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Positive obligations and the European Court of Human Rights

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Analysts of the ever-burgeoning jurisprudence of the European Court of Human Rights (ECtHR) have been quick to emphasise that the Court is making increased use of the concept of "positive obligations".[1] In other words, rather than merely requiring Council of Europe states to refrain from interfering with individuals' rights, the Court is frequently insisting that those states take direct action to protect those rights. States are no longer just being told to allow individuals to live their lives as they please provided they cause no harm to others; they are being required to do things for those individuals that give them a certain quality of life.

There is, however, some potential for a lack of clarity in this context. In reality, while the distinction between negative obligations and positive obligations may seem attractive, the dichotomy is a false one, as any cursory reading of the classic writings of Wesley Hohfeld will indicate.[2] All rights ("claim rights" in Hohfeld's terminology) have correlative obligations (or "duties") and nothing is added to the truth of this statement by sub-dividing obligations into those that are negative and those that are positive. Negative obligations can easily be re-stated as positive obligations (and vice versa), and all rights can just as readily be described as having correlative obligations that are both positive and negative. Thus, a right to liberty means not just that the state must not arbitrarily deprive an individual of his or her liberty, but also that it must take steps to ensure that no one else brings about such a deprivation of liberty. Likewise, a right to a fair trial means that the state must not stack the odds against a claimant or defendant during a trial but, in addition, it must also ensure that others do not create such an imbalance either. What use is the right to free speech, for example, if every time someone says something that is controversial someone else can lawfully come along and harm that person for expressing such a view? Put more simply, a duty to not do something can always (or virtually always) be re-phrased as a duty to do something.

To some extent the simplicity of this point is conveyed quite admirably by the first Article of the European Convention on Human Rights and Fundamental Freedoms

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1 The *locus classicus* is already A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing 2004), helpfully reviewed by Ed Bates at (2005) 5 *Human Rights LR* 191.

2 See his "Some fundamental legal conceptions as applied in judicial reasoning" (1913) 23 *Yale LJ* 16, and the follow-up article in (1917) 27 *Yale LJ* 710.

(ECHR), which reads, under the heading "Obligation to respect human rights",[3] as follows: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." In addition, Article 17 of the Convention, under the heading "Prohibition of abuse of rights", makes it clear that:

> Nothing in this Convention may be interpreted as implying for any State . . . any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The Convention itself, therefore, presupposes that Council of Europe states will actually do things to "secure" Convention rights and to save them from "destruction".

It is submitted that use of the term "positive obligations" has proliferated for three reasons. First, the supposed distinction between first-generation civil and political rights and second-generation economic and social rights has encouraged the adoption of contrasting terminology, partly because the wording of the International Covenant on Civil and Political Rights is largely based on the "Everyone has the right . . ." model, while the wording of the International Covenant on Economic, Social and Cultural Rights prefers the model "The States Parties recognize that (or undertake that) . . ." The difference in the models reflects the different approaches adopted by the Western and Eastern bloc countries at the time of the negotiations around the Covenants. As regards social and economic rights, Western countries were happy with a formulation that in their eyes played down the justiciability of the rights by individuals, while Eastern countries were content with wording that put the emphasis on what government should do for people, not on what individuals could claim from their governments. But today most human rights theorists, as well as activists, accept the hollowness of this apparent difference of approach and proudly affirm the indivisibility of human rights.[4] To be consistent they should also assert the fallacy in trying to maintain a distinction between negative and positive obligations.

The second reason for the greater use of "positive obligations" is quite simply that the idea that human rights can be adequately protected if states content themselves with merely standing by and doing nothing has become patently absurd. Societies are too complex for a purely passive approach to human rights to be sufficient. This is all the more so in societies that wish to uphold the ideals of democracy and the rule of law. The Preamble to the ECHR acknowledges this when it reminds us that in signing the Convention governments are reaffirming their profound belief in the fundamental freedoms, which are the foundation of justice and peace and which are best maintained by an effective political democracy and by a common observance of the human rights upon which those freedoms depend.[5] The Preamble also states that one method by which Council of Europe states can pursue greater unity is by maintaining and further realising human rights and fundamental freedoms.[6] The Convention is thus part of a building project, not merely a fire-fighting operation. It presupposes the construction of a better rights framework, not just the prevention of the destruction of whatever framework already exists.

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3 Headings were not introduced into the text of the ECHR until the amendments made by Article 2(1) of Protocol 11 in 1998.

4 See e.g. para. 5 of the Vienna Declaration resulting from the World Conference on Human Rights in 1993: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

5 Para. 4. Para. 5 refers as well to European countries' "common heritage of political traditions, ideals, freedom and the rule of law".

6 Para. 3.

The third stimulus for the concept of "positive obligations" is the perfectly understandable commitment by the European Court to treat the Convention as a living and evolving document, one that provides *effective* protection of human rights. The Court, especially since its transformation into a full-time body in 1998, wants to be seen not just as a factory churning out thousands of judgments each year, but as an institution that can make a real difference to the lives of people throughout the continent. In case after case it has asserted that the Convention must be interpreted in a way that guarantees rights that are "not theoretical or illusory but practical and effective".[7] Hence, there would be little point in the Convention's conferring the right to life if the Court did not take this to mean that a state must act to stop people being killed as well not kill them itself. And, if a killing does occur, the right to life would be rendered almost completely useless if a state did not have to carry out an effective investigation into how it happened: such an investigation is not itself a remedy, and is not therefore a requirement flowing from Article 13's guarantee of an effective remedy for violations of the rights and freedoms set forth in the Convention. This practical approach to human rights is consistent with that argued for by Henry Shue, who in a seminal work emphasised the importance of "respecting" and "fulfilling" rights as well as "protecting" them.[8] South Africa's 1996 Constitution adds a fourth important leg to the stool, that of "promoting" rights.[9]

A related point is that, through the procedural reforms now under way thanks to the coming into force of Protocol 14 on 1 June 2010 (the Court issued its first decision under the new admissibility criterion on 28 June),[10] and as a result of the development of the very significant "pilot judgment" device,[11] the European Court is in the process of becoming a truly "constitutional court" rather than one which aims to deal with every allegation of a human rights violation, great or small, in all 47 countries.[12] In that capacity it wants to strive towards a holistic approach to rights protection, one that ignores irrelevant barriers and embeds basic values.

The main difficulty with courts telling states what they must do as opposed to what they must not do is, supposedly, that of democratic accountability. Judges are not elected and therefore cannot be held to account for their decisions in the same way as politicians. But when judges tell states what they must not do this can be just as big a constraint on the politicians' freedom of action as telling them what they must do. An analysis of the dialogue between the UK's House of Lords (latterly the Supreme Court) and the Labour governments of 2001–2010 illustrates this point very clearly. Government ministers were virtually tearing their hair out when the country's most senior judges ruled, first, that the

7 This approach seems to have been first articulated in *Artico* v *Italy* (1980) 3 EHRR 1.

8 H Shue, *Basic Rights: Subsistence, affluence, and US foreign policy* (New Jersey: Princeton University Press 1980).

9 S. 7(2).

10 This was in *Adrian Mihai Ionescu* v *Romania* App. No 36659/04, where the applicant claimed that a coach company had not fulfilled its promise to provide reclining seats on a trip he had booked between Bucharest and Madrid and that the Romanian courts had not dealt fully and publicly with his complaint. The ECtHR ruled that, in line with the new Article 35(3)(b) ECHR, the applicant had not suffered "a significant disadvantage" since his financial loss was estimated at 90 euros, respect for human rights as defined in the convention did not require an examination of the application on the merits since the relevant legal provisions in Romania had been repealed, and the case had been duly considered by a domestic court. See, too, *Korolev (II)* v *Russia* App. No 25551/05, 27 July 2010.

11 See the excellent study by P Leach, H Hardman, S Stephenson and B Blitz, *Responding to Systemic Human Rights Violations – An analysis of pilot judgments of the European Court of Human Rights and their impact at national level* (Mortsel, Belgium: Intersentia 2010). And see now *Rumpf* v *Germany* App. No 463044/06, judgment of 2 September 2010.

12 For a compelling case in favour of this trend see S Greer, *The European Convention on Human Rights: Achievements, problems and prospects* (Cambridge: CUP 2006).

indefinite detention without trial of foreign nationals reasonably suspected of terrorism was unlawful;[13] then that use could not be made in a UK court of information that may have been obtained as a result of torture practised anywhere in the world;[14] then that requiring a suspected terrorist to remain inside a small flat with little or no access to the outside world for more than 16 hours a day was not permissible;[15] and, finally, that when seeking to justify a control order issued against a suspected terrorist the government could not keep secret from the controlee the reasons why he or she was suspected of involvement in terrorism.[16] The cases on control orders indicate that if the government wishes to interfere with the right to liberty it must actively mitigate the effects of that interference by ensuring that the person in question has access to a range of contacts that make life tolerable.

There is no knowing what developments have still to occur in the European Court's employment of the concept of "positive obligations". If it were to follow the example set by the Supreme Court of India, in the way in which that court has constructed a huge panoply of positive duties on the basis of the meagre negative obligation relating to the right to life contained in Article 21 of the Indian Constitution,[17] then the resulting case law could be very impressive indeed.[18] It might in that way extend the application of the ECHR deep into the realm of economic and social rights. Already the Court's interpretation of Article 1 of Protocol 1 has come close to creating a right to an adequate standard of living. The Court has been less activist in sculpting a right to healthcare out of Articles 2 or 3, or a right to fair working conditions out of Article 4, or a right to shelter out of Article 8, but the potential for these developments to occur clearly exists.

In this 60th anniversary year of the start of the jurisprudence of the ECtHR, it is appropriate to take stock of where the Court has got to in its "positive" work to date.[19] To that end a workshop was held in the Human Rights Centre of the School of Law at Queen's University Belfast on 24 March 2010. The five papers included in the Special Issue of this journal were all first aired at that workshop, but have been polished and updated since then.[20]

Catherine Donnelly's piece explores in a most instructive way the relationship between positive obligations and privatisation. She points out that it is conceivable that a national court, or the ECtHR, could devise constraints for states' privatisation policies: not just as to how the privatisation rolls out but also as to what functions can be privatised in the first place. It is hard to imagine the Court tolerating the privatisation of criminal prosecutions, but where should the line be drawn as regards the adjudication of non-criminal disputes? And will the Court ever insist that privatisation has to be conditional upon the state retaining some responsibilities under the ECHR? In so far as the state is already under a positive obligation to put in place an effective justice system, the buck must always surely stop with it if an individual is unable to obtain an effective and fair "trial" of his or her

13 *A* v *Secretary of State for the Home Dept* [2004] UKHL 56, [2005] 2 AC 68 (9 judges).

14 *A* v *Secretary of State for the Home Dept (No 2)* [2005] UKHL 71, [2006] 2 AC 221 (7 judges).

15 *Secretary of State for the Home Dept* v *JJ* [2007] UKHL 45, [2008] 1 AC 385.

16 *Secretary of State for the Home Dept* v *AF* [2008] UKHL 28, [2009] 3 WLR 74.

17 "No person shall be deprived of his life or personal liberty except according to procedure established by law."

18 See e.g. Arun Ray Mohapatra, *Public Interest Litigation and Human Rights in India* (Radha Publications: New Delhi 2003).

19 The ECtHR's first judgment was issued on 14 November 1960 (*Lawless* v *Ireland (No 1)*). The Court actually held its first session on 23 February 1959.

20 A sixth paper was delivered by Paul Mageean, of the University of Ulster on the way in which the European Court has conjured out of Article 2 of the ECHR a state obligation to conduct an effective investigation into suspicious deaths. For a related publication, see Gordon Anthony and Paul Mageean, "Habits of mind and 'truth-telling': Article 2 in post-conflict Northern Ireland" in J Morison, K McEvoy and G Anthony (eds), *Judges, Transition and Human Rights* (Oxford: OUP 2007).

grievance. Donnelly also explains how, paradoxically, the remedies available to the "victim" of privatisation may be stronger when the obligation that has been violated is of the positive rather than the negative variety. It seems that some positive duties cannot be shaken off by the state merely through contracting out its functions to a private body: the very contracting out, if conducted in a way which does not pay sufficient attention to the rights of individuals affected by the decision as opposed to the interests of society as a whole, may trigger a violation of the Convention.

Ellie Palmer examines an area which is a common candidate for privatisation – the provision of housing – but concludes that, while the ECtHR has made some important strides down the positive obligation path, it has not yet reached the point where vulnerable homeless people are entitled to be provided with shelter. She explains how the Court is still rather obsessed with the negative approach to rights, citing decisions in several cases involving the United Kingdom. There are clear indications that the Court has been trying to develop both Article 6 and Article 14 – especially in relation to the right to enjoyment of possessions guaranteed by Article 1 of Protocol 1 – in a manner which comes close to imposing a positive duty to supply socio-economic goods, including housing, but the inference Palmer draws from this is that the very fact that such an indirect approach has had to be adopted belies a reluctance on the part of the ECtHR to step on the toes of national legislatures in this field. She rightly observes that the insistence on formal due process and non-discrimination is not enough to constitute a principled and systematic commitment to social justice. She reminds us of some candles in the wind within recent UK case law (in particular *Bernard*[21] and *Limbuela*),[22] but also has to acknowledge that the UK Supreme Court looks as if it wants to row back on the idea that a right not to be homeless can be a "civil right" (and *ex hypothesi* a Convention right).[23]

Ursula Kilkelly presents a fascinating account of how the ECtHR has exploited the concept of positive obligations in the specific context of children's rights. Indeed, it is the reliance on positive obligations that has made the ECHR really relevant to children. Kilkelly substantiates this by setting out how exactly the ECtHR has employed positive duties in order to develop children's rights to family ties, to a personal identity and to a safe environment. These duties have also been vital to the development of a right to a family life (for the benefit of adults as well as children), especially in cases where a child has been abducted. The author concludes by speculating on what lies ahead in this context: the possibilities are many, given the growing realisation that children are human beings in their own right who deserve positive assistance from the state to protect them from abusive parents and from other pernicious influences. We certainly have not heard the ECtHR's final words on questions such as an adopted child's right to know his or her parentage, a disabled child's right to an appropriate education, or a sick child's right to proper hospital treatment. The thorny issue of a state's duties vis-à-vis unborn children is also likely to be further explored before long.

Rory O'Connell's article examines the part that positive obligations have, and could, play in ensuring the protection of "political" rights. He focuses on the right to vote, the right to stand for election and the right to form and operate political parties, but he contextualises his discussion of those specific topics by considering the scope of the margin of appreciation in this field. Given that there are 47 member states of the Council of Europe, there is significant variety in the way in which elections and party politics are regulated.

21 *Bernard* v *Enfield LBC* [2002] EWHC (Admin) 2282.

22 R *(Limbuela)* v *Secretary of State for the Home Dept* [2005] UKHL 66, [2009] 1 AC 396.

23 *Ali* v *Birmingham City Council* [2010] UKHL 8, [2010] 2 WLR 471.

Many of the practices in question have deep historical and cultural roots and it would be regarded as unacceptable in several government corridors for a group of judges in Strasbourg to dictate what is or is not appropriate within certain political cultures. Should non-nationals be allowed to stand for election, should all elected politicians have to swear allegiance to the state, should minority groups be guaranteed representation in the national parliament, should 17-year-olds be allowed to vote? The outstanding questions are legion. On top of this, one can think of numerous issues which, in a US context at least, would be exempt from judicial scrutiny because they are regarded as essentially "political questions": should a prime minister be able to sack a member of the government at will, should parliaments be allowed complete freedom to regulate their own activities regardless of the rights of individual politicians, and should big decisions – such as whether to go to war, whether to bail out depositors or creditors of a failing bank, or whether to devalue the national currency – ever be justiciable? Where, in other words, does the state's positive obligation to uphold democracy end and its right to sovereignty and autonomy begin?

The final contribution in this Special Issue, by David Russell, brings home the impact which positive obligations could and should have in the particular context of Northern Ireland. Working as he does for the Northern Ireland Human Rights Commission (but writing here in a purely personal capacity), Russell is in a good position to explain the thinking of the commission when it drafted its advice to the UK government on what should be contained in a Bill of Rights for Northern Ireland, although sadly it seems that those with real influence at Westminster (in any of the three major parties) are not persuaded of the need to have a Bill of Rights of the expansive nature that the commission wants.[24] This does not mean, however, that more piecemeal reform is not possible or desirable and that the concept of positive obligations could not be invoked within specific legislative initiatives either in London or in Belfast. One of the last actions of the Labour government was to secure the enactment of the Equality Act 2010, section 1 of which requires public authorities, when making decisions of a strategic nature about how to exercise their functions, to "have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage". This is not yet part of Northern Ireland's law (and the commitment of the Northern Ireland Executive to a so-called Single Equality Bill has fallen away in recent years), but it is a good example of the "programmatic duty" which Russell highlights towards the end of his piece and there is no good reason for not replicating it in this jurisdiction.

It is strange that the apparent contrast between negative obligations and positive obligations plays such a prominent role in international human rights law, for it seems to play hardly any role at all at the national level. The reality, however, is that international courts are even more reluctant than national courts to issue judgments which give instructions to governments to do things. The rule of law does not yet operate at the international level in the way that it does within democratic states. That does not have to mean, however, that positive obligations can have no role at all to play. Incrementally, surreptitiously, they are slowly seeping into the ECtHR's case law. We can only hope that it will not be long before the trickle becomes a steady stream.

24 For the response of the Northern Ireland Office to the commission's advice, see its consultation paper, *A Bill of Rights for Northern Ireland: Next steps* (November 2009).

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Positive obligations and privatisation

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Introduction

The aim of this short article is to examine the impact, if any, of the positive obligations jurisprudence of the European Court of Human Rights (ECtHR) on private provision of public services in the United Kingdom. In order to explore this question properly, the following issues will be considered: first, different forms of privatisation, which must be understood in order properly to appreciate the impact of positive obligations; second, the theoretical underpinnings of a discussion of positive obligations and privatisation; third, the effect of positive obligations on the remedies available for human rights violations where privatisation has occurred; and, fourth, the potential impact of positive obligations on the government's privatisation decisions.

Overall, it will be seen that, on a theoretical level, positive obligations create tensions with privatisation. On a practical level, those tensions translate into a modest twofold interaction with privatisation. First, where provision of public services has been privatised, positive obligations may result in unexpected distinctions in the scope of remedial protection for breaches of positive and negative obligations in the European Convention on Human Rights (ECHR). Second, and perhaps more interestingly, it may be possible to develop limited constraints on the government's privatisation decisions from the positive obligations jurisprudence, both in terms of the government's capacity to privatise and, more particularly, in terms of the manner in which it privatises.

Privatisation in context

Although often narrowly interpreted as transfer of state assets, in fact, there are many forms of privatisation[1] and the term is used more broadly here to describe private performance of what are usually thought to be governmental functions. Private performance can generally arise in a twofold way. The first is probably more easily recognisable as privatisation as it involves outsourcing by government – whether through legislation, contract or grant – such that the government no longer performs certain functions itself, although it maintains overall responsibility for the delivery of the functions. This involves

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1 See e.g. J J Hansen, "Limits of competition: accountability in government contracting" (2003) 112 *Yale LJ* 2465, p. 2466, n. 6 (noting that privatisation can include divestiture of government assets, deregulation, vouchers, tax reductions or user fees, quasi-private corporations, and contracting out).

the classic understanding of privatisation as entailing a move from "rowing to steering".[2] By contrast, what has sometimes been described as "bottom-up" privatisation can also arise, usually involving withdrawal from service provision by government or fostering of private sector service provision.[3]

Starting with outsourcing, in the UK, this form of privatisation is generally associated most strongly with the Thatcher period, which has been described as having a "pathological . . . antipathy to the public sector *per se*" and an "ideologically driven obsession" with constraining it.[4] However, although driven by Thatcherite policies, outsourcing did not abate in the Labour era. For example, private prisons were inaugurated under Thatcher, yet withstood the election of the supposedly centre-left Blair governments, even though the Labour Party had actually gone on record in the mid-1990s vowing to re-nationalise all prisons on the termination of contracts.[5] Outsourcing is commonplace now in the UK, with private actors exercising discretionary authority in a wide variety of circumstances including residential care for the elderly,[6] welfare accommodation,[7] foster placements and adoption agencies,[8] crime and justice,[9] prison privatisation,[10] and military and defence activities.[11] In the context of crime and justice, the Crime and Disorder Act 1998 enabled local authorities to contract out functions relating to the bringing of applications for anti-social behaviour orders,[12] while s. 25 of the Police and Justice Act 2006 created a power for local authorities to contract out their powers to enter into parenting contracts and to apply for parenting orders. Meanwhile, the Police Reform Act 2002 offers significant scope for use of private actors to perform policing functions, such as serving as "detention officers" or "escort officers".[13]

Bottom-up privatisation differs from outsourcing in that "governmental" activities[14] – perhaps most notably in the fields of security and regulation – are performed by private actors, without any instrument of transferral of the function from public to private. The "massive consumer demand for security"[15] has coincided with the development of mass private property such as shopping centres and gated communities. "[V]acuum theory", whereby communities regard the public police as inadequate to safeguard their lives and

2 D Osborne and T Gaebler, *Reinventing Government: How the entrepreneurial spirit is transforming the public sector* (Reading: Addison-Wesley 1992), pp. 25–48.

