the first principle of dignity is violated: the state enforces the external and hostile moralistic preferences of some individuals on others and denies them their ethical independence and their special responsibility for their life.

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interpretation at a later stage. Still, there is a common plateau that they all share and this is marked by Dworkin's two principles of dignity. In fact, Dworkin argues that even non-egalitarian theories such as utilitarianism begun as interpretations of this abstract egalitarian requirement but fail to provide morally attractive interpretations of it and violate the two principles of dignity that it entails. See also Letsas, 'Rescuing Proportionality', for the argument that the idea of proportionality is grounded on an interpretation of the abstract right to be treated with equal concern and respect.

<sup>43</sup> And not a-social absolutes such as need or wholly subjective criteria such as autonomy interests grounded on the self-conception of the agent. See S Meckled-Garcia, 'Giving Up the Goods: Rethinking the Human Right to Subsistence, Institutional Justice and Imperfect Duties', pp. 73-87, for the argument that social rights claims –or in our case, claims to resources in the context of civil and political rights- must be based on principles of distributive justice based on social values such as fairness or equality that determine fair shares and reasonable burdens. Meckled-Garcia convincingly argues that if such claims are made regardless of a social scheme governed by principles of fair distribution there seems to be no alternative way or principle for determining what a reasonable burden amounts to. As a consequence any such a-social claims are implausible as unreasonable or, as we could put it in the language of the ECtHR, disproportionate.

At the same time, equal concern and respect also imposes an obligation on the state to look out for and take into account any relevant moral considerations<sup>44</sup> and undertake action that is necessary in order to bring about a fair and equitable distribution of goods, benefits or opportunities, thus ensuring the 'equal worth'<sup>45</sup> of freedoms granted to all. Such relevant moral considerations could be the circumstances that place particular individuals or groups in a vulnerable or disadvantaged position, e.g. disability, poverty, immigration, illness, trafficking etc. Besides, even the characteristics mentioned above, i.e. sex, race, sexual orientation, religious or political beliefs, could be relevant considerations in designing policies to protect individuals or show concern, so that these features do not hinder individuals' ability to exercise their rights and freedoms. Of course, distributive justice theorists disagree about the circumstances under which these considerations are morally relevant. In addition, they disagree about what makes a distribution fair or equitable and therefore what is the precise content of rights and obligations as fair shares to this distribution. I will explore these issues later but for now I will briefly explain why I believe that liberal egalitarian theories of distributive justice appear to fit better with the practice of the ECtHR.

Taking a closer look at the practice of the ECtHR, we notice that, ever since its inception, the Court has always considered two principles as 'inherent' in the system of the Convention. For one thing, it regularly states that a search for a fair balance between various competing interests is inherent in the system of the Convention.<sup>46</sup> At the same time, it takes positive obligations to be inherent in an effective respect for ECHR rights.<sup>47</sup> Referring to the principles of proportionality and effectiveness, side by side, in all the relevant case law, the Court appears to me eager to address a twofold moral concern. Firstly, that the obligations we place upon the state in order to provide effective protection of an individual's interests must not place an impossible, unreasonable or disproportionate burden upon others or the state.<sup>48</sup> This is linked to the idea that we must be able to 'balance' or determine limits to rights and corresponding duties in a reasonable and coherent way

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<sup>44</sup> This is a more positive way of putting the point also made by Letsas who argues that equal respect and concern requires the state not to make any decision that will prevent it from taking into account morally relevant considerations.

<sup>45</sup> For the distinction between liberties and equal worth or fair value of liberties see Rawls, *A Theory of Justice*, n. 36, pp. 194-200, and his *Justice as Fairness: A Restatement*, (Belknap, Harvard, 2001), pp. 148-152, where he makes it clear that the idea of fair value applies to equal political liberties and that the difference principle is aimed at ensuring the equal worth (as much as possible) of other liberties. In Chapter 5, I discuss the relationship between Rawls's two principles of justice.

<sup>46</sup> In the famous *Belgian Linguistics Case* (1968) the Court noted that, alongside the principle of effectiveness, the Convention also implies 'a *just balance* between the protection of the general interest of the Community and the respect due to fundamental human rights *while attaching particular importance to the latter*' (my emphasis), see I(B), para 5.

<sup>47</sup> Since *Marckx v. Belgium* (1978) and in most positive obligations cases to date.

<sup>48</sup> This is exemplified in the famous *Osman v UK* and all similar cases that I discuss in Chapter 2.

and that claims cannot be absolute. Secondly, in trying to serve legitimate public aims and interests through its policies and decisions, the state should seek a fair balance: it must not place an excessive or unreasonable burden upon any individual rendering her freedom ineffective or meaningless.<sup>49</sup>

In light of this long tradition in the Court's jurisprudence, I take it that the judges and scholars' moral concern behind the idea of proportionality, especially in positive obligations cases, is linked to the idea of some kind of fair distribution of burdens and resources in society. In cases with socio-economic implications, such as many of the positive obligations cases, judges and scholars are conscious of the fact that a society's resources are (to a smaller or larger extent) scarce. For this reason, it makes sense for the ECtHR to seek out principles that define reasonable burdens and fair shares, in order to resolve the tension between competing claims to these resources. Similarly, it makes sense to acknowledge that neither individual nor communal claims must be based on absolutes but must be delineated by principles expressing relational, cooperative values, such as fairness or equality.

Viewed in light of such principles, the question of reasonableness or proportionality is primarily a question of fairness, rather than one of weighing or balancing, and not the other way around. It goes against the moral concern of those involved in this practice to claim that any outcome of ad hoc balancing will be deemed fair. Instead, there will be balance and proportionality, where there is fairness. To be sure, not many would suggest that the balancing or proportionality test should be carried out in a random and wholly unprincipled way. Still, only recently have some scholars begun to spell out the necessity and priority of moral principles and, in particular, principles of *fairness and equality*, as inherent in the moral point of this test.<sup>50</sup> So, to make best sense of the moral concern that

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<sup>49</sup> Such are the cases where the ECtHR found that the state had not struck a fair balance because the legitimate aim that the state pursued was placing an 'unreasonable or excessive burden upon the individual', e.g. when being divested of a benefit through a measure aimed at correcting of a previous mistake, which was legitimate but not imposed 'in good time and in an appropriate and consistent manner' as required by the 'principle of good governance' that the Court found to be important in the context of property rights (*Moskal v Poland*, (2010) 50 EHRR 22, para. 72-73). Similarly, the ECtHR found that a state had placed an 'excessive and disproportionate burden' upon the applicant by depriving him of his pension altogether because this was 'a total deprivation of his entitlements' and not just a 'reasonable and commensurate reduction' –although the Court noted, citing previous case law, that the Convention cannot be interpreted as entitling people of pension of a particular amount (*Asmundsson v. Iceland*, (2005) 41 EHRR 42, para 45). In another context, in *Sen v. Netherlands*, Application no. 31465/96, (21 December 2001), the Court reflected on the kind of choice that the applicants would be left with and found that 'to impose upon the parents the choice between severing the family life contact with their oldest child (in Turkey) or abandoning their position in Dutch society was a failure to establish a fair balance between the interest of the family and those of the state.' Of course, the question I press throughout this thesis is: what are the criteria or principles that can help us determine in a coherent and fair way what counts as excessive or disproportionate.

<sup>50</sup> See Webber, Ferraz, Tsakyrakis, Letsas, Kyritsis and Bilchitz, as above n. 8.

seems to underlie the idea of proportionality and balancing, we must remember that it could not be and is not meant to be a morally neutral, a utilitarian or a cost-benefit analysis device but, rather, that it aims to serve principles of justice, fairness and equality. This is particularly important to bear in mind when attempting to introduce the idea of balancing and proportionality in the field of social and economic rights or positive obligations and claims to resources in general, where the need for reference to distributive justice principles is even more pronounced than in negative rights claims to non-interference. Such cases raise complex moral questions about the fairness in the allocation of resources and demand an analysis of what amounts to a justified right-claim to a fair share in the society's available resources.

To begin with, we cannot and should not aim to substitute this distributive justice debate with a structured proportionality test. As I explained earlier, proportionality may function as an institutional tool that serves important institutional concerns by helping judges structure the analysis of the matters before them. However, appeal to the idea of proportionality also carries with it significant moral concerns of justice. Therefore, when applying the test we also need to draw on principles of fairness and equality, without which any balancing exercise is incapable of producing a coherent and fair assessment of the interests, rights, goals and burdens that appear to be in tension. In this light, those who argue that the debate about the minimum core content of social and economic rights –or claims to resources in our case- is secondary or outdated and that a structured proportionality test alone can help us determine the content of social and economic entitlements,<sup>51</sup> are misguided. In particular, they argue that we should not be consumed by the supposedly inconclusive theoretical debate about the minimum core content of social and economic rights but, instead, rely on 'a structured balancing test in order to enclose in the fluid, flexible content of social rights the demanding balancing acts regarding the social, economic, and fiscal policy.'<sup>52</sup>

In its best interpretation, this view's underlying concern is that the content of social and economic rights should be construed in light of and not independently of social and economic conditions and available resources. A preliminary observation is that this resource-dependence is not only due to practical or institutional reasons, such as the need

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<sup>51</sup> See X Contiades A Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Adjudication', pp. 660-686, who argue that the application of proportionality in the area of social and economic rights does not presuppose the existence of a minimum core content of social rights but offers a different approach to the question of their justiciability. They defend this position in their most recent debate with Bilchitz who argues for a minimum core theory in their 'Socio-Economic Rights, Economic Crisis and Legal Doctrine: A Reply to David Bilchitz', pp. 740-746.

<sup>52</sup> Contiades and Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Adjudication', p. 666.

to be realistic given social or economic crises or be respectful of the legislator's primary role in designing social and economic policies. We had better think of this resource-dependence as a requirement of justice: it ensures that we only grant those rights-claims to resources or impose those burdens that can be justified as fair shares under a scheme of fair and equitable distribution of the society's available resources. We need to refer to principles of fairness or equality, in order to construe the content of these fair shares and any corresponding rights and duties. Otherwise, we risk being arbitrary or unfair in the allocation of rights and benefits, duties and burdens in society. Of course, this is also true in the context of civil and political rights to the extent that they, too, entail claims to resources and positive obligations.

The structured form of the proportionality test may assist judges in applying principles of fairness and equality but only such principles can assign any normative weight to the competing interests and considerations and help us resolve the tension between them. In order to 'evaluate distributive policies' and decide whether lawmakers have made *'fair* choices in the way they have decided to interfere with social rights<sup>53</sup> it is not enough to look for less restrictive ways to pursue her legitimate aims. An investigation on the impact of the legislature's decisions on those who bear the burden of the limitations imposed on social rights<sup>54</sup> must refer to criteria about what is a fair, and thus reasonable, or unfair and thus excessive, burden. For, the lawmaker may have deliberated elaborately and openly and justified a measure as the least restrictive one. However, this may still be less than a fair share in an equitable distribution of resources or, at times, fairness may require a more restrictive measure in order to bring about an equitable distribution. Because she would need to refer to principles of fairness and equality, in order to take into account any morally relevant considerations or block any impermissible ones in the decision-making process.<sup>55</sup> So, fairness cannot be guaranteed unless we feed such principles into the proportionality test. These principles will be crucial in determining the content of claims to resources or positive obligations, as well as when we aim to check on the legitimacy of a political process, through which limit-setting decisions are made in the allocation of resources, i.e. determining the features that these processes must have if they are to treat

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<sup>53</sup> My emphasis. See Contiades and Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Adjudication', p. 673.

<sup>54</sup> *Ibid*, p. 674.

<sup>55</sup> *Ibid*, p. 685 where Contiades and Fotiadou claim that a structured proportionality test would guarantee fairness but they only refer to procedural aspects of the test and fail to acknowledge the need to feed such principles into the proportionality test. Along the same lines is Bilchitz's response to an attempt to use the doctrine of proportionality to determine the content of social and economic entitlements, either in times of economic crisis or not, in his 'Socio-Economic Rights, Economic Crisis and Legal Doctrine' and 'Socio-Economic Rights, Economic Crisis and Legal Doctrine: A Rejoinder to Xenophon Contiades and Alkmene Fotiadou', last section.

all those bound by the decisions fairly, and in a way that all those concerned can regard as legitimate.<sup>56</sup>

Minimum core content theories aim to function in this way but whether these theories actually offer a morally attractive approach to the justification, content and allocation of rights and duties is a matter that I will explore further in the following section. For now, I only want to note that, even if true, any criticism directed at minimum core content theories would merely prove that these particular theories are unconvincing or inappropriate and not that we should conduct the balancing that proportionality requires without reference to any theory or principles whatsoever. Instead, it only means that we have to look elsewhere. An institutional tool, such as the proportionality test, cannot offer substantive moral arguments, only provide a structure that could help practitioners frame their analysis.

## **2. The Minimum Core Approach**

An approach to the question of the content of claims to resources that has gained significant appeal in social and economic rights literature and human rights practice in recent years is that of a minimum core of rights or of minimum core obligations.<sup>57</sup> The central idea of this approach is that, if we could define this minimum core, then claims to resources or positive obligations would not be vague requirements or mere aspirations. A minimum core approach would help us specify, determine and adjudicate on claims to resources. As is often pointed out by those who advocate applying this approach in the context of social and economic rights, courts would not have to impose extensive obligations for the 'full realisation' of social and economic rights. They could immediately require the provision and protection of a minimum level of food, health, shelter or other goods and interests that are deemed of greatest importance or urgency and that government would need to prioritize over all other needs and goals and secure no matter the scarcity of resources.

This approach has been used extensively in the context of the International Covenant on Social Economic and Cultural Rights but some scholars are now suggesting introducing

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<sup>56</sup> For this point see S White, 'Social Minimum', *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Zalta Edward N. (ed.), available at <http://plato.stanford.edu/archives/fall2008/entries/social-minimum>. In the health-care context, this issue is explored by Norman Daniels and James Sabin, in 'Limits to Health Care: Fair Procedures, Democratic Deliberation and the Legitimacy Problem for Insurers', *Philosophy and Public Affairs*, Vol. 26, Issue 4, October 1997, pp. 303-350. See also, N Daniels and J Sabin, *Setting Limits Fairly* (2002)

<sup>57</sup> For an overview see K G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of a Content.', *The Yale Journal of International Law*, Vo.33: 2008, p. 112-175.

it in the context of the ECHR too, as a way to determine the content of social and economic entitlements and positive obligations.<sup>58</sup> The Committee on Economic, Social and Cultural Rights, which supervises the implementation of this UN Covenant, has explained that, although the Covenant provides for a progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various minimum core obligations of immediate effect to ensure the satisfaction of, at the very least, minimum essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education and must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>59</sup>

In constitutional law theory, there is a great similarity between this idea of a minimum core of rights and obligations and the argument about the inviolable core of civil and political rights. Most commonly, when referring to the metaphor of balancing, constitutional and human rights scholars and judges argue that the method of balancing is supposed to reach a decision, through which any limitations imposed will not violate the essential core of either of the competing rights.<sup>60</sup> Notice that, as I explained in the previous section, this structure implies that the minimum core content of rights is determined in advance and independently of any other considerations (moral, social, economic). According to this approach, other considerations become relevant for and may influence the determination of specific rights and obligations only at the second, limitations stage.

In the same vein, in the context of social and economic rights or claims to resources and positive obligations more generally, this approach is also linked to the idea that an inviolable and justiciable core content is determined independently of social and economic circumstances. This supposedly brings social and economic rights –at least their core content- at an equal standing with civil and political rights. Namely, the minimum core of both types of rights is supposedly determined independently of competing considerations, such as the demands of other individual interests or the general welfare and the state must make every effort to use all resources available to satisfy the essential minimum

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<sup>58</sup> I Leijten, 'Defining the Scope of Economic and Social Guarantees in the Case Law of the ECtHR', in Brems & Gerards (eds), *Shaping Rights: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, pp. 109-136, esp. p.125-136. For the same approach in another international human rights concept and in socio-economic rights more generally see Bilchitz, 'Socio-Economic Rights, Economic Crisis and Legal Doctrine' (2014).

<sup>59</sup> General Comment No. 3, 'The nature of States parties' obligations', (Fifth session, 1990), U.N. Doc. E/1991/23, Annex III. Various national constitutional courts around the world and other regional courts for the protection of human rights have followed similar approaches. For an overview of how this has been applied in practice see Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory', in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008).

<sup>60</sup> For an analysis of this approach in German Constitutional Law see Alexy, *A Theory of Constitutional Rights*.

obligations to these basic goods or needs as a matter of priority. Different theorists who espouse minimum content theories of rights justify the minimum core of goods to be secured or needs to be satisfied on the basis of different purposes: as a minimum necessary to enable agency, to secure a minimum worthwhile life, a minimally decent life, or the minimum necessary to be able to be a holder of other rights.<sup>61</sup> Many find this approach to the content of claims to social and economic entitlements appealing, as they believe that it can 'give them teeth':<sup>62</sup> they hope that it can provide a fair, more determinate and easily justiciable content to social and economic rights and claims to resources.

However, a minimum core approach fails to offer an effective and morally attractive theory or set of principles for determining the content of claims to resources and positive obligations in the ECHR. To begin with, a first problem is whether we are able to assume that the resources available within most of the ECHR Member States are enough to guarantee the provision of certain goods or conditions or the satisfaction of certain needs at a minimum level as the minimum core content of the ECHR rights. A first response could be that none of these countries is so poor as to raise an objection of such an extreme scarcity of resources that makes it impossible to satisfy baseline rights. But, surely, this depends on what expenditure precisely this minimum level requires.

Suppose we distinguish between two levels of protection. We could then set the minimum level to cover merely a first level of 'survival needs'<sup>63</sup>, in which level we could grant unconditional rights and obligations to the satisfaction of survival needs, irrespective of any consideration of responsibility for one's inability to meet them. Although we may be able to argue that most Member States to the ECHR have enough resources to reach this level, protection would be restricted to too little and we would face the following problem: many of the claims to resources that regularly reach the ECHR would be dismissed as moving beyond this threshold or minimum core. Consider examples such as

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<sup>61</sup> See criticism of this approach in Meckled Garcia, 'Giving Up the Goods: Rethinking Human Rights to "subsistence", Institutional Justice, and Imperfect Duties', with reference respectively to: A Gewirth, *Human Rights: Essays on Justification and Applications*, Chicago: University of Chicago Press, 1982, 20; J Griffin, *On Human Rights*, OUP, 2008; T Pogge, *World Poverty and Human Rights*, 2nd ed. 54; A Buchanan, *Justice, Legitimacy and self-determination*, New York: OUP, 2004, 128; Shue, *Basic Rights*, p. 18.

<sup>62</sup> Bilchitz, *Poverty and Fundamental Rights*, and more recently in his 'Socio-Economic Rights, Economic Crisis and Legal Doctrine'. Some hope that a 'consensus approach' to the minimum core rights or obligations, i.e. what most states seem to consider essential social and economic guarantees, can help us determine their scope without entering the normative discussion about what people are entitled to, see, Leijten, 'Defining the Scope of Economic and Social Guarantees in the Case Law of the ECtHR', p. 132-133, citing Young (as above) and others in this respect. This view is implausible for reasons I explain in the text throughout this thesis: the question of what claims to resources are justified under the ECHR is unavoidably a question of political morality and distributive justice, an essentially normative matter that is only circumvented and not resolved through proposals such as this.