3 See e.g. D Gordon, "Privatization in Eastern Europe: the Polish experience" (1994) 25 *L and Policy in International Bus* 517, p. 552.

4 A Barron and C Scott, "The Citizen's Charter programme" (1992) 55 *MLR* 526, p. 526.

5 D E Pozen, "Managing a correctional marketplace: prison privatization in the United States and the United Kingdom" (2003) 19 *J of L and Politics* 253, p. 256.

6 J Teal, "Sustainable procurement: spending it wisely" (2005) 30 *Scots L Times* 167.

7 *R (Heather)* v *Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936, paras 2, 4, 11–16.

8 Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act*, 7th Report (London: Joint Committee on Human Rights 2003–04), para. 53.

9 Crime and Disorder Act 1998, s. 1F.

10 See, generally, Pozen, "Managing a correctional marketplace", n. 5 above.

11 C Walker and D Whyte, "Contracting out war?: Private military companies, law and regulation in the United Kingdom" (2005) 54 *ICLQ* 651, p. 652.

12 S. 1F.

13 S. 39.

14 It is beyond the scope of this article to give a detailed treatment of the question of when an activity will be regarded as "governmental" in nature and for present purposes it is simply assumed that the type of coercive powers involved in policing and regulation can be regarded as such. See also C Donnelly, *Delegation of Governmental Power to Private Parties: A comparative perspective* (Oxford: OUP 2007), p. 6.

15 L Zedner, "The concept of security: an agenda for comparative analysis" (2003) 23 *Legal Studies* 153, p. 160; see also Private Security Industry Act 2001.

property, has encouraged the rise of hiring of private security forces.[16] Meanwhile, the phenomenon of self-regulation has been explored in a number of judicial review cases and courts have considered whether or not, if a particular self-regulatory body did not exist, "Parliament would almost inevitably intervene to control the activity in question."[17] In the case of *R* v *Advertising Standards Authority, ex p The Insurance Service plc*,[18] the authority was found to be exercising a public law function, in part because, if it did not exist, its function would be exercised by the Director of Fair Trading.[19] In the well-known case of *R* v *Panel on Take-Overs and Mergers, ex p Datafin*, the self-regulatory panel was found to be performing functions "integral" to the governmental framework of regulation, albeit not established on a statutory or charter basis.[20]

The theory of positive obligations and privatisation

On a theoretical level, positive obligations produce tensions with privatisation in at least two ways that can only be explored superficially here.[21] First, positive obligations create responsibilities on the part of the state towards citizens. The types of responsibilities identified in the ECtHR's jurisprudence are varied and have included: responsibilities to investigate killings;[22] responsibilities to protect vulnerable individuals from abuse by others[23] or risks to life;[24] responsibilities to create effective criminal sanctions for certain violations of rights;[25] responsibilities to provide legal recognition of the new gender of transsexuals;[26] responsibilities to regulate environmental harm;[27] and responsibilities to provide legal aid.[28] The emphasis in these cases is clearly also on requiring the state to take responsibility for monitoring what happens in the context of private relations. As the ECtHR has frequently observed in the Article 8 context, positive obligations may involve adopting measures "even in the sphere of the relations of individuals between themselves".[29] By contrast, privatisation is more usually regarded as involving government divesting itself of responsibility (through outsourcing) or refusing to take on responsibility (as in the context of bottom-up privatisation). It is also often associated with a liberal or neo-liberal attitude to social ordering that emphasises individual liberty, limited government and the entitlement of all citizens to equal respect and consideration.[30]

Framed in this way, the quest for limited government, which sometimes fuels the privatisation agenda, would appear to run counter to the responsible state that underpins positive obligations. Some qualification of this easy dichotomy is necessary, however.

16 J Gilsinan, J Millar, N Seitz, J Fisher, E Harshman, M Islam and F Yeager, "The role of private sector organizations in the control and policing of serious financial crime and abuse" (2008) *J of Financial Crime* 111, p. 115.

17 *R* v *Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1992] 1 WLR 1036 (QBD) 1041.

18 [1990] 2 Admin LR 77 (QBD).

19 [1990] 2 Admin LR 77 (QBD), 86.

20 [1987] QB 815 (CA) 836.

21 The limit on space precludes more expansive examination of this issue.

22 *Kelly* v *UK* App. No 30054/96, 4 May 2001.

23 *Z* v *UK* (2001) 34 EHRR 97.

24 *Osman* v *UK* (1998) 29 EHRR 245.

25 *Siliadin* v *France* (2005) 20 BHRC 654.

26 *Goodwin* v *UK* (2002) 35 EHRR 447.

27 See e.g. *Giacomelli* v *Italy* (2006) 45 EHRR 871.

28 *Airey* v *Ireland* (1979) 2 EHRR 305.

29 See e.g. *Von Hannover* v *Germany* (2004) 40 EHRR 1, 25, para. 57.

30 See, e.g., R A Dahl, *Democracy and its Critics* (New Haven; Yale University Press 1989), pp. 83–105.

Privatisation – at least in its outsourcing form – cannot be so easily aligned with liberal divestiture of responsibility on the part of the state. While it could appear that privatisation of governmental functions promotes the objective of limited government, in reality, government is not retracting but evolving, to use the metaphor mentioned above, from rowing to steering.[31] In this role, it does not necessarily reduce its responsibilities, but it does have reduced visibility, since, rather than operating directly, it operates through the medium of private actors. Nonetheless, while perhaps not directly incompatible, it is possible to identify a tension between the "responsibilisation" of government created by positive obligations and the "de-responsibilisation" of government involved in privatisation, particularly in the context of bottom-up privatisation.

Second, proponents of privatisation are often preoccupied with "the 'liberal' element of liberal democracy, or even more narrowly, just the economic element of liberalism".[32] For example, a "consumer" metaphor is sometimes invoked as a replacement for citizenship, perhaps most notably in John Major's Citizen's Charter project in the UK in the 1990s.[33] The "consumer" metaphor transforms the state's role into one of creating and maintaining consumer choice and regulating quality.[34] Citizenship has both a political and a sociological dimension,[35] suggesting full membership of the society, state or community and implying a claim to participate in the processes of democracy.[36] In contrast, "consumer status", deriving from the neo-liberal philosophical tradition, identifies the individual by reference to the individual's role in the economy, rather than by reference to his or her role in the political society.[37] Positive obligations avoid such reductionist understandings of the individual. They acknowledge the many dimensions of the individual's personality – the vulnerable witness in need of police protection, the abused child in need of a safe home, the homeowner suffering pollution from the nearby factory, the transsexual concealing his or her birth certificate – and they also require the state to acknowledge and respond to these facets of the individual personality.

Remedies for breaches of Convention rights

(a) The public/private dichotomy in the Human Rights Act

The reach of the ECHR obligations given effect by the Human Rights Act 1998 (HRA) is well-known and has been the topic of much discussion. It is determined by s. 6(1) of the HRA, which provides that "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right" and the term "public authority" includes, by virtue of s. 6(3)(b), "any person certain of whose functions are functions of a public nature". Section 6(5) adds to this by stating that "[i]n relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private". The Act thus establishes a dichotomy between "core" public authorities, bound by s. 6(1) to act compatibly with the ECHR, whether the act is public or private, and "hybrid" bodies, i.e.

31 Osborne and Gaebler, *Reinventing Government*, n. 2 above, pp. 25–48.

32 M Feintuck, *The Public Interest in Regulation* (Oxford: OUP 2004), p. 184.

33 *Citizen's Charter: Raising the Standard* Cm 1599 (London: HMSO: 1991); Barron and Scott, "The Citizen's Charter Programme", n. 4 above.

34 M Freedland, "Law, public services, and citizenship – new domains, new regimes?" in M Freedland and S Sciarra (eds), *Public Services and Citizenship in European Law* (Florence: European University Institute 1998), pp. 1, 10–11.

35 M Barnes, "Users as citizens: collective action and the local governance of welfare" (1999) 33 *Social Policy and Administration* 73, p. 83.

36 Freedland, "Law, public services, and citizenship", n. 34 above, pp. 9–10.

37 Ibid.

bodies that perform some public functions and are bound by the ECHR to the extent of their public functions. It is the "hybrid" or s. 6(3)(b) public authority that is most relevant for reaching private actors performing governance functions. The effect of a finding that an entity is a "hybrid" public authority is that a direct action for breach of a Convention right will lie against that entity. Where an entity is not found to be a public authority, any person seeking to vindicate a Convention right against it will be confined to pre-existing common law actions, to the extent that any cause of action is available.[38]

Section 6(3)(b) has been interpreted cautiously by the courts, and this cautious approach has been discussed often and much criticised. It can be said with certainty that a private psychiatric hospital exercising a statutory power of compulsory detention[39] and a limited company exercising a power to control access to public markets[40] are bound directly by human rights obligations. There have also been influential *dicta* to the effect that private prison managers and those exercising regulatory powers will be required to comply with human rights.[41] Beyond these specific examples, it is difficult to make definite claims. The leading authority is *YL* v *Birmingham City Council*,[42] in which the House of Lords, by a 3:2 majority, held that a private care-home provider, acting pursuant to a contract with a local authority, could not be deemed to be a s. 6(3)(b) public authority. The local authority was under a duty to ensure provision of accommodation pursuant to s. 21 of the National Assistance Act 1948 (the 1948 Act) and was permitted by s. 26 to use a private contractor's services to provide the accommodation.[43] The care home, Southern Cross, issued notice to YL, pursuant to the termination clause in the contract between it and YL, and the question was whether it was obliged to act compatibly with the Convention in so doing.

The reasoning in the case is complex and only a brief review can be presented here. The majority's conclusion was driven by a number of factors, including the contractual source of the care provider's functions that "differentiates them from any 'function of a public nature'";[44] the private contractor's motivation for providing accommodation, namely "carrying on a socially useful business for profit"[45] as "a private, profit-earning company";[46] and the distinction between using public monies to subsidise an activity and using public monies to pay for a service.[47] Much can be said about the weaknesses in the reasoning but, for present purposes, it suffices to highlight its restrictiveness. For example, while motivation can be useful for characterising the *actor* as "private" or "public",[48] this does not mean that it is as useful a factor for characterising the nature of a *function*. To illustrate, it seemed to be accepted by Lord Mance and Lord Neuberger that private prison managers were self-evidently performing functions of a public nature.[49] Yet, a private

38 See further Donnelly, *Delegation*, n. 14 above, pp. 329–32, 367–77.

39 *R (A)* v *Partnerships in Care Ltd* [2002] EWHC 529 (Admin), para. 21.

40 *R (Beer (trading as Hammer Trout Farm))* v *Hampshire Farmers Market* [2003] EWCA Civ 1056, [2004] 1 WLR 233.

41 *Aston Cantlow and Wilmcote with Billesley Parochial Church Council* v *Wallbank* [2003] UKHL 37, [2004] 1 AC 546, para. 9 (Lord Nicholls); *YL* v *Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, paras 7 (Lord Bingham), 63 (Baroness Hale), 91 (Lord Mance), 166 (Lord Neuberger, also mentioning maintaining defence and providing police services).

42 *YL* v *Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

43 Ibid. para. 1.

44 Ibid. para. 120 (Lord Mance); see also paras 26, 29, 31, 32, 34 (Lord Scott), 133, 168 (Lord Neuberger).

45 Ibid. Lord Scott, para. 26.

46 Ibid. Lord Mance, para. 116. See also para. 105 (Lord Mance).

47 Ibid. paras 26, 27 (Lord Scott), 105 (Lord Mance), 148, 165 (Lord Neuberger).

48 For discussion, see Donnelly, *Delegation*, n. 14 above, pp. 6–10.

49 *YL* v *Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, paras 91 (Lord Mance citing *Aston Cantlow* (n. 41 above)), 166 (Lord Neuberger).

prison manager, very often a "private, profit-earning company", is regularly also motivated by carrying out a "business for profit".

For the most part, reaction to the *YL* case was negative,[50] and on the specific question of residential care homes the case has actually been reversed by legislation.[51] There is also some evidence that the English courts are interpreting and applying the case with at least a degree of circumspection. In a recent Court of Appeal case – *R (Weaver)* v *London and Quadrant Housing Trust*[52] – it was held that a registered social landlord (RSL), which served on an assured tenant a notice seeking possession for rent arrears, was bound by the Convention in the performance of that act. To explain, RSLs in the UK are landlords registered under the Housing Act 1996. They provide one half of the social housing in England and Wales,[53] pursuant to governmental grants,[54] and are heavily regulated by the Housing Corporation.[55] The Court found that a number of factors were present that cumulatively established[56] a "sufficient public flavour" to make provision of social housing by the landlord "a function of a public nature", such as: the substantial public subsidy received by the RSLs;[57] the fact that the RSL worked in close harmony with local government and helped to fulfil the latter's statutory obligations;[58] and the fact that provision of subsidised housing, as opposed to the provision of housing itself, was a function that could properly be described as governmental as by definition it was the antithesis of a private commercial activity.[59] Turning to the s. 6(5) question of whether the act was "private", the Court concluded that the act of terminating a housing contract, while often a private act, was in this case:

> so bound up with the provision of social housing that once the latter is seen, in the context of this particular body, as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts.[60]

Viewed from one perspective, the *Weaver* judgment may be helpful in holding private providers accountable for Convention violations and appears to suggest a subtle progression on the *YL* analysis in making it clear that a contractual act will not, for that reason alone, be regarded as "private". The difficulty is that the uniqueness of the role performed by RSLs and the depth of their entanglement with local authorities may also suggest that this case falls within the strict *YL* criteria, rather than expanding those criteria.

(b) The impact of the HRA's public/private dichotomy on remedies for violations of Convention obligations

The implications of this case law for negative Convention obligations are obvious. If provision of particular services is privatised, there may be no direct right of action against the private service provider for violation of a Convention right unless the private provider can satisfy the restrictive *YL* criteria and is, for instance, in receipt of subsidy (as was the

50 See e.g. S Palmer, "Public functions and private services: a gap in human rights protection" (2008) 6 *Intl J of Constitutional L* 585; Donnelly, *Delegation*, n. 14 above, pp. 262–70.

51 Health and Social Care Act 2008, s. 145(1).

52 [2009] EWCA Civ 587, [2010] 1 WLR 363.

53 Ibid. para. 8.

54 Ibid. para. 12.

55 Ibid. paras 9–11.

56 Ibid. para. 72.

57 Ibid. para. 67.

58 Ibid. para. 69.

59 Ibid. para. 70; see also para. 101 (Lord Collins).

60 Ibid. para. 76 (Elias LJ); see also para. 101 (Lord Collins).

RSL in *Weaver*) rather than in receipt of contractual payments, or unless the private provider can be regarded as integral to a governmental framework. Moreover, even if the governmental authority responsible for privatising the function retains an obligation to fulfil the primary human rights duty, in the context of negative Convention obligations, the government may not be able to provide an appropriate remedy for the victim. Vindication of the right may involve compelling the private provider to perform a specific task (such as not evicting a tenant) that the government will not be in a position to perform and will not be in a position to compel the private delegate to perform. So, in one English case, the court falsely equated compelling a housing authority to operate *particular* welfare accommodation with a local authority's duty to provide accommodation *generally*: but, actually, the general duty to provide any accommodation would be inadequate if vindication of the right to a home required that the particular accommodation be provided.[61] In brief, the impact of privatisation on negative obligations is that direct remedial redress in the form of a claim for breach of a human right may be precluded.

By contrast, it is in the very nature of positive obligations that privatisation has no impact on the remedial obligations of the government and the state can be held accountable for interferences with Convention rights resulting primarily from the actions of private providers. Some examples are useful to illustrate the contrast in the remedial scheme accompanying negative and positive obligations.

Taking one hypothetical, if a private company were engaged, pursuant to a public–private partnership, to build a motorway, it is highly unlikely that this activity would be regarded as a "function of a public nature" on the basis of the *YL* and *Weaver* case law; the private company would therefore not be regarded as an entity bound by Convention obligations. Should the private company, in the course of preparing for the motorway construction, take intrusive photographs of the houses on the motorway route (such as to amount to an invasion of the privacy of the homeowners), there would be no direct human rights action available against the private company. There may be a tort action for breach of confidence, but no free-standing action under the HRA.[62] There would also be no action against the government department that entered into the contract with the private company, as the department did not breach the right and could not therefore be held responsible for the violation. However, if, in the course of constructing the motorway, the private company were to cause pollution (such as to amount to an interference with the homeowner's enjoyment of their home), a remedy would be available against the state if it has not ensured a balancing between the community and the right of the individual to respect for his or her home[63] or if it has not conducted appropriate investigations and studies into possible environmental effects.[64] A further example might arise in an immigration detention centre. It may be that, given its function, such a detention centre could be found to constitute a private actor, similar to a private prison. If not, if such a centre were systematically to open the letters of asylum seekers in breach of Article 8, there would be no remedy;[65] yet if they were to house dangerous detainees such as to cause risks to other asylum seekers, there would be a remedy.[66]

The point made here is very modest: privatisation produces remedial distinctions between negative obligations and positive obligations. Given current interpretations of the

61 *R (Heather)* v *Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936, para. 33.

62 See e.g. *Mosley* v *News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

63 See e.g. *Giacomelli* v *Italy* (2006) 45 EHRR 871, para. 82.

64 Ibid. para. 83.

65 See e.g. *Ostrovar* v *Moldova* (2007) 44 EHRR 19, para. 100.

66 *Edwards* v *UK* (2002) 35 EHRR 487.

reach of the HRA, breaches of negative obligations may often result in the absence of a direct remedy against privatised service providers and the unavailability of a remedy against the state. In contrast, it is in the nature of positive obligations that they bind the state and that obligation cannot be sidestepped by privatisation. While limited, this distinction does merit some consideration: at the very least, it must provide further justification for encouraging judicial reconsideration of the s. 6(3)(b) case law in the UK. It seems anomalous that the core negative (and arguably less onerous) obligations of the Convention should be protected to a lesser degree than its judicially created positive obligations.

Potential for limitations on privatisation

(a) Constitutional and legislative limitations on privatising by government

In the UK, there are effectively no constitutional limitations on the government's ability to privatise or outsource. Such legal constraints as exist often seem to promote freedom of governmental action to privatise rather than control it. For example, the Deregulation and Contracting Out Act 1994 (the 1994 Act)[67] grants a general licence to ministers to transfer statutory ministerial functions to private actors at the Minister's discretion.[68] It provides the executive with an unusually broad privatising power and creates the opportunity for a wide range of governmental activities to be transferred to private parties, thereby facilitating, rather than limiting, the externalisation capacity of governmental actors.[69] A Minister may provide by order for any statutory function currently performed by the Minister or an office-holder to be performed by any person or the employee of any person authorised by the Minister.[70] The list of functions excluded from this order power is narrow: apart from a few specific exceptions,[71] the excluded category only extends to judicial power;[72] functions affecting the liberty of the individual;[73] powers of entry, search or seizure;[74] powers to make subordinate legislation;[75] and functions that must be exercised personally by a Minister or office-holder.[76] This list of externalisation exceptions fails to recognise the importance of many other powers at the government's disposal, such as discretionary administrative powers deciding on the individual's eligibility for welfare benefits. There are even exceptions to the coercive powers excluded from the 1994 Act: enforcement for non-payment of rates and taxes is a function that may be privatised, in spite of its clear potential to entail coercion.[77] Ultimately, perhaps the only constraint on privatisation in the UK is a political or social one: as Freedland puts it, "even today one shrinks from accepting that a total freedom of contracting out could validly be asserted".[78] One might hope that political

67 The order-making provisions of Part I of the 1994 Act were amended by the Regulatory Reform Act 2001. However, the contracting out provisions of Part II of the Act continue in force as originally enacted, apart from minor amendments which are not relevant for present purposes.

68 S. 69. For discussion, see M Freedland, "Privatising *Carltona*: Part II of the Deregulation and Contracting Out Act 1994" (1995) *PL* 21; and Donnelly, *Deregulation*, n. 14 above, pp. 158, 197–9.

69 T Daintith, "Regulation by contract: the new prerogative" (1979) *CLP* 41, p. 48.

70 1994 Act, s. 69(1)–(2).

71 Ibid. s. 79(1) excluding functions of the Comptroller and Auditor General, Parliamentary Ombudsman, Health Service Ombudsman.

72 Ibid. s. 71(1)(a).

73 Ibid. s. 71(1)(b).

74 Ibid. s. 71(1)(c).

75 Ibid. s. 71(1)(d).

76 Ibid. s. 69(1).

77 Ibid. s. 71(3); Freedland, "Privatising *Carltona*", n. 68 above, p. 23.

78 M Freedland, "Government by contract and public law" (1994) *PL* 86, p. 93.

or social outrage would help to control the most far-reaching privatisations. Overall, though, the UK governmental actor has a relatively free hand in respect of privatisation.