<sup>63</sup> Bilchitz, *Poverty and Fundamental Rights* (2007), esp. pp. 94-97 where he discusses the role and limits of considerations of responsibility with regards to what people are entitled to.

those I discussed earlier in chapter 2, of those who argue that respect for their private and family life require a robotic arm<sup>64</sup>, or access to public beaches<sup>65</sup>, public buildings<sup>66</sup> or polling stations.<sup>67</sup> However, notice that, in most of these cases, the Court acknowledges that a human rights issue may be at stake but defers the judgment about how to define its precise content to the margin of appreciation of the national authorities –due to the lack of a principled method about how to determine such questions.

On the other hand, if we set the threshold too high to also cover basic freedoms and 'sufficient resources' that provide the enabling conditions for individuals to achieve a 'wide variety of goals'<sup>68</sup> then the gap is too wide between conditional and unconditional claims to those freedoms or resources.<sup>69</sup> To bridge that gap we will need to decide whether these claims can counterbalance conflicting considerations and yield unconditional determinate rights to certain resources. Now, if, in order to make such difficult decisions, we turned to a balancing method, such as that used in the context of the proportionality doctrine examined earlier, we could not reach any determinate answers unless we relied on a principle about what is a fair share of resources for people to demand from others.

Therefore, a minimum core approach would also need to turn to the question of a fair or equitable distribution of resources and this is where its problem of justification begins. In particular, following the minimum core approach, the justification and priority of rights and obligations is exclusively based on arguments about the importance of certain interests, needs or goods and independently of any argument or principle about a fair or equitable distribution of resources and burdens in society. I will briefly explain why this principle is morally relevant and necessary and why justifying claims to resources independently of it is a problem.

Although most of us feel sympathy for those who lack such important and basic resources, we would not feel comfortable with a political decision to re-direct a significant amount of valuable resources to the satisfaction of those needs of some individuals, without inquiring at all, about how those who are worst-off ended up in this position. When thinking this way, we actually locate the problem with this approach in a doubtful assumption, on which it rests. In particular, the assumption that it is inherently unjust for people to lack these resources irrespective of any personal responsibility they may have for how they ended up lacking those resources and irrespective of how much it is

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<sup>64</sup> *Sentges v. The Netherlands*

<sup>65</sup> *Botta v. Italy*

<sup>66</sup> *Zehmalova and Zehnal*

<sup>67</sup> *Molka v Poland*

<sup>68</sup> Bilchitz, *Poverty and Fundamental Rights* (2007), pp. 64-65.

<sup>69</sup> Ferras, 'Poverty and Human Rights', pp. 590-594. The same applies to Moller's and Alexy's account of rights as I discuss in the text.

reasonable to burden others in order to compensate for that disadvantage. The classic illustrative example is that of Aesop's fable of the Ant and the Grasshopper: should we take away resources from those who have worked and contributed to the production of resources in order to satisfy the basic needs of those who denied to work and contribute? Of course, there is a great philosophical discussion around the distinction between choice and circumstance. I will return to this distinction and the relevant debate about the plausibility and role that individual responsibility should play in the distribution of resources in the following chapter. For now, I only wanted to clarify our objection: what we object to is not really that this approach defines a minimum but that it determines and justifies it based on a dubious assumption.

To be sure, we are often inclined to think that individual behaviour and responsibility does not influence whether and how we protect rights such as the right to freedom of expression, thought, conscience, religion, the right not to be tortured or enslaved etc. We assume that we ought to respect and protect these rights irrespective of any expectation of reciprocity or dependence upon the overall behaviour or responsibility of the individual concerned.<sup>70</sup> Still, as I argued in the last section of chapter 3 of my thesis, on closer inspection, and following an integrated account of liberty and equality, all rights and freedoms are determined in light of the demands of equality. Therefore, even in the case of rights such as those mentioned above, we do take into account the demand of equality to respect the moral rights of others; in this sense, before granting those rights we consider whether the behaviour that claims protection will impose excessive cost for other individuals or impair their moral rights and equal standing.

For instance, we do not consider the claim not to have one's religion criticized as falling within the right to freedom of religion, because that would significantly impair the right of others to freedom of expression. For the same reason, we believe that the right to private life and the development of one's personality, as well as the right to freedom of expression, would be meaningless, if we restricted it on the demand of others not to be shocked or provoked by the appearance, actions or words of others. Of course, we protect the right to one's image and personality and exclude defamation from the ambit of the right to freedom of expression. As for the right to be free from torture and inhuman and degrading treatment, notice that the ECtHR sets a quite high threshold for classifying an interrogation technique, police action, treatment by public officials or those that are under their control and supervision or for the conditions of life or detention in the care of public authorities. Any action or inaction below that threshold is not protected under Art. 3 of the ECHR (although it may fall under the right to life or bodily integrity or the respect for

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<sup>70</sup> Ferraz, 'Poverty and Human Rights', p. 595.

private and family life) and is considered an acceptable compromise required, in order to show due respect and concern for the rights of others. In other words, interrogation techniques that do not cross this threshold but are still quite pressing are deemed necessary to protect the rights of others or for the investigation and prevention of crime. Similarly, uncomfortable prison conditions would be deemed acceptable, if they reasonably correspond to the economic conditions of the state. Following this line of reasoning, principles of fairness or equality will determine what should fall below this threshold of inhuman and degrading treatment and outside of the ambit of the rights discussed above, taking into account what is necessary for the protection of (and the essential content of) the rights of others. In the case of claims to resources and positive obligations in particular, the demand of equality is to claim and receive only those resources that one is entitled to under a fair distribution of resources that also somehow accommodates people's responsibility for their choices.

In the previous paragraphs, I aimed to show that it is misleading to argue that civil and political rights are regularly interpreted in isolation from the demands of the values of fairness or equality. No rights and freedoms (negative or positive, civil and political or social and economic) have any minimum core content that is determined irrespective of relational values of social co-existence and co-operation, such as fairness and equality. The idea of responsibility and a concern about the cost of our choices to others is central to both types of rights. Besides there may be another way to justify minimum claims to goods and resources, i.e. through an interpretation of the values of fairness and equality that accommodates the idea of individual responsibility. For instance, a claim to provide and protect certain minimum core socio-economic rights or entitlements, as the essential preconditions for the exercise of civil and political rights, could be based on a presumption of unfairness in the distribution of resources in a society.<sup>71</sup> In this way, individual responsibility is not deemed irrelevant in a discussion about the content of these entitlements. To the contrary, it is considered morally relevant to the extent that it is impaired when by the unfair circumstances that people find themselves in. The difference is significant and should be reflected both in how we justify claims to resources and positive obligations but, also, in the way we determine their content. I will return to this in Chapter 5 but in the last section of this chapter, I examine the capabilities approach, an alternative theory that could be employed to determine the content of claims to resources and positive obligations.

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<sup>71</sup> Ferraz, 'Poverty and Human Rights', p. 602. I develop this point further in Chapter 5.

### 3. The Capabilities Approach

Within the debate about the 'currency of egalitarian justice',<sup>72</sup> or else, the debate about what an egalitarian state should aim to equalize people in, Amartya Sen has argued that we should aim to measure and improve people's well-being by attending to their 'capabilities to function'. In particular, for the 'capabilities approach', as it is now widely known, the state's egalitarian action must turn to a more inclusive conception of the well-being of individuals. Sen argued that, unlike other welfarist theories, the focus of egalitarian concern should not merely be the maximization of happiness or desire or preference satisfaction.<sup>73</sup> He identified the flaw of these theories in that they are overly sensitive to interpersonal variability. He argued that they make the task of identifying which preferences or desires should matter and be satisfied a highly subjective task: all kinds of preferences, either reasonable and modest or extravagant, will be equally relevant for the purposes of distributive justice and for grounding claims to resources.<sup>74</sup> As an alternative to this, he argued that things other than happiness or preference satisfaction matter fundamentally for people and that our understanding of a person's well-being must also encompass the 'functionings' that people can achieve. These are:

'beings and doings [which] ...can vary from such elementary things as being adequately nourished, being in good health, avoiding escapable morbidity and premature mortality, etc., to more complex achievements such as being happy, having self-respect, taking part in the life of the community, and so on.'<sup>75</sup>

It is crucial to note here, that a point that differentiates the capabilities theory from theories of welfare and gives it much of its appeal is that it somehow accommodates the idea of individual responsibility for the outcome of one's life and for the cost of her choices. Specifically, people have justice claims to the capabilities that enable them to achieve functionings but no claim that others help them to actually achieve these functionings if they fail or neglect to do so.<sup>76</sup> The state may have positive duties and people may have corresponding rights to the capabilities as means for achieving the ends, i.e. the functionings, but not to the functionings themselves. Therefore, the state does not have

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<sup>72</sup> See GA Cohen 'On the Currency of Egalitarian Justice', in (1989) *Ethics* 99, pp. 906-944.

<sup>73</sup> A Sen, *Inequality Re-examined*, (Oxford University Press, 1992) and his *Development as Freedom*, (Oxford University Press, 1999)

<sup>74</sup> Sen, 'Well-Being, Agency and Freedom: The Dewey Lectures 1984', *The Journal of Philosophy* 82: 169-221. For this criticism to welfarist theories see also: Dworkin, *Sovereign Virtue*, ch.1, TM Scanlon, 'The Moral Basis of Interpersonal Comparisons' in *Interpersonal Comparisons of Well-Being*, in (eds.) J Elster and JE Roemer, (Cambridge University Press) p. 17-44.

<sup>75</sup> Sen, *Inequality Re-examined*, p. 39.

<sup>76</sup> For this point see J Wolff, 'Equality: The Recent History of an Idea', (2007) *Journal of Moral Philosophy* 4

any positive duties to facilitate their attempts to achieve functionings and people do not have any such corresponding rights or additional claims to resources.

Following this theory, we may suppose that applicants to the ECtHR, such as *Sentges*, *Botta*, *Zehnalova and Zehnal* or *Molka*, would have a claim, respectively, to a robotic arm, access to public beaches, public buildings and polling stations for people with impaired mobility.<sup>77</sup> They would have justified claims to these capabilities that enable them to enjoy a private life, establish relationships with others and participate in the life of the community but not to be facilitated in the actual enjoyment or development of these functionings. This, on first sight, seems like a plausible and attractive theory for determining the content of claims to resources and positive obligations in the context of the ECHR. For instance, it may be true that many of the ECHR provisions that are relevant to the protection of labour rights (such as those of Art. 4, 8 and 10 and 11), can be analysed in light of the capabilities approach. In light of this theory, they can be understood as aiming to secure key capabilities, such as the capability of 'being able to work as a human being, exercising practical reason and entering into meaningful relationships of human recognition with other workers' or the capability to have 'control of one's political and material environment',<sup>78</sup> such as the work environment, through having a meaningful right to voice at work (including strong protection of collective bargaining, freedom of association and rights to strike).<sup>79</sup> This approach appears to have the benefit that it does not confine the state's concern to the tangible benefits that are derived from work, e.g. income, but also requires positive action to secure intangible benefits, such as the development of one's identity, personality and social relationships through the work environment.<sup>80</sup> Supposedly, these benefits of work are best captured and served by capabilities equality because this theory is not solely concerned with income and resources but also with actual freedom and opportunities.<sup>81</sup> The view that equality theories that focus on resources are not concerned with actual freedom and real opportunities or circumstances is based on a common misinterpretation of these theories and I will argue against it in Chapter 5 of this thesis.

For now, although I do accept that the capabilities approach expresses an important concern, when it advocates for a proactive role of the state to secure real freedoms and

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<sup>77</sup> See discussion of the relevant cases in Chapter 2 of this thesis.

<sup>78</sup> M Nussbaum, *Women and Human Development* (Oxford: Oxford University Press, 2000), p. 79-80.

<sup>79</sup> For an analysis of labour rights may be integrated into ECHR provisions through the capabilities approach see V Mantouvalou, 'Labour Rights in the European Convention on Human Rights, An Intellectual Justification for an Integrated Approach to Interpretation', in *Human Rights Law Review*, (2013), pp. 529-555.

<sup>80</sup> *Ibid*, p. 550-551.

<sup>81</sup> *Ibid*, p. 551.

opportunities I will highlight the reasons why I believe it is nonetheless unattractive as a theory of distributive justice and rights.

To begin with, the capabilities theory may be criticized with similar arguments such as those directed against welfarist theories. Despite Sen's attempt to argue otherwise,<sup>82</sup> Dworkin is right to point out that an account of human capabilities and functionings based on this theory necessarily suffers, to a certain extent, from the problem of subjectivism, as it relies on welfarist notions and is sensitive to interpersonal comparisons on various aspects of well-being.<sup>83</sup> Notice that Sen has not provided in his theory any specific list of capabilities that the egalitarian concern should focus on or any way to assess their relative weight that would be independent of people's views of what contributes to well-being. To the all-important question of which capabilities should be the focus of a proactive egalitarian state and the basis for claims to resources, the state will respond that we have obligations to secure those capabilities that are necessary to achieve various functionings, such as 'being happy, having self-respect, taking part in the life of the community'<sup>84</sup> or to enter into meaningful relationships of human recognition with others. A capabilities theorist would note that all egalitarian theories must ultimately rely on such welfarist notions. For instance, we seem to assess the significance of disability or poverty with reference to what choices or opportunities they deprive us of and then seek to remedy or compensate for them accordingly.

This is partly true but not an accurate conclusion, at least for Dworkin's equality of resources, as I will develop it in Chapter 5. As I explained in Chapter 3, the abstract obligation to treat all individuals with equal concern about the morally arbitrary circumstances that they find themselves in and bear no moral responsibility for, relies on arguments about what these circumstances deprive individuals of. However, these arguments are significantly different from those that figure in a capabilities theory. They are based on what choices individuals would have had in the distribution of resources were circumstances *more nearly equal* and not based on what choices they would have had in a distribution of resources that aims to secure a particular outcome or effect, which relies on welfarist notions and ideals. The first argument is deontological and agent-relative and has to do with the kind of *treatment* of individuals in the distribution of resources and the distribution *per se*, while the latter is agent-neutral and points to a particular desirable *outcome or effect* of a distribution of resources.<sup>85</sup> The connection between circumstances

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<sup>82</sup> See generally Sen, *Inequality Re-examined*, pp. 36-38 and more recently in his *The Idea of Justice*, p. 207.

<sup>83</sup> See Dworkin, *Sovereign Virtue*, ch. 7, esp. p. 301-303 and *Justice for Hedgehogs*, p. 476-477.

<sup>84</sup> Sen, *Inequality Re-examined*, p. 39 and Nussbaum, *Women and Human Development*, p. 79-80.

<sup>85</sup> The difference is significant, although I do believe that the outcome of a distribution may be relevant in some way: certain outcomes may indicate that there is an injustice in treatment. See my

and welfarist notions in a welfarist or a capabilities approach is necessary, whereas any such connection in the context of a resourcist theory is not necessary but merely incidental. In support of that conclusion, notice that, under a theory of equality of resources, the level of compensation for these circumstances will be determined through a prudent insurer test, whereby we will have to assume whether and how much a prudent individual would have chosen to insure herself for the risk of facing particular circumstances. In this test, nothing is pre-determined as a disadvantage, let alone one of particular weight: rather, it is a moral, interpretive (and secondarily empirical) question whether in the particular conditions pertaining in a particular community an average prudent person would have deemed some (and which) circumstances as causing disadvantage and to what extent.<sup>86</sup>

Now, I take it that no capabilities theorist would want to concede that, in order to avoid the problems common with welfarism that are discussed above, equality of capabilities actually aims to secure those personal resources that are necessary for various functionings. Recall that Sen has developed his theory as an alternative and distinct from primary goods (Rawlsian) and resourcist (Dworkian) theories that focus, as he claims, in a 'fetishistic' way on primary goods or resources as means rather than on the supposed actual freedom that one can enjoy with them. Therefore, it seems to me right that any such move would cause a capabilities theory to collapse into equality of primary goods or resources: as Dworkin argues, understood in this way, capabilities are part of what he describes as personal resources and therefore within the focus of egalitarian concern in his theory too.<sup>87</sup> Of course, this may not be such an unattractive combination after all and I discuss it later in Chapter 5. However, it means that a resources theory is doing the work here, rather than a clearly distinct capabilities theory.

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discussion in Chapter 3. On the difference between agent-neutral and agent-relative arguments as the basis of rights see T Nagel, 'Personal Rights and Public Space', 24 (2) *Philosophy and Public Affairs* (1995).

<sup>86</sup> It is for this reason that Dworkin argues that the prudent insurer test in the context of the hypothetical insurance device should take into account the public opinion before rationing decisions are made: because rationing should not just reflect cost-benefit calculations but also the public's sense of priorities: in order to determine whether an average prudent insurer would have insured and at what level. See Dworkin, *Sovereign Virtue*, p. 318.

<sup>87</sup> Dworkin, *Sovereign Virtue*, ch. 7, esp. p. 301-303 and E Kelly, 'Equal opportunity, unequal capability' in *Measuring Justice. Primary Goods and Capabilities*, (Cambridge University Press, 2010) who argues that capabilities theory collapses into equality of primary goods. On the point whether these theories are indeed distinct see the exchange between Dworkin and Williams who argues that Sen's capabilities theory is actually distinct from equality of resources on the basis that it is more sensitive to and responds differently to social contingencies that matter for equality and attaches greater importance to individuals' evaluation of their own circumstances. See A Williams, 'Dworkin on Capability', 113 *Ethics* (October 2002), 23-39 and R Dworkin, 'Sovereign Virtue Revisited', 113 *Ethics* (October 2002), p. 136-140. I believe his objection is unconvincing but it is beyond the scope of my argument to discuss this here. I give some reasons against such an objection later in Chapter 5, when I examine certain misconceptions of Dworkin's theory of equality of resources.

An alternative move would be to confine the capabilities theory, and a corresponding account of rights and claims to resources and positive obligations, to securing the minimum capabilities that supposedly both primary goods and resourcist theories deem necessary for the moral powers of an autonomous person or personal responsibility, respectively. True, in order to hold people responsible for the outcome of their lives, we must show concern for the essential conditions for choice. However, if we really hold this to a minimum then it will cover too little and will not capture a significant range of circumstances that we normally think of as disadvantageous and worthy of some form of remedy. On the other hand, if we wish to argue for rights to capabilities above that threshold or if we make the idea of essential conditions for responsibility over-inclusive, then we run the risk of subjectivism and perfectionism, which is the other major problem with capabilities theory. Sen's approach greatly suffers from these two flaws, because it is underspecified as to which capabilities matter, what their relative weight is and what level of priority or urgency should be assigned to them.