To date, attempts to invoke human rights to restrain that freedom have failed before the courts.[79] An effort to construct a strong non-privatisation doctrine using the ECHR and the HRA was rejected by the Court of Appeal in the *YL* case, discussed above.[80] One of the claimants, who was a resident in a care home operated by the local authority, sought to prevent the transfer of the care home (and other care homes) to private sector control, which was permitted under s. 26 of the 1948 Act.[81] The claimant argued that the transfer itself would result in a breach of her Article 3 right (to be free from inhuman or degrading treatment) and her Article 8 right (to respect for her home) because she would not be able to enforce these rights against the private carers, which would constitute a "fundamental and material diminution (and, indeed, in certain cases, negation)" of her existing rights.[82]

In respect of Article 3, Buxton LJ, giving judgment for the court, concluded that there was no lacuna in protection because, if a private care home subjected a resident to inhuman and degrading treatment, breaches of the criminal law would be involved with the result that legal protection of the resident would not be diminished by the transfer.[83] The claimant's case on Article 8 was also rejected. Buxton LJ noted that loss of a direct remedy against the care home operator would only entail a diminution in Article 8 protection if it could be assumed that Article 8 placed the state under an obligation to make welfare provision of the type provided by the 1948 Act.[84] Making a more general point, Buxton LJ observed that accepting the claimant's argument would "place very far-reaching and surprising inhibitions on national policy",[85] which the court indicated was a relevant consideration where the reach of an article, as in this context with Article 8, was unclear.[86] His Lordship expressed concern that the implications of accepting the claimant's argument would be that *every* example of privatisation would result in a breach of Convention responsibilities, as in every case there would be a loss of direct action,[87] and concluded that views on privatisation were "more appropriately adjudicated upon by the national democratic process" and that this was an area where the ECHR should only enter with "considerable diffidence".[88] This particular claimant did not pursue her case to the House of Lords. However, in adjudicating upon the arguments of the remaining claimant, Lord Neuberger expressed concern that a generous interpretation of s. 6(3)(b) would obstruct the privatisation policy of the state, and, even though he observed that a justification for privatisation based on avoiding legal constraints applicable to public actors might be considered "unattractive", he noted that this matter was for the legislature.[89]

(b) Using positive obligations to limit privatisation

Given the potentially very far-reaching consequences of the argument made by the claimant in *YL* – that the loss of direct HRA action produced by every privatisation breaches the

79 Contrast *Academic Center of Law & Business, Human Rights Program* v *Minister of Finance, HCJ (Israel)* 2605/05.

80 [2007] EWCA Civ 26, [2008] QB 1. The issue was not argued before the House of Lords.

81 Ibid. para. 1.

82 Ibid. para. 8.

83 Ibid. para. 11.

84 Ibid. paras 15–16.

85 Ibid. para. 20.

86 Ibid.

87 Ibid. para. 21.

88 Ibid.

89 *YL* v *Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, para. 152.

HRA – the position adopted by the Court of Appeal is hardly surprising. However, it may be possible to envisage a more limited restraint on governmental privatisation emerging from the positive obligations jurisprudence. This jurisprudence is likely to have only very limited impact on the determination of the *types* of functions that can be privatised; it does, however, have the potential to have a more interesting impact on the *manner* of governmental privatisation.

Positive obligations and the types of functions privatised

Starting with the types of functions that can be privatised, positive obligations may have an impact on bottom-up privatisation, i.e. privatisation that results from state withdrawal of service provision or, alternatively, from state refusal to provide the service in the first instance. This is because, as noted above, positive obligations create responsibilities from which the state cannot extract itself; or at least, if the state decides not to provide the service itself, it will still retain liability as a matter of human rights law. Taking the example of private security, while the state can withdraw or refuse to provide certain security services and while private security can flourish, as a matter of compliance with Article 2, a minimum core of provision must be maintained by the state. State authorities can never withdraw responsibility for doing "all that could reasonably be expected of them, to avoid a real and immediate risk to life of which they have or ought to have knowledge".[90] Similarly, to comply with Article 3, when privatising adoption and foster placement services, states can never withdraw responsibility for taking reasonable steps to protect children "from ill-treatment of which the authorities had or ought to have had knowledge".[91]

While these examples suggest very minimal constraints on privatisation by the state, they are not without significance, as can be demonstrated by the situation which pertains in the absence of recognition of positive obligations. Describing the position in US constitutional law, Sullivan and Bitter have commented that, following the decision of the Supreme Court in *DeShaney* v *Winnebago County Department of Social Services*[92] refusing to find an affirmative Fourteenth Amendment duty on the state to intervene to protect a child from abuse by a private actor:

> American children have been murdered, sexually molested, and physically abused in private homes and schools across the country, at rates courts recognize as epidemic, while the states are able to do very little. And, while the courts recognize that it is tragic and traumatic, and are "not unmoved by natural sympathy", under *DeShaney* it is all constitutional.[93]

Positive obligations in the jurisprudence of the ECtHR prevent European states from using privatisation to withdraw responsibility from service provision which coincides in substance with those positive obligations.

Positive obligations and the manner of privatisation

The more interesting impact of positive obligations on privatisation decisions may be on the manner in which the government privatises, as can be illustrated by the following

90 *Osman* v *UK* (1998) 29 EHRR 245, para. 116

91 *Z* v *UK* (2001) 34 EHRR 97, para. 73.

92 489 US 189 (1989).

93 T J Sullivan and R L Bitter Jr, "Abused children, schools, and the affirmative duty to protect: how the DeShaney decision cast children into a constitutional void" (2003) 13 *George Mason U Civil Rights LJ* 243, p. 243.

examples: the requirements for independence and impartiality in Articles 5(4) and 6 of the Convention[94] and a sampling of the range of positive obligations identified by the ECtHR.

Article 6

As has been discussed, the 1994 Act grants sweeping power to the executive to contract out and privatisation could involve transfer of decisions in respect of citizens' civil rights to a private company without violating the Act. One example is the Contracting Out (Functions relating to Social Security) Order 2000,[95] under which it is possible to contract out functions relating to "work-focused interviews", as conferred by regulations under s. 2A of the Social Security Administration Act 1992.[96] Certain benefits, such as incapacity benefits,[97] are conditional upon the applicant attending a "work-focused interview" and functions relating to the holding of such interviews, including applying regulations concerning the determination of whether applicants have "good cause" for failure to attend are considered suitable for private delegation.[98] Failure to attend an interview without good cause will result in the applicant being deemed not to have applied for a benefit or, if the applicant is in receipt of a benefit, having the benefit terminated.[99] Given that non-attendance at interviews may result in termination of or a rejected application for benefits, and given that it seems that private actors may decide on whether or not the applicant has "good cause" for non-attendance, albeit that the exercise of discretion is confined by the criteria set out in the relevant regulations,[100] it seems possible for private actors to decide effectively whether or not applicants are entitled to benefits. Although not without some jurisprudential wrangling, the ECtHR has held that such benefits may give rise to "civil rights",[101] thereby triggering the Article 6 independence and impartiality requirements.

Article 6 concerns could arise as follows: the private actor may not be independent if the government department exercises excessive control over it or its funding; or the private actor may not be impartial if the payment structure of the arrangement encourages it to operate in a particular way. For instance, it is well documented that a flat fee for the contract in this type of scenario has encouraged contractors to "dump" incoming files or cases or engage in "churning" in which applicants are handled selectively depending on their resource requirements and expected payoffs.[102] Thus, Article 6 may require careful attention to the privatisation terms to ensure that no incentive is created which may conflict with the public service task being performed by the private service provider.

That Article 6 may have the potential to influence governmental outsourcing decisions has been given tacit recognition by the courts in the context of the application of Article 6 to review of local authorities' decisions regarding homelessness. Pursuant to Part VII of the Housing Act 1996 (the 1996 Act), a local authority is under a duty to ensure that

94 The requirements of independence and impartiality are explicit in the text of Article 6; they are implicit in Article 5(4)'s reference to a "court". See e.g. *R (Brooke)* v *Parole Board* [2008] EWCA Civ 29, [2008] All ER (D) 21, paras 13, 21.

95 SI 2000/898.

96 This was inserted by the Welfare Reform and Pensions Act 1999, s. 57.

97 Social Security Administration Act 1992, s. 2A(2)(e).

98 See Social Security Administration Act 1992, s. 2A(3)(e)(ii)–(f); Social Security (Incapacity Benefit Work-focused Interviews) Regulations 2003, regs 3, 4 11.

99 Social Security Administration Act 1992 s. 2A(4)(i)–(ii).

100 Social Security (Incapacity Benefit Work-focused Interviews) Regulations 2003, reg. 11.

101 *Feldbrugge* v *Netherlands* (1986) 8 EHRR 149, paras 26–40; *Salesi* v *Italy* (1998) 26 EHRR 187, para. 19; *Mennitto* v *Italy* (2000) 34 EHRR 1122, paras 25–8; *Tsfayo* v *UK* (2009) 48 EHRR 18, para. 39.

102 D Stevenson, "Privatization of welfare services: delegation by commercial contract" (2003) 45 *Arizona L Rev* 83, pp. 107–8.

accommodation is provided to any person it is satisfied is in priority need and not homeless intentionally. By s. 202, an applicant has the right to request a review of, inter alia, any decision of a local housing authority as to his or her eligibility for assistance. The local authority's conduct of the review process is regulated by the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999. However, pursuant to s. 70 of the 1994 Act discussed above, the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 (the 1996 Order) provided that the local authority's functions relating to homelessness (apart from specific excepted functions) could be performed by any person, or the employees of any person, authorised by the local authority. At present, some local authorities have availed themselves of this provision to contract out the s. 202 review function; while other authorities have retained it in-house.

In *Runa Begum* v *Tower Hamlets London Borough Council*[103] – a case in which the local authority had retained the function in-house – the alleged problem was that the reviewing officer worked for the same local authority that made the initial decision.[104] One of Begum's arguments was that the local authority should have used its power under Article 3 of the 1996 Order to contract out the review decision and achieve independence[105] – an argument which had been regarded favourably in an earlier Court of Appeal judgment.[106] The House of Lords rejected this option, however, with Lord Hoffmann citing a number of objections,[107] including that he was: "by no means confident that Strasbourg would regard a contracted fact finder, whose services could be dispensed with, as more independent than an established local government employee".[108] Lord Millett expressed similar reservations about whether a person "appointed ad hoc by the authority directly concerned and lacking any kind of security of tenure could constitute an 'independent . . . tribunal established by law'".[109]

The issue arose again in *De-Winter Heald* v *Brent London Borough Council*,[110] although this time the local authority had contracted out the s. 202 review function. The applicants contended that Article 6 of the ECHR required a reading down of the 1996 Order to exclude s. 202 functions, on the basis that the private contractor in this case was not sufficiently independent and that he was not democratically elected.[111] In particular, it was argued that the contract conferred no security on the company, such that he lacked the independence necessary to perform s. 202 reviews. Accepting that the outsourcing was permissible pursuant to the 1994 Act and the 1996 Order,[112] Stanley Burnton LJ considered the Article 6 challenge. He did not regard the *Begum* comments as determining the matter,[113] although he used as his "starting point" *Begum*'s holding that review by an employee of a local housing authority did not infringe Article 6[114] and considered it necessary to compare the independence and impartiality of a private contractor with those of an employee. His Lordship commented that he did not see that a third party should necessarily be any less

103 [2003] UKHL 5, [2003] 2 AC 430.

104 Ibid. para. 16.

105 *Begum* [2003] UKHL 5, [2003] 2 AC 430, para. 23.

106 *Adan* v *Newham LBC* [2001] EWCA Civ 1916, [2002] 1 WLR 2120, paras 9, 43–45, 76, 94.

107 *Begum* [2003] UKHL 5, [2003] 2 AC 430, [46].

108 Ibid.

109 Ibid. para. 97.

110 [2009] EWCA Civ 930, [2010] 1 WLR 990.

111 Ibid. para. 40.

112 Ibid. paras 44–50.

113 Ibid. para. 50.

114 Ibid. para. 51.

impartial than an employee,[115] but, importantly, he noted that whether or not the third party should be regarded as less independent "may depend on the particular facts, and in particular the terms of the contract between the authority and the third party".[116] On the facts of this case, the Court did not find any violation of Article 6: although the contractor only had a one-year contract and a longer contractual term may have assisted in building a high degree of independence,[117] the contractor should not be "more concerned to reject an application than the local authority that instructs him".[118] Given that the local authority was primarily interested in *correct* decisions that would withstand legal challenge, it could not be concluded that the private contractor lacked independence or impartiality.[119] While the recognition that Article 6 may have repercussions for privatisation is welcome, it does appear that a closer examination of the contractual terms to test for compromised independence would have been merited in this case. For example, it does not appear that the contract's payment structure was considered by the Court to ascertain whether any incentives might have been created that would have undermined the contractor's independence and impartiality.

Article 5

With regard to Article 5, a constraint on privatisation could potentially emerge in the private prison context. Article 5(4) provides that everyone deprived of liberty by arrest or detention shall be entitled to "take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". The role of parole boards in the English criminal justice system has evolved over time, from being one of advising the Secretary of State in relation to his or her discretion to release prisoners who have not yet served the full term of their sentences, to that of a judicial body assessing whether continued deprivation of a prisoner's liberty is justified because of the risk that he or she will re-offend if released.[120] In *R (Brooke)* v *Parole Board*,[121] the Court of Appeal reasoned that this change in function resulted in a greater need for the board to be, and to be seen to be, free of influence in relation to the performance of its judicial functions.[122] Consequently, in breach of Article 5(4), a number of features of the parole board system could be regarded as undermining its appearance of independence: both by directions and by the use of the Secretary of State's control over the appointment of members of the board, the Secretary of State had sought to influence the manner in which the board carried out its risk assessment and the close working relationship between the board and the Ministry of Justice had tended to blur the distinction between the board's judicial function of deciding whether prisoners qualified for release on licence and the executive functions of the department.[123] Restriction of the board's funding, while not threatening its impartiality, constituted excessive interference with the board's work by the department.[124]

Although not directly comparable, the *Brooke* decision could have potential implications for private governance. To transfer to a private prison manager the parole

115 [2009] EWCA Civ 930, [2010] 1 WLR 990, para. 52.
116 Ibid.
117 Ibid.
118 Ibid. para. 57.
119 Ibid.
120 *R (Brooke)* v *Parole Board* [2008] EWCA Civ 29, [2008] All ER (D) 21, paras 13–16, 43–53, 78.
121 Ibid.
122 Ibid. para. 79.
123 Ibid.
124 Ibid. para. 80.

board's task of determining whether an individual should be detained due to risk of re-offence could be questionable from the perspective of independence and impartiality. A risk of lack of independence could derive from close relationships with the relevant governmental department, as in the *Brooke* case; but more significantly, even in the absence of such relationships, a risk of partiality could arise due to the private operator's pecuniary interest in the outcome of the decision. If a private actor is paid according to the length of detention, clearly, prolonging detention of prisoners could increase the private actor's profit-maximising potential; this is an issue that has raised concerns in the US.[125] It may be, therefore, that legislation transferring the parole board function, or similar functions, to a private prison manager would contravene Article 5(4). At the very least, such legislation would have to be interpreted to require a particular pay structure that did not jeopardise impartiality.

Overall, where Convention rights require an independent and impartial decision maker, instruments of privatisation need to ensure that the independence and impartiality of the private service provider is not compromised by reason of a pay incentive, profit motivation or other promotion of self-interest.

Positive obligations more generally

Moving beyond requirements of independence and impartiality, one issue that has been mooted by UK courts is that it is possible in the context of contracting out for recipients of privatised public services to require governmental authorities to include Convention obligations in their contracts with private service providers. As Lord Woolf noted in the *Leonard Cheshire* case, residents could require the local authority "to enter into a contract with its provider which fully protected the residents' Article 8 rights and if this was done, this would provide additional protection".[126] For many reasons, not least the fact that service recipients are very rarely party to contractual negotiations between the state body and the private provider, this is an unrealistic proposal.[127] In addition, as has been shown above, given the narrowness in the reach of application of the HRA, the reality is that in so far as negative Convention obligations are concerned, there is no incentive on the government to ensure that outsourcing instruments, such as contracts, require compliance on the part of private contractors with Convention obligations. The government will not be held accountable for the breach as it is not the perpetrator of the breach; in many situations, the private actor will also not be held accountable as, on the strict *YL* criteria, it will either not be regarded as performing a public function or else it will be regarded as carrying out a private act. The situation changes with positive obligations, however: because the state retains responsibility for its failure to fulfil the positive obligation, there is an incentive to draft outsourcing instruments, such as contracts, so as to ensure private provider compliance, or at least, to secure a remedy for the state against the private provider in the event of non-compliance.

A number of examples demonstrate the point. Contracts with those operating privatised detention should be drafted in a way which contains obligations requiring minimisation of risks to the safety of inmates,[128] or risks to healthcare of inmates;[129] likewise contracts for the management of privatised immigration detention centres.[130] In contracts for privatised

125 For discussion, see Donnelly, *Delegation*, n. 14 above, pp. 110–11.

126 *R (Heather)* v *Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936, para. 34.

127 See further Donnelly, *Delegation*, n. 14 above, pp. 350–64.

128 *Dougoz* v *Greece* (2002) 34 EHRR 330; *Peers* v *Greece* (2001) 33 EHRR 1192.

129 *Rohde* v *Denmark* (2006) 43 EHRR 325; *McGlinchey* v *UK* (2003) 37 EHRR 41.

130 *Slimani* v *France* (2004) 43 EHRR 1068.

child placement or foster services, the government may be interested in imposing obligations to minimise risks of abuse of children.[131] As for privatised healthcare, the state will wish to compel private providers to adopt appropriate measures for the protection of their patients' lives and ensure an independent investigation into any death.[132] In the context of private policing, it is in the state's interest to impose obligations on private service providers to ensure access to timely medical care for any person who is detained.[133]

Again, it may be said that these obligations appear relatively modest. Two points can be made. First, perhaps surprisingly, even these basic obligations have not always been imposed on private contractors as a matter of practice.[134] Second, the range of positive obligations emerging in the Court's jurisprudence is ever-expanding. As such, while perhaps tentative at this point, it must surely be the case that the potential of positive obligations to have an impact in this context can increase. Of course, imposing such obligations on private service providers does have cost implications and, to an extent, will undermine the cost-cutting rationale underpinning privatisation. However, the state may conclude that it is in its own interest to impose these obligations on private service providers as it will, itself, ultimately bear responsibility for ensuring their fulfilment.

Conclusion

This article has sought to explore the intersection of positive obligations and privatisation. It has been shown that, from a theoretical perspective, there is potential for tension between positive obligations and privatisation: between the state responsibilisation of positive obligations and the state de-responsibilisation associated with privatisation; and between the citizen of positive obligations and the consumer of privatisation. In practice, these tensions manifest themselves in two modest ways. First, privatisation can reduce the remedial protection of negative Convention obligations but not positive Convention obligations. It was suggested that this observation should provide an additional reason for UK courts to reconsider their s. 6(3)(b) HRA case law, on the basis that it seems anomalous that core negative Convention obligations should receive less remedial protection than their judicially created positive counterparts. Second, positive obligations have the potential to have an impact on both the range of functions privatised by the state and on the manner in which the state privatises. Affecting the manner of privatisation may, in turn, produce costs which, to an extent, undermine the efficiency rationale for privatisation. The ECtHR's positive obligations jurisprudence is also ever-evolving and although described repeatedly in this article as "modest", the impact of positive obligations on privatisation may become more marked over time.

131 *Z* v *UK* (2001) 34 EHRR 97.

132 *Calvelli* v *Italy* App. No 32967/96, 17 January 2002.

133 *Anguelova* v *Bulgaria* (2004) 38 EHRR 31.

134 See e.g. L Sossin, "The criminalization and administration of the homeless: notes on the possibilities and limits of bureaucratic engagement" (1996) 22 *NYU Rev of L and Social Change* 623, p. 691.

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Beyond arbitrary interference: the right to a home? Developing socio-economic duties in the European Convention on Human Rights

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Abstract

This paper is concerned with divergent trends in the protection of socio-economic rights by the European Court of Human Rights (ECtHR). It focuses on the potential to gain access to housing or housing-related benefits through the incremental development of positive obligations in the European Convention on Human Rights (ECHR). First, it argues that, despite the conceptual inadequacy of the positive–negative dichotomy of rights, its influence is still strongly reflected in the ECtHR's jurisprudence. It demonstrates that, despite the potential to develop the positive aspects of Articles 3 and 8 ECHR to protect vulnerable homeless individuals in respect of their need for shelter, strategic successes of the past decade, such as Connors *v* UK[1] *and* McCann *v* UK,[2] *reflect a bias towards claims involving negative interference with the enjoyment of an existing home. Second, the article considers the implications of a trend towards the harmonisation of socio-economic rights in member states, through use of the fair trial right in Article 6, or the right to equal treatment in Article 14, read with Article 1 of Protocol 1 ECHR. It argues that, despite the impression of progress in* Tsfayo *v* UK[3] *and* Stec *v* UK,[4] *the ECtHR has relied on an artificial extension of substantive rights to a fair trial or to property covered by the Convention, rather than on efforts to address issues of socio-economic disadvantage more holistically through the development of a principled jurisprudence of positive obligations in the ECHR.*

Introduction

During the past two decades, individuals and groups have increasingly tested the extent to which governments and public authorities might be held to account through the judicial system for failing to provide access to health and welfare services or the financial means to acquire them.[5] The ECtHR has not escaped this trend. It has increasingly been faced with questions from national courts concerning the boundaries of state responsibilities for meeting basic human needs, such as life-prolonging treatment for terminally ill patients and facilities to increase the ability of people with disabilities to live a

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1 (2005) 40 EHRR 9.

2 (2008) 47 EHRR 40.

3 (2009) 48 EHRR 18.

4 *Stec* v *UK* (2006) 43 EHRR 47.

5 See, generally, M Langford (ed.), *Social Rights Jurisprudence: Emerging trends in international and comparative law* (Cambridge: CUP 2008).

fulfilling life in the community, or for making basic provision, including shelter, for those who have suffered extreme deprivations or psychological injury as a result of conduct by the state, its agents, or third parties.[6] Moreover, in recent cases, there have been strategic victories in gaining access to economic social security benefits[7] of the kind protected by Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) or by Article 12 of the European Social Charter (ESC).[8] Furthermore, it is notable that these are complaints in which the vulnerability or social deprivations of claimants have not necessarily been in issue.[9]

However, by comparison with modern constitutions, such as that of South Africa, where obligations have been graduated according to the severity of threats to rights,[10] there are complex difficulties in the use of an old-fashioned instrument, predominantly expressed in terms of civil and political rights, to gain protection for human rights in the socio-economic sphere.[11] Moreover, lack of development of the normative content of the rights has been exacerbated by the Court's general failure to develop a coherent theory of positive obligations in the ECHR, or to pursue the logic of its own conclusions concerning the scope of positive obligations in welfare needs contexts.[12] Furthermore, difficulties of standard setting have increased in a growing number of European states, each with very different constitutional arrangements, socio-political and economic histories, and ideological approaches to the role of the state in welfare protection. Thus, even commentators who recognise the long-term societal benefits of a more protective role for states than is now envisaged in post-welfare democracies are sceptical about the potential of the ECtHR case law to provide a coherent framework by which to pursue this goal.[13]

6 See L Clements and A Simmons, "European Court of Human Rights: sympathetic unease", in Langford, *Social Rights Jurisprudence*, n. 5 above; E Palmer, "Protecting socio-economic rights through the European Convention on Human Rights: trends and developments in the European Court of Human Rights" (2009) 2 *Erasmus Law Review* 397.

7 See *Carson* v *UK* (2009) 48 EHRR 41. The case concerned the general policy of the United Kingdom to pay index-linked pensions to residents while refusing to up-rate in the case of pensioners abroad unless they were resident in countries having reciprocal agreements with the UK.

8 Article 12 (4) states: "The Parties undertake . . . to take steps by the inclusion of bilateral agreements and multi-lateral agreements . . . to ensure equal treatment of their own nationals and the nationals of other parties . . . in respect of social security rights including the retention of benefits arising out of social security legislation whatever movements the persons undertake between the territories of the parties."

9 See Palmer, "Protecting socio-economic rights", n. 6 above, pp. 419–21.

10 Rights in the South African Constitution have been formulated in three different ways, each of which requires different responses from the courts. See, generally, D Brand, "Introduction to socio-economic rights in the South African Constitution" in D Brand and C Heyns (eds), *Socio-economic Rights in South Africa* (Pretoria: Pretoria University Law Press 2005), pp. 1–56. In respect of the second category of rights, which includes the majority of specific socio-economic rights (access to adequate housing, healthcare, food and water, and social security), the state is required to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right. By contrast, the third category, which has been negatively formulated, prohibits the state from interfering with the enjoyment of other rights.

11 Generally, see E Palmer, *Judicial Review, Socio-economic Rights and the Human Rights Act* (Oxford: Hart 2007), pp. 49–103.

12 See A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart 2004) for a comprehensive review of the development of positive obligations under the ECHR.

13 See O De Schutter, "The protection of social rights by the European Court of Human Rights" in J Vande Lannotte, J Sarkin, T De Pelsmaeker and P Van Der Auweraert (eds), *Economic, Social and Cultural Rights: An appraisal of current international and European developments* (Antwerp: Maklu 2002), pp. 207–39. See also, generally, Palmer, "Protecting socio-economic rights", n. 6 above.

Two broadly different approaches to the development of positive socio-economic obligations can be found in the ECtHR's jurisprudence. In the first approach, the socio-economic content of the rights, for example, to shelter or protection against destitution under Articles 3 or 8 ECHR, has been found to exist at the level of the Convention in order to give effective protection to the rights of the complainant in the circumstances of the case.[14] In the second approach, the ECtHR has expanded the content of socio-economic rights that already exist in national legal systems by affording supplementary protection through explicit Convention rights, such as the right to a fair trial under Article 6 or the right to non-discrimination under Article 14.

The aim of this article is to evaluate these disparate approaches to the protection of socio-economic rights, in the context of a putative "right to shelter" in the ECHR, by focusing on the potential to gain access to housing or housing-related benefits through the incremental development of positive socio-economic obligations in the ECHR. It will also consider how these different strategic approaches have played out in the UK courts since the Human Rights Act 1998 (HRA). First, it argues that, despite the conceptual inadequacies of the positive–negative dichotomy of rights, its influence is still strongly reflected in ECtHR jurisprudence. Thus, it demonstrates that, despite the strategic progress in housing cases such as *Connors* v *UK*[15] and *McCann* v *UK*,[16] the ECtHR socio-economic jurisprudence reflects a strong bias towards claims involving negative interference with the enjoyment of an existing home. Second, it argues that in cases such as *Tsfayo* v *UK*[17] (Article 6) and *Stec* v *UK*[18] (Article 14), the ECtHR has pragmatically relied on an artificial extension of substantive rights to a fair trial and to a formal concept of equality that is inconsistent with the development of a principled jurisprudence of positive socio-economic obligations in the ECHR.

It is therefore suggested that, when assessing the ECtHR's contribution to the development of standards in the ECHR, an important distinction should be drawn between cases in which the content of the rights has been developed according to core principles and the values of equal respect for the dignity and autonomy of every human person that are immanent in all of the Convention rights, and cases in which a formal conception of equality has been used to create substantive rights that are akin to the notion of legally enforceable socio-economic entitlements for citizens in EU law. It is argued that only in the former cases can we see the promise of a jurisprudence of transformative positive obligations that fully respects the indivisibility of civil and political rights on the one hand and socio-economic rights on the other.[19]

Beyond the negative–positive dichotomy of rights? Articles 3 and 8 ECHR

Since *Airey* v *Ireland*,[20] the ECtHR has developed positive obligations across the full range of Convention rights. However, it is well known that this phenomenon can most easily be demonstrated in relation to Article 8 ECHR. Not only has the ECtHR given expansive

14 Examples of fundamental socio-economic rights that have benefited from an autonomous protection by the ECtHR are found in the right not to be subjected to inhuman or degrading treatment (Article 3), the right to be exempt from servitude or forced labour (Article 4), the right to freedom of association (Article 11), and the right to respect for private and family life and home (Article 8).

15 (2005) 40 EHRR 9.

16 (2008) 47 EHRR 40.

17 (2009) 48 EHRR 18.

18 *Stec* v *UK* (2006) 43 EHRR 47.

19 See, generally, S Fredman, *Human Rights Transformed: Positive rights and positive duties* (Oxford: OUP 2008).

20 (1979–1980) 2 EHRR 305.

interpretations to the substantive elements of Article 8 – private and family life, home and correspondence – the Strasbourg organs have also allowed the flexible concept of "respect" in Article 8(1) to support the development of a wide range of both positive and negative obligations in the ECHR.[21] Moreover, although at first sight there is little to connect the negative formulation of Article 3 with the imposition of positive obligations, the ECtHR has concluded that state parties may be required to undertake a growing range of affirmative duties in order to be Article 3 compliant.[22]

However, it is also notable that in its dynamic development of Convention rights the ECtHR has continued to use the language of positive–negative duties, which is in contrast to the tripartite analysis that is now widely used to address the conceptual inadequacies of the negative–positive analysis of human rights.[23] Nevertheless, it should also be emphasised that, when we examine the content of positive and negative duties that have been incrementally developed by the ECtHR to give practical effect to the Convention rights, we find a range of procedural and substantive obligations that, in practice, mirror those in Henry Shue's elaborate taxonomy of human rights obligations. Thus, affirmative duties across the range of ECHR rights can be described according to the threefold classification: a primary duty to avoid depriving a person of his or her basic rights (the duty to respect); a secondary duty to protect the right against interference from others (the duty to protect); and a duty to take procedural steps to promote (facilitate) rights.

Therefore, as Alistair Mowbray has shown, when we examine the identification by the ECtHR of positive obligations across the full range of ECHR rights, we find that the range and scope of duties is consistent with contemporary understandings that threats to *all* human rights require a host of protective and preventive measures that take into account the context in which the violation occurs, the seriousness of the threat, and the immediacy of the action required, including the spending of resources necessary to fulfil or facilitate the protection of the right.[24] Thus, in the search for a more principled lens in Articles 3 and 8 ECHR, through which issues of state responsibility for extreme socio-economic deficits can be examined, Clements and Simmons have recently suggested that it is no longer helpful to follow the two broad categories "state action denied" and "state action demanded". Instead, they have suggested that, although still artificial, a better approach is to analyse state obligations according to context: to "what degree it can be said that the State [itself] is culpable and just how severe is the destitution in issue?"[25]

Nevertheless, despite the unreliability of the negative–positive dichotomy, there have been concerns that a difference of treatment could be found, for example under Article 8, depending on whether claims have been framed as allegations of negative or positive breaches of state duties.[26] This is because, it is argued, in complaints framed as positive breaches of duty (failure to protect the right) it is all too easy for the question of breach to be conflated with the logically prior question of the scope of the duty encompassed by

21 For a comprehensive review of the development of positive obligations under the ECHR, see Mowbray, *Development*, n. 12 above.

22 Ibid. pp. 43–65.

23 Ibid. pp. 221–9.

24 Ibid.

25 See Clements and Simmons, "European Court of Human Rights", n. 6 above, p. 412. See also Palmer, "Protecting socio-economic rights", n. 6 above, pp. 53–65.

26 See C Warbrick, "The Structure of Article 8" (1998) *EHRLR* 1, pp. 32–44.

Article 8(1).[27] It has therefore been suggested that, where complaints are framed as positive breaches of duty, both parties may lose the benefit of the complex balancing exercise that has traditionally followed the preliminary inquiry and which has marked the evolution of the ECHR as a sophisticated mechanism of differential rights adjudication.[28]

However, in *Powell and Rayner* v *UK*,[29] the ECtHR was clear that, whether a case is presented in terms of a positive state duty to take reasonable and appropriate measures to secure the applicant's rights under Article 8(1) or in terms of "an interference" by a public authority, the *same methodological approach should be applied*. Moreover, in response to similar concerns relating to allegations of breach of the positive aspects of Article 3, in *Rees* v *UK*,[30] the ECtHR concluded that, despite the absence of an express requirement of proportionate interference, the defensive precepts in Article 8(2) are no less appropriate as yardsticks for determining the limits of state liability for positive breaches of duty under Article 3 ECHR. Nevertheless, in its analysis of the same question in *Pretty* v *UK*,[31] the Court significantly held that:

> while states may be *absolutely forbidden to inflict the proscribed treatment* on individuals within their jurisdictions, the steps appropriate to discharge a positive obligation may be more judgemental, more prone to variation from state to state, more dependent on the opinion and beliefs of the people and less susceptible to any universal injunction.[32]

Thus, here we find a significant example of the ECtHR's reluctance to embrace a modern theory of human rights adjudication that fully acknowledges that, even though resources are implicated, issues of state responsibility should be determined *not* by the negative or positive designation of the right at issue, but rather by the immediacy and seriousness of the *threat*, the degree – if any – of state involvement and the extent to which resources are implicated in the satisfaction of the right.

Nevertheless, before concluding this section, it is also important to emphasise that, in its incremental development of affirmative duties, the ECtHR has not always been able to escape the logic of contemporary human rights theory: that positive obligations are an integral aspect of all human rights, rather than extraneous constructs superimposed on the existing catalogue of so-called negative rights. Nor has the ECtHR been immune from a growing trend in judicial review whereby international, constitutional and administrative courts are expected to shape our understanding of what is positively required of governments in protecting fundamental human rights, in addition to giving effective protection to the rights of the complainant in the circumstances of the case before it.[33] Thus, although the Court is mindful of its institutional boundaries vis-à-vis national

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

28 (1987) 9 EHRR 56.

29 (1990) 12 EHRR 355. The applicants, who lived near Heathrow Airport, complained that excessive noise from the airport breached their right under Article 8 to respect for their private life and home. Therefore, as a preliminary issue, the government sought to question whether the complaint disclosed the necessary "interference by a public authority", because Heathrow Airport and the traffic using it were not owned or controlled by the government or its agents.

30 (1987) 9 EHRR 56. The applicant claimed that refusal by the UK government to allow her legally to alter her birth certificate so as to reflect her gender reassignment constituted a positive breach of her Article 8 right to respect for private life.

31 (2002) 35 EHRR 1.

32 Ibid. para. 15 (emphasis added).

33 See D Dyzenhaus, *The Unity of Public Law* (Oxford: Hart 2004), especially pp. 2–23.

resource allocation policies, from time to time we see the tentative seeds of a principled jurisprudence of socio-economic obligations, especially under Articles 3 and 8 ECHR, that fully respects the indivisibility of civil and political and socio-economic rights.

Moreover, since the HRA 1998, these embryonic developments have lent themselves in UK courts to what has been hailed as the foundations of a transformative jurisprudence of positive socio-economic obligations in ECHR rights.[34]

(a) Developing core obligations in Articles 3 and 8 ECHR

Violations of Article 3 have increasingly been recognised by the ECtHR in complaints of state failure to provide conditions of human existence that satisfy the fundamental right of all humans to be treated with equal respect for dignity in relation to their basic needs, including the need for shelter.[35] Moreover, although a positive duty to meet medical and other welfare needs of vulnerable individuals has most frequently been found in the context of prison or police custody, beyond those areas of dependency and state control it has also been recognised that failure to make provision for vulnerable claimants suffering from disabilities may, in humanitarian cases of sufficiently acute need, constitute infringements of Article 3.[36] Moreover, two frequently cited cases have been widely viewed as authority for the proposition that state parties may be liable for violations of Article 3, whether committed by the state or its agents, in *extreme* circumstances, where there is a real risk that degradation and suffering are likely to be exacerbated by the failure of states to provide for the elementary health and welfare needs of individuals in their jurisdictions.

In the first of those cases, *D* v *United Kingdom*,[37] the applicant, a drug dealer from St Kitts who was suffering from AIDS, resisted a proposal by the UK government to return him to his country of origin, where treatment and ancillary support for AIDS sufferers was virtually non-existent. In his complaint to Strasbourg, he relied on a series of cases, starting with *Soering* v *UK*,[38] in which the ECtHR had demonstrated its willingness to extend the concept of a state's responsibility beyond its borders[39] by interpreting Article 3 as including a prohibition on extradition or deportation in cases where there is a risk that an individual would face a sufficiently serious risk of ill-treatment if returned to another state. However, the test of severity in *D* was set at a very high threshold, as recently confirmed by the ECtHR in *N* v *UK*.[40] It was accepted by the ECtHR in *N* that, in deciding in favour of the applicant in *D*, the ECtHR had predominantly been influenced by such factors as the

34 S Fredman, "Human rights transformed: positive duties and positive rights" (2006) *Public Law* 498.

35 See, for example, *Moldovan* v *Romania (No 2)* (2007) 44 EHRR 16, concerning the Haderini pogrom which had been carried out with police complicity. The applicants' homes had been destroyed, as a result of which they lived in appalling conditions for 10 years, suffering very detrimental effects on their health and well-being. In conjunction with the racial discrimination they suffered, this constituted an interference with the applicants' human dignity and amounted to degrading treatment and a breach of Article 3.

36 See *Price* v *UK* (2002) 34 EHRR 53. See, generally, Palmer, "Protecting socio-economic rights", n. 6 above, pp. 410–12.

37 (1997) 24 EHRR 423.

38 (1989) 11 EHRR 439. In a series of cases starting with *Soering* v *UK* (1989) 11 EHRR 439, the ECtHR has interpreted Article 3 as including an absolute prohibition on extradition or expulsion where there is a sufficient risk that the complainant will face serious ill-treatment if returned to another state, thereby demonstrating the willingness of the ECtHR to extend the concept of state responsibility beyond a state's own borders.

39 See also *Chahal* v *UK* (1997) 23 EHRR 413; *Vilvarajah* v *UK* (1991) 14 EHRR 248; *Jabari* v *Turkey* App. No 40035/98, 11 July 2000.

40 *N* v *UK* (2008) 47 EHRR 39; this applies beyond cases of AIDS to physical and mental illness generally (see para. 47).

imminence of his death, the lack of sanitation in the receiving hospital in St Kitts, and the fact that there might not even have been a bed for him there.

In the second case, *O'Rourke* v *UK*,[41] the applicant was a vulnerable individual who on coming out of prison was provided with temporary accommodation pending a local authority decision as to whether he was eligible for housing as a homeless person. Following his eviction by the authority from temporary accommodation, he lived rough on the streets for 14 months, eventually complaining to Strasbourg that his eviction and the subsequent failure to provide him with accommodation constituted violations of Articles 3 and 8 ECHR. However, in his case, the Court did not consider the suffering that followed his eviction to have reached the requisite level of severity to engage Article 3. Moreover, since he was judged largely to be the author of his own misfortune (having failed to visit a night shelter and refused to accept temporary accommodation), there would have been no infringement of Article 3 even if his condition had reached the requisite level of severity. Significantly, however, the Court accepted that, although failure to provide shelter could not of itself amount to degrading and inhuman treatment, a positive obligation to make social provisions of the kind required by the applicant *could* arise in a case of sufficiently acute individual need. Further, it was emphasised by the Court that, as in the case of *D*,[42] compliance with the negative duty in Article 3 could give rise to positive undertakings of this kind, in cases where a course of conduct pursued by the state (in these cases, deportation or eviction) is likely to result in inhuman or degrading consequences for the individual concerned.[43]

Nevertheless, although in isolation these cases have seldom been used successfully before the ECtHR to gain access to socio-economic provisions (within or beyond national borders), in the landmark House of Lords decision in *R (Limbuela)* v *Secretary of State for the Home Department*,[44] they were absorbed as an integral part of the transformative human rights framework of ECHR positive socio-economic duties in Article 3.[45]

In *Limbuela*, the House of Lords had been asked to consider the circumstances in which the state's obligations (primarily under Article 3 ECHR) should extend to providing accommodation and basic necessities for destitute asylum seekers who were living without day-to-day certainty of food or shelter. However, the speeches of their Lordships went much further than that specific context. Thus, not only was it suggested that it is a basic value of the unwritten UK constitution that the state will always be responsible for preventing destitution arising as a result of a statutory regime of the kind imposed on the claimants that has removed all reliable and predictable forms of social support while at the same time preventing those whom they have made destitute from working.[46] The speeches of their Lordships may also be viewed as articulating a more general and far-reaching proposition, namely that the state can be held responsible for meeting the basic needs of everyone in the jurisdiction wherever existing legal structures have been implicated in their denial. Indeed, the case has been widely applauded as coming close to suggesting a general principle that whenever individuals are reduced to abject poverty as a result of their

41 App. No 39022/97, admissibility decision, 26 June 2001.

42 (1997) 24 EHRR 423.

43 See also *N* v *UK* (2008) 47 EHRR 39.

44 [2005] UKHL 66, [2009] 1 AC 396.

45 In *Limbuela*, the House of Lords concluded that state responsibility is engaged where positive state action drives individuals into inhuman and degrading living conditions. For a full discussion of the case, see Palmer, "Protecting socio-economic rights", n. 6 above, pp. 265–70, an analysis cited with approval by the ECtHR in *N* v *UK* (2008) 47 EHRR 39.