Yet another alternative would be to develop an approach with a supposed universal appeal, such as that offered by Martha Nussbaum, who argues for an objective list of basic, key capabilities.<sup>88</sup> This alternative faces the problem of perfectionism, though: any list of key capabilities is unavoidably justified on a particular conception of what the good life consists in –as broad and inclusive as we may construe it. In fact, it seems that if we construe it in very broad terms, it will be too abstract or too subjective to be of any use. On the other hand, if we attempt to narrow it down, we can only do so guided by the only criterion that is available to this theory: namely, a particular conception of well-being. For reasons that I developed in Chapter 3, when I was discussing perfectionism and the abstract ideal of equal concern and respect, resting on a particular conception of well-being would violate the principle of special responsibility, as it could impose on some individuals a distribution of resources and opportunities based on the ethical values and beliefs of others. This means that some could either be prevented from making certain choices of ethical foundation for themselves or that they would be denied assistance or compensation for choices they claim that they should have had. As Dworkin's puts it: 'it doesn't follow from the fact that sensible people value resources as means to better lives that government should aim to make people equal not in resources but in the goodness of their lives. ... [A]ny such program would impair personal responsibility.'<sup>89</sup>

Besides, even if we conceded to perfectionism and used such a list of capabilities as a basis for determining what individuals can claim as fair shares in a just distribution of

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<sup>88</sup> M Nussbaum, *Creating Capabilities. The Human Development Approach*, (Oxford: Oxford University Press, 2011), p. 23-33.

<sup>89</sup> Dworkin, *Justice for Hedgehogs*, p. 480, note 13.

resources, the project of assessing the personal circumstances and level of capabilities of all individuals by official state agencies or courts seems implausible and potentially offensive. It would require a detailed assessment of an immense amount of personal, sensitive data, managed by a large administrative bureaucracy and could still fall short of accomplishing an equitable outcome.<sup>90</sup> To this Arneson responds that it is better than nothing and develops a prioritarian account for a capabilities theory but the merits of this theory aside, it starts off with a flawed premise: that there is no alternative egalitarian theory that can perform this task in a less complicated or stigmatizing way.<sup>91</sup> As I will argue in the following chapter, this is based on certain misinterpretations of Dworkin's equality of resources and his hypothetical insurance device.<sup>92</sup> I will turn to this shortly but, before I close this section, I wish to draw attention to the fact that, despite its problems, the capabilities theory expresses a very important concern that is central to all egalitarian theories and has contributed to its great appeal and recognition. This is the concern about a proactive human rights ethic and it may be wise to incorporate this into any other theory that we find more attractive and workable.

To be sure, it is difficult to promote a proactive human rights ethic unless we also suggest a fair and feasible way of determining the content of rights and corresponding obligations. In other words, as I have stressed throughout this thesis, state authorities could only adopt the positive measures necessary for the effective protection of human rights, if they have a workable method for identifying their content, i.e. which circumstances constitute an unfair disadvantage, which circumstances leave some people with less than a fair share and which require special concern. The capabilities approach assigns a very proactive role to the state by recognizing that all entitlements entail affirmative tasks with respect to people's capabilities<sup>93</sup> but, as I argued in the previous paragraphs, we have good reasons to believe that focusing on equalizing people in their capabilities to function contradicts central liberal egalitarian principles. Furthermore, an interpretation of this theory that suggests a specific list of capabilities may offer judges some guidance. However, a specific list of capabilities could also pose significant difficulties, e.g. with respect to measuring their weight and importance and prioritizing them or demarcating claims based on them in relation to other individual or communal goals. Still, the work of capabilities theorists in identifying the plurality and complexity of human needs and forms

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<sup>90</sup> T Pogge, 'A Critique of the Capability Approach', in H Brighouse and I Robeyns (eds.), *Measuring Justice: Primary Goods and Capabilities* (Cambridge: Cambridge University Press, 2010), p. 51.

<sup>91</sup> R Arneson, 'Two cheers for capabilities' in *Measuring Justice. Primary Goods and Capabilities*, p. 118-122.

<sup>92</sup> On this point see also Pogge, 'A Critique of the Capability Approach', p. 44-48.

<sup>93</sup> Nussbaum, *Creating Capabilities – The Human Development Approach*, p. 65.

of disadvantage, may offer complementary insights that another liberal egalitarian theory of distributive justice, and an account of claims to resources and positive obligations based on it, can incorporate.<sup>94</sup>

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<sup>94</sup> This suggestion comes from an advocate of the capabilities approach, see I Robeyns, 'The Capability Approach in Practice', (2006) 14 *The Journal of Political Philosophy*, Number 3, p. 351-376.

## CHAPTER 5

### CLAIMS TO FAIR CAPABILITIES THROUGH EQUALITY OF RESOURCES

#### Introduction

Throughout this thesis, I have argued that the problem that claims to resources and positive obligations pose for the ECtHR is primarily a problem about their content and, therefore, related to distributive justice questions. In the previous chapter, I assessed the relevance and merits of the doctrine of proportionality and of two theories of distributive justice that have been employed widely in the context of human rights theory and practice, in search for a principled framework for the ECtHR to determine the content of and adjudicate between competing claims to resources.

I explained that the widely used proportionality and balancing tests could serve as institutional tools that assist judges to structure their analysis and assessment of the complex matters before them. Moreover, I highlighted the moral concerns underlying the idea of proportionality and argued that, in order for it to serve its institutional role effectively, it would have to be supported by relational principles of distributive justice, such as fairness and equality. Furthermore, I argued that the minimum core approach downplays the significance and role of individuals' personal responsibility for choice and, therefore, treats as unfair distributions that are not necessarily (inherently) unfair. Finally, I explained that the capabilities theory suffers from the following significant flaws. It suffers from the flaw of subjectivism, if it takes personal preferences as relevant to the distributive justice question of which capabilities should be secured equally to all and at what level. On the other hand, if we try to avoid subjectivism by drawing up a list of capabilities that are supposedly universally shared by all human beings, we run the high risk of perfectionism and paternalism. Despite these problems, I argued that the capabilities approach has an important and interesting feature that makes it appealing to human rights theorists and international organisations: it puts the focus on what individuals can actually do within the spheres of freedom that are granted to them and calls for a proactive role of the state in securing these capabilities.

In this chapter, I will argue that concern about the actual circumstances that individuals find themselves in is also central to Dworkin's theory of equality of resources. Moreover, I will suggest that his theory is more convincing and morally attractive than the ones examined earlier, as it shows enough concern for mitigating the impact of morally arbitrary circumstances in what share of resources people get in life but also accommodates the idea of individual responsibility for choice, better than any other theory. In particular, I will explore how Dworkin's equality of resources is shaped in light

of his two principles of dignity and how it accommodates both concern for the circumstances that individuals find themselves in and respect for their individual choices and personal responsibility for the outcome of their lives. I will then develop and justify an interpretation of Dworkin's theory of distributive justice in a way that endorses the appealing features of the capabilities theory (leaving aside its flaws) and uses them to facilitate the application of the theory of equality of resources to the non-ideal, real world context of human rights adjudication. I will argue that this is the best starting point for framing plausible and fair claims to resources and positive obligations in the context of the ECHR.

### 1. Overview of Dworkin's Equality of Resources

Dworkin's theory of distributive justice is based upon the same foundation as other liberal egalitarian theories, Rawlsian or welfarist: namely, respect for the 'common humanity' of people, or their 'equal objective moral worth' and concern to mitigate the impact upon them of their 'culpable' environments<sup>1</sup> or their natural endowments and circumstances as all egalitarians refer to them. In fact, Dworkin argues that no plausible political theory and society can disregard the fundamental right of all individuals to be treated with equal concern and respect: he claims that they are all egalitarian, in the sense that they are all premised upon different interpretations of this abstract ideal, some more plausible and attractive than others.<sup>2</sup> In Chapter 3, I explained how Dworkin further develops this abstract moral principle into two principles of dignity: the principle of the equal objective moral worth and importance of each individual's life and the principle of personal responsibility of each individual for making the ethical choices that bring success and value in her own life (the principle of ethical independence). In Chapter 4, I highlighted the reasons why the three most popular approaches to the distributive justice questions in the context of claims to resources and positive obligations fall short of or fail to respect adequately these two principles of dignity. In this section, I will draw attention to and reinforce the special importance that Dworkin places on responsibility for choice and its role in the distributive justice theory that he develops, namely, equality of resources.

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<sup>1</sup> See the famous essay by B Williams, 'The Idea of Equality', in *Philosophy, Politics and Society*, 2<sup>nd</sup> series, ed. P Laslett and W G Runciman (Oxford: Blackwell, 1962). See also S Guest, *Ronald Dworkin*, 3<sup>rd</sup> edition, (Stanford University Press, 2013), p. 144-148.

<sup>2</sup> W Kymlicka, *Contemporary Political Philosophy, An Introduction*, (2<sup>nd</sup> Edition, Oxford University Press, 2002), p. 3-4.

*The central importance of responsibility for choice*

So far, I have argued that claims to resources and positive obligations before the ECtHR raise complex distributive justice questions. In particular, I explained that, when we seek to determine what principles must govern the distribution of goods, resources, benefits, burdens and obligations, we should better turn to relational values such as fairness and equality.<sup>3</sup> Following this, a superficial and hasty assumption would be that the value of freedom has no role to play here: in this realm, any claims to freedom would seem to conflict with, rather than complement, the aims of social justice, fairness and equality.<sup>4</sup> Contrary to this widely held belief in legal and political philosophy, I developed and reinforced, in Chapter 3, Dworkin's integrated account of the values of freedom and equality. I will follow up on this discussion here, in order to defend the implications of this moral and political outlook for a theory of distributive justice: freedom has an integral role within a theory of distributive justice alongside and not in competition with the other relational values mentioned above.

In fact, the idea that freedom and responsibility for choice should have an important role within an egalitarian theory of distributive justice has its roots in Dworkin's criticism of Rawls's two principles of justice. Rawls develops an ideal theory of justice starting from a thought experiment. He describes an 'original position', where people are required to choose principles of justice for their social institutions behind a veil of ignorance about their natural endowments, gender, age, ethnicity, race, income and wealth, their comprehensive doctrines as well as the political and economic system and circumstances of their society.<sup>5</sup> Rawls assumes that, under such conditions, reasonable citizens would reject utilitarianism because it does not respect the 'distinctness of persons' and they would most likely choose the following principles:

First Principle: Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; (the liberty principle)

Second Principle: Social and economic inequalities are to satisfy two conditions:

- a. They are to be attached to offices and positions open to all under conditions of fair equality of opportunity;
- b. They are to be to the greatest benefit of the least-advantaged members of society (the difference principle).<sup>6</sup>

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<sup>3</sup> Earlier in Chapter 4 I justified my position that we should better turn to egalitarian rather than utilitarian or libertarian theories to look for such principles.

<sup>4</sup> For a discussion of these arguments, see Chapter 3 of this thesis.

<sup>5</sup> J Rawls, *A Theory of Justice*, (Revised Edition, Harvard University Press, 1999) and his *Justice as Fairness: A Restatement*, (Belknap, Harvard, 2001).

<sup>6</sup> Rawls, *Justice as Fairness: A Restatement*, p. 42-43.

It is not my aim here to discuss in length Rawls's theory but only to draw attention to the relationship between the 'liberty principle' and the 'difference principle', which, in turn, reveals Rawls's position about the relationship between the values of liberty and equality.

Following these principles, a scheme of social cooperation is fair if all individuals enjoy equal basic liberties (including the traditional civil and political rights) and the state always strives to distribute social and economic resources in a way that maximizes the wealth and income of the least advantaged in society. This arrangement gives all individuals significant areas of freedom of choice: each member of the society is free and responsible to choose and pursue her own conception of the good life. At the same time, a society treats all persons as equals if it seeks to remove those inequalities that disadvantage some of its members but considers as fair those inequalities that make the worst-off in society as better-off as possible. Following these principles, the state must take care, firstly, to allow people to enjoy the benefits of their free choices (in shaping their lives and choosing their own ends) and, secondly, to compensate them for circumstances that place them in a disadvantaged position in the distribution of social and economic resources.

Notice, there is little, if any, connection between the two principles of justice: Rawls himself explains that they are meant to operate at different levels. The liberty principle is apt for constitutional provision and adjudication by the courts, whereas the difference principle is to be interpreted and applied by economic institutions and arrangements. Still, we may identify points of overlap between these two, if we assume, as Rawls suggests, a further, lexically prior, principle. This principle would guarantee certain basic needs as part of what he calls 'constitutional essentials', namely, certain minimum social and economic conditions that are essential for individuals, in order to be able to exercise their all-important two moral powers: to have a sense of justice and to be able to choose and pursue their own conception of the good life.<sup>7</sup> This principle would pick out certain claims to basic socio-economic entitlements from the wider scope of social and economic justice covered by the difference principle and elevate them to the level of justiciable equal basic liberties or assign them even greater urgency and priority.<sup>8</sup> But Rawls has not developed this idea and, besides, this too could be open to the same criticism as his difference principle. To this I now turn.

To begin with, criticism came from libertarians such as Nozick, who argued that the exercise of the liberty principle should be extended to economic liberties too. This, Nozick

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<sup>7</sup> Ibid, p. 44 note 7 and p. 47-48.

<sup>8</sup> Ibid, p. 161-162.

suggested, would lead to an inconsistency and a clash between the exercise of this principle by individuals and the distributive justice arrangements required by the difference principle.<sup>9</sup> According to this view, Rawls placed unjustified emphasis on the value of equality and the demands of distributive justice at the expense of the value of liberty. This view is premised upon a conception of the values of liberty and equality that has similarities with the one I criticized earlier in Chapter 3 of this thesis, so I will not develop it here again. However, Nozick's significant contribution to the debate is the idea that the motivations and rights of those who produce a society's resources must have some bearing on the way these goods and resources are distributed.<sup>10</sup> Of course, Rawls does not disregard this altogether, as theories of flat equality would do. His difference principle aims to provide incentives for people to be productive, albeit for the benefit of all and with no claims of natural right or desert over their production.<sup>11</sup> This still leaves the difference principle open to further points of criticism, which were best formulated by Dworkin.

In particular, elevating the debate between libertarians and egalitarians to a more abstract level, Dworkin argues that they both provide interpretations of the abstract and fundamental ideal of treating people with equal concern and respect but offer unattractive or indefensible accounts of what that amounts to in terms of liberty and equality. Making this move, he creates what many have called 'an egalitarian plateau' where all theories are treated as fundamentally egalitarian and measured by how well or badly they interpret and apply this widely held and indisputable abstract ideal.<sup>12</sup>

Dworkin goes along with Rawls (and Nozick for that matter) in his critique of utilitarian and welfarist theories. Nevertheless, he points out that the two principles of justice as fairness of social institutions fail to treat people with equal concern and respect because they fail to account for a crucial aspect of it: individual responsibility and the cost and burdens that the exercise of free choice of some entails for others. Dworkin convincingly argues that Rawls's theory is not sufficiently choice-sensitive and endowment-insensitive. I will explain.

To begin with, it is not sufficiently choice-sensitive as it aims to always compensate the worst-off in society, without investigating whether they are, and to what extent,

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<sup>9</sup> See R Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974)

<sup>10</sup> See Nozick, *Anarchy, State and Utopia*, and W Kymlicka, *Contemporary Political Philosophy: An Introduction*, p. 103-138.

<sup>11</sup> J Wolff, 'Equality: The Recent History of an Idea', (2007) *Journal of Moral Philosophy* 4, pp. 125-136.

<sup>12</sup> See in general W Kymlicka, *Contemporary Political Philosophy: An Introduction*, Introduction and Chapter 3, also S Guest, *Ronald Dworkin*, and A Ripstein, 'Liberty and Equality' in A Ripstein (ed.) *Ronald Dworkin* (Cambridge University Press, 2007), pp. 82-108. It is beyond the scope of my research here to develop his criticism of Nozick's interpretation of the value of liberty but some points are common with the criticism to the view discussed in Chapter 3, i.e. that liberty and equality are distinct and conflicting values.

responsible for ending up in this disadvantaged position through their own free choices, or as Dworkin labels it, through bad 'option luck'. In this way, it may often be counter-intuitive, as it subsidizes those who make a lifestyle choice to be under-productive at the expense of the hard-working. Taxing the hard-working, talented and ambitious, in order to redistribute resources to those who are indiscriminately viewed as disadvantaged does not just remove all incentives for the former to be productive. It also unfairly allows some to bear none of the cost that their freely made choices entail and allows them to transfer the burden to others. Treating people with equal respect for the responsibility of each for the success of her own life requires us to accept as fair those outcomes in the distribution of resources that result from peoples freely made choices.

On the other hand, Dworkin distinguishes bad option luck from bad brute luck, which is the outcome of circumstances beyond the individual's control or free choice, such as natural endowments (disabilities, lack of talents, genetic predispositions etc), social circumstances (race, gender, ethnicity), deprived upbringing or natural disasters. All these are morally arbitrary circumstances: individuals did not choose them through the exercise of their free will, according to a preference, evaluation or life plan. For this reason, a fair scheme of social justice and cooperation should not allow such circumstances to place individuals in a disadvantaged position in the distribution of resources and opportunities.<sup>13</sup>

The central problem in dealing with bad brute luck is the kind and extent of compensation that the state owes individuals who suffer from it. Rawls and Dworkin are right to argue, against welfarist theories, that it would be unfeasible and unfair for the state to try to constantly equalize people's circumstances in terms of welfare (happiness, preference satisfaction or else). This, they both argue, could require an endless and excessive sacrifice on the part of others: diverting all of society's resources to this could deprive other individuals from pursuing their life plans and the society as a whole from supporting other valuable goals and activities.<sup>14</sup> To be sure, this is the reasonable concern behind Rawls's reluctance to compensate for natural disadvantages too. If we try to equalize people as much as possible in these circumstances, in order to help them achieve their ends, we might have to devote all resources to that end and, therefore, we will prevent anyone from achieving their goals.<sup>15</sup>

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<sup>13</sup> Note, here I imply that we should, firstly, not allow morally arbitrary circumstances to reduce the share that one is entitled to and, secondly, that we ought to take them into account in order to increase the share of resources that one is entitled to in the form of compensation for the choices she would have had were circumstances more nearly equal, as Dworkin puts it in his *Sovereign Virtue*, p. 334. I will develop this argument in the text in the following section.

<sup>14</sup> See generally Dworkin, *Sovereign Virtue*, ch. 1.

<sup>15</sup> Kymlicka, *Contemporary Political Philosophy: An Introduction*, p. 72-74.

Still, Dworkin is right to note that Rawls's theory is not sufficiently endowment-insensitive: it allows the distribution of resources to be unduly influenced by morally arbitrary natural endowments, such as talents or mental, physical or psychological integrity and ability. In particular, by focusing on social primary goods, it directs distributive justice concerns mainly on income and wealth and does not contain any compensatory mechanism whatsoever for the lack of natural endowments. However, treating people with equal concern and respect, Dworkin argues, requires us to consider natural endowments as morally arbitrary factors outside of the free will and choice of individuals and compensate individuals who find themselves in a disadvantaged position in the distribution of resources, goods and opportunities due to such circumstances. This is the so-called problem of expensive needs.<sup>16</sup> In particular, given what Rawls regards as a fair share of social primary goods, some people will be much less productive and less able to use these goods and opportunities due to circumstances beyond their control, such as lack of talent or due to some form of disability or frail health. As a result, they will need to use a significant amount of their share of resources to mitigate for their lack of health or other abilities.

In response to the problem of expensive needs, Dworkin developed his theory of equality of resources, taking particular care to distinguish it from egalitarian theories that tend to equalize people in some form of welfare rather than social primary goods. In this way, he wanted to avoid running the opposite risk of encouraging some to enjoy their expensive tastes at the expense of others. As explained above, Dworkin argues that it is highly subjective and, therefore, unfeasible to measure and determine relative welfare and equalize people in e.g. happiness or preference satisfaction. Most importantly, it is potentially unfair, as it may require a transfer of resources from those with ordinary tastes and preferences to those with expensive tastes.<sup>17</sup> To be sure, Dworkin does not deny the freedom of individuals to cultivate or embrace expensive tastes; he only points out that it is counter-intuitive and unfair for those who have expensive tastes to demand that those with ordinary tastes be burdened with the additional cost of satisfying them.

However, not only expensive but even ordinary tastes entail some cost upon others and the society as a whole so the crucial aspect of our objection here is not really the smaller or greater *cost of satisfying* them compared to that of other preferences or tastes. Of course, the greater the cost, i.e. the more expensive and extravagant the tastes that demand satisfaction the greater the sense of resentment will be. Still, what we actually find as counter-intuitive and unfair is the fact that welfarist theories do not take into

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<sup>16</sup> See generally Dworkin, *Sovereign Virtue*, ch. 1.

<sup>17</sup> Dworkin, *Sovereign Virtue*, p. 48-59.

account the distinction between morally arbitrary circumstances (such as disability) and individual responsibility for choices, tastes, preferences, life plans and goals, no matter how modest or expensive they are. The problem is there in both cases but only becomes pronounced the more expensive or extravagant the tastes appear to others. Besides, those with expensive tastes could also object to diverting any resources at all to the satisfaction of, what they regard as, the inferior or unworthy preferences of others. To cite one such common example: many would complain against transferring some of a society's valuable resources to subsidize the opera, music venues and organizations (such as orchestras) or art galleries, especially during a financial crisis. At the same time, classical music or art lovers would consider this as an investment in culture and they would as regard wasted any money spent on subsidizing football clubs.<sup>18</sup> My point is that the problem lies not in the actual relative cost of tastes and preferences to be satisfied but in the fact that people are bound to disagree about what goals and preferences resources should be spent on.

So, Dworkin rightly responds to the problem of expensive tastes with a criticism of welfarist theories in general, based on the argument that they are highly subjectivist and that they focus on equalizing people in some form of welfare or preference satisfaction, without any objective criterion about what claims to resources are reasonable.<sup>19</sup> He discusses the problem of expensive needs and that of expensive tastes as two sides of the same problem with welfarist theories.<sup>20</sup> This opens the way for Dworkin to offer, in response, a theory about the fair distribution of resources that aims to mitigate the impact of circumstances of brute luck but also place individual responsibility of each person for the cost of her own choices at its heart. Many have criticized this move and I will briefly discuss their views in the following paragraphs but, first, I will provide an outline of Dworkin's theory of equality of resources.

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<sup>18</sup> See the example of Greece where the debate about discontinuing state funding for Athens's major classical music organization and venue, the Athens Music Hall, revolved around whether in times of financial crisis and austerity valuable resources should be spent at all for an organization that offers 'elitist' entertainment. In fact, none of those criticizing state subsidy for the Athens Music Hall was able to argue that this is in fact an expensive preference of some as it actually is not: the amount of state support is not that significant. Rather, the focus was on the fact that, in the face of scarcity of resources, no money should be spent on satisfying what most regard as 'elitist' preferences not shared by most others. Still, as the famous violinist Leonidas Kavakos observed in an interview published in a Greek newspaper, no one raised this argument against state funding of football clubs. For this reason, welfarist theories are bound to fail to provide a fair scheme of social cooperation and fair distributive claims to resources.

<sup>19</sup> Guest, *Ronald Dworkin*, p. 184-188.

<sup>20</sup> Ripstein, 'Liberty and Equality', (2007), p. 86-89.

### *Equality of Resources*

With his theory of equality of resources, Dworkin aims to provide a theory of fair distribution of resources that is more choice/ambition-sensitive and endowment-insensitive than Rawls's theory of justice. As I explained above, this means that his theory aims to mitigate the impact of a wider range of morally arbitrary natural and social circumstances in the distribution of resources. At the same time, it purports to do so while better accommodating the idea of responsibility of individuals for the free choices that they make and allow these choices to influence the distribution of resources to a certain extent. But what other circumstances is his theory sensitive to, and in what way? Also, how and to what extent should we make a scheme about the distribution of resources sensitive to the responsibility of individuals for their choices and the inequalities in the distribution of resources that these produce?

To answer these central questions Dworkin devises a thought experiment that is similar to Rawls's but aims to produce an ideal, 'envy-free' distribution, i.e. a distribution that satisfies the 'envy test': a distribution shows equal concern and respect for all if, once the division of resources is complete, no one envies someone else's bundle of resources.<sup>21</sup> This is consistent with Dworkin's dynamic or integrated conception of the values of liberty and equality as described and defended earlier in Chapter 3 of my thesis. Firstly, equality is preserved when no one envies someone else's package of work and reward because the package that they have achieved reflects their own authentic choices and preferences. Secondly, liberty is respected, if people are free to shape their lives according to their choices and preferences about how to use the resources that have been awarded to them under a reasonably fair distribution, so long as they violate no one's rights.<sup>22</sup> It is crucial to note here that the envy test is not meant to be a psychological test but a technical and economic test.<sup>23</sup> Resentment is a feeling that cannot be eliminated, no matter how ideally we design social institutions and a scheme for the distribution of resources. But the envy test as an economic test is also an indicator of the fairness of our social institutions: we should and can alleviate injustice and respond to reasonable claims of an injustice in the distribution of resources. I will briefly sketch how equality of resources approaches this ideal.

Dworkin's ideal of a fair distribution takes place in an imaginary auction: suppose all human beings, bearing no economic resources of their own but capable of 'authentic'

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<sup>21</sup> Dworkin, *Sovereign Virtue*, see generally ch. 2.

<sup>22</sup> Dworkin, 'Do Values Conflict? A Hedgehog's Approach', Isaac Marks Memorial Lecture, (2001) *Arizona Law Review*, Vol. 43 (2), p. 253-254.

<sup>23</sup> See Dworkin's reply to critics on this point in R Dworkin, 'Sovereign Virtue Revisited', (October 2002) *Ethics*, p. 117 n. 19. Also, Guest, *Ronald Dworkin*, p. 189.

choices, arrived as immigrants in an uninhabited island and were each given 100 clam shells as a form of currency by which to bid in an auction for the island's resources. The bidding determines the price/cost of goods and resources, it continues until the envy test is satisfied and is repeated any time that it is necessary in order to re-adjust and produce an envy-free distribution. This scheme satisfies the envy test and respects Dworkin's fundamental principles of dignity. It respects the principle of equal importance of all human beings, as all arrive at the island having the same knowledge and with no extra resources of their own. Also, if conducted successfully, the auction is adequately ambition-sensitive and respects the special responsibility of each individual as all are given equal purchasing power to bid for those resources that best reflect their life plans, ambitions and values. This way, it ensures that all are responsible for making their own free and authentic choices but lets them bear the cost of these choices and accept the impact that they may have on how their lives turn out. Following this, no one would envy someone else's bundle of resources because they could have bid for it. Instead, everyone is happy with their bundle of resources, as it reflects their individual choices about what brings value to their lives, e.g. what kind and amount of work and leisure, material resources, social recognition etc. Notice, this means that those found in a worst-off position would not necessarily have a justified claim to resources, as their unequal position in the distribution of resources is not necessarily morally arbitrary but could be attributed to their own free will and choices and not some moral wrong or injustice. But surely, this means that we need to establish exactly what can be attributed to free will and choice. This may turn out to be an intractable problem in real-world conditions: we may find that those who make bad choices with a significantly bad impact on their lives are often those who are brought up and live in deprived social and economic conditions or belong to vulnerable and disadvantaged groups. So, how are we to distinguish the morally arbitrary circumstances from the morally relevant choices and grant people what they are entitled to? To deal with this challenge in a more effective way than Rawls's theory of justice, Dworkin supplements his imaginary auction model of a fair distribution of resources with the device of a hypothetical insurance market.

## **2. The Hypothetical Insurance Device as a Safety Net**

Outside of Dworkin's imaginary deserted island, the envy test could never be satisfied as people come to the world with very different natural endowments and often in unequal social and economic conditions. A just society must somehow compensate them for the circumstances that cannot be attributed to bad option luck, i.e. they are not the bad outcome of their free choices taking 'deliberate and calculated gambles' but are the

unfortunate outcome of brute bad luck, 'which is a matter of risks fall out that are not in that sense deliberate gambles.' In the real world, insurance schemes give people an opportunity and choice to cover themselves against various forms of brute luck, such as against the risk of suffering natural calamities, disability or health issues: brute luck is in this way converted to option luck. Nevertheless, many people find themselves in these circumstances or instances of brute bad luck before they even get the chance to exercise their choice to protect themselves through insurance. For instance, they may have pre-existing conditions, belong to vulnerable or disadvantaged groups or be too young, i.e. lacking knowledge and financial resources to take up insure or relying on others to have purchased insurance for them. So, our ideal theory of fair distribution should include a hypothetical insurance device that aims to mitigate this real-world injustice. Here we have to reason about and assume whether, and at what level, a prudent insurer would have insured herself, knowing the *average risk* of someone suffering from various forms of brute bad luck but behind a veil of ignorance about whether and to what extent she would *actually* suffer from it.

Notice here a very important function of the hypothetical insurance device for the overall scheme of equality of resources that is often overlooked. Not all instances of brute bad luck are deemed as worthy of compensation but only those that a prudent insurer would have protected herself against, if she had had a fair opportunity to do so. This does not make this strategy 'a compromise or a second-best solution that accepts some injustice out of necessity' but it is 'what equality, properly understood, requires'<sup>24</sup> in light of the principle of special responsibility and the need to show equal concern for the lives of all. This test can be the objective criterion that will help us decide if and how much compensation society owes to certain individuals. I will explain.

To be viable and burden individuals with reasonable premiums –calculated, collected and redistributed through taxation and tax funded policies- this scheme will mitigate, rather than fully compensate, for real-world injustice. As rational people normally do in real insurance markets, so prudent insurers in the hypothetical insurance market would only devote part of their resources to pay for insurance, while retaining a considerable amount for themselves to spend on living well and pursuing their life plans. After all, the aim of this scheme is to correct ex ante inequalities in a rational and practicable way but

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<sup>24</sup> See R Dworkin, 'Equality, Luck and Hierarchy', (2003) *Philosophy & Public Affairs*, Vol. 31, No. 2, p. 190-198, for this and other rebuttals of misinterpretations of the theory of equality of resources under the label of 'luck egalitarianism' in Samuel Scheffler's 'What is Egalitarianism?', (2003) *Philosophy & Public Affairs*, Vol. 31, p. 5-39. In greater length, Dworkin explains why a real-world justice scheme cannot require society to 'rescue' individuals from all bad luck and, therefore, why any rights or claims to resources as compensation cannot be construed to cover the whole realm of ideal justice, in *Sovereign Virtue*, p. 340-346.

at the same time make sure to respect the value of liberty, with its emphasis on individual responsibility for free choices.<sup>25</sup> As I will further discuss below, this test does not rely on a person-by-person psychological or factual inquiry about one's actual disadvantaged position due to choices rather than circumstances. Instead, it rests on assumptions about the risk that people would have insured against before they even encounter real-world choices or circumstances.<sup>26</sup>

Following these principles, it is difficult to argue against the reasonable assumption that Dworkin makes: in such hypothetical circumstances, we can assume that almost everyone would have purchased at least a given level of insurance against accident, disease, unemployment, or low wage. Therefore, the hypothesis continues, if some people in our non-ideal society are in a disadvantaged position in the distribution of resources because of such instances of bad luck, then we may assume that this is due to a failure or injustice in ex ante equality and not down to their bad choices, for which they, alone, should bear the burden. For instance, we can safely assume that if some people lack basic medical care this is due to unfairness in the distribution of resources in our society<sup>27</sup> or that if they lack basic unemployment insurance this is attributable to circumstances, such as that it is unavailable or unaffordable in their community.<sup>28</sup> Individuals in such circumstances would then have reasonable and justified claims to those resources that would bring them up to the level or conditions that we can safely assume they would have insured themselves for, had they had the fair opportunity to do so.<sup>29</sup> On the other hand, resource redistribution through a hypothetical insurance market may well exclude cosmetic or vanity insurance, because it is irrational to assume that prudent citizens would have paid the extravagant premiums necessary to cover such services.<sup>30</sup> Besides, the principles of justice explained above<sup>31</sup> would also exclude speculative and hugely expensive diagnostics and treatments from the hypothetical insurance compensation owed to individuals because they would too raise premiums well beyond a practicable and affordable for all level of reasonable and necessary medical care and make other public and individual goals unfeasible.

For the same reason, it seems fair to argue that, under a hypothetical insurance scheme, those living close to a major international airport would only have a justified claim to

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<sup>25</sup> Dworkin, *Is Democracy Possible Here?*, (Princeton University Press, 2006), p. 115.

<sup>26</sup> Dworkin, *Sovereign Virtue*, p. 333-334.

<sup>27</sup> *Ibid*, p. 315.

<sup>28</sup> *Ibid*, p. 334.

<sup>29</sup> Dworkin, *Is Democracy Possible Here?*, p. 115-116.

<sup>30</sup> Dworkin, *Sovereign Virtue*, chapter 8.

<sup>31</sup> Notice that it is always these principles of justice and not other arbitrary or accidental factors that determine what we can assume is reasonably owed to individuals. See Dworkin's reply to critics on this point in Dworkin, '*Sovereign Virtue Revisited*', p. 115-116.

compensation for relocation, if a new policy of regular night flights affected their sleep but not a right to block that policy from materializing altogether.<sup>32</sup> Serious sleep disturbance can be detrimental to one's health and private life, so the point here is not whether this is an important enough interest to ground a human right. Neither is this merely a question of whether the moralistic preferences of the majority played a part in this decision to allow or cause sleep disturbance to some or force them to relocate.<sup>33</sup> In positive obligations claims this is rarely, if ever, the point of contention. Instead, my point is that the premium to insure against the risk of suffering from those circumstances would be very high and it seems reasonable to assume that a prudent individual would not have chosen to protect herself fully against the possibility of an airport expansion near her home. These types of infrastructure have an enormous impact on the economy and the development of various sectors of the society. One would have to pay an extravagant premium to ensure that no airport close to her home will allow regular night flights and seriously affect her sleep. Therefore, it is more plausible to suggest that a prudent individual would have chosen to pay the more reasonable premium that would ensure that she would get a fair amount or favourable conditions in compensation for relocation –if the noise had indeed such detrimental effect on their sleep.

So, leaving such cases aside, Dworkin introduces the hypothetical insurance device as a 'safety-net device',<sup>34</sup> based on certain principles of justice that flow from his interpretation of the abstract requirement to treat all with equal concern and respect and the dynamic conception of the values of liberty and equality. He offers a principled way of overcoming the intractable problem of distinguishing between outcomes of choices and outcomes of morally arbitrary circumstances in the real world. At this point, although I cannot discuss them in length in the context of this thesis, it is important to stress the reasons why I find the egalitarian criticism of Dworkin's emphasis on the responsibility for choice unjustified and misguided. This point is central to Dworkin's theory of equality of resources but also crucial for the analysis and twist to his theory that I wish to argue for in the following section.

Firstly, it would be wholly unfeasible but also unfair to suggest that the distribution of resources should not be influenced by the choices that individuals make. This position rests on the argument that it is impossible to determine whether and to what extent

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<sup>32</sup> *Hatton & Others v. the United Kingdom*, (2002) 34 EHRR 1

<sup>33</sup> See Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, pp. 126-130, who discusses *Hatton v. the United Kingdom* and concludes that for cases like this the states' margin of appreciation is infinite. I would agree that this policy falls within the margin of appreciation of the national authorities and does not violate Article 8 but for the different reasons that I explain in the text. The difference is significant because it could yield different outcomes in other cases.

<sup>34</sup> Dworkin, *Is Democracy Possible Here?*, p. 121.

individuals are responsible for their choices, given that control over their preferences and tastes is illusory and rarely the act of free will. However, Dworkin's insistence that individual responsibility for choice is essential for respecting equality does not rest on the latter assumption: indeed, individuals rarely have full control over the preferences and tastes that they develop through their upbringing and adult lives, through their family, social and cultural environment.<sup>35</sup> Some, who are raised in an affluent environment, may develop expensive tastes, while others living in deprived socioeconomic conditions develop bad habits and work aversion. Dworkin's crucial point here is that what matters is not the *origin* of these tastes and preferences but our *choice to act* upon them and assume responsibility for acting *along or against* them.<sup>36</sup> If we overlook this distinction between choice and the psychological elements behind it, we underestimate 'ordinary people's ethical experience',<sup>37</sup> which involves a sense of freedom for choice and responsibility that people have for the direction of their own lives.

Besides, our preferences and tastes may lead us to a particular range of choices but it is simplistic to suggest that they lead to very specific choices. Within this range, some choices may be abhorrent but others acceptable, some catastrophic for our lives while others just negative. One would have to be an incompatibilist, i.e. to believe that determinism is incompatible with free will,<sup>38</sup> to argue that our inbred preferences and tastes dictate very specific choices, deny that we, eventually, stand critically against them, and pick one while rejecting other possible ones, forming our character and lives in this way. This would not just be contrary to the 'ordinary people's ethical experience', as Dworkin argues, but it would also be at odds with the practice of human rights. People argue for their right to vote because they believe that they can and should be responsible for self-government and shaping the course of their political affairs. Similarly, people believe that they are and should be the ones responsible for directing their private and family lives when they argue for their freedom to make their own ethical choices about

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<sup>35</sup> Dworkin, 'Do Liberal Values Conflict?', p. 257, *Sovereign Virtue*, chs 6 and 7.

<sup>36</sup> Dworkin, 'Sovereign Virtue Revisited', p. 119.

<sup>37</sup> Dworkin, *Sovereign Virtue*, p. 289-290 and 'Sovereign Virtue Revisited', p. 118-119.