46 Palmer, "Protecting socio-economic rights", n. 6 above, pp. 265–70.

inability to work, through old age or mental or physical infirmity, the state has a responsibility to ensure that their elementary needs are met through alternative appropriately tailored structures.[47]

Turning then to Article 8, we find that, as under Article 3, state parties may be required to protect individuals in respect of a broader bundle of social needs than at first sight presupposed by the constituent elements of Article 8: in the case of vulnerable individuals with disabilities, states may be required to take positive steps to provide them with an environment that will facilitate their enjoyment of autonomy and a more independent life in the wider community.[48]

The Court first considered the extent to which Article 8 gives rise to positive state obligations to make wider social provision for vulnerable individuals in *Botta* v *Italy*.[49] This was a case in which the applicant complained of "impairment of his private life and the development of his personality" resulting from the Italian government's failure to take appropriate measures to remedy the omissions of the private bathing establishments in the town where he was taking a holiday. The essence of his complaint was that his Article 8 rights had been infringed because of his inability to enjoy a normal social life, "which would enable him to participate in the life of the community, by the exercise of his essential non-pecuniary personal rights".[50]

It was recognised in *Botta* that the duty to protect physical and emotional integrity could arise even where there had been no direct interference by the state,[51] although the Court refused to find that there had been a violation of Article 8 in a case where the right asserted by the applicant (to gain access to beach and sea at a place distant from his normal place of residence) "concerned interpersonal relations of such broad and indeterminate scope that there could be no conceivable direct link between the measures the state was urged to take and the applicant's private life".[52] At the same time, however, the ECtHR recognised that, in principle, Article 8 *could* give rise to precisely the type of affirmative duties for which the applicant had argued in cases where it was possible to establish "a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life".[53]

Nevertheless, the ECtHR in *Botta* drew attention to the concurring opinion of the minority in the European Commission, in so far as the Commission had recognised that the precise aim and nature of the measures to be undertaken for people with disabilities would vary from place to place and that this was an area where a wide discretion would always be left to national governments. Moreover, in seeking further to limit the implications of its own jurisprudence, the Court recalled the more cautious opinion of the Commission's *majority*, namely that, in light of the resources necessary to satisfy such a claim, "the social nature" of the rights at issue rendered them more suitable for protection under the flexible machinery of the ESC.[54]

47 C O'Cinneide, "A modest proposal: destitution, state responsibility and the European Convention on Human Rights" (2008) *EHRLR* 583.

48 See Clements and Simmons, "European Court of Human Rights", n. 6 above, p. 422.

49 (1998) 26 EHRR 241.

50 Ibid. para. 27.

51 Ibid. paras 32–3.

52 Ibid. para. 35.

53 Ibid. para. 34.

54 *Botta* v *Italy* (1998) 26 EHRR 241, proceedings before the Commission, 246–55. For the concurring minority opinion on the application of the margin of appreciation of Judges Liddy, Tune, Pellonpää, Bratza, Sváby, Perenic and Schermers, see 251–2.

Since *Botta*, there have been few successes before the ECtHR in claims for social care by disabled people seeking to enjoy autonomy and independence in the wider community.[55] However, by contrast, in the UK, since the closely reasoned judgment by Sullivan J in *Bernard* v *Enfield LBC*,[56] the principles enunciated by the ECtHR in *Botta* have provided the bedrock for an important jurisprudence of positive public authority duties concerning social support for vulnerable groups, such as children and frail, elderly and disabled people. Thus, although agreeing in *Bernard* that the main thrust of Article 8 is to prevent arbitrary interference by public authorities with an individual's private and family life, Sullivan J was not prepared to overlook the relevance of developments in ECtHR jurisprudence in which, in the wake of *Botta*, respect for individuals' psychological and physical integrity had been recognised as giving rise to positive obligations of the kind at issue in *Bernard*.[57]

However, by contrast, when we turn to examine Article 8 disputes that are more directly concerned with the "home" component of Article 8 in the concrete physical sense, we find that the ECtHR has shied away from a principled jurisprudence of positive obligations of the kind explored in *Botta*. Instead, recent Article 8 cases claiming home protection in the concrete physical sense continue to *reflect a bias towards claims involving negative interference with the enjoyment of an existing home*.

(B) Beyond arbitrary interference: the right to a home?

The core idea of respect for the home in Article 8 ECHR is said to be one of sanctuary against intrusion by public authorities, that is an essentially negative obligation.[58] However, there is a wide penumbra of positive connotations in the idea of respect for "home, family and private life".[59] Further, it is clear that the state will facilitate the right to live in one's existing home rather than merely protect it against interference as an existing property

55 See *Zehnalova and Zehnal* v *Czech Republic* App. No 38621/97, admissibility decision, 14 May 2002. The applicants were partners, one of whom was disabled. They complained that, in contrast to the complaint by Botta, they were unable to access a number of public buildings such as the post office and swimming pool in their home town. The ECtHR doubted that they needed access to the buildings listed on a daily basis, but also denied that there was a direct and immediate link between the measures sought and the applicants' private lives. See also *Sentges* v *The Netherlands* App. No 27677/02, admissibility decision, 8 July 2003.

56 [2002] EWHC (Admin) 2282. See also *Anufrejiva* v *Southwark London Borough Council* [2003] EWCA Civ 1406, where Lord Woolf endorsed the counterintuitive conclusion accepted by Sullivan J in *Bernard* that treatment that does not reach the severity of Article 3 degradation may nonetheless constitute a breach of the private life aspects of Article 8 when adverse effects on an individual's moral and physical integrity are sufficiently grave.

57 The first applicant in *Bernard* [2002] EWHC (Admin) 2282, who had been severely disabled following a stroke, suffered from a range of infirmities that left her confined to a wheelchair and wholly dependent on others for her personal care, hygiene and feeding. Sullivan J concluded that the local authority was under an obligation not merely to refrain from unwarranted interference in the claimants' family life, but also to take positive steps, including providing suitably adapted accommodation, to enable the claimants and their children to lead as normal a family life as possible, bearing in mind the first applicant's severe disabilities.

58 See D Harris, M O'Boyle, E Bates and C Buckley, *Law of the European Convention on Human Rights* 2nd edn (Oxford: OUP 2009), p. 376. In complaints against Turkey concerning the burning of houses by security forces, the ECtHR found that the destruction of the applicants' homes and properties constituted particularly grave and unjustified interferences with the their right to respect for their home, private and family life. See also *Selcuck and Asker* v *Turkey* (1996) 26 EHRR 477. The positive state obligations under Article 8 may also relate to the right to "adequate housing", although it appears from the case law that these obligations rest more clearly on the "private and family life" components of Article 8 than on the specific reference to "respect for home".

59 The essential ingredient of family life is the right to live together so that family relationships may develop normally: see *Marckx* v *Belgium* (1979) 2 EHRR 330. *Powell and Rayner* v *UK* (1990) 12 EHRR 355 concerned a duty to protect a person's home and family life from the negative interference of environmental pollution.

right.[60] Nevertheless, although there are positive state obligations to protect against home deprivation and its consequences in many contexts,[61] the ECtHR has attempted to set justiciable boundaries around the growing social problem of homelessness in Europe by using the well-known mantra that "there is no right to a home". Thus, in *Chapman* v *UK*,[62] the ECtHR familiarly stated that:

> while it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. *Whether the state provides funds to enable everyone to have a home is a matter for political not judicial decision*.[63]

Nevertheless, it is well known that the defensive statement that there is no right to a home in *Chapman* sits uneasily with developments in *Botta* and with *Marzari* v *Italy*,[64] the first case in which the ECtHR clearly stated that, although not creating a right to a home per se, the positive duty in Article 8 to respect private family life did not absolve the government of all responsibilities in respect of housing needs. In *Marzari*, the Court recognised that:

> Although Article 8 does not guarantee the right to have one's housing problems solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8.[65]

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

However, in *Chapman* v *UK*,[66] one of several UK Gypsy cases, which concerned an interference with the applicant's Article 8 rights caused by a failure to grant her planning permission to live in a caravan on her land,[67] eight members of the ECtHR recalled in a strong dissenting opinion that, although the essential object of Article 8 is to protect the individual against arbitrary action by public authorities, there may in addition be positive obligations inherent in an effective "respect for private and family life and home". In

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

61 See e.g. *Moldovan* v *Romania (No 1)* (2007) 44 EHRR 16. It has been suggested that "this is best described as a remedial right – to compensate for deprivation of housing". See Clements and Simmons, "European Court of Human Rights", n. 6 above, p. 413.

62 (2001) 33 EHRR 18.

63 Ibid. para. 99G.

64 (2000) 30 EHRR CD218.

65 Ibid.

66 (2001) 33 EHRR 18.

67 In the UK in a series of cases, starting with *Buckley* v *UK* (1996) 23 EHRR 101, it had been alleged that land development controls had unfairly discriminated against gypsies, with the result that almost 30 per cent of them were technically homeless and that controls that made it particularly difficult to obtain permission for the stationing of a caravan constituted a form of indirect discrimination. Second, complainants had argued that the legitimate state action has had a disproportionate (if unintended) socio-economic effect and that either the scheme should be amended to make it possible for them to find their own accommodation or the state should take responsibility for its provision.

addition, they noted that positive duties to respect a person's home might arise even in cases where there has been no state interference of the kind identified in *Chapman*. Thus, in considering whether the applicant's eviction served a "pressing social need", referring to the judgments in *Marzari*[68] and *Botta*,[69] the minority recalled that "where there is a direct and immediate link between the measures sought by an applicant and the latter's private life, positive obligations may be imposed on states".

Since *Chapman*, the ECtHR has demonstrated that, in sensitive "housing" cases concerning the legitimacy of interference (rather than the state's failure to provide housing), the Strasbourg Court will not routinely fall back on the wide margin of appreciation associated with domestic resource allocation issues or sensitive issues of general housing policy. Thus, in *Connors* v *UK*,[70] which concerned the legality of a gypsy's forced eviction from a local authority caravan site on the ground of the alleged misbehaviour of his extended family,[71] the ECtHR modified its position in *Chapman*. It was said in *Connors* that weighty reasons of public interest would be required to justify the very severe interference with the applicant's Article 8 rights, namely eviction and homelessness resulting in very detrimental effects on his and his family's health and education, circumstances that had not existed in *Chapman*. Accordingly, the ECtHR stated that "a margin of appreciation must inevitably be left to the national authorities", which "by reason of their direct and continuous contact with the vital forces of their countries, are, in principle, better placed than an international court to evaluate local needs and conditions".[72] However, on the issue of proportionality, the Court stated that, although in general it is for the national authorities to make the initial assessment of necessity, "the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention".[73] The margin will therefore vary "according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the aim pursued by the restrictions".[74] It will "tend to be *narrower* where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights".[75]

By contrast, it was said that a wide margin of appreciation is more likely to be applied in contexts such as planning, in so far as "the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies".[76] Thus, "in spheres such as housing, which play a central role in the welfare and economic policies of modern societies" (particularly in cases where Article 1 of Protocol 1 is in play), the legislature's judgment as to what is in the general interest will generally be respected, "unless that judgment is manifestly without reasonable foundation".[77] It is also possible to

68 (2000) 30 EHRR CD218.

69 (1998) 26 EHRR 241.

70 (2005) 40 EHRR 9.

71 In *Connors* (2005) 40 EHRR 9, the applicant and his family had lived on a local authority caravan site for 13 years. Following eviction, the family was forced to move on continuously and the stress led to the breakdown of the applicant's marriage. In finding a violation, the ECtHR emphasised the lack of procedural protection for gypsies in comparison to the local authority reviews of anti-social behaviour on local authority housing estates. Although the applicant denied the allegations, he had no opportunity to challenge them in court.

72 (2005) 40 EHRR 9.

73 Ibid. para. 81.

74 *Gillow* v *UK* (1986) 11 EHRR 335, para. 55.

75 *Connors* v *UK* (2005) 40 EHRR 9, para. 82.

76 Ibid.

77 Ibid.

distinguish cases such as *Mellacher* v *Austria* (founded on Article 1 of Protocol 1) from disputes founded on Article 8, which was said uniquely to "concern rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community".[78]

Moreover, the ECtHR has emphasised that, even where general social and economic policy considerations arise under Article 8, "the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant". In *Connors*, the "eviction of the applicant and his family . . . was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights". It could not be regarded as justified by a pressing social need or proportionate to the legitimate aim being pursued. Accordingly, there had been a violation of Article 8.

Nevertheless, in the United Kingdom there is a well-known tension between the use of eviction as a legitimate tool for the management of depleted social housing stock and the *effective* protection of the right to respect for the home in Article 8 ECHR. This tension was not directly addressed in *Connors*. In the later case of *McCann* v *UK*,[79] the ECtHR was therefore asked to consider whether the applicant's eviction from his home (which served a legitimate aim and had been conducted in accordance with relevant legal procedures) constituted an interference with his right to respect for his home.[80] As in *Connors*, the central question was whether, in the applicant's case, the interference was proportionate and necessary in a democratic society.[81] Significantly, the ECtHR held that it was not, suggesting that domestic law must always permit the proportionality of removing a person from his or her home to be assessed by an independent tribunal (which is currently not the case in the UK) if it is to comply with Article 8. Notably, however, in the later case of *Doherty* v *Birmingham City Council*,[82] the House of Lords decided to depart from the ECtHR judgment in *McCann*, arguing that it was based on a fundamental failure to understand the complexities of English housing law and therefore did not have to be followed in the domestic courts.

In the foregoing analysis of Article 8 case law, it has been argued that, despite the *potential* for the positive obligation in Article 8 to protect vulnerable individuals in respect of a bundle of needs, including the need for shelter, successful challenges before the ECtHR have continued to reflect a bias towards claims involving negative interference with the enjoyment of an existing home. Although regrettable, this is not surprising. Here, perhaps more than in any other area of social needs, we see the limitations of on an old-fashioned instrument, primarily directed at preventing negative state interference, in this case with individuals' substantive possessory rights under Article 1 of Protocol 1, when vulnerable individuals in need are seeking to gain access to adequate housing.

78 The ECtHR cited *Pretty* v *UK* (2002) 35 EHRR 1 and *Goodwin* v *UK* (1996) 22 EHRR 123.

79 (2008) 47 EHRR 40.

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

81 The ECtHR refused to accept the UK government's contention that the *Connors* decision (2005) 40 EHRR 9 was to be confined only to cases involving gypsies or where applicants sought to challenge the law itself rather than its application in their particular case.

82 [2008] UKHL 57, [2009] 1 AC 367.

Reflecting further on the significant problem of the indeterminacy of content of socio-economic rights in the ECHR, in relation to the "right to be adequately housed" it is worth remembering that even in the South African Constitution, which affords express protection to civil, political and socio-economic rights, housing obligations requiring "fulfilment" by the state have been carefully circumscribed. Thus, s. 26 of the constitution, which imposes a positive duty on the state and other relevant role players to "desist from preventing or impairing the positive right of access to housing", deals only with court procedures relating to *arbitrary evictions* rather than those that are carried out within the law.[83] In respect of the majority of specific socio-economic rights (access to adequate housing, healthcare, food and water, and social security), the state is required to take reasonable legislative and other measures *within its available resources* to achieve the progressive realisation of the right.

Articles 6 and 14: towards the fair distribution of socio-economic entitlements in member states?

In the foregoing review of cases under Articles 3 and 8 ECHR, we have seen the potential for progress through the development of core values and principles that give rise to open-textured positive obligations of the kind enshrined in Article 11 ICESCR (to recognise "the right of everyone to an adequate standard of living for himself and his family") or in Article 30 ESC (the right to protection against poverty and social exclusion).[84] By contrast, the fair trial right in Article 6 ECHR and the non-discrimination provision in Article 14 ECHR, coupled with substantive benefits, such as property and education (covered in Protocol 1 to the ECHR), have been used by the ECtHR to protect substantive socio-economic entitlements of the kind protected in Article 9 ICESCR or Article 12 ESC.[85] Thus, in the following review of cases, this article's focus turns from concern with equal protection of socially disadvantaged individuals in accordance with the core value of equality that infuses the entire Convention to more formal conceptions of equality in relation to the distribution of public goods.

(a) Article 6 ECHR: access to administrative justice in social security claims

It has already been noted how the right to free legal assistance as a "social" dimension of the right to a fair trial was first emphasised by the ECtHR in *Airey*.[86] Since then, the ECtHR has continued to recognise that the specific guarantees protected by Article 6, such as the right to an oral hearing and to legal aid, can be crucial in assisting disadvantaged individuals to gain access to assistance that might otherwise be denied in criminal proceedings.[87]

However, Article 6 does not apply to all proceedings – only to those concerning the determination of civil rights and obligations or a criminal charge – and in interpreting these concepts the ECtHR has given them "autonomous meanings" that in many cases depart from their meanings in domestic law. Thus, gradually, the scope of the concept of civil rights and obligations has been widened to encompass a right of access to courts or

83 See n. 10 above.

84 See n. 8 above.

85 Article 12 (4) states: "The Parties undertake . . . to take steps by the inclusion of bilateral agreements and multi-lateral agreements. . . . to ensure equal treatment of their own nationals and the nationals of other parties . . . in respect of social security rights including the retention of benefits arising out of social security legislation whatever movements the persons undertake between the territories of the parties."

86 (1979–1980) 2 EHRR 305.

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

tribunals in public law disputes over most discretionary socio-economic benefits. For example, early in the Court's jurisprudence, even though the right to health insurance benefits under social security schemes was treated as a public law right in the Netherlands, in *Feldbrugge* v *The Netherlands*,[88] it was held to constitute a civil right within the autonomous meaning of Article 6(1).[89]

Moreover, the ECtHR has held that the formal principle of equality of treatment dictates that Article 6 should apply even in cases where a socio-economic benefit is derived from a discretionary, non-contributory form of public assistance granted unilaterally by the state[90] and where the cost is fully borne by the public purse without any link to a private contract of employment.[91] Thus, in *Salesi* v *Italy*,[92] the definition of a civil right was said to cover social security or welfare benefits regarded as "sufficiently well defined to be analogous to rights in private law" and of "economic significance to the claimant".[93] Since the features of private law claims predominated, the right to social security benefits was a civil right within the meaning of Article 6.[94]

But the Court's "dynamic" approach to remedying the Convention's failure to include rights of due process in public law disputes has been problematic. In many jurisdictions, including the UK, the requirement of a "full hearing" under Article 6 disturbs existing models of administrative dispute resolution and the public–private jurisdictional divide. Thus, seeking a flexible accommodation in the case of *Bryan* v *UK*,[95] the ECtHR concluded that "full jurisdiction" in public law disputes means jurisdiction to deal with the case as the nature of the decision requires, in accordance with the dictates of "democratic accountability, efficient administration and the sovereignty of Parliament".[96] Problematically, there is no clear guidance as to how the criteria enunciated in *Bryan* are to be applied in national jurisdictions. In the UK, there has been intense litigation concerning the limits of the right to a full hearing in administrative disputes over discretionary socio-economic entitlements relating to housing.[97] This culminated in the recent case of *Tsfayo* v *UK*.[98]

Tsfayo concerned the application of Article 6 ECHR to a decision by a housing benefits review tribunal to refuse payment of housing benefit to a non-English-speaking asylum seeker because she had failed to show "good cause" why she had not submitted her renewal claim on time. On her complaint to Strasbourg, the ECtHR decided that the tribunal had been in breach of Article 6, irrespective of whether the claimant had had access to a

88 (1986) 8 EHRR 245.

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

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

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

92 (1996) 21 EHRR 342

93 *Ringeisen* v *Austria (No 1)* (1971) 1 EHRR 455.

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

95 (1996) 21 EHRR 342.

96 Per Lord Hoffman in *Begum* v *London Borough of Tower Hamlets* [2003] UKHL 5, [2003] 2 AC 430, paras 35 and 43.

97 In *Runa Begum*, the House of Lords held that administrative burdens and other societal costs associated with constitutional entitlements to a full evidentiary hearing should legitimate a more limited form of adjudication in disputed claims to discretionary welfare benefits.

98 (2009) 48 EHRR 18.

traditional judicial review hearing on appeal. In her case, the ECtHR insisted that intricately linked to the councillors' manifest lack of independence was the "limited control" that could be exercised by the reviewing court.[99] It did *not* have jurisdiction to rehear the evidence or to substitute its own views as to the applicant's credibility. Nor, indeed, did it have the power to order the decision to be taken by a different body. This meant that:

> there was never a possibility that the central issue of the applicant's credibility would be determined by a tribunal that was independent of one of the parties to the dispute. Accordingly, there had been a violation of Article 6(1).[100]

In seeking to give effect to rights that were "real and not illusory", in the circumstances of the case, the ECtHR concluded that there had been an infringement of the claimant's right to a fair and impartial hearing. However, if the ECtHR's approach to the interpretation of Article 6 in that case were given general application in the UK, it would mean that disputes of fact could no longer be determined internally at first instance: the existing supervisory administrative structure is inadequate to guarantee an impartial determination of all aspects of the dispute. The decision therefore threatened to disrupt established internal administrative procedures and court hearings for the allocation of welfare entitlements that have long been regarded by courts in the UK as uniformly hedged around by sufficient safeguards to satisfy the guarantees in Article 6.

Therefore, in the recent case of *Ali* v *Birmingam City Council*,[101] the Supreme Court sought to row back from the pragmatic, albeit generous, interpretation of "civil rights" in *Runa Begum*,[102] where, although rejecting her claim, the House of Lords had decided (in order to avoid over-judicialisation of the issue) that a review of homelessness appeals by a local authority housing officer under s. 193 (5) of the Housing Act 1996 constituted a determination of the applicant's "civil rights" within the meaning of Article 6(1) of the ECHR. Thus, in Ali, having reviewed a small number of ECtHR authorities since *Runa Begum*, including *Stec* v *UK*,[103] the Supreme Court unanimously concluded that:

> cases where the award of services or benefits in kind is not an individual right of which the applicant can consider himself the holder, but is dependent on a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met . . . do not give rise to "civil rights" within the autonomous meaning that is given to that expression for the purposes of . . . Article 6(1).[104]

The right to administrative due process has long been regarded as one of the most important avenues for the protection of socio-economic rights of the vulnerable and

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

100 (2009) 48 EHRR 18, paras 46–9.

101 [2010] UKSC 8, [2010] 2 WLR 471.

102 *Begum* v *London Borough of Tower Hamlets* [2003] UKHL 5, [2003] 2 AC 430.

103 (2006) 43 EHRR 47.

104 Per Lord Hope, para. 49. Lord Collins preferred to place "less emphasis on the evaluative nature of the exercise under section 193 and greater emphasis on the nature of the applicant's rights . . . and in particular on the absence of what the Strasbourg Court has characterised as an important and perhaps necessary feature, namely an individual economic right in the applicant", para. 58. See also the Supreme Court's decision in *R (A)* v *Croydon London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557, where the court concluded that a local authority decision as to whether or not to provide accommodation for children in need under s. 20 of the Children Act 1989 was a determination of a civil right within the meaning of Article 6(1).

marginalised.[105] However, despite the need for appropriate protection of rising numbers of destitute and socially disadvantaged claimants seeking access to a largely depleted stock of public housing, we see very clearly the disadvantages of a jurisprudence that has not developed according to abstract principles and standards, but, in the case of Article 6, in accordance with a formal notion of equality and, by analogy, with private law dispute resolution where very different principles, procedures and standards apply.

(b) Article 14: the ECtHR approach to the fair distribution of social security benefits

It is well known that, in contrast to more sweeping provisions in many written constitutions and human rights instruments (most notably the very broad formulation of the Fourteenth Amendment to the US Constitution),[106] Article 14 has been restricted in two ways. First, the substantive arena in which discrimination is forbidden has been restricted to the "enjoyment of the rights and freedoms set forth in [the] Convention". Second, the grounds upon which discrimination is forbidden have been restricted to "any ground such as [the specified grounds] or other status".[107] Moreover, although those limitations have to some extent been addressed by the adoption of Protocol 12, many member states, including the UK, have failed to ratify the protocol.[108] Thus, Article 14 continues to impose a duty on the state and public authorities acting within the scope of Convention rights not to discriminate on the listed grounds, or on the grounds of "other status", unless the discrimination can be justified.

Nevertheless, the ECtHR has attempted to overcome those restrictions in a variety of ways: by at times avoiding the "ambit" discussion altogether (by treating some discriminatory acts as violations of Article 3[109] or Article 8 ECHR)[110] while, in other cases, bringing allegations of discriminatory treatment (for example, in the distribution of social security benefits) within the ambit of Article 14, although, notably, the ECtHR seldom uses Articles 8 or 3 in conjunction with Article 14.

Thus, in *Gaygusus* v *Austria*,[111] the ECtHR confirmed that, by analogy with the proprietary right of a contributor to a private pension fund, a claim to contributory benefits in the Austrian municipal system was a possession, thereby grounding the complaint within

105 The access to justice movement in the USA was spearheaded by M Cappelletti and had a bias towards collective group action. See M Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobs-Merrill 1971).

106 Cf. also Article 26 of the International Covenant on Civil and Political Rights, which has a much stronger free-standing text than Article 14 ECHR.

107 Article 14 states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

108 Cf. Article 1 of Protocol 12, which has been formulated by the Council of Europe to apply to "any right set forth by law", thereby purporting to extend its territory widely. As of July 2010, Protocol 12 had been ratified by just 17 states, although a further 17 had signed it.

109 *Moldovan* v *Romania (No 2)* (2007) 44 EHRR 16 (racial discrimination); *Price* v *UK* (2002) 34 EHRR 53 (disability discrimination).

110 Article 8 (the right to respect for private and family life) has been successfully invoked in a series of cases concerning discrimination against gay men and lesbians and persons who have had gender reassignment. See *Christine Goodwin* v *UK* (1987) 9 EHRR 56, para. 90.

111 In *Gaygusuz* v *Austria* (1996) 23 EHRR 365, a Turkish man who had worked in Austria for 10 years had been refused the social benefit of an advance on his pension in the form of emergency assistance on the grounds that it could only be claimed by Austrian citizens. This was discrimination under Article 14, read in conjunction with Article 1 of Protocol 1.

Article 14 taken together with Article 1 of Protocol 1.[112] Moreover, relying on that approach in the case of *Koua Poirrez* v *France*,[113] the ECtHR decided that difference in treatment with respect to entitlements to social benefits between French nationals (or nationals of a country having signed a reciprocity agreement) and other foreign nationals was not based on any objective and reasonable justification. The Court therefore concluded that the government's refusal to allow the applicant, an Ivorian national, to claim disability benefits constituted a breach of Article 14 taken in conjunction with Article 1 of Protocol 1:[114] "Very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality to be compatible with the Convention".[115]

Although there are many jurisdictions, including a number of new accession countries, where, as in the UK,[116] contributions to the social security fund are regarded as hardly distinguishable from general taxation, this difficulty has been surmounted in Strasbourg by means of a technical argument to the effect that, although a claim to a social security benefit is a possessory right falling within the ambit of Article 1 of Protocol 1, it differs from a purely private law right to the extent that it does not entitle the claimant to "anything in particular".[117] Thus, the admissibility decision in *Stec* v *UK*,[118] in which the ECtHR extended the ambit of property rights to include any social security payment, was confirmed by the Grand Chamber in 2007,[119] thereby deciding that, despite their non-contributory nature, such benefits are invariably governed by the non-discrimination principle. Accordingly, the ECtHR held by 16 votes to one that there had been no violation of Article 14 taken together with Article 1 of Protocol 1 in respect of the cessation of Reduced Earnings Allowance at different ages for men and women.

Until recently, Article 14 jurisprudence was overwhelmingly devoted to a formal equality model. Thus, although it has allowed for stricter standards of scrutiny in "suspect classes" of discrimination, such as sex and most recently race,[120] the ECtHR has focused primarily on the extent to which there was a difference in treatment of analogously placed persons according to status and "situations" before seeking to determine whether the difference served a legitimate aim and was proportionate.

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

113 (2005) 40 EHRR 34. para. 37.

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

115 The ECtHR relied on *Gaygusuz* v *Austria* (1996) 23 EHRR 365 where, by contrast, the right to payments had been linked to the nature of the contributory system. But see the dissenting opinion of Judge Mularoni who, distinguishing *Koua Poirrez* from *Gaygusuz*, on grounds that it involved non-contributory benefits for disabled people, argued that, although there had been no violation of Article 14 taken in conjunction with Article 1 of Protocol 1, there had been a violation of Article 14 taken in conjunction with Article 8. See *Koua Poirrez* (2005) 40 EHRR 34, para. 46. See also *Stec* v *UK* (2006) 43 EHRR 47, para. 53: "If . . .a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements."

116 See *R (Carson)* v *Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, para. 12.

117 See *Jankovic* v *Croatia* (2000) 30 EHRR CD183.

118 *Stec* v *UK* (2006) 43 EHRR 47.

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

120 See e.g. *Timishev* v *Russia* (2005) 44 EHRR 76.

However, a more nuanced approach has developed in social security case law, as demonstrated in the Court's recent decision in *Carson* v *UK*.[121] That case concerned the general policy of the UK to pay index-linked pensions to residents while refusing to up-rate in the case of pensioners abroad. The ECtHR emphasised the importance of a wide margin of appreciation in cases involving social security systems (specifically pensions), referring also to the "very wide margin, which the state enjoys in matters of socio-economic policy". However, the ECtHR also stressed the importance of justification and did not suggest that the courts should abnegate their reviewing role – where the state's policy is not rational a national court may say so.[122] Moreover, the ECtHR also spelled out in *Stec* that a difference of treatment that is prima facie discrimination under Article 14 can be justified in cases where it is intended to correct "factual inequalities".[123]

In contrast to this small progress, however, we have seen that historic limitations in the drafting of Articles 6 and 14 have hampered the Convention's evolution as an instrument for the principled resolution of disputes concerning the fair distribution of socio-economic entitlements in member states. In the case of Article 6, emphasis on a formal conception of equality, directed at the assimilation of public and private law claims, has left little room for the development of a Convention jurisprudence focused on what due process may require when discretionary socio-entitlements are withheld from vulnerable and dependent individuals in need. Moreover, as we have seen in the context of Article 14, a formal conception of equality has similarly encouraged the ECtHR to focus more closely on the artificial extension of the range of substantive socio-economic rights covered by the Convention than on efforts to address issues of systemic socio-economic deprivation more holistically through the development of a principled substantive model of equality in the Convention jurisprudence.

Conclusion

In this article, it has been acknowledged that there are significant institutional difficulties for the ECtHR in establishing anything but the lowest common standards for the protection of vulnerable individuals in welfare needs contexts across 47 member states, each with its own social and political histories and levels of welfare protection. Moreover, significant limitations in the drafting of ECHR rights have also been recognised, by contrast with modern constitutions, such as the African Charter, which spell out the indivisibility of rights, or the South African Constitution, which recognises the tripartite nature of all human rights obligations and affords graduated protection to human rights in accordance with the severity of threats and the availability of resources.

Nevertheless, emphasis has been put on the special responsibilities and expectations that are placed on international courts and monitoring bodies in developing the content of socio-economic rights.[124] It has been envisaged that when an international court, especially one of such standing as the ECtHR, identifies a latent right in the terms of the Convention, or finds that positive socio-economic consequences flow from the court's interpretation of

121 (2009) 48 EHRR 41.

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

123 *Stec* v *UK* (2006) 43 EHRR 47. The difference in pensionable ages of men and women in the UK had been intended to address the economically disadvantaged position of women.

124 See P Alston, "Establishing a right to petition under the Covenant on Economic, Social and Cultural Rights" in *Collected Courses of the Academy of European Law* (Florence: European University Institute 1993) vol IV, book 2, p. 107, pp. 151–2 with reference to the underdevelopment of the normative content of the rights in the ICESCR.

substantive ECHR rights, this might break the "vicious circle"[125] in which lack of development of human rights norms in socio-economic contexts has inhibited the search for creative and innovative judicial procedures to guarantee their protection. It is not unreasonable to hope that, by entering the field of socio-economic rights, the ECtHR will attempt to give "concrete meaning to mere slogans", turning them into enforceable norms and encouraging national judges to apply them without fear of exceeding the law, a process that has been seen at its best before the UK courts in *Bernard*[126] and *Limbuela*.[127]

However, this paper has suggested that, despite evidence of this valuable interaction, there is room for the ECtHR further to define the scope of positive obligations in order to protect the socio-economic rights of the vulnerable and socially disadvantaged in member states. On the one hand, this would recognise the overlap between civil, political and socio-economic rights and, on the other hand, it would acknowledge the very different levels of resources by which states might progressively realise the rights. Instead, however, it has been demonstrated that the ECtHR has not only sought to avoid the logic of its own jurisprudence in Articles 3 and 8 ECHR. It has been suggested that the pragmatic attempt at harmonisation through an artificial extension of the substantive socio-economic rights covered by the Convention runs counter to the development of a jurisprudence of positive obligations that fully respects the moral and existential overlap between civil, political and socio-economic rights. This paper therefore has argued that despite some recent departures from a formal equality model in the ECHR jurisprudence, the incremental development of positive obligations in Articles 6 and 14 has inhibited the Convention's evolution as an instrument for the principled resolution of disputes concerning the fair distribution of socio-economic entitlements in member states.

125 De Schutter, "The protection of social rights", n. 13 above, p. 232.

126 [2002] EWHC (Admin) 2282.

127 [2005] UKHL 66, [2009] 1 AC 396.

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Protecting children's rights under the ECHR: the role of positive obligations

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Introduction

The European Convention on Human Rights (ECHR) contains few express references to children and so its potential to protect children's rights is not immediately apparent from its text. In fact, the ECHR mentions children only twice, although other ECHR provisions – notably Article 8 on the right to respect for private and family life – have special relevance to children. It is in these and other less likely areas that the Convention's potential to protect the rights of children has come to be realised. This has been made possible by access to the right of individual petition by children and their representatives and has led to an increasing number of applications before the European Court of Human Rights (ECtHR).[1] A number of interpretive approaches have been instrumental in the development of ECHR case law in children's cases, including the development of procedural obligations[2] and the emphasis on effective rights protection.[3] The Court has also sought to rely, increasingly, on other children's rights instruments, notably the Convention on the Rights of the Child (CRC), in order to ensure that its judgments reflect current standards in children's rights. However, as this paper will show, it is the Court's "positive obligations" approach that has underpinned ECtHR case law in the development of its children's rights jurisprudence, allowing it to make a genuinely unique contribution to international children's rights standards. Accordingly, the aim of this paper is to explore the contribution made by the positive obligations approach to the interpretation of the ECHR in cases involving children against the backdrop of the CRC. In particular, it seeks to explore the role of this approach in securing children's rights under the ECHR and considers the contribution that the Court's positive obligations jurisprudence has made to the protection of children's rights. The article begins with an introduction to the CRC, the principal international standard-setting instrument in this area. It then goes on to outline the relevance and significance of the ECHR to children before outlining three areas in

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1 See, generally, U Kilkelly, *The Child and the ECHR* (Aldershot: Ashgate 1999). See also U Kilkelly, "Children's rights; a European perspective" (2004) 4 *Judicial Studies Institute Journal* 68–95 and J Fortin, "Rights brought home for children" (1999) 62 *MLR* 350.

2 See D Harris, M O'Boyle, E Bayts and C Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* 2nd edn (Oxford: OUP 2009), pp. 18–21.

3 See Kilkelly, *The Child*, n. 1 above.

which the positive obligations approach has played a central role in the determination of applications concerning the treatment of children. It concludes with an outline of what further potential the positive obligations approach might offer in the advancement of children's rights under the ECHR.

The Convention on the Rights of the Child

The CRC was the first comprehensive, internationally binding treaty to give full recognition to the individual rights of children.[4] Its widespread ratification – by all UN members except the USA and Somalia – suggests that it is consistent with a strong level of international consensus on the way children should be treated in a wide variety of areas and circumstances.[5] The Convention is widely regarded as the "touchstone for children's rights throughout the world"[6] and its particular merits include its breadth and the extent of its detailed provision for the autonomous rights of children.[7] Its comprehensive nature means that the CRC contains standards applicable to all areas of the child's life including school (Articles 28 and 29) and the family (Articles 3, 5, 12 and 18), as well as in specific settings of alternative care (Article 20, 21) and youth justice and detention (Articles 37 and 40), for example. It provides for children's well-being in a variety of contexts (Articles 6, 24, 27) and makes specific provision for children with disabilities (Article 23), children whose parents have separated (Articles 3, 9), children who have suffered abuse and exploitation (Articles 19, 30–4, 37) and refugee children (Articles 7, 8, 10). The Convention contains rights of general relevance (Articles 7 and 8 on identity), rights of special importance to children (Articles 18 on family support and 31 on the right to play, rest and leisure) and general human rights adapted to the specific needs of children (Articles 13 on freedom of expression, 14 on expression of religion and 17 on access to information). Since its adoption, the Convention has been usefully explained by the adoption by the United Nations Committee on the Rights of the Child of numerous General Comments on issues such as adolescent health and development, child rights in early childhood, corporal punishment and juvenile justice.[8] The Convention's implementation is monitored by the United Nations Committee on the Rights of the Child and so the Convention's growing jurisprudence now includes hundreds of Concluding Observations which detail the extent to which each state party has implemented the Convention.[9]

Despite the monitoring work of the Committee on the Rights of the Child, the absence from the Convention of any mechanism to enforce its provisions has been the subject of

4 General Assembly Resolution 44/25, 20 November 1989.

5 For details of ratification of the Convention, see www.unhchr.org.

6 J Fortin, *Children's Rights and the Developing Law* 3rd edn (Cambridge: CUP 2009), p. 49.

7 See D McGoldrick, "The United Nations Convention on the Rights of the Child" (2001) 5 *International Journal of Law and the Family* 133; and U Kilkelly, "The best of both worlds for children's rights: interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child" (2001) 23 *Human Rights Quarterly* 308.

8 CRC Committee, General Comment No 4, *Adolescent Health and Development in the Context of the Convention on the Rights of the Child* CRC/GC/2003/4, 1 July 2003; CRC Committee, General Comment No 7, *Implementing Child Rights in Early Childhood* CRC/C/GC/Rev. 7, 20 September 2006; CRC Committee, General Comment No 10, *Children's Rights in Juvenile Justice* CRC/C/GC/10, 25 April 2007; and CRC Committee, General Comment No 8, *The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment* CRC/C/GC/8, 2007.

9 On the reporting process see U Kilkelly, "The UN Committee on the Rights of the Child: an evaluation in the light of recent UK experience" (1996) 8 *Child and Family Law Quarterly* 105.

negative comment.[10] There is no international court to adjudicate on children's rights issues and no body that children can petition to seek to have their CRC rights vindicated. Although international dialogue on the addition of a protocol to provide children with a right of individual petition has finally begun,[11] it is important nonetheless to continue to explore alternative ways in which the Convention's potential to improve the treatment of children can be realised. The increasing use of the CRC in research to benchmark and monitor implementation of children's rights is an important development in this regard.[12] However, its use in litigation is arguably a more strategic and immediate way to advance specific children's rights goals.[13] To this end, use of the CRC in litigation at national and international levels is key and use of the Convention by the ECtHR illustrates very clearly what added value child-specific standards can bring to an already effective system of individual petition.[14]

The ECHR and children

In some respects, the ECHR could not be more different from the CRC. The ECHR, which came into force in 1953, is a regional instrument drafted by the Council of Europe as a response to the atrocities of the Second World War.[15] Its scope is not comprehensive and it is defined largely by civil and political rights, such as the freedom from torture and the rights to life, fair trial and liberty. Without its supplementing protocols, the ECHR makes no reference to particularly vulnerable groups; its references to children are limited to just two provisions.[16] Article 6, the right to a fair trial, makes provision for the press and public to be excluded from all or part of a trial "where the interest of juveniles . . . require", whereas Article 5(1)(d) makes provision for the detention of a "minor for the purpose of educational supervision and to bring a minor before the competent legal authority".[17] There has been some case law under these provisions, notably concerning the child's right to participate effectively in criminal proceedings under Article 6,[18] and the detention of a

10 D Balton, "The Convention on the Rights of the Child: prospects for international enforcement" (1990) 12 *Human Rights Quarterly* 120; T Hammarberg, "The UN Convention on the Rights of the Child – and how to make it work" (1990) 12 *Human Rights Quarterly* 97; and D Fottrell, "One step forward or two steps sideways? Assessing the first decade of the Convention on the Rights of the Child" in D Fottrell (ed.), *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (The Hague: Kluwer Law International 2000), p. 1.

11 *Report of the Open-ended Working Group to Explore the Possibility of Elaborating an Optional Protocol to the Convention on the Rights of the Child to Provide a Communications Procedure*, report by the Human Rights Council, UN Doc. A/HRC/13/43, 21 January 2010, available at www.ohchr.org.

12 U Kilkelly, "Operationalising children's rights: lessons from research" (2006) 4 *Journal of Children's Services* 35; and U Kilkelly and L Lundy, "Children's rights in action: using the Convention on the Rights of the Child as an auditing tool" (2006) 18 *Child and Family Law Quarterly* 331.

13 See P Geary, *Children's Rights: A guide to strategic litigation* (London: Children's Rights Information Network 2009).

14 See U Kilkelly, "The best of both worlds", see n. 7 above; and U Kilkelly, "Effective protection of children's rights in family cases: an international approach" (2002) 12 *Transnational Law & Contemporary Problems* 336.

15 See Harris et al., *Law of the European Convention*, n. 2 above, p. 1.

16 In addition, Article 2 of Protocol 1 guarantees the right to education and Article 5 of Protocol 5 recognises parental equality and the role of the best interests of the child in the exercise of parental responsibility. No other provisions give express protection to children's substantive rights.

17 See U Kilkelly, "The Human Rights Act: implications for the detention and trial of young people" (2000) 51 *NILQ* 466.