<sup>38</sup> Roughly, one is an incompatibilist, if she believes that both natural phenomena and human choice and action are subject to the laws of causality and that, therefore, this excludes the possibility of free will. Compatibilists, on the other hand, distinguish the question of determinism from that of free will and argue that we can accept that the former does not extinguish the latter. For the distinction between compatibilism and incompatibilism see T Honderich, *How Free Are You?* (Oxford: OUP, 1993) and R Kane, *A Contemporary Introduction to Free Will* (Oxford: OUP, 2005). The metaphysics of free will is a very important question underlying all theories that implicate ideas such as freedom of choice and action, see Flikschuh, *Freedom*, p. 6-9. It is beyond the scope of this thesis to discuss and take a position in this debate but my analysis rests on the view that a significant range of people's ethical experience and sense of self-direction suggests that, when designing distributive justice schemes and policies, we must accept an account of freedom of choice, in some sense independent from causal determinations that may shape our preferences and tastes.

who to form personal, sexual or professional relationships with or about the religious or political views that they hold and express, about procreating or about ending their lives.<sup>39</sup> Institutions, such as the legislature and the courts treat us as free and responsible in this sense too when they grant such rights and regulate the role of government (limit or require action) within these spheres of free choice.

Secondly, the objection that the hypothetical insurance device is disrespectful to those who are disadvantaged due to disability, ill-health or deprived socio-economic circumstances<sup>40</sup> is also misguided and at odds with human rights practice. Unlike the case of expensive tastes, where people normally identify themselves with the particular lifestyle and should be therefore required to pay the cost for it, people in deprived socio-economic circumstances regret living in such conditions but also argue that these circumstances signify an injustice and that they have justified claims to resources against the society to remedy the injustice. Their claims against society are not based on an admission of inferiority or inability and request for pity but on an argument about what resources and opportunities *a fair distribution would have made available* to them. Indeed, such claims may be justified only on the basis that there is something deeply unjust and inegalitarian about the circumstances that these individuals find themselves in.

Contrary to what the critics argue, the basis for rightful claims to compensation and redistribution in these cases is not a self-humiliating complaint of some individuals that they suffer from low welfare due to lack of talent, abilities or resources. Instead, it is an argument about equal concern and respect: i.e. that their share of resources is less than fair because it limits excessively the range of choices and effectively extinguishes the individual's special responsibility to direct her own life.<sup>41</sup> And this is not unfair against a standard of a minimum acceptable range of choices (which would have been a welfarist standard) but based on an argument about what we can reasonably assume that a prudent insurer would have insured herself for. In this sense, no humiliation or shameful revelation of disadvantage would be required on the part of individuals seeking compensation from the state. Recall that the hypothetical insurance device works with assumptions about the level of coverage that a reasonable and prudent person would have chosen to undertake against the risk of suffering certain forms of disadvantage. This kind of compensatory

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<sup>39</sup> See my examples from the ECtHR case law in Chapters 1 and 2 of this thesis.

<sup>40</sup> For instance Wolff argues that, in order to secure the aid offered some individuals will be required to make a 'shameful revelation' about the personal circumstances that place them in a disadvantaged position, in J Wolff, 'Fairness, Respect and the Egalitarian Ethos', (Spring 1998) *Philosophy & Public Affairs* 27 (2): 97 Similarly, Anderson refers to the case that those claiming resources will have to make in their favour as a public declaration of 'personal inferiority', in E Anderson, 'What is the Point of Equality', (1999) *Ethics* 109 (2): 287-337, at p. 205.

<sup>41</sup> Dworkin, 'Sovereign Virtue Revisited', p. 116-117.

mechanism does not require on a person-by-person psychological or other factual inquiry about the cause (i.e through choice or circumstance) of their actual disadvantage.

Notice that in human rights practice too, we may interpret the claims of applicants at an international court, such as the ECtHR, as complaints about an injustice in the distribution of resources and opportunities. Specifically, they appear to claim that a fair distribution of resources would have taken into account their circumstances and would have ensured the conditions necessary for actually exercising choices within the spheres of freedom granted to them. Recall the claims of applicants with disabilities that I discussed in Chapter 2: they argue that the state does not respect their right to private and family life because it fails to make or implement provisions (that require resource allocation decisions of course, but not necessarily significant) that are necessary to show due concern for their circumstances. For instance, they argue that the state ought to make special arrangements to ensure that access to public buildings is equally possible for people with impaired mobility as it is for other individuals, because the choice to access them should be available to all, as a matter of what effective respect for private and family life requires.<sup>42</sup>

Still, to apply the hypothetical insurance device to the real-world realm of human rights adjudication, we need to be able to make justified and safe assumptions about which circumstances or forms of disadvantage could warrant claims to resources and which conditions for the exercise of choice and responsibility are essential and at what level.

### 3. Claims to Resources and Positive Obligations to Fair Capabilities

The question that runs through this thesis is how to determine the content of claims to resources and positive obligations under the ECHR: what principles can we use to approach this difficult task that raises issues of distributive justice and how can we apply them in practice to determine the precise content of such rights and duties?

To shed light to the problem of how we can apply a distributive justice model from ideal theory to the non-ideal context of human rights adjudication, I suggest that we look closer at how the hypothetical insurance device is designed to compensate for injustice in the real world. As I explained earlier, we would not want it to remove risk from people's lives, as this would also deprive them of the ambition and special responsibility for their lives. Besides, it would not be feasible to fully eliminate disadvantage in the distribution of resources. However, since the hypothetical insurance device aims to function as the

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<sup>42</sup> See for instance the cases of *Botta v Italy*, *Zehnalova and Zehnal v the Czech Republic*, *Molka v Poland*, discussed in Chapter 2 (Section 2) of this thesis.

best possible safety net device that we can provide, it rests on an assumption: the assumption that people would have insured against certain circumstances of brute bad luck, in the form of various forms and causes of disadvantage (illness, disability, deprived socio-economic background, lack of talent, natural disasters, vulnerability etc). Some critics overlook this when they complain that equality of resources is unforgiving to those who suffer significant disadvantage from bad option luck or suggest that it is not sensitive to the difference in circumstances that are morally relevant for social justice purposes.<sup>43</sup> This could have been so in the absence of a hypothetical insurance device that makes an assumption, such as the one I described above. But Dworkin's equality of resources is very clear about this: the hypothetical insurance device assumes that people would have insured for *at least* a decent minimum standard of living and quite possibly for other circumstances or instances of disadvantage.<sup>44</sup> Then, we need to reason about the precise conditions and level of that minimum standard of living or the other circumstances or instances of disadvantage that people would have insured for, in order to estimate how much compensation they may be entitled to in real-world situations, such as when they claim resources as a matter of rights. To this I now turn.

To begin with, I take it that choice/ambition-sensitivity and endowment-insensitivity are both essential features of the principle of special responsibility. We cannot plausibly and justifiably assign responsibility on an individual for the outcome of her own life unless we respect her freely made choices but also, at the same time, show concern for removing morally arbitrary obstacles or compensating her for the choices that she would have had, if natural and social circumstances were more nearly equal. This means that the state may be required to undertake various forms of positive action to 'provide the circumstances in which it is fair to ask all citizens to take responsibility for their own lives.'<sup>45</sup> Concern here would require compensation in any form of positive measures and socio economic entitlements, such as legislative provisions, operational measures or social or economic benefits. Such a scheme of socio-economic entitlements and positive state duties would come closer to treating people as equals by adding to the choices they have, choices they would have had were circumstances more nearly equal.<sup>46</sup> These more-nearly-equal circumstances are, in a way, the *enabling conditions of responsibility*: without them, it may be impossible or unduly costly for individuals to make any free choices and, in the

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<sup>43</sup> See R Arneson, 'Equality and Equal Opportunity for Welfare', in (1989) *Philosophical Studies* 56, pp. 77-93, G A Cohen, 'On the Currency of Egalitarian Justice', in (1989) *Ethics* 99, pp. 906-944, J E Roemer, 'A Pragmatic Theory of Responsibility for the Egalitarian Planner', E Anderson, 'What is the Point of Equality', in (1999) *Ethics* 109, pp. 287-337.

<sup>44</sup> Dworkin, *Sovereign Virtue*, ch. 2 and 9, Dworkin, 'Sovereign Virtue Revisited', p. 114.

<sup>45</sup> Dworkin, *Sovereign Virtue*, p. 319.

<sup>46</sup> *Ibid*, p. 334.

absence of such conditions, it also seems unfair to hold people responsible for the disadvantaged position that they may find themselves in. But what are these enabling conditions of free choice and responsibility –required by equal concern and respect- and how can we determine their content? In what follows, I will suggest that we can model rights-claims to resources in the ECHR, as claims to such conditions and determine their content through a modified version of the hypothetical insurance device.

Suppose that we try to determine the content of claims to resources and positive obligations in the ECHR through Dworkin's hypothetical insurance device. Our arguments would have to take the form of the following two-stage hypothesis. Firstly, what kind of resources or which enabling conditions would an average prudent insurer have insured herself against the risk of lacking, in the specific social and economic conditions of a given member state to the ECHR? Secondly, at what level would she have insured for each condition or against the risk of each potential disadvantage or instance of brute bad luck? Dworkin offers very good examples of how to apply the hypothetical insurance test in areas such as health care or social security.<sup>47</sup> But claims to resources based on the ECHR rights are more complex in terms of the nature and extent of positive obligations necessary to satisfy them. For instance, would a prudent insurer have insured against the risk of not being able to access public facilities or buildings in her home town<sup>48</sup> or polling stations<sup>49</sup> due to impaired mobility?; for the risk of not being able to perform everyday personal and social activities autonomously without the assistance of another person?;<sup>50</sup> for the risk of living in appalling or dangerous prison conditions?;<sup>51</sup> for the risk of needing renal dialysis<sup>52</sup> or access to HIV treatment?<sup>53</sup> And supposing we can reasonably assume that people would have insured for these instances of brute bad luck, what is a reasonable premium that they would have paid and therefore what would be the reasonable burden that this would entail for others?

To deal with these particular questions, it seems to me that it is not enough to form arguments aiming to guarantee 'the minimum conditions of a decent life'<sup>54</sup> or a 'minimum core'<sup>55</sup> of rights through the hypothetical insurance device. Such notions are vague and we

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<sup>47</sup> Ibid, ch. 8

<sup>48</sup> *Botta v Italy* and *Zehnalova and Zehnal v the Czech Republic*

<sup>49</sup> *Molka v Poland*

<sup>50</sup> *Sentges v the Netherlands*

<sup>51</sup> *Pierce v Greece, Dougoz v Greece*

<sup>52</sup> *Valentina Pentiacova & Ors v Moldova*.

<sup>53</sup> *D v the United Kingdom, N v the United Kingdom*.

<sup>54</sup> Dworkin, 'Sovereign Virtue Revisited'.

<sup>55</sup> For an application of Dworkin's hypothetical insurance device to determine the content of social and economic rights as those claims to basic, minimum core needs that we can safely assume that a prudent insurer would have covered herself for see O Ferraz, 'An insurance model for the justiciability of social and economic rights', (PhD thesis, 2006).

will need to specify exactly what these minimum conditions are in real life with reference to specific abilities, disabilities, disadvantages etc. Besides, many of the claims raised above are beyond what many people normally understand as minimally decent life. Some are claims for protection against destitution or inhuman and degrading living conditions whilst in prison or for basic medical care but others are claims for a robotic arm, for access to public buildings, for basic education whilst in prison, for expensive medical treatments etc. However, all of them can be construed as claims to the essential conditions of freedom of choice and responsibility for choice, within the spheres of freedom granted by the ECHR provisions: and this may often be more than what we usually describe as the minimum conditions of a decent life.

To construe claims to resources in this way has close affinities with the capabilities approach discussed earlier, in Chapter 4. Following Sen's theory of freedom as capability for functionings, distributive justice focuses on capabilities, as the conditions that enable individuals to exercise choices or functionings, within the spheres of freedom granted to them. In a nutshell, recall what I identified as the problem with this theory: the fact that both features that make it popular are also liable to make it morally unattractive. Firstly, while it draws attention to the pluralism of individual needs, disadvantages, capabilities and the functionings that people can actually achieve with them within their formal freedom spheres, it risks sliding into subjectivism and welfarism. Secondly, if it points to a list of essential capabilities shared by all human beings, it runs the risk of perfectionism. The alternative move, namely to view capabilities as the conditions that are essential for individuals to be able to plan and live a decent life according to their choices and not their personal or impersonal endowments, causes this theory to collapse into equality of resources.<sup>56</sup> Still, I will suggest that it is not pointless to pay attention to certain features of the capabilities approach.

In the analysis that follows, I assume that the most morally attractive and useful interpretation of the capabilities approach is actually one that causes it to collapse into equality of resources in the following sense. Indeed, as Dworkin puts it, 'people want resources not simply to have them but to do something with them.'<sup>57</sup> But the way that the state must show concern for people's circumstances or for their capabilities for various

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<sup>56</sup> Dworkin, *Sovereign Virtue*, ch. 7. See also Pogge, 'A Critique of the Capability Approach'. Pogge does not argue, like Dworkin, that the capabilities theory is either welfarist or collapses into equality of resources; still, he concedes that the difference between the two approaches is 'overstated' by capabilities theorists and that a better interpretation of an equality of resources theory can also be sensitive to natural human diversity, see p. 1 and pp. 32-53. Pereira also argues that Dworkin's hypothetical insurance device is sensitive to differences among people that are relevant to justice, in 'Means, Capabilities, and Distributive Justice', p. 60. See also my discussion of this issue in Chapter 4 ('The Capabilities Approach' section) of my thesis.

<sup>57</sup> Dworkin, *Sovereign Virtue*, p. 302-303.

functionings is by seeking to mitigate the impact of differences in personal and impersonal resources through mechanisms such as the hypothetical insurance device, i.e. 'according to most people's understanding of the relative importance of different capability sets'<sup>58</sup> and not through an objective ranking and equalization of capabilities (as aspects of well-being). In fact, there are good reasons to suggest that we can better apply Dworkin's hypothetical insurance device in the real-world context of human rights adjudication if we incorporate in it certain features drawn from such an analysis of the capabilities approach. Let us develop these reasons and offer some examples.

Suppose we construe the hypothetical insurance device as a mechanism that aims to determine which circumstances, conditions or capabilities a prudent insurer would have insured for and at what level. Understood in this way, the capabilities that must be the object of egalitarian concern are only those personal and impersonal endowments that we can safely assume that a prudent insurer would have insured against the risk of lacking. The content of a claim to resources in the form of compensation for actually lacking those capabilities is determined in relation to the premium that people would be willing to pay to insure themselves, if they had a fair opportunity to do so.

This gives a significant benefit to the idea of freedom as capability. Linking the idea and content of compensation for disadvantage due to the lack of capabilities with the prudent insurer test in this way ensures that we do not run the risk of subjectivism and perfectionism. Because, following this interpretation, it is not an objective list of capabilities that warrant compensation because they are deemed important for the welfare of individuals. Rather, it is only those and to that level that we can assume people would have chosen to insure themselves for. This scheme offers a fair and principled way of determining the limits and priorities between competing claims to resources and setting the threshold of reasonable sacrifice and fair distribution of benefits and burdens.<sup>59</sup> The prudent insurer test would most likely justify compensation for functionings, such as being adequately nourished or avoiding premature mortality, but would not take into account other welfarist notions, such as being happy or having self-respect.<sup>60</sup> Again, what is crucial for the different outcome is the justification: the reason for compensating for the lack of certain capabilities is not that these are objectively important for achieving certain functionings but that we can reasonably assume that people would have insured (and up

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<sup>58</sup> Dworkin, '*Sovereign Virtue Revisited*', p. 140.

<sup>59</sup> The 'limits-setting' problem is a complex and crucial one for human rights adjudication but also for theories of distributive justice, especially when they argue for a social minimum. See S White, '*Social Minimum*', who argues that welfarist theories, including the capabilities approach, have no criteria of fairness for limit-setting whereas Dworkin's hypothetical insurance device is a fair but also practical way of dealing with this problem.

<sup>60</sup> Sen, *Inequality Re-examined*, p. 39.

to a certain level) against the risk of lacking them. For instance, recall the *Hatton* case discussed earlier: following the prudent insurer test, applicants living close to a major international airport would have a justified claim to compensation for the sleep disturbance caused by a policy to allow regular night flights. Serious sleep disturbance is detrimental to various basic capabilities. However, as I explained earlier, we can reasonably assume that a prudent insurer would only have purchased insurance to cover the cost of relocation and not the extravagant premium required to block that policy from materializing altogether.

But if we interpret the capabilities approach in this way, Dworkin is right to argue that this version of the theory is not distinct from equality of resources as, following application of the hypothetical insurance device, the only capabilities deemed worthy of compensation would be those covered anyway, i.e. personal and impersonal endowments as described by Dworkin's equality of resources. So what does reference to capabilities and functionings add to this theory or its application in the real world?

To begin with, if it is true that people want resources to do or be something with them, then developing an account of what functionings, i.e. 'beings and doings'<sup>61</sup> they would have insured themselves for, will certainly help the application of the hypothetical insurance device in a real-world context. Notice that claims to resources and positive obligations under the ECHR express a concern that is common in both the theory of equality of resources and the capabilities approach. This is the concern that, within the spheres of formal freedom of choice and responsibility, certain conditions are essential for people to have any meaningful or genuine freedom of choice and for society to assign them responsibility for the outcome of their lives.<sup>62</sup> Several complaints of people with disabilities or people belonging to vulnerable groups, such as asylum seekers or Gypsies have reached the ECtHR. These applicants acknowledge that they should make their own choices in their private and social life and in developing their personality, in establishing relationships with other human beings and participating in the life of the community or in public education. However, they claim that states have positive obligations to ensure that their freedom of choice is not excessively diminished by morally arbitrary disadvantageous circumstances, such as being disabled or belonging to a vulnerable group. Specifically, they claim that the state ought to take those steps necessary to provide

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<sup>61</sup> Ibid.

<sup>62</sup> A similar view is expressed by G Pereira in 'Means and Capabilities in the Discussion of Distributive Justice' *Ratio Juris*, Vol. 19, No. 1, March 2006, p. 55-79 and White, 'Social Minimum', For a brief discussion and criticism of the idea to apply the theory of minimum capabilities up to the threshold of an 'autonomous person' and an equality of resources theory above that threshold, see Chapter 4 of my thesis. A similar proposal is put forward by E Anderson, 'What is the Point of Equality'.

the conditions that are essential to facilitate access to public buildings and spaces,<sup>63</sup> as well as equal access to education<sup>64</sup> or housing,<sup>65</sup> in light of their particular needs, abilities and cultural background. The hypothetical insurance device aims to secure such conditions in a fair way but is highly abstract and underdeveloped. Namely, neither theory nor practice has invoked, developed or tested it as a method in identifying the various forms in which disadvantage appears in the real world and the conditions, resources or capabilities that could be necessary and fair for people to have in the form of compensation for real world injustices.