18 See e.g. *T* v *UK* (1999) 30 EHRR 121 and *SC* v *UK* (2005) 40 EHRR 226. See, further, U Kilkelly, "Youth courts and children's rights: the Irish experience" (2008) 8 *Youth Justice* 39.

child in the exercise by the state of parental authority under Article 5, for example.[19] However, due mainly to the strict terms of these provisions, the scope of this jurisprudence has been limited in nature. Other, more generously worded provisions have provided the Court with greater flexibility and so, ironically, those provisions that make no reference to children have provided greater potential to have children's rights protected. There are two key provisions here. The first and most important provision is Article 8, which guarantees the right to respect for private and family life. The second, increasingly important provision is Article 3, which recognises the right to freedom from torture, and inhuman and degrading treatment or punishment. Although these two provisions could not be more different in form – Article 3 is an absolute prohibition to which no exceptions are permitted whereas Article 8 sets out the right in the first paragraph while the permitted limitations are explained in paragraph 2 – as analysis of the case law below will show, the Court's approach to both provisions in children's cases has been remarkably similar. It is here that the positive obligations approach has been critical.

Article 8 is by far the most litigated provision from a child's perspective and its case law has touched on many areas of family law including adoption, child abduction, alternative care, custody and access, guardianship and identity issues.[20] As the next two sections show, in the areas of family ties and custody and access, the positive obligations approach has been crucial in ensuring the application of these provisions to children's cases. Notwithstanding that the application of Article 3 to children's issues has been a more gradual process, the positive obligations approach has been similarly critical in articulating the relevance of this provision to children. In particular, as explained below, case law on Article 3 has played a key role in protecting children from physical punishment and abuse, including at the hands of their parents. The following sections explain this jurisprudence in more detail.

Family ties

One of the major contributions of the ECHR to children's rights and generally is its case law on the legal recognition of family ties. Established in the ground-breaking case of *Marckx* v *Belgium* in 1979,[21] this line of case law has encouraged the promotion of a child-centred approach to the legal recognition of family relationships, underpinned by the positive obligation to respect family life. The *Marckx* case concerned the requirement under Belgian law that an unmarried mother had to take certain steps to have her bond with her daughter legally recognised. The applicants – mother and daughter – complained that this breached their rights to respect for family life under Article 8 taken alone and together with the non-discrimination provision under Article 14. In its judgment, the Court established that the tie between mother and daughter in this case amounted to "family life" within the meaning of Article 8 and in reaching this conclusion, the Court rejected that a distinction could be made between the so-called "legitimate" and the "illegitimate" family.[22] The next step for the Court was to consider what "respect" for this family life required. Here, the Court noted that "the object of the Article is essentially that of protecting the individual against arbitrary interference by the public authorities",[23] but it went on to say that,

19 See *Koniarska* v *UK* App. No 33670/96, 12 October 2000 and *DG* v *Ireland* App. No 39474/98, 16 May 2002. See, further, U Kilkelly, "*DG* v *Ireland*: protecting the rights of children at risk: a lazy government and unruly courts" (2002) 24 *Dublin University Law Journal* 269.

20 See Kilkelly, *The Child*, n. 1 above, and, more generally, Fortin, *Children's Rights*, n. 6 above.

21 *Marckx* v *Belgium* (1979–80) 3 EHRR 230.

22 Ibid. para. 31.

23 Ibid.

"nevertheless", Article 8 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".[24] According to the Court:

> This means, amongst other things, that when the State determines in its domestic legal system the régime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life.[25]

Respect for family life, in the Court's view, implies: "the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family".[26]

Although the state has a "choice of means" in this regard, a law that "fails to satisfy this requirement" violates Article 8(1) "without there being any call to examine it under paragraph 2".[27] Applying this principle to the applicants' situation under Belgian law, the ECtHR found that the requirement that the applicant mother had to choose between taking steps to ensure legal recognition with her daughter and being able fully to give or bequeath property to her was "not consonant with 'respect' for family life", rather it thwarted and impeded the normal development of such life.[28] Significantly, the Court held that the legal situation in which the daughter, Alexandra, was placed also resulted in "a lack of respect for her family life" under Article 8.[29] So, through its application of the "positive obligations" approach in the *Marckx* case, the ECtHR not only recognised the right to legal recognition of biological family ties as a part of respect for family life, it extended that approach to children as well as their parents. In doing so – 10 years before the adoption of the CRC, which recognised the child's right to respect for his/her family ties for the first time – the Court could clearly be said to be ahead of its time.[30] Indeed, it is arguable that in the *Marckx* decision the ECtHR went even further than the protection guaranteed by Articles 7 and 8 of the CRC, which protect the child's right to identity but do not specify what that means or how that right is to be realised.[31]

The Court continued with this emphasis on the child's legal status in the case of *Johnston* v *Ireland* in 1986.[32] Here, the Court came to consider the legal status under Irish law of a child born to parents who were unable to marry because her father had been married before and at the time divorce was prohibited under the Irish Constitution. As a result of her "illegitimate" status, Nessa suffered numerous disadvantages (e.g. she could not be adopted by her parents, legitimated by their subsequent marriage, nor could her father be appointed her guardian), which her parents were unable to alleviate, and together with her parents all three applicants complained that this violated their rights under Article 8 of the ECHR. Although the Court had failed to find that the applicant parents' inability to marry violated

24 *Marckx* v *Belgium* (1979–80) 3 EHRR 230.

25 Ibid.

26 Ibid.

27 Ibid.

28 Ibid. para. 36.

29 Ibid. para. 37.

30 Moreover, the Court drew inspiration here from the Council of Europe Convention on the Legal Status of Children born out of Wedlock, which was adopted in 1975 but had not yet entered in force at the time of the *Marckx* judgment. Ibid. para. 41.

31 See further S Besson, "Enforcing the child's right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" (2007) 21 *IJLP & F* 137.

32 *Johnston* v *Ireland* (1986) 9 EHRR 203.

their ECHR rights, the Court agreed that the daughter's status under Irish law raised a serious issue under Article 8.

The Court began by finding that all three applicants enjoyed "family life" within the meaning of Article 8 notwithstanding that the parents were not married.[33] It then considered whether "respect for family life" imposed a positive obligation on the state to improve the child's legal situation.[34] In short, the Court held that it did and, in reaching this conclusion, it made a distinction between the impact of Irish law on her parents (which was not incompatible with Article 8) and on the child (which was).[35] In its judgment, the Court reiterated the Marckx principle that "'respect' for family life . . . implies an obligation for the State to act in a manner calculated to allow these ties to develop normally".[36] It then went on to find that:

> in the present case the normal development of the natural family ties between the first and second applicants and their daughter requires . . . that she should be placed, legally and socially, in a position akin to that of a legitimate child.[37]

Notwithstanding its conclusion that the Convention did not require Ireland to allow divorce, the Court was clearly concerned about the impact of the lack of divorce on the child's legal situation "seen as a whole".[38] In particular, it held that an examination of her situation revealed that it differed considerably from that of a legitimate child and that, without the means to eliminate or reduce these differences, the absence of an appropriate legal regime to reflect the third applicant's natural family ties amounted to a failure to respect her family life.[39]

Although the Court failed to find that the obligation to respect the family life of the adults required that they be placed in a position akin to that of a married couple, the ECtHR took the important step of recognising the impact of the child's legal status not just on her rights, but on those of her parents. In particular, it held that the "close and intimate relationship between the third applicant and her parents is such that there is of necessity also a resultant failure to respect the family life of each of the latter".[40] So, the absence of a legal regime reflecting the third applicant's natural family ties amounted to a failure to respect the family life of all three applicants, in violation of Article 8.[41] In adopting this approach, the Court demonstrated its awareness of the impact on private family relationships of the state's failure to grant them legal and public recognition. In this sense, *Marckx* and *Johnston* represented important milestones, since unmatched in standard setting, including in CRC jurisprudence, in the recognition at international level of relationships between parents and their children.

Moreover, the Court built on this case law in a number of cases about paternity beginning with *Kroon* v *Netherlands* in 1994.[42] In this case, the applicants – again a child and

33 *Johnston* v *Ireland* (1986) 9 EHRR 203, para.72. In doing so, the Court rejected that the principle established in the *Marckx* case applied only to mothers and children alone, finding that its principles were equally applicable to the instant case.

34 Ibid. para. 74.

35 Ibid. para 75. This reflects the approach of the Court according to which positive obligations vary in scope depending on the circumstances of each case.

36 Ibid. para. 45.

37 Ibid. para. 74.

38 Ibid. para. 75.

39 Ibid.

40 Ibid.

41 Ibid.

42 (1995) 19 EHRR 263.

her parents – complained that the law operated so as to undermine their natural relationship, a situation which they considered in breach of Article 8. In particular, they complained that the irrebuttable presumption that the applicant's husband was the father of her child frustrated the child's father from being so recognised and thus breached all three applicants' Article 8 rights. The Court agreed and in, reaching this conclusion, it held that respect for family life requires:

> that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone.[43]

This recognition by the Court that respect for family life under Article 8 requires legal recognition of social and biological ties represented a very important step in the application of the ECHR to the serious, practical issues affecting children and their parents in this area. The positive obligations approach was central to the Court's development of these principles. In particular, it demonstrated that the Convention does not simply require that the state refrain from interfering in families; rather, it established that how the national legal system governs and recognises family relationships – including in less traditional forms – is an issue that engages Convention rights, as well as being of huge importance to family members, including children. Again, here the ECtHR can be said to have gone further than the protection secured by the CRC although the Committee on the Rights of the Child has actively encouraged states parties to eliminate all discrimination between children on the basis of Article 2 of the CRC, which requires that all children enjoy Convention rights equally, regardless of their status (under Article 2(1)) or, notably, that of their parents (under Article 2(2)).[44]

It was perhaps a reasonable assumption from the Court's use of language ("social and biological ties") in *Kroon* that the Article 8 obligation to recognise family ties could only be invoked by those whose social and biological ties pointed to the same conclusion, i.e. where children lived socially with their biological parents. Indeed, to an extent this viewpoint informed the Court's judgment in the case of *X, Y and Z* v *UK* in 1996.[45] This case concerned a female-to-male transsexual (X), his partner (Y) and their child (Z) born by donor insemination (AID) who claimed that the failure to recognise X as the child's father on her birth certificate due to his status as a transsexual amounted to a failure to respect their rights under Article 8. Despite the somewhat unusual circumstances of the case, the Court applied the same approach as it had in other family ties cases. In this respect, its first conclusion was that the applicants enjoyed "family life" within the meaning of Article 8, and it then went on to consider whether the applicants' treatment showed the necessary "respect" for that family life. It began by citing the principles set out in the *Marckx* and *Johnston* cases, i.e. that where the existence of a family tie with a child has been established, the state must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible, from the moment of birth or as soon as practicable thereafter, the child's integration in his family.[46] But, the Court then departed from its approach on the basis that this case concerned "different issues, since Z was conceived by AID and is not related, in the biological sense, to X, who is a transsexual".[47] Although it did not rule out that the state's positive obligation was engaged in this context,

43 (1995) 19 EHRR 263, para. 40.

44 See e.g. Committee on the Rights of the Child, *General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 44, Paragraph 1(a) of the Convention* UN Doc. CRC/C/5 (1991).

45 *X, Y and Z* v *UK* (1997) 24 EHRR 143.

46 Ibid. para. 43.

47 Ibid.

it gave more careful consideration to the scope of that obligation. According to the Court, the facts of the case necessitated a different approach to previous cases, i.e. one that involved weighing up the arguments for and against the legal recognition sought by the applicants in order to strike a fair balance between "the competing interests of the individual and of the community as a whole".[48] With regard to the latter, the Court noted that there was a community interest in having a "coherent system of family law which places the best interests of the child at the forefront".[49] However, the Court did not articulate how protection of this "community interest" would be served by denying the parties recognition of the family life that had been found to exist between them. Especially problematic in this respect is the Court's finding that although recognising X as the child's father would not be harmful to her interests, it did not necessarily confer any advantage.[50] In an apparent contradiction of earlier case law – including the *Marckx*, *Johnston* and *Kroon* cases – which had clearly identified the important advantages that flow from the legal recognition of family ties, the Court chose to downplay those advantages in the instant case, preferring instead to accentuate the measures that the applicants themselves could take to alleviate the difficulties they faced. For example, in respect of the issues of succession and legal recognition, the Court noted that their practical impact could be mitigated by X adopting a will and X and Y applying for a joint residence order, which would confer parental responsibility. While it accepted that it might be distressing for the child not to have her father's name on her birth certificate, it considered that the applicants were in a similar position to any other family where, for whatever reason, the person who performs the role of the child's "father" is not registered as such.[51] With respect to the applicants' concerns about the effect on the child of the position, the Court noted that X was not prevented in any way from acting as the child's father in the social sense.

In further contrast to earlier jurisprudence where the ECtHR had displayed a clear understanding that children should not suffer the disadvantages conferred on them as a result of their parents' status, the Court in *X, Y and Z* appeared at best ambivalent about the impact of the failure to ensure respect for the child's family life. According to the Court, it was impossible to predict "the extent to which the absence of a legal connection between X and Z will affect the latter's development" and it went on to conclude that "there was no certainty as to how to best protect the best interests of the child in such cases".[52] In conclusion, the Court held that "given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States", Article 8 could not be taken to imply "an obligation . . . to recognise as the father of a child a person who is not the biological father". Accordingly, the fact that the law of England and Wales did not allow for legal recognition of the relationship between X and Z did not amount to a failure to respect family life within the meaning of Article 8.[53]

There are at least two significant features to this judgment. The first is the extent to which the Court was influenced by the absence of a European consensus in refusing to find that there was a positive obligation to recognise the right of a transsexual to have his name entered on the birth certificate of the child born to him and his partner. This is perhaps not surprising given that, at the time of the judgment, its other case law in this area also relied

48 *X, Y and Z* v *UK* (1997) 24 EHRR 143. para. 41.

49 Ibid. para. 47.

50 Ibid.

51 Ibid. para. 49.

52 Ibid. para. 51.

53 Ibid. paras 52–3.

heavily on the lack of consensus that was seen to permeate the law affecting transsexuals.[54] Related to this, however, is the second notable feature of the Court's judgment, i.e. that the Court clearly considered that the case concerned how the law should treat transsexuals, rather than how it should recognise children's family ties. In this way, for example, the Court's view that there are risks associated with recognising as the father of a child a person who is not the biological father was not made in the context of donor-supported assisted human reproduction – where such points could validly be made – but rather against the backdrop of the father's status as a transsexual. This is reinforced by the Court's summary dismissal of the disadvantages endured by the child concerned – whose family had no means available to alleviate these disadvantages – and its rather simplistic encouragement to her that she should not feel stigmatised by her legal status. In addition, the judgment made clear that notwithstanding that a relationship may constitute "family life", the Article 8 positive obligation to respect that family life applies only to those enjoying ties of a biological, as opposed to a social nature (although they can of course, and indeed may have to, enjoy both elements).[55] Although the Court may have been able to draw support for its judgment in *X, Y and Z* from the lack of European consensus on the issue, the change in the Court's jurisprudence, signalled by *Goodwin* v *UK* in 2002,[56] would suggest that this approach is now shaky at best.

Notwithstanding these weaknesses in the Court's approach, it is submitted that the Court can be commended for the concern it expressed in its judgment with regard to the best interests of the child. In particular, the Court questioned what the consequences might be of recording on the child's birth certificate the name of a person who was her social but not her biological father. Even if this was not the reason for the Court's decision, it reflects an apparent concern for the child's right to identity. Although this concern was more pronounced in later case law, it is regrettable that the Court did not take the opportunity in X, Y and Z to articulate the child's right to identity with greater force and clarity. Drawing on the CRC would arguably have supported this approach.

As a result, it was 2002 before the child's right to identity emerged in ECHR case law, in the case of *Mikulic* v *Croatia*.[57] Here, the applicant child complained that the state had failed to fulfil its positive obligation to respect her private life under Article 8 because she had been unable to ascertain the details of her identity. Under Croatian law, the only mechanism available to the applicant, who wished to establish her paternity, was to take a civil action against her putative father, JH. However, as nothing compelled him to undergo DNA testing, he refused to attend over a period of three-and-a-half years, after which time the first instance court relied on his non-attendance and the evidence of the child's mother to declare him the father. The appellate court overturned this decision having found this evidence to be inconclusive. When the case came to Strasbourg, the ECtHR acknowledged the importance to the applicant of obtaining accurate information about her identity and also accepted that states approach such situations in different ways. Nonetheless, it found that as there were no effective means to oblige JH to undergo DNA testing, this, together

54 For a review of these cases, and those that came later, altering the direction of Strasbourg law see U Kilkelly, "Article 8: the right to respect for private and family life, home and correspondence", in Harris et al., *Law of the European Convention*, n. 2 above, pp. 385–6.

55 E.g. the Court has yet to consider whether the relationship between a sperm donor and the child born as a result would enjoy family life. The former commissioner rejected this in *G* v *Netherlands* (1993) 16 EHRR CD 38.

56 *Goodwin* v *UK* (2002) 35 EHRR 447.

57 App. No 53176/99, 7 February 2002.

with the absence of alternative means available to the applicant to establish her identity, resulted in a violation of Article 8. In conclusion, the Court noted that:

> In determining an application to have paternity established, the courts are required to have regard to the basic principle of the child's interests. The Court finds that the procedure available does not strike a fair balance between the right of the applicant to have her uncertainty as to her personal identity eliminated without unnecessary delay and that of her supposed father not to undergo DNA tests, and considers that the protection of the interests involved is not proportionate.[58]

In other words, the inefficiency of the courts had left the applicant in a state of prolonged uncertainty as to her personal identity, which meant that the national authorities had failed to take the necessary steps to respect her private life. There is a welcome emphasis here on the measures that states must take to ensure effective protection of the applicant's private life, of which identity is an integral part. The Court was not perturbed by the applicant's status as a child and, indeed, made it clear that the child's best interest is an important factor in determining an application for the establishment of paternity. In doing so, the Court relied not only on the identity provisions of the CRC, but more generally on the requirement under Article 3, which requires that in all matters affecting the child the child's best interest must be considered as a primary consideration.

But the suggestion that Article 8 might require states to take steps to protect a child's right to identity was undermined somewhat by the decision of the Grand Chamber in *Odièvre* v *France*.[59] This concerned the complaint by an adopted woman that the French law permitting anonymous adoption constituted a failure to respect her private and family life under Article 8. In particular, she complained that the fact that the legal system entitled her birth mother to veto her access to her identity constituted a violation of the positive obligation under Article 8. Weighing up the interests on both sides, the Court considered that a fair balance had been struck between the interests of the applicant who had a strong desire to know her true identity and that of her mother who clearly wished to remain anonymous. In light of the impact that disclosure would have on the mother, and the fact that the daughter had received certain non-identifying information about her, it considered that a fair balance had been struck in this case. The Court distinguished *Mikulic* on the basis that the instant case concerned two consenting adults (whereas the applicant in *Mikulic* was only five). So notwithstanding the Court's view (expressed in *Gaskin* v *UK*)[60] that people "have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development", it found no violation in this case.

With some limited exceptions, therefore, it appears that Article 8 requires states to ensure that family ties that have both a biological and a social basis enjoy legal recognition. In establishing this position, the Court has expressed a strong awareness of the importance of legal recognition for family relationships, even if it has not applied this approach equally to all forms of family relationships. Although some exceptions are perhaps to be expected in what can be a sensitive area of national law and policy, it is regrettable that the Court has not always supported its conclusions with a well-reasoned analysis nor with a child-focused view of what is at stake for the applicants. In particular, in the cases of *X, Y and Z* and *Odièvre* the Court arguably relied too heavily on the absence of European-wide consensus

58 App. No 53176/99, 7 February 2002, para. 65.

59 (2003) 38 EHRR 871.

60 (1989) 12 EHRR 36.

(which was debatable in both cases) and gave insufficient weight to the consequences for the individual child concerned of the situation complained of as well as the importance of the right (to identity) being invoked. At the same time, however, the ECtHR, through this body of case law, has made an important contribution to standard setting in the area of the recognition of legal relationships, on whose foundations a new Council of Europe instrument will be based. It is patently clear that the positive obligations approach has been central to the articulation of state obligations under Article 8, and in respect of putting flesh on the bones of the child's right to identity it can also be said to have gone further than the CRC in this area.

Promoting family life

A second area of family life jurisprudence that has been underpinned by the positive obligations approach is the ECHR case law with regard to protecting the integrity of family life relationships. Here too, the Court has made a unique and important contribution to children's rights standards with an emphasis on ensuring that steps are taken to promote the effective realisation of rights. The Court's approach was first established in the context of public care, where parents whose children were placed in care complained about their inability to have their children returned to them. In a long and steady line of such cases, the Court has consistently held that Article 8 includes a right for parents to have measures taken with a view to them being reunited with their children and an obligation for the national authorities to take such action.[61] Significantly, however, the Court went on to apply these principles to the private family law context and, in doing so, the ECtHR used the positive obligations approach to strengthen the effective protection associated with the right to respect for family life under Article 8. In the seminal case of *Hokkanen* v *Finland*, the applicant's children had been placed, with agreement, in the custody of his parents after his wife's death.[62] As time went on, however, they refused to return the children to him and also sought to deprive him of contact with them. The situation was unresolved for such a long time that the Finnish courts ultimately agreed to transfer legal custody of the children from their father to their grandparents.