Besides, it seems to me that any application of the hypothetical insurance device cannot avoid referring to capabilities and functionings. That will be necessary in order to explain and justify what counts as a disadvantage or a disability and assess the relevance and weight of disadvantages and of the lack of personal or impersonal resources in determining the kind and level of compensation owed to individuals. Still, that does not necessarily mean that our judgments about these questions must be guided by our views about the central *importance* to a decent human life of specific functionings and capabilities –this indeed would necessarily tie our theory to the welfarist interpretation of the capabilities approach.<sup>66</sup> Instead of the criterion of importance, we may base our judgments, again, on the findings of the hypothetical insurance device to decide the lack of which functionings and capabilities a prudent insurer would have counted as a disadvantage. In the same way, we could also determine the level of insurance that a prudent insurer would have chosen to purchase for these functionings, i.e. how significant she would have judged the risk of suffering from the particular disadvantage to be and how much of her resources she would be willing to sacrifice in order to insure against it.

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<sup>63</sup> See *Botta v Italy*, *Zehnalova and Zehnal v the Czech Republic*, *Molka v Poland*, where applicants with impaired mobility claimed that, by failing to make the necessary adjustments in the built environment, the state showed no concern for their particular circumstances and needs and left them effectively unable to develop and enjoy their private and family life rights under Article 8 of the ECHR. Notice that the Court declares all such claims inadmissible and falling within a wide margin of appreciation of the national authorities. See my discussion and criticism of this approach in Chapter 2 (Section 2).

<sup>64</sup> See *D.H. & Others v Czech Republic* where the Court found that the difference in treatment in schooling arrangements between Roma and non-Roma children showed that the state had not taken into account their needs as members of a disadvantaged class and had a disproportionate impact on Roma children in particular. For these reasons, the Court found that the state failed to discharge its positive obligations for an effective respect of the applicants' right to education.

<sup>65</sup> See *Buckley v the United Kingdom* and *Chapman v the United Kingdom*, where the applicants claimed that the state had an obligation to offer alternative suitable sites for their caravans to settle, in order to mitigate the impact that town planning policies and the denial of planning permission had on them in particular as Gypsies.

<sup>66</sup> White argues that Dworkin's theory needs to make reference to capabilities and functionings and this means making judgments about their importance to a decent human life, see his 'Social Minimum'

Applied in this way, an equality of resources approach would not 'dispense with judgments about the kind of "'beings' and 'doings' that make a decent human life'"<sup>67</sup> but could form such judgments in a more impartial and fair way through the hypothetical insurance device. In addition, this would allow for much greater variation and adjustment to the real-life empirical data of particular communities, cultural priorities and socio-economic conditions.<sup>68</sup> This would accommodate the need for an international court, such as the ECtHR to ensure respect for human rights standards, while at the same time drawing the limits of the national authorities' margin of appreciation following principles of fairness and equal respect and concern for all.<sup>69</sup>

Moreover, when trying to apply the hypothetical insurance device to the real world context of human rights adjudication we could benefit enormously from the significant insights of political philosophers, lawyers, economists and social theorists into the nature, variety and impact of disadvantage. For instance, Jonathan Wolff and Avner De-Shalit have developed a pluralist analysis of disadvantage, revealing through analytical philosophy, social theory and empirical research, how disadvantages and risks associated with the exercise of choice and opportunity compound each other and cluster together.<sup>70</sup> This has the effect that some people are disadvantaged and insecure in several different aspects and functionings and have to bear an impossible or unreasonable cost in order to exercise their formal opportunities and choices. For this reason, they propose a modification of Sen's and Nussbaum's capabilities approach that also aims to avoid the problem of indexing or prioritizing among capabilities (which ones we ought to secure and at what level) and determining what equality means with reference to capabilities. According to this, government should aim to break up clusters of disadvantage, so that no

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<sup>67</sup> White, 'Social Minimum'.

<sup>68</sup> Pogge, in his 'A Critique of the Capabilities Approach', in *Measuring Justice* agrees that although capability theories have much more developed accounts of these valuable judgments, i.e. of the determinants that influence how people can convert capabilities/endowments into functionings/ends (in general, their means into whatever ends they find valuable), equality of resources theories too can and need to incorporate such judgments through mechanisms such as the hypothetical insurance device. In fact, Pogge argues that resourcist theories can better accommodate these judgments within a more plausible public criterion of social justice. In this chapter of my thesis I also argue that an interpretation of Dworkin's equality of resources that accommodates such judgments is not only more plausible but also a *fairer* criterion of social justice, compared with capabilities theories.

<sup>69</sup> On the 'evidentiary role' that an account of human capabilities may play in providing data about important functionings even if that will be used to apply or revise our resourcist criterion of justice see Pogge, 'A Critique of the Capabilities Approach', p. 50 and I Robeyns, 'The Capability Approach in Practice', (2006) *The Journal of Political Philosophy*, 14 (3), p. 351-376, who argues that, although the capabilities approach is 'radically underspecified' (in that debates are ongoing on whether the focus should be on functionings or capabilities, which matter, how much, how to set the priorities and solve the indexing problem), it may have 'relative usefulness' depending on the context and need not supplement other approaches but instead provide complementary insights to more established approaches.

<sup>70</sup> Wolff and De-Shalit, *Disadvantage* (OUP, 2007)

group is overall worst off, and guarantee 'genuine opportunity for secure functionings': for the purposes of distributive justice they suggest that we should ask whether it is reasonable to expect someone to act one way rather than another.<sup>71</sup> They argue that, in order to determine the question of burden, this criterion of 'reasonableness' helps us set aside questions of moral responsibility and, in this way, helps us avoid the 'metaphysical swamp' of trying to identify which individual decisions are down to free choice and which are a consequence of some form of disadvantage.<sup>72</sup>

To be sure, this is a prioritarian version<sup>73</sup> of the capabilities approach: that is, it entails that government must give priority to the most urgent task of improving the lives of the least advantaged in society by declustering disadvantage as explained above. Furthermore, this version disconnects, in part at least, the question of personal responsibility from the question of what burdens it is reasonable for society to impose on individuals.<sup>74</sup> With this move, Wolff and De-Shalit aim to avoid what they consider an unappealing feature of Dworkin's theory of equality of resources, when applied in the circumstances of the real world, where people make their choices against the background of inequality. In real-world scenarios, they claim, it is too harsh to hold people responsible for the cost of their choices without first equalizing their circumstances.<sup>75</sup>

However, this objection clearly overlooks the crucial role and function of the hypothetical insurance device in Dworkin's theory of equality of resources, as I explained it in the previous section.<sup>76</sup> The proper use of equality of resources as a model for a fair distribution of resources in the real world presupposes that we first apply the hypothetical insurance device. Crucially, and contrary to what Wolff and De-Shalit argue, this does not entail an intrusive and implausible inquire about actual personal responsibility: i.e. whether particular individuals identify with their choices or tastes. Rather, it requires that we make a *reasonable assumption* about whether and to what extent the *average* prudent insurer would have insured against the *risk* of suffering various forms of disadvantage. Then, based on this assumption we can determine the kind and amount of compensation that should be added to the share of resources that individuals receive: now this will be a fair share, as it will be the outcome of a device that applies both principles of equal concern and respect.

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<sup>71</sup> Ibid, p. 79-80.

<sup>72</sup> Ibid.

<sup>73</sup> For a prioritarian theory of distributive justice, i.e. giving 'priority to the worst off', see D Parfit, 'Equality and Priority', in A Mason (ed.), *Ideals of Equality* (Oxford: Blackwell, 1998).

<sup>74</sup> Wolff and De-Shalit, *Disadvantage*, p. 79

<sup>75</sup> Ibid, p. 13 and 77-78.

<sup>76</sup> Dworkin explains and defends the important role of the hypothetical insurance device in his reply to critics who argue that equality of resources is unforgiving in 'Sovereign Virtue Revisited', pp. 113-118.

Moreover, following the 'reasonableness test' that Wolff and De-Shalit suggest, in order to justify a claim to compensation, individuals would have to argue that the impact of exercising their choices and opportunities, i.e. of acting in this rather than the other way, places an undue cost or risk to their functionings and therefore that they lack genuine opportunity. This view has some appeal: it makes moral sense to distinguish between formal and genuine opportunity for choice and functioning and shift the focus of our egalitarian concern to the latter. The principle of effectiveness in the ECtHR case law has its roots in the similar idea that states ought to secure 'practical and effective' rather than 'theoretical and illusory' rights.<sup>77</sup> However, as I have tried to demonstrate throughout this thesis, the problem lies in determining what is an undue cost, risk or burden. In this respect, when applied in a real world context, Wolff's and De-Shalit's strategy seems to me more indeterminate and potentially humiliating than Dworkin's hypothetical prudent insurer test. According to their theory, an individual seeking compensation would have to focus on the details of her actual circumstances and explain the impact that exercise of a particular choice or opportunity would have on her various functionings, in order to establish in what ways and how much this makes her worst off than others.<sup>78</sup> To the contrary, the focus of the prudent insurer test is not to establish the degree of inferiority of some compared to others in society. Instead, it aims to determine what a fair distribution of resources that shows equal concern and respect for all would entail for those particular individuals who suffer from bad luck, if they had a fair opportunity to protect against it.<sup>79</sup> This is achieved only through reference to an impartial criterion of fairness, such as the assumption embodied in the prudent insurer test.

Therefore, we may still show concern for genuine opportunity by seeking to determine the reasonable cost or burden associated with the exercise of individual choice and responsibility through a modified hypothetical insurance device. Specifically, we can try to make safe assumptions about how the average hypothetical prudent insurer would have determined the relative importance of different capability sets<sup>80</sup> and what premium she would be willing to pay, in order to insure herself for these different capability sets. Following this scheme, our compensatory mechanism will not rely on a definitive list of *important or universally significant* capabilities and functionings but will seek to guarantee *fair* capabilities.

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<sup>77</sup> In the ECtHR's own words in the cases of *Airey*, *Marckx* etc. See Chs.1 and 2 of this thesis.

<sup>78</sup> To be fair, Wolff and De-Shalit explore ways in which their theory can be applied through social policy while respecting people in Ch. 10 of their book *Disadvantage* but I believe that their very interesting points do not deal with the problem of establishing the reasonableness of the cost, risk or burden.

<sup>79</sup> Dworkin, 'Sovereign Virtue Revisited', p. 116-117.

<sup>80</sup> Dworkin, 'Sovereign Virtue Revisited', p. 140.

For instance, let us reconsider the case of *Sentges v the Netherlands*,<sup>81</sup> where the young sufferer of a terminal neurological condition was unable to perform everyday activities and claimed that the state's health system ought to provide him with a robotic arm. I suggest that we should not construe the applicant's right as a claim to a key capability that all humans are entitled to because of its importance to their autonomy. As I explained in Chapter 4, this would not take into account the idea of personal responsibility or the reasonableness and fairness of allocating the cost of such a provision to others in society. To the contrary, if we follow a theory of fair capabilities we could rely on a reasonable assumption that, in many of the countries where the ECHR applies, it is only *fair* that the state ought to secure that capability because an average prudent person would have chosen to ensure against the risk of lacking it. In particular, she would have chosen to insure so as to have access to a robotic arm in case she suffered from a devastating disability that left her unable to perform any personal everyday action whatsoever without the assistance and presence of others and could, only with the help of this device, gain some valued autonomy in these personal actions and enjoy some form of private life.

Furthermore, we would not claim that a state violates the right of individuals under Article 3 ECHR to be free from inhuman and degrading treatment if it does not provide for certain universally accepted minimum living conditions in prisons or if it does not ensure the basics of subsistence or a list to key capabilities to the poor. Instead, we would make an assumption about the level of insurance that an average prudent person would have purchased to cover for certain living conditions, such as for sleep and nutrition, hygiene, health etc., in case she faced extreme poverty and deprivation. Not because this is what we owe individuals irrespective of any account of personal responsibility and based on a universal standard of minimum core obligations<sup>82</sup> or set of minimum conditions or capabilities. But because this is what an average prudent person would have chosen to insure for if she had a fair opportunity to do so, considering the risk and impact of being imprisoned for her health, dignity, private and family life but also taking into account the specific socio-economic conditions in her society.

Following this scheme, we could reasonably assume that an average prudent person, especially in the socio-economic conditions of most countries that are Members to the ECHR, would have insured against the risk of being left for a prolonged period of time unable, as a vulnerable asylum seeker, to cater for her most basic capabilities and needs -

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<sup>81</sup> See *Sentges v. the Netherlands*, discussed in detail in Chapter 2.

<sup>82</sup> As Leijten argues in, 'Defining the Scope of Economic and Social Guarantees in the Case Law of the ECtHR', p. 131. It is unclear what principles could help the Court determine what is fair for people to claim as part of this minimum core.

food, hygiene and a place to live. Finding a violation of Article 3 ECHR in *M.S.S. v Belgium and Greece* could be justified on the grounds that the failures of the Greek authorities in the application of their legislation on asylum effectively left (or forced to return) the applicant in inhuman or degrading living conditions that a prudent insurer would have protected herself for.<sup>83</sup> Considering the factor of vulnerability could raise the premium that a prudent insurer would have been willing to pay to ensure protection and this criterion could be relevant in determining the level of protection owed to other individuals in a vulnerable position, e.g. children in abusive or neglectful environments, the elderly in care homes, individuals with mental or physical disabilities in detention etc. Indeed, the ECtHR has, on numerous occasions, found that states had failed to discharge their positive obligations and protect effectively individuals in similar circumstances.<sup>84</sup> In this way, it acknowledges that respect for the rights of these individuals required more concern to be shown, through positive steps, to mitigate the impact of their disadvantageous circumstances.

We can make similar assumptions in other cases of vulnerable individuals, such as the applicant in *N v the United Kingdom*, who was an immigrant facing expulsion and the consequent withdrawal of vital HIV treatment that kept her alive.<sup>85</sup> That is, it seems reasonable to assume, contrary to the Court's finding in that case, that an average prudent person within the jurisdiction of most states members to the ECHR would have chosen to protect herself against the risk of facing expulsion and discontinuation of essential medical treatment for her life-threatening condition. More specifically, given the socio-economic conditions in the United Kingdom, we can reasonably assume that, allowing the applicant to remain in the country to continue to receive life-saving treatment and not sending her to a country where her health would deteriorate rapidly and she would face untimely death, is a reasonable and fair burden to impose on others in the particular society. Notice that, if we construed the applicant's complaint in this way, we would not be claiming that Article 3 ECHR imposes on the state 'a duty to rescue the nearby needy.'<sup>86</sup> Rather, we

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<sup>83</sup> See *M.S.S. v Belgium and Greece*, discussed in Chapter 2. The Court found that Greece had failed to discharge its obligations under Article 3 ECHR to ensure that applications for asylum were promptly processed and their result communicated to the asylum seeker to mitigate the impact that the uncertainty, vulnerability and deprivation would very likely have on their living conditions as asylum seekers. Belgium was found to be in breach of the obligation not to return an individual in a country where she is likely to suffer inhuman and degrading treatment.

<sup>84</sup> See the cases cited and discussed earlier in Chapter 2, note 23, 27 and 28.

<sup>85</sup> See my discussion of *N v the United Kingdom* in Chapter 2 (Section 2).

<sup>86</sup> See Mantouvalou, '*N v UK: No Duty to Rescue the Nearby Needy?*', pp. 721-724. The author points to various criteria that could support an argument for a 'duty to rescue', such as physical presence within the jurisdiction of a Member State to the ECHR, such as being in an advanced stage of a terminal and incurable illness or other medical condition of similar gravity, the availability of medical treatment and support in the receiving country that would ensure a decent standard of health and the dramatic deterioration and untimely death in case of removal from the

would be claiming that she has a right to those opportunities (avoid expulsion, remain in the country) and resources (continue to benefit from medical treatment) that are deemed to be part of the applicant's fair share under a fair scheme for the distribution of resources in that society. Besides, the fact that the applicant had no entitlement to remain in the United Kingdom for other reasons relating to immigration policy is irrelevant here. Her justified claim, which is enough to block deportation, is that she is entitled to remain in the country because this is what respect for her dignity requires: to be treated with equal respect and concern for her particular circumstances. Recall that the Court, on various instances, has scrutinized the states' decision and act of deportation and found that it would be in violation of the rights of the individual under Article 3, as it would put her at a real and foreseeable risk of suffering inhuman or degrading treatment in the destination country.<sup>87</sup>

To be sure, application of the hypothetical insurance device to real case law examples would require careful reconsideration of all the facts in support of the applicant's complaint, the nature and extent of the disadvantage complained of, as well as an assessment of the social and economic conditions pertaining in the respondent state. So, in cases other than those discussed above, it may be more difficult to make safe assumptions about which conditions, capabilities or resources individuals would have a fair entitlement to. For instance, we may be able to argue that a case such as *Pentiacova and Others v Moldova* should have been found admissible based on the reasonable assumption that an average prudent person would have chosen to insure against the risk of suffering from chronic renal failure. Moreover, the assessment of whether the state had an obligation to provide comprehensive haemodialysis treatment, as the applicants claimed, or partly funded by the individual, as the government argued, and at what percentage, should not have been left to the margin of appreciation of the national authorities. Instead, the Court should have discussed and assessed the socio-economic conditions pertaining in Moldova and could have attempted to determine the level at which an average prudent person would have insured against the risk of suffering from

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country and withdrawal of treatment. She also suggests a moral justification for grounding a duty to rescue the nearby needy, as opposed to any weaker obligations that we may have to rescue or help the distant needy. However, as I try to show in the text, these significant considerations, as well as considerations about the cost of this treatment should better be incorporated in an argument about the share of resources that an individual is entitled to as a matter of respect for her dignity, specifically determined through a scheme such as Dworkin's hypothetical insurance device. This scheme would ensure that the applicant would be treated with respect for her dignity rather than with pity or humanitarian concern. In this way, the duty under Article 3 ECHR is not to rescue but to respect the nearby needy: in particular, to secure her rights to resources properly understood and fairly determined.

<sup>87</sup> See for instance *Soering v the United Kingdom*, *Chahal v the United Kingdom*, *Saadi v the United Kingdom*, discussed in Chapter 2.

such an illness. This could produce a finding such as that finally reached by the Court but its fairness would have been examined and justified in a more thorough, coherent and principled way.

Besides, note that, contrary to what some critics falsely assume, such a fair capabilities scheme would also distinguish between two persons with identical incomes and other primary goods and resources. It would compensate the one who is formally free but unable to avoid undernourishment or exclusion from all aspects of social life due to disability or a particular cultural or identity difference or vulnerability: because this device seeks to compensate for personal and impersonal resources but through a different compensatory mechanism.<sup>88</sup>

Moreover, equality of resources supported by a hypothetical insurance device, such as that described above, would not merely entail cash transfers through taxation. To the contrary, we may interpret the hypothetical insurance device as requiring compensation that may take various forms, other than cash handouts. It could take the form of legislative measures, institutional or social policy changes etc.<sup>89</sup> Dworkin rightly protests against the critics that 'a distribution that a society achieves is a function of its laws and policies, not only its property and tax laws, but the full, complex legal structure that its citizens and officials enact and enforce.'<sup>90</sup> When conducting the prudent insurer test, we ask whether a prudent insurer would have insured against a particular disadvantage and up to what level or premium. But we may also inquire as to what is the best way to use the resources that society collects through taxation: it could be benefits, better regulation in an area of human activity or alterations of certain aspects of the social structure, so that certain conditions no longer represent a disadvantage.<sup>91</sup> And to this latter task, our inquiry about

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<sup>88</sup> See A Brown, who defends in this way Dworkin's equality of resources against Sen's 'capabilities objection' in his *Ronald Dworkin's Theory of Equality. Domestic and Global Perspectives* (Palgrave Macmillan, 2009), p. 70-73.

<sup>89</sup> As I explain in the text, given that this is a plausible understanding of the hypothetical insurance device it seems unfair to treat Dworkin's equality of resources as offering 'external resources to make up for a lack of internal resources'. For this charge, see J Wolff, 'Disability Among Equals' in K Brownlee and A Cureton, *Disability and Disadvantage*, (Oxford University Press, 2009). Besides, equal concern may require that, in applying the hypothetical insurance device, we must also attend to some, but not all, of the concerns expressed by a strategy of status enhancement, i.e. the strategy to modify technology, laws, the built environment or social attitudes out of respect for people with disabilities. Again, the prudent insurer test is not meant to calculate what should be handed out to individuals but to determine the fair cost of any measure (of any kind) that individuals may claim or the society may decide to undertake. For the strategy of 'status enhancement' see Wolff, as above, esp. p. 127-132.

<sup>90</sup> See R Dworkin, 'Equality, Luck and Hierarchy', p. 197-8.

<sup>91</sup> This could be the focus of positive measures that aim to show respect for people's 'unpopular' choices (such as gender reassignment) through recognition, adaptation of legislation and social and cultural policies. See S Segall, 'Is Health (Really) Special? Health Policy between Rawlsian and Luck Egalitarian Justice', (2010) *Journal of Applied Philosophy*, p. 10.

disadvantage or the conditions necessary to overcome it could converge with that of those working in versions of the capabilities approach, such as that discussed above.

Interpreted this way, it is unfair to say that equality of resources adopts a 'medical' or an 'economic model' of disability, i.e. one that assumes that disability is a purely physical and mental condition or a condition that makes life economically harder.<sup>92</sup> To the contrary, in its best moral light, the hypothetical insurance device is closer to the 'social model' of disability. That is, it could acknowledge that much of disability policy should be directed at a whole range of social, cultural and material factors, e.g. facilitating accessibility to public buildings and spaces through public investment, but also through changes to building codes, adjustments in the workplace, the language used, education about disability and difference and various other measures that aim to reduce the impact of impairment.<sup>93</sup> Most importantly, it is the only egalitarian strategy that does not pre-determine specific circumstances, e.g. deafness or autism, as instances of brute luck but allows the hypothetical insurance device to determine whether and to what extent a prudent insurer would have seen that as a source of disadvantage or as just a difference. Following this, in a social environment that is structured to respect, accommodate and celebrate difference and diversity, a prudent insurer may have chosen to spend less or none at all to insure herself against the risk of those circumstances. Whereas, we can safely assume that one would have chosen to pay a great premium to insure against the risk of finding herself in such circumstances in a society that discriminates against or excludes people with disabilities.

For instance, most Member States to the ECHR claim to be or aspire to become inclusive societies that respect and seek to accommodate the needs of people with disabilities. In Chapter 2, I discussed examples of the case law where the ECtHR acknowledges that states may have positive obligations to accommodate the needs of people with disabilities. However, I highlighted the fact that the Court is reluctant to scrutinize these cases, as it has no principles at hand by which to determine the precise content of such claims to resources and positive obligations. Consequently, any existing legislative framework is not applied in practice, the Court's reasoning is incoherent and leaves these issues to a wide margin of appreciation of the national authorities and the individual remains effectively unprotected. The reasoning in these cases would be more consistent and the outcomes of these cases more likely fair if based on arguments formed through Dworkin's hypothetical insurance device.

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<sup>92</sup> J Wolff, *Ethics and Public Policy, A Philosophical Inquiry*, (Routledge, 2011), ch. 7 'Disability', esp. p. 149-151.

<sup>93</sup> Contrary to what Wolff argues in, *Ethics and Public Policy, A Philosophical Inquiry* (2011), p. 151.

Applying this hypothetical scheme, we could make a reasonable assumption that an average prudent person would have chosen to insure herself against the risk of lacking the conditions and capabilities necessary to access public buildings and facilities open to the public or public beaches and polling stations. Based on this, for example, in *Zehnalova and Zehnal* and in *Botta* the Court could have found a direct and immediate link between the applicants' private life and their ability to access the post office, police station, specialist doctors' surgeries and lawyers' offices, cinemas and the town swimming pool in their home town or to public beaches, because it seems very reasonable to assume that an average prudent person would have considered access to these buildings, facilities and public spaces as an essential capability or condition of her 'right to personal development and her right to establish and develop relationships with other human beings and the outside world.'<sup>94</sup> Also, we can reasonably assume that the average prudent person would not have made that choice dependent on whether she would need to use these facilities frequently or use only those close to her home. This condition would defeat the very point of having a right to develop her personality and participate in the social life of the community: she would want to ensure that, like all other individuals, she too would have access *if, whenever* and to *whatever* buildings or spaces she chooses to visit. The precise coverage that a prudent insurer would have chosen to purchase and the corresponding level of compensation justified would have to be determined also with reference to the social and economic conditions in the particular state. But it seems reasonable to assume that it would have covered the cost of making necessary arrangements for disabled access in public buildings or the minimal cost of overseeing the application of existing legislation by private parties that offer services to the public.

In the same way, in *Molka v Poland*, the Court could have found a violation of the applicant's rights as the cost of ensuring adequate access to polling stations in particular for people with disabilities could be minimal and would have definitely been worth insuring for under a hypothetical insurance scheme. We can make a safe assumption that an average prudent person would have chosen to ensure that she would be facilitated in exercising the fundamental right to vote. After all, that could have been achieved not only through installing ramps to polling stations but also through cost-free provisions in the relevant legislation to facilitate voting, e.g. by allowing a member of the polling station staff to cast the vote on behalf of a disabled person.

In all these cases, it is true that the national authorities, as the Court often states, are in direct and continuous contact with the vital forces and socio-economic conditions of

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<sup>94</sup> *Zehnalova and Zehnal v. the Czech Republic*, section A and also *Botta v Italy*, both discussed in detail in Chapter 2 (Section 2).

their countries and are entrusted with protecting the ECHR rights while evaluating and observing local needs and conditions.<sup>95</sup> However, that does not necessarily mean that they should be afforded a margin of appreciation in the assessment of whether their choices in the distribution of resources and opportunities unfairly disadvantage some individuals, in that they show less than equal respect and concern for the circumstances, conditions or capabilities that they are left with within their formal spheres of freedom. Indeed, the applicants' complaints can be seen as challenging the distribution of resources in their society as unfair. In fact, if we view their claims through Dworkin's hypothetical insurance scheme, as I propose, many of them would have to have been substantively examined, and possibly justified, as it seems reasonable to assume that a fair distribution of resources in the particular countries would have mitigated the disadvantage suffered by the particular applicants.

Moreover, through the hypothetical insurance device, individuals and groups that find themselves in disadvantageous circumstances could have justice claims not only to resources equivalent to what others have but also to additional compensatory resources, if that were deemed necessary to show equal concern and respect for their very particular circumstances despite living in an otherwise inclusive and favourable social environment.<sup>96</sup> In this way, this approach could also incorporate some of the concerns of 'difference'<sup>97</sup> and 'recognition'<sup>98</sup> theorists. There is *nothing in the structure* of the hypothetical insurance device that prevents it from paying attention to the cultural or 'relational' aspect of equality,<sup>99</sup> i.e. in creating and fostering equality respecting relations

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<sup>95</sup> See for instance *Chapman v the United Kingdom* discussed in Chapter 2 (section 2). Also note that the Court has, on many instances substantively examined and found that national policies that deprived individuals of certain social benefits or reduced them significantly imposed a disproportionate or excessive burden on them and, therefore, violated their rights. See for instance, *Asmundsson v. Iceland* and *Moskal v Poland*, discussed in Chapter 4, note 49, where the Court found that the national authorities had not struck a fair balance: no matter how well justified by a legitimate aim, a policy that divested the applicants of social security benefits that they were receiving was excessive and disproportionate.

<sup>96</sup> Pogge, in 'A Critique of the Capability Approach', p. 52-53, does not explain why a resourcist like Dworkin could not justify such justice claims through his hypothetical insurance device (that could give rise to perfect duties that correlate with rights).

<sup>97</sup> I M Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990).

<sup>98</sup> N Fraser and H Axel, *Recognition or Redistribution?* (London: Verso. 1998).

<sup>99</sup> For social equality and social egalitarianism and a discussion of how they are supposedly distinct from but not incompatible with liberal egalitarian theories of distributive justice see C Fourie, F Schuppert and I Wallimann-Helmer, 'The Nature and Distinctiveness of Social Equality: An Introduction' in C Fourie, F Schuppert and I Wallimann-Helmer (eds.), *Social Equality. On What It Means To Be Equals*, (Oxford University Press, USA, forthcoming 2015), now available in [http://www.academia.edu/8036895/The\\_Nature\\_and\\_Distinctiveness\\_of\\_Social\\_Equality\\_-\\_An\\_Introduction](http://www.academia.edu/8036895/The_Nature_and_Distinctiveness_of_Social_Equality_-_An_Introduction). As I briefly suggest in the text, it seems to me that charges about the inadequacy of Dworkin's theory of equality to accommodate concerns about relations of equality among members of a society by theorists of social or relational equality are misplaced, if they assume that this theory is solely focused on some 'thing' that must be distributed equally. This underestimates the point that Dworkin's overarching principle of equal respect and concern entails a fundamental

between individuals. That is, of course, as long as we can make safe assumptions that an average prudent person would have insured herself against a racist, xenophobic, homophobic, sexist or discriminating environment. Or, as long as we can reasonably assume that a fair distribution of resources and opportunities would provide a careful regulation of the private sector and relations, the public administration, the natural or built environment or the 'food environment',<sup>100</sup> in an attempt to show equal concern and respect for vulnerable groups, such as the LGTB community, Roma,<sup>101</sup> people with disabilities<sup>102</sup> or those at risk of exploitation, forced labour or trafficking.<sup>103</sup>

For instance, we can reasonably assume that, within liberal, tolerant societies that generally value and protect the freedom of choice of individuals in how best to develop their personality and form personal relationships, an average prudent person would have insured to have her post-gender reassignment identity fully recognized, respected and protected in practice.<sup>104</sup> Likewise, having had a fair opportunity to do so, a prudent person living in a society that has a constantly evolving understanding of the institution of marriage and of family relationships would certainly have insured to have equal access to institutions such as civil union and marriage, irrespective of her sexual orientation or gender changes.<sup>105</sup> Dworkin's hypothetical insurance device would also entail

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right and obligation to be treated with a certain *attitude*. Besides, this criticism underestimates the fact that the distributive aspect of Dworkin's principle of equal respect and concern is meant to be indicative of and reflecting that attitude and not the other way around. This requires further discussion that is beyond the scope of my argument in this thesis.

<sup>100</sup> UK campaign group Action on Sugar ([www.actiononsugar.org](http://www.actiononsugar.org)) has recently called for 'sugar tax' to reduce child obesity rates but also for better regulation of the food industry, marketing and advertisement targeting children. See BBC Health News report 'Health Group calls for 'sugar tax' to cut child obesity', 22 June 2014. Notice that a low cost measure, such as passing the relevant legislation or amending existing policies, could benefit certain vulnerable groups (e.g. children) enormously and significantly relieve the public health services' budget at the same time. Of course, this will come at a loss of income for the profitable business of marketing, advertising and selling this type of food (for the state too in the form of revenue) but such considerations cannot be valid reasons for allowing a harmful food environment (if this is so).

<sup>101</sup> See for instance, my discussion, in Chapter 2, of cases relating to the concern and respect owed to Roma people by the state assess the particularly disadvantageous impact that land regulation or educational policies may have on their rights to private and family life or their right to education, e.g. in *Chapman v the United Kingdom* and *D.H. & Others v. Czech Republic* respectively.

<sup>102</sup> See my discussion of how we can construe ECtHR cases relating to the rights of persons with disabilities in light of Dworkin's hypothetical insurance device earlier in this chapter.

<sup>103</sup> The ECtHR has taken such an approach against exploitative relationships and activities in *Siliadin v France* (2006) 43 EHRR 16 and *Rantsev v Cyprus and Russia*, where it found that states have positive obligations to put in place clear criminal law legislation and adopt all operational measures to protect vulnerable individuals sufficiently from being enslaved or trafficked.

<sup>104</sup> See *Christine Goodwin v the United Kingdom*, discussed in Chapter 1, where the Court also noted that 'where a State has authorised the treatment and surgery...financed or assisted in financing the operations...it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads', in para. 78.

<sup>105</sup> In *Vallianatos & Others v Greece* (2014) 59 EHRR 12, the Court found that the Greek state had not shown it to have been necessary, in pursuit of the legitimate aims invoked by the law introducing civil unions, to bar same-sex couples from entering into such unions. The Court's approach has been more restrained in allowing post-operative transsexuals to remain married, e.g.

compensation or protection in the form of social policy change to allow homosexuals to adopt children: living in a society that fully recognizes and shows equal respect to all irrespective of their sexual orientation an average prudent person would also have ensured that she would be given an equal opportunity in the adoption process.<sup>106</sup> Of course, under such a scheme for the distribution of resources and opportunities in a society that does not allow the prejudices of some to influence what others are entitled to, an average prudent person would have protected herself against dismissal from work on the grounds of the prejudices of others related to gender, sexual orientation or HIV-positive status.<sup>107</sup>

Only, under equality of resources any state action aiming to establish and protect relationships of equality among individuals would have to respect the special responsibility of each individual for the ethical choices in her life. This means that any measures aiming to foster more 'equal' relations between members of a society would be justified only so long as they do not rest on a choice about the personal virtues that a good life reflects or violate ethical independence by denying people the freedom and responsibility to make their own decisions about matters of ethical foundation.<sup>108</sup> As I explained earlier in this thesis, ethical arguments will not be permissible in forming assumptions such as those I briefly sketched throughout this chapter. Instead, arguments and principles of political morality about conserving scarce resources or respecting the moral rights of others or forcing people to pay taxes, in order to fund fair education or health schemes, will not just be permissible but, also, essential.

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in *Parry & Anor v. United Kingdom*, *Schalk and Kopf v Austria* and the very recent *Hamalainen v Sweden*, discussed in Chapter 1.

<sup>106</sup> See these cases discussed earlier in Chapter 2: *Frette v. France*, where the Court found no violation of the applicant's rights not to be discriminated against in the exercise of their Article 8 right to private and family life. In this case, the limitation of the applicants' right was deemed justified because it was in pursuit of a legitimate aim – i.e. the protection of the health and rights of children. Contrary to this, in *EB v France*, para 91, the Court declared that 'where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8.' Following this, it decided that French authorities violated the applicant's rights because they rejected her application for an authorization to adopt largely based on her homosexuality and the lack of parental referent in the household, which were both not legitimate reasons for the different treatment.

<sup>107</sup> See respectively *Emel Boyraz v Turkey*, (2015) 60 EHRR 30 and *Smith and Grady v the United Kingdom*, discussed in Chapter 1 and *I.B. v Greece*, Application No. 552/10 (3 October 2013).

<sup>108</sup> Such as those related to religious beliefs and in personal commitments of intimacy and to ethical, moral and political ideals, except when necessary to protect the life, security, or liberty of others. See Dworkin, *Justice for Hedgehogs*, p. 368-369. Of course, the question then arises whether, if they follow this fundamental principle, theories of relational or social equality are indeed distinct from Dworkin's egalitarian theory of distributive justice. It seems to me that they can either collapse into equality of resources (with emphasis on a development of the hypothetical insurance device as I argued in this chapter) or risk sliding into perfectionism or paternalism. But it is beyond the scope of my thesis to discuss this in detail.

## CONCLUSION

In this thesis, I set out to explore the question of what positive obligations and claims to resources are inherent in an effective respect for the ECHR rights. My aim was twofold: firstly, to establish that we must look for answers to this question within a theoretical framework outlined by certain values and principles of political morality; secondly, to suggest an answer based on a particular interpretation of the values of liberty and equality and the fundamental principle of equal concern and respect. Before setting out to advance my thesis, I made sure to clarify and stress where we cannot and should not look for answers: in flawed categorizations and distinctions between different types of rights and duties and in formalistic or conventional interpretations of the ECHR.

In particular, I explained in the Introduction to this thesis that all rights, civil and political or social and economic, may entail both negative and positive obligations and that both kinds of rights and obligations depend on resources and involve resource allocation decisions. I argued that it is a fundamental interpretive question about the content of ECHR rights to distinguish which claims with resource allocation implications fall within the legitimate role and the institutional competence of the ECtHR to decide and which belong to the margin of appreciation of the national authorities. Reference to the very notion of the margin of appreciation is part of the question and not the answer to our problem. On the other hand, neither the so-called principle of effectiveness can provide us with guidance, as it lacks any normative content: it merely tells us that states must protect the ECHR rights in a 'real and practical' way and not render them 'theoretical or illusory.' This promise for a proactive human rights ethic remains unfulfilled or misguided, if not underpinned by a set of principles, by which we could coherently decide which positive obligations in particular are inherent in an effective respect for the ECHR rights.

To begin with, in Chapter 1, I highlighted the flaws of a 'conventional effectiveness approach' adopted by some scholars and judges who are eager to set limits to a potentially far-reaching quest for effectiveness and to what they see as the exercise of judicial discretion beyond the Court's institutional role. I explained that neither the plain meaning of the text nor the concrete intentions of the drafters can help us answer the question of what effective respect for the ECHR requires. Theory and practice point to the argument that choices in interpretation are necessary and within the role of the ECtHR judge in easy and hard, controversial cases and we need substantive moral reasoning to resolve disagreement about the meaning and requirements of the ECHR provisions. I explained how formalist and originalist approaches have largely been abandoned in the practice of

the ECtHR and discredited in theory. They have given way to a 'substantive effectiveness' approach: an evolutive interpretation of the Convention, as a living instrument, i.e. trying to discover what effective respect requires in the present day conditions and in light of substantive moral arguments about the essence of the rights at stake and the values that underpin them. Still, judges and scholars are keen to point to other conventional limits, such as the lack of consensus, especially in positive obligations cases that are considered more sensitive and controversial, in that they have budgetary or social policy implications. Besides, reference to a wide margin of appreciation in these difficult cases usually implies uncertainty and unease about whether these matters should really be treated as human rights issues that the ECtHR should decide.

For this reason, I critically reviewed case law examples that rely on the idea of consensus as a justification to deny the existence of certain positive obligations and grant states a wide margin of appreciation. I explained how this contradicts the Court's admitted role as the ultimate guardian of the substantive effectiveness of certain fundamental rights of individuals: these rights are meant to offer certain fundamental, inviolable moral claims against more powerful authorities and would therefore remain illusory if their content and limits were ultimately determined by national or international majorities. Finally, I noted that, although there is a noteworthy shift towards substantive moral reasoning, the Court's reluctance to apply this in positive obligations cases is due to the difficulty in dealing with questions about what claims to social policies or resources individuals are entitled to under the ECHR rights.

In Chapter 2, I discussed representative examples of two categories of cases that illustrate this disparity between, on the one hand, the progress in some areas of the case law in the search for substantive arguments and criteria about what positive obligations are inherent in effective respect and, on the other hand, the problems in identifying the principles for those claims that the Court fears may have significant resource allocation implications. I demonstrated how the Court reviews substantively claims to procedural obligations relating to the administration of justice or the conduct of public authorities, the police and the military services and has even developed certain criteria, by which to judge whether states have failed to comply with these typical state functions and responsibilities. I then drew attention to the fact that the Court is much more restrained when dealing with claims that appear to be closer to welfare state responsibilities or have wider social policy or resource allocation implications. My aim was to reveal how the lack of a set of principles about which claims to resources and positive obligations are justified as a matter of ECHR rights dissuades the Court from dealing with many of these claims altogether or leads it to grant states a wide margin of appreciation based on poor reasoning and justification. My close examination of how these claims are, or could be, understood

was intended to point to the need to focus our discussion to the substantive interpretive work that is required in order to determine the content of claims to resources and positive obligations, in light of the values and principles underlying the ECHR rights.

My analysis then turned on the value of liberty as the core value underlying the ECHR rights. My aim in Chapter 3 was to appraise three different conceptions of the value of liberty that could be or have been used to tackle the interpretive question of what effective respect for the ECHR rights requires and defend the one I believe could provide a principled account of claims to resources and positive obligations under the ECHR. I examined Isaiah Berlin's interpretation of the value of liberty, which is often impliedly relied upon by scholars and judges. My aim was to reveal the unappealing implications of Berlin's account of liberty construed independently of the moral demands of other values – implications that those who subscribe to this account of liberty and rights often underestimate. This distinctive feature of Berlin's theory, I argued, divests a conception of liberty of any evaluative considerations of what it is that we value about liberty and, therefore, of what is morally worthy of respect and protection.<sup>1</sup> In this way, it offers an implausible and unattractive account of freedom, whereby claims to choices, opportunities, resources and positive obligations are formed in disregard of morally relevant considerations about what is rightful for people to claim. In this way, it offers no solution to our problem, which I have identified as distinctively moral: how much and what kind of choices, opportunities or resources individuals are entitled to as a matter of effective respect for the ECHR rights.

On the other hand, I argued against scholars who appeal to Joseph Raz's interest-based theory of rights as a basis for an account of positive obligations under the ECHR. I closely examined its moral foundations and found that it poses a challenge for our understanding of the moral point of human rights because it relies on a conception of liberty in light of the value of autonomy, understood as a social and perfectionist value. The importance of individual choice is downplayed and rights lose their distinctive moral force. Individuals will have rights or claims to resources (and the state corresponding duties) based only on those autonomy interests that have emerged as valuable in social practices and are established as worthy of protection and promotion according to the particular conception of the good favoured by the perfectionist state. Following Dworkin, I argued that this approach disregards the fundamental principles of liberal neutrality and the principle of special responsibility of each individual for matters of ethical foundation, i.e. about the right way to live one's life and about what adds value or brings success to one's life. At

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<sup>1</sup> Recall here my clarification in the Introduction that my reference is to political morality, i.e. the principles about how we should treat others and not to personal morality or ethics, that is the best way to live one's own life.

the same time, I tried to show that although this approach entails wide-ranging duties to promote the conditions of autonomy, it allows the perfectionist state to provide the resources or opportunities necessary for the options and choices that it finds conducive to autonomy. This, I suggested, is at odds with the very point of human rights and the purpose and practice of the ECHR, which is aimed at guaranteeing certain fundamental moral rights of individuals against the preferences or competing interests of the majority or the prevailing social norms, practices and conceptions of the good.

In contrast to these two approaches, I developed and reinforced Dworkin's integrated account of liberty and equality. Construed as integrated with equality, liberty includes the ways in which we believe people ought to be free, having taken into account the demands of equality, fairness and social justice. I argued that the most attractive feature of this theory is that claims to resources and positive obligations depend on a prior theory about what people are entitled to according to a fair and equitable distribution of resources. That is, once their content is determined in this way, as fair shares in a just distribution of resources, they can be strong and justiciable claims, as we want rights to be. Besides, my analysis in the last section of Chapter 3 was intended to reveal a further appealing consequence of interpreting liberty and rights in this way. Unlike Berlin's theory, this conception of freedom and rights depends on moral evaluative judgments and unlike Raz's outlook, these moral evaluative judgments are not framed according to a particular conception of the good, such as well-being or autonomy. Instead, they are shaped by what Dworkin famously calls the fundamental ideal of equal respect and concern. This, firstly, requires that government allow and respect the freedom and special responsibility of individuals to make their own choices regarding matters of ethical foundation. Secondly, and most crucially for my thesis, this ideal also demands government to show concern for the morally arbitrary disadvantageous circumstances that render this freedom of choice worthless and prevent individuals from exercising it in any meaningful way. My analysis aimed to establish that it is essential to shift the focus of the debate about the content of claims to resources and positive obligations to this question: which disadvantageous circumstances indicate an unfairness in the distribution of resources or that some are left with less than a fair share of resources.

Having established that we better understand claims to resources and positive obligations as claims to fair shares according to a just distribution of resources I examined, in Chapter 4, three approaches that appear to offer a way to determine what people may claim as a fair share. Firstly, I explained that the idea of proportionality and a fair balance between competing interests, that is prevalent in constitutional and human rights practice, is best understood as expressing a concern about determining a reasonable or fair relationship (a 'fair balance' as the ECtHR puts it) between competing claims to freedoms

and resources. However, I tried to show that the proportionality test is used in practice as an institutional tool that often falls short of serving this purpose. This happens because it is usually conducted in the absence of what is essential to make the balancing actually fair: a coherent set of principles about what is a fair and equitable distribution of benefits and burdens in society. Without such a theory, we risk using the proportionality test in an ad hoc and arbitrary way, hoping only, rather than ensuring that we come up with correct and fair outcomes. Indeed, the practice of the ECtHR has come under intense criticism for the incoherent outcomes in the application of the balancing test of and proportionality.

Furthermore, I argued, in the same vein as others have done, that a utilitarian or cost-benefit outlook does not provide an attractive theory to underpin the proportionality test as it is contrary to the point of this test, properly understood, violates the fundamental principle of equal concern and respect and is incompatible with the very idea of human rights. Neither can a subjective account of autonomy interests help us determine the rightful claims of individuals to a fair share of the available resources. Because it allows *prima facie* rights to pretty much everything that is considered as essential from the point of view of the agent, without clear guidance about where to draw the fair and reasonable limits of these claims in the second, balancing stage. Instead, following up the discussion from the last section of Chapter 3, I explained that the moral concern behind the idea of proportionality is best served by liberal egalitarian principles, which draw our attention to the fairness than the (*ad hoc*) balancing feature of the proportionality test. Specifically, I argued that to use this institutional tool in an effective way, the Court should aim to establish that an individual's claim is reasonable or proportional if it is justified under a fair scheme of distribution of benefits and burdens in society.

I examined two such theories of fair distribution of resources that are broadly egalitarian, in that they are both interpretations of the fundamental egalitarian principle that government must treat all with equal concern and respect. The minimum core approach, I explained, would fix the content of claims to resources and positive obligations only with reference to the importance of certain interests, needs or goods, independently of morally relevant considerations of personal responsibility and the reasonable burden that may be imposed on others in light of the overall available resources. I argued that determining the share of resources that individuals are entitled to in this way violates the fundamental principle of equal concern and respect since it treats as unfair distributions that are not necessarily inherently unfair. Because it does not somehow accommodate the possibility that differences in people's ability to satisfy these basic needs or have these basic good may be due to their free and responsible choices.

The capabilities theory too, as developed by Amartya Sen, attempts to answer the question of what share of resources individuals can rightly claim. But, it rests on welfarist

notions to define the rightful claims of individuals and therefore suffers from the problem of subjectivism: a great variety of personal preferences about what increases that welfare would be deemed morally relevant in determining a share of resources as fair and rightful. On the other hand, I clarified that we run the risk of perfectionism if we follow Martha Nussbaum's capabilities theory and determine claims to resources based on a list of key capabilities that are deemed universally important. Specifically, such a list can only be drawn with reference to a particular conception of what is good or valuable in life but this contradicts the principle of special responsibility, which stipulates that people must make ethical choices for themselves. Still, I argued, we have good reasons not to abandon the capabilities approach altogether. In fact, I suggested that it could offer significant complementary insights to other theories of distributive justice. For instance, it can help us determine the various ways in which morally arbitrary circumstances and disadvantages affect the actual enjoyment of rights and freedoms formally granted to all. But, notice, my suggestion was that these considerations are meant to be complementary in the sense that they will have to be incorporated in and justified on the basis of a theory that integrates the demands of liberty and equality better than both the capabilities and the minimum core approach.

This analysis opened the way for following up on my discussion (in Chapter 3) of an account of claims to resources and positive obligations based on Dworkin's integrated conception of liberty and equality. In Chapter 5 I set out to further explore the better justification, greater attractiveness and possible application in a real world context of this ideal account, that integrates respect for personal responsibility for the free *choices* of individuals about their lives with concern for mitigating the impact of morally arbitrary *circumstances* and *disadvantages* that hinder the effective exercise of these choices within their spheres of freedom. I closely examined Dworkin's theory of equality of resources with a view to defend an interpretation of his hypothetical insurance device as a strategy for determining the content of claims to resources and positive obligations under the ECHR. Against those who criticize it as ungenerous and unforgiving, I argued that the great importance this theory attaches on the principle of special responsibility does not exclude but justifies and determines, in a different way, certain minimum conditions of dignity, even to those who make bad choices. Much of this kind of criticism, I claimed, is due to a misinterpretation of the function of the hypothetical insurance device within Dworkin's theory of equality of resources. In light of the principle of equal concern, the principle of special responsibility presupposes those conditions that are essential for freedom of choice and responsibility to be meaningful –and the hypothetical insurance device aims to determine what these conditions are. Moreover, I revealed how, applying Dworkin's prudent insurer test, we can construe claims to resources and positive

obligations based on interpretive judgments about which disadvantages we can reasonably assume people would have insured themselves against the risk of suffering and at what level.

At this point, I suggested complementing the application of the prudent insurer test in the real world context of human rights adjudication by employing the significant work of capabilities theorists in identifying the various forms in which disadvantage appears and the policies, measures or resources that can be used to mitigate it. I proposed an account of positive obligations and claims to choices, opportunities or resources under the ECHR as claims to fair capabilities, i.e. not to a specific list of capabilities but only those and at that level that we can reasonably assume people would have chosen to guarantee for themselves, if they had had a fair opportunity to do so.

It is beyond the scope of my research to explore in depth the implications of this thesis for the practice of the ECtHR and for the interpretation of specific provisions of the Convention. Nevertheless, I will briefly outline how certain features of this practice may be reconsidered in light of my main arguments, acknowledge some of its weaknesses and identify areas for further research.

Throughout this thesis, I have tried to reinforce the view shared by many critics that a mere general reference to the potential resource allocation implications of a certain claims cannot be sufficient reason for dismissing these claims outright at the admissibility stage. Unless, of course, it can be justified how they fail to satisfy the admissibility criteria, especially whether they are 'manifestly ill-founded' or whether the applicant has not made a reasonable case that she has suffered a 'significant disadvantage'.<sup>2</sup> My argument was intended to emphasize that it is an abnegation of its power and role as the ultimate guardian of the ECHR rights to find inadmissible some claims with supposedly far-reaching implications, without any substantive justification (other than a general reference to resource allocation implications) of why a particular claim to resources does not seem to

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<sup>2</sup> See my discussion of a characteristic group of such inadmissible cases in Chapter 2. For the Court's Practical Guide on the Admissibility Criteria see [www.echr.coe.int/Documents/Admissibility\\_guide\\_ENG.pdf](http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf), especially pp. 68-77 for the reasons for finding through a preliminary examination of the substance of the application whether it is 'manifestly ill-founded' or whether the applicant may have suffered a 'significant disadvantage'. For a criticism of the Court's practice with regards to the admissibility criterion of 'manifestly ill-founded' see J Gerards, 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning', (2014) *Human Rights Law Review* (1): 14. For a review of the Court's practice on the 'significant disadvantage' admissibility criterion so far see A Buyse, 'Significantly Insignificant?' The Life at the Margins of the Admissibility Criterion in Article 35 (3)(b) of the ECHR' in B McGonigle Leyh, Y Haeck, C Burbano Herrera, and D Contreras Garduno (eds.), *Liber Amicorum for Leo Zwaak*, (Antwerp: Intersentia 2013) as well as the ECtHR's Research Report on the New Admissibility Criterion under Article 35 (3)(b) of the Convention: Case Law Principles Two Years On, (2012) available at [http://www.echr.coe.int/Documents/Research\\_report\\_admissibility\\_criterion\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_admissibility_criterion_ENG.pdf)

raise a human rights issue but is deemed to be a social policy issue that should better be left to the margin of appreciation of the national authorities. Notice that the Court explains the substantive feature of this criterion to be whether it discloses an appearance of a violation of an ECHR right. It further explains that this conclusion will be reached and an application may then be dismissed if, after the Court *examines the merits* of the complaint, it finds that the decision-making process in the national context that resulted in the act (or omission)<sup>3</sup> complained of by the applicant was *fair* and *not arbitrary* and whether any interference complained of was proportionate. This, as the Court mentions, is out of respect for the principle of subsidiarity but also of the principle of effectiveness: the national authorities are those primarily entrusted with the protection of the ECHR rights; however, it is the Court's role to review whether the national authorities' decisions, practices and policies had been fair in these respects.<sup>4</sup> At this point, I was less ready to condemn the Court's reluctance to enter this discussion in difficult cases and in the face of uncertainty about how to establish fairness.

I observed that the lack of appropriate justification and poor reasoning in positive obligations cases that the Court finds inadmissible is understandable. In particular, I tried to show that the Court lacks a coherent set of principles by which to decide these interpretive questions that raise difficult issues related to distributive justice, about what kind of treatment or share of resources people are entitled to as a matter of effective respect for the ECHR rights. In light of my analysis in this thesis, we could reconsider these criteria of admissibility. We could construe them as inviting the Court to establish whether the interference or disadvantage complained of by the applicant is potentially unfair in the following sense: although it is unfeasible (and potentially unfair) to strive to eliminate all limitations or all disadvantage, which disadvantages or which capabilities/conditions of choice and at what level can we reasonably assume that people would have insured themselves for under a broadly just scheme for the society's available resources? The question would then turn on whether the applicant makes a reasonable claim for a connection, link or relationship between the disadvantage that she complains of and the actual exercise of choice within one of the spheres of freedom granted by the ECHR, such as private or family life. Notice that, as I argue throughout this thesis, this link is primarily moral and would have to rest on substantive moral arguments about the essence of the ECHR rights.

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<sup>3</sup> My addition.

<sup>4</sup> See the ECtHR's Practical Guide on the Admissibility Criteria, p. 71.

The same principles should apply when the Court reviews substantively the merits of complaints, when it examines whether there has been an interference with one of the Convention freedoms and whether that is justified or proportionate.

With regards to claims to positive obligations the Court could, firstly, inquire whether it is reasonable to assume that a prudent individual would have deemed the circumstances complained of as a disadvantage in the effective enjoyment of a particular freedom – a capability that she would have considered as essential condition for the exercise of choice and would have insured against the risk of lacking, by sacrificing some of the overall resources available to her.

The second point of inquiry, i.e. whether the action or omission of the state is justified as proportionate, could better be construed as an inquiry about how much or what kind of measures or resources can we reasonably assume that a prudent individual would have deemed as enough to compensate for the particular disadvantage or condition/capability for choice. Interpreted in this way, this inquiry has nothing to do with balancing the individual's claim to resources or positive obligations against conflicting considerations, such as the rights and interests of others or the economic well-being of the country. To be sure, recall that in Dworkin's hypothetical insurance device the cost of mitigating the impact of disadvantage and guaranteeing certain capabilities or conditions of freedom is crucial when determining the kind and level of protection that people would have guaranteed for themselves. However, the way it is taken into account satisfies certain conditions of fairness and equal concern and respect and it is a test that invites interpretive judgments about what it is that we value about various freedoms and what conditions we would consider worth protecting and ensuring.

At the same time though, as well as being a moral test, recall that an application of the prudent insurer test in order to determine the fair capabilities as the fair shares that people are entitled to, allows for great flexibility with regards to the factual basis of other morally relevant circumstances (within the boundaries of fairness). Specifically, our inquiry would have to look for a link or connection in light of the social and economic conditions in each state, taking into account the level of social, economic, institutional and infrastructural development or any special conditions of austerity and extreme scarcity of resources. This seems to accommodate well the concern about the diversity of practices or the difference in socio-economic conditions among the Member States to the Convention.

It also accommodates the idea that what counts as a disadvantage and the level of compensation that it warrants should be sensitive to how people in a particular society perceive of certain circumstances, what priority or urgency they attach to claims to compensate for them and at what level. The abstract moral requirement to treat all with equal concern and respect is the same, albeit the interpretive judgment of what positive

obligations and claims to resources that fundamental principle yields must be dependent upon the particular social and economic context, in which the strategy of the modified hypothetical insurance device will be applied. Again, as I explained in Chapter 5, this is not a flaw of this strategy to be regretted but a requirement of fairness and proper understanding of the demands of equality.

I find it quite possible that such an assessment of facts and moral arguments would have led the Court at least to review substantively or even decide differently certain claims to resources and positive obligations, such as the hard cases discussed in Chapter 2. In Chapter 5 I provided some examples of how Dworkin's hypothetical insurance device could alter the reasoning or produce a different outcome in ECtHR cases. Of course, each individual case would require careful re-examination and I acknowledge that the main weakness of my thesis is that it only provides a theoretical framework for a different approach to the content of positive obligations and not a detailed method of how to apply the modified hypothetical insurance device. So, the question of exactly how to determine the precise content of fair capabilities or conditions and resources necessary for an effective respect of the ECHR rights remains open. And it requires interdisciplinary work at the intersection between human rights law and theory, political philosophy, economics and social policy. Equally, any project of applying human rights considerations to budgetary analysis and seeing how claims to resources and positive obligations can influence resource allocation decisions<sup>5</sup> largely depends on a clear and coherent set of principles about how to determine their content. My aim was to demonstrate the need for and justify such a framework for determining the content of claims to resources and positive obligations inherent in an effective respect for the ECHR rights. At the same time, I acknowledge the considerable difficulties in setting out how it could be applied by the ECtHR in general and in the context of specific provisions in particular. In this respect, my research endeavours are to be continued.

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<sup>5</sup> See the very interesting recent book in this area by R O'Connell, A Nolan, C Harvey, M Dutschke and E Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources*. (Routledge, 2014)

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