Before the ECtHR, the applicant complained that this constituted a failure to respect his family life with his children. Considering the matter under Article 8, the Court agreed that the provision imposed a positive obligation on the state to take measures to facilitate the reunion of parent and child even in the private context. However, it went on to note that this obligation was not absolute, "since the reunion of a parent with a child who has lived for some time with other persons may not be able to take place immediately and may require preparatory measures being taken to this effect".[63] According to the Court, "the nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned will always be an important ingredient".[64] Moreover, whilst national authorities must take every effort to facilitate co-operation:

> any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention.[65]

61 See *Eriksson* v *Sweden* (1989) 12 EHRR 183, para. 71; *Margareta and Roger Andersson* v *Sweden* (1992) 14 EHRR 615, para. 91 and *Olsson* v *Sweden (No 2)* (1992) 17 EHRR 134, para. 90.

62 (1994) 19 EHRR 139.

63 Ibid. para. 62

64 Ibid.

65 Ibid.

Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them. Ultimately, what was decisive under Article 8 was whether the national authorities had taken "all necessary steps to facilitate reunion as can reasonably be demanded in the special circumstances of each case".[66] In this case, although the Court acknowledged that there were difficulties arranging contact as a result of the animosity between the parties, it rejected that the government could not be held liable for the obstacles created by the children's grandparents. Because the inaction of the authorities placed a burden on the applicant to have "constant recourse to a succession of time-consuming and ultimately ineffectual remedies to enforce his rights", his right to respect for family life under Article 8 had been violated.[67]

This judgment has since been followed by a long list of cases wherein the Court has applied these principles to the specific context of child abduction, a growing and complex international problem where children are removed from one jurisdiction without the permission of the custodial parent. Given that, numerous international instruments and measures have been adopted in the area of child abduction, it is submitted that the ECtHR has made a unique contribution to this area.[68] The case of *Ignacollo-Zenide* v *Romania*[69] illustrates the Court's approach effectively. This concerned a mother who sought to have her children returned to her custody following their abduction to Romania by their father. The ineffectiveness of the authorities' response led her to complain to the ECtHR in respect of a breach of her family life rights under Article 8. According to the Court, the efforts of the Romanian authorities to secure implementation of the court order to return the children to the applicant were indeed inadequate and ineffective. The fact that the father's failure to return the children to their mother had no consequences for him, combined with the authorities' failure to take sufficient steps, including the arrangement of preparatory contact to reunite them, led to a violation of her rights under Article 8. Importantly, not only had the state authorities failed to take the necessary measures to facilitate reunion (and respect for family life), they had failed to do so within a reasonable time.

As in *Hokkanen*, the Court acknowledged in *Ignacollo-Zenide* that the duty to take action to bring about the reunification of the abducted children and their custodial parent was not absolute and would depend on the circumstances. According to the Court:

> any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them.[70]

Although the ECtHR did not refer expressly to the CRC, its judgment is clearly informed by CRC principles, notably Article 3 (the best interests principle) and Articles 9 and 10 dealing with the separation of children from their parents. The uniqueness of the ECtHR's contribution in this area is also apparent from its opinion that in such cases, "the adequacy of a measure (to reunite parents with their children) is to be judged by the swiftness of its

66 (1994) 19 EHRR 139.

67 Ibid. para. 61.

68 See N Lowe, M Everall and M Nicholls, *The International Movement of Children* (Bristol: Family Law 2004) and U Kilkelly, *Children's Rights in Ireland: Law, policy and practice* (Dublin: Bloomsbury Publishing 2008), pp. 167–99, for details of the range of instruments that now make up international child abduction law. See also J Murphy, *International Dimensions in Family Law* (Manchester: Manchester University Press 2005).

69 *Ignaccolo-Zenide* v *Romania* (2001) 31 EHRR 7.

70 Ibid. para. 94.

implementation".[71] According to the Court, this is due to the fact that the passage of time can have irremediable consequences for relations between the child and the parent who does not live with him/her. Significantly, in this context, the Court has referred to the requirement of expedition given expression in Article 11 of the Hague Convention on Child Abduction.[72] Accordingly, in *Ignacollo-Zenide*, and in many subsequent cases, the Court has held not only that the authorities had failed to take all the measures that could reasonably be expected to reunite parent and child, but that they did not do so "without delay".[73]

This illustrates that one of the innovative aspects of the case law in this area is the interplay in ECHR case law between the duty on the state to respect family life under Article 8 of the ECHR and state party compliance with the requirements of the Hague Convention on Child Abduction. In particular, the Court has sometimes been drawn into assessing whether state parties to the ECHR are complying with their Hague obligations. For example, in *Ignacollo-Zenide*, the Court referred to Article 7 of the Hague Convention (which sets out the duties on Convention states with respect to securing the prompt return of an abducted child) in the context of assessing compliance with Article 8 of the ECHR.[74] Moreover, in *Bajrami* v *Albania* the Court went even further in finding that its judgment that a violation of Article 8 had been found (on the basis of the ineffective measures taken to reunite a parent with an abducted child) was related to the absence of measures designed to remedy Albania's failure to ratify the Hague Convention.[75] Albania lacked the legal framework to ensure the practical and effective protection of the applicants' family life that is required by the state's positive obligation enshrined in Article 8 of the ECHR.

The CRC recognises the importance to children of family relationships in a number of contexts including where children are separated from their parents.[76] Similar to the right to identity discussed above, ECHR law has put flesh on the bones of these principles by incorporating into the duty to respect family life under Article 8 important positive and practical obligations, which are designed to promote the integrity of the child's family relationships and to realise the child's right to enjoy contact with his or her parents unless that is contrary to the child's best interest. Although the ECtHR has made little use of the CRC in this context, its judgments are clearly consistent with CRC principles. Moreover, its use of the arguably more relevant Hague Convention has given further force to its case law while at the same time giving additional teeth, through the ECHR system, to the Hague Convention itself. Again, here the ECtHR has applied its positive obligations approach in a manner that is not only consistent with international children's rights standards but in a way that has built upon them.

Respect for physical integrity

The third area of ECHR jurisprudence in which the positive obligations is worthy of analysis is in relation to the child's right to physical integrity. The child's right to protection

71 *Ignaccolo-Zenide* v *Romania* (2001) 31 EHRR 7, para. 102.

72 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. See also *Karadzic* v *Croatia* App. No 35030/04, 15 December 2005.

73 See *Sylvester* v *Austria* (2003) 37 EHRR 417. See also *Maire* v *Portugal* (2006) 43 EHRR 23, where the Court was critical of the four-year delay in returning the child, who was particularly young at the time.

74 *Ignaccolo-Zenide* v *Romania* (2001) 31 EHRR 7, para. 113.

75 See *Iosub Caras* v *Romania* [2007] 1 FLR 661 and *Monory* v *Hungary and Romania* (2005) 41 EHRR 771.

76 See, in particular, Article 7, which refers to the child's right to know and be cared for by his/her parents, and Article 9, which provides for the child's right to maintain contact with both parents unless this is contrary to the child's best interests. Furthermore, Article 10 makes provision for the reunification with their parent of children who are separated from them across borders.

from harm has strong support in Article 19 of the CRC, which requires states to take all necessary measures to protect children from all forms of harm, abuse and neglect, including at the hands of their parents and carers. This duty to protect children has been elaborated in the Secretary General's *Study on Violence against Children*, which led inter alia to the appointment in 2009 of the first United Nations Special Representative on Violence against Children and numerous supporting international instruments.[77] The ECHR makes no reference to children's right to protection from violence but this has not prevented applicants from invoking ECHR provisions in respect of children's treatment both at the hands of the state and of their carers. In 1987, the ECtHR was asked to consider an application concerning a child's right to respect for physical integrity, as an integral part of respect for her private life under Article 8 of the ECHR. In *X and Y* v *Netherlands* in 1987, the Court first recognised that the state's duty to respect private life may require it to take positive action to intervene in relations between individuals.[78] The facts of the case were that there had been a sexual assault on a 16-year-old girl with an intellectual disability by an adult male. Due to a lacuna in Dutch law at the time, she was deprived of a remedy because it was not possible to have the alleged perpetrator prosecuted (without her making a complaint which she lacked the capacity to do). She complained that this amounted to a failure to respect her physical integrity, which formed part of her private life, which the state was required to respect under Article 8. Considering the merits of the case, the Court accepted that physical integrity formed a part of a person's private life, and it went on then to articulate a strong view of what the positive obligation to respect physical integrity means in this context.[79] In particular, the Court expressed the view that, in the circumstances of the case, the absence of an effective criminal remedy constituted a failure to respect the girl's private life which required measures of effective deterrence. Importantly, civil remedies, which might otherwise be effective, were insufficient to protect her Convention interests because they were not without their practical drawbacks. Due to the "fundamental values and essential aspects of private life . . . at stake" here, effective deterrence, which the Court considered to be "indispensable in this area", could only be achieved by criminal law provisions.[80]

The strength of the Court's conclusion – that violence against children required measures of deterrent supported only by criminal remedies – was not matched in later cases. In particular, in the case of *Costello-Roberts* v *UK*, the Court rejected that Article 8 could support a positive obligation to respect the physical integrity of a child (as part of his/her private life).[81] This concerned a boy attending a private school who received three whacks on his bottom with a gym shoe as a punishment for ill-discipline. The applicant complained that this was a breach of his physical integrity under Article 8 of the Convention. This was rejected by the Court, which held that the treatment did not entail sufficiently adverse effects for the applicant's physical or moral integrity to found a violation of that provision. The Court undertook its more substantive analysis of the complaint under Article 3, however, signalling a clear preference, borne out in subsequent case law, for the consideration of complaints of violence against children under that provision.[82] Despite

77 The UN Secretary General's *Study on Violence against Children*, 2006, available at www.violencestudy.org. Ms Marta Santos Pais is the current office holder. See also Committee on the Rights of the Child, General Comment No 8, n. 8 above; and the Council of Europe Policy Guidelines on Integrated National Strategies for the Protection of Children from Violence, Recommendation CM/Rec. (2009)10.

78 (1985) 8 EHRR 235.

79 Ibid. para. 22.

80 Ibid. para. 27.

81 *A* v *UK* (1993) 19 EHRR 112.

82 E.g. in *Z* v *UK*, the Court considered the ill-treatment of the applicant children under Article 3, finding no separate issue to arise under Article 8. See further below.

the failure of the merits of the applicant's complaint – a majority of five (from nine) judges found that his treatment was not severe enough to raise an issue of inhuman and degrading treatment under Article 3[83] – the *Costello-Roberts* case made it clear that ECHR obligations cannot be delegated to private institutions like schools and that they apply, equally, in the private as well as the public sphere. This principle took on even greater significance in the case of *A* v *UK* in 1993,[84] which concerned the caning of a nine-year-old boy by his stepfather. His injuries were considered to be sufficiently serious to merit the initiation of criminal proceedings against the boy's stepfather, who was acquitted on the defence that the punishment amounted to "moderate and reasonable chastisement". The boy complained that this represented evidence that the legal framework in place in England and Wales failed to provide him with effective protection from inhuman and degrading treatment contrary to the Convention. The positive obligations approach was key in the Court's response. in particular, in its judgment, the Court set out the positive obligations under Article 3 of the Convention by reading it together with the duty under Article 1 of the ECHR to "secure" Convention rights to everyone. On this basis, the Court ruled that the Article 1 obligation requires states "to take measures designed to ensure that individuals within their jurisdiction are not subjected to treatment proscribed by Article 3, including such treatment administered by private individuals". Moreover, the Court went on to find that "children and other vulnerable individuals are entitled to protection in the form of effective deterrence against such serious breaches of personal integrity". Applying this approach, the Court held that the UK had infringed Article 3 because its law did not adequately protect a child against the infliction by a parent of suffering that reached the threshold of Article 3. Accordingly, the Court's conclusion was that the law and its application did not provide the boy with effective protection from ill-treatment. Thus, it was the way in which the legal framework was organised that was problematic and the state's responsibility for this meant that a violation of Article 3 was the result. The fact that this mirrored the earlier observation of the Committee on the Rights of the Child, which in 1995 had queried the compatibility with the CRC of the defence of moderate and reasonable chastisement,[85] serves to reinforce the link between both conventions, notwithstanding the difference in their provision.

Significantly, the Court went even further in its application of the positive obligations approach under Article 3 in *Z* v *UK*.[86] Here, a family of four children had suffered appalling abuse and neglect at the hands of their parents and, despite their involvement with the family, social services had failed to intervene in time to prevent them from permanent damage. Having found that their neglect and injury reached the level of severity required to bring it within the scope of Article 3, the ECtHR went on to note that the local authority was aware of this treatment and had both a statutory duty and a range of powers available to it to protect the children. Despite the sensitive and difficult decisions facing social services and the important countervailing principle of respecting and preserving family life, the Court concluded that the system had failed to protect the children from serious, long-term neglect and abuse in violation of Article 3.[87] In terms of its approach, the Court

83 Contrast this with *Warwick* v *UK*, where the (former) European Commission of Human Rights found that one stroke of a cane given to a 16-year-old girl constituted degrading punishment in violation of Article 3: App. No 9471/81, 60 DR 60, p. 5, paras 86–8.

84 (1993) 19 EHRR 112. See R Smith, "To smack or not to smack? A review of *A* v *UK* in an international and European context and its potential impact on parental physical chastisement" (1999) *Web Journal of Current Legal Issues*.

85 Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland* CRC/C/15/Add.34, 15 February 1995, para. 16.

86 (2000) 34 EHRR 97.

87 Ibid. paras 69–75.

followed the reasoning applied in *A* v *UK* finding that Article 1 of the ECHR taken together with Article 3 requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. It went on to say that such measures should provide "effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge".[88]

Z v *UK* is an important case for a number of reasons. First, it establishes without doubt that Article 3 applies to treatment suffered by children at the hands of their carers. Second, it offers the first child-focused analysis under the ECHR of where the balance should fall between respecting the integrity of the family and protecting children from abuse. Although it is difficult to identify the exact nature of the positive obligation that Article 3 imposes on states in the area of child protection, nonetheless it sets down an important benchmark that child protection services must be proactive in identifying and responding to signs that children are suffering physical and psychological harm that, with the lapse of time, may cause long-term, even permanent problems.[89] Indications from the judgment are that respect for the child's right to protection from harm under Article 3 requires timely intervention in the family, with effective and practical steps to be taken when the situation at home does not show a significant and timely improvement. As in the other areas discussed above, the contribution of the ECHR to the child's right to protection from harm represents a practical, important and original contribution to this area. Building on Article 19 CRC, the ECtHR's positive obligations jurisprudence on Article 3 is an important and welcome addition to international law on the child's right to protection from harm.

Conclusions

The contribution of the ECHR to children's rights law is often underplayed or ignored when contrasted with the contribution of the CRC. Yet, as has been highlighted here, the application of the ECHR to children's cases in several important areas has led to the development of positive obligations, notably under Articles 3 and 8 of the ECHR, which both develop existing children's rights standards and articulate an entirely unique set of legal requirements. In this way, the ECtHR has not only developed children's rights jurisprudence that builds on the CRC, it has also forged a new path for children's rights in the areas discussed here. Although the focus on practical and effective mechanisms to realise ECHR rights has played an important role, this article demonstrates the significant contribution made by the positive obligations approach in all three areas considered, i.e. family ties, family reunification following abduction, and child protection. In each case, it is notable that the positive obligations approach defines in practical detail what states must do to ensure effective respect for ECHR rights and, although this approach has wavered from time to time, the case law is largely coherent and consistent.

Given that the ECtHR's approach to children's cases has been somewhat unpredictable to date, it is difficult to foresee where the scope of the positive obligations may next be realised. Each case is genuinely decided on its merits and is dependent on the set of circumstances that bring each child applicant to Strasbourg. Nonetheless, challenges to the child's right to identity associated with assisted human reproduction and with adoption would seem inevitable and here a positive obligations approach that seeks to respect the child's rights to identity in line with the CRC would bring added value to existing standards.

88 (2000) 34 EHRR 97, para. 73.

89 See the Report of the European Commission of Human Rights in *Z* v *UK* App. No 29392/95, Comm. Rep., 10 September 1999, para. 97.

The pressure to extend Article 8 case law to require states to give legal recognition to less traditional family forms – notably those headed by same-sex parents – is arguably growing, especially where children are affected. Similarly, the Court's failure to establish more robust obligations to ensure respect for father's rights under Article 8 could come under scrutiny as family breakdown continues and awareness about the importance of contact with both parents builds. In this regard, the Council of Europe Convention concerning Contact[90] may provide some support for the development of an obligation upon states to do more in this area. With respect to child protection, the development of greater consensus around the measures necessary to protect children from violence should support the development of more onerous positive obligations on states under Article 3, and the elimination of physical punishment may well emerge again before the Court in this context. Overall, as the case law demonstrates, the ECtHR is not only capable of developing new standards of human rights protection from a child's perspective, it is equally willing to build on those that currently exist, under the CRC and companion instruments.

90 ETS No 192. This treaty came into force on 1 September 2005.

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Realising political equality: the European Court of Human Rights and positive obligations in a democracy

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Introduction

The European Convention on Human Rights (ECHR) speaks of the importance of an "effective political democracy" in its Preamble, though it is only in the first protocol that we find a right to free elections. Article 3 of Protocol 1 (P1-3) reads as follows:

> *Right to free elections*
>
> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

This paper discusses the role of "positive obligations" under P1-3. It identifies positive obligations that might contribute to realising equal political rights in an effective political democracy.

Positive obligations include many different measures that states are obliged to undertake under the ECHR. The diversity of measures contemplated is impressive. The list includes obligations to adopt an effective legal framework to protect rights, duties to investigate allegations that certain rights have been violated, duties to take operational measures in certain cases to protect individuals from violations of their rights, duties to provide information about threats to individuals' rights, duties to provide resources, duties to provide training, and so forth.

In one sense, discussing positive obligations in relation to P1-3 is too straightforward. This Article, unlike other Articles in the Convention, is expressly about positive obligations on the state to do something, in this case to "hold free elections at reasonable intervals by secret ballot" so as to "ensure the free expression of the opinion of the people in the choice of legislature". More importantly, the right to vote and the right to run for election cannot

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be exercised at all without state measures such as electoral laws, registration processes, voting booths.[1] At the most basic level, legislature must exist and elections be held for it.[2]

This paper outlines the positive obligations in P1-3 focusing on obligations where the state is required to do more than just change the law. This may mean providing resources or facilities, adopting regulatory frameworks or creating new institutions. The paper highlights specific positive obligations that need to be further developed in the jurisprudence of the European Court of Human Rights (ECtHR). Sometimes these can be developed by analogy with positive obligations recognised in other areas of ECtHR jurisprudence. However, beyond these cases, states should ensure that members of vulnerable and disadvantaged minorities are able to participate in the electoral process and should ensure that dominant political groups cannot abuse their political power to exclude other parties unfairly. This is necessary to realise equal political rights.

The second section of this paper sketches some preliminary points about the Strasbourg institutions' approach to P1-3. After that, the third section identifies circumstances where the ECtHR should apply a more intense scrutiny in P1-3 cases. The fourth, fifth and sixth sections look at positive obligations relating to the right to vote, the right to run for election and the regulation of political parties.

The journey from obscurity

For a long time P1-3 seemed to lie within a "jurisprudential black hole"[3] in the Convention, with applications regularly being dismissed as inadmissible. The early jurisprudence of the Commission treated P1-3 as only being about the obligation to hold elections and not about conferring subjective rights.[4] Even when the Commission recognised that P1-3 required universal suffrage (though not specified in the text of P1-3), the Commission still rejected the idea that P1-3 conferred "the right unreservedly to every single individual to take part in elections".[5]

However, the Commission came to recognise that there were rights implicit in P1-3[6] and the Court confirmed this in its first decision on P1-3 in *Mathieu-Mohin* v *Belgium*.[7] Referring to indications in other parts of the protocol, as well as the preparatory works, the ECtHR held that P1-3 guaranteed "subjective rights of participation – 'the right to vote' and 'the right to stand for election to the legislature'".[8] In later cases, the Court refers to these as the active and passive aspects of the P1-3 rights.[9] There rights are subject to "implied limitations".[10]

States have a wide margin of appreciation in limiting these rights, subject to review by the ECtHR. The ECtHR:

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1 Lécuyer says that political rights are "consubstantial" with positive obligations: Y Lécuyer, *Les droits politiques dans la jurisprudence de la Cour européenne des droits de l'homme* (Dalloz: Paris 2009), p. 413.

2 *Denmark and Others* v *Greece* (1969) 12 Ybk 1 (The *Greek* case).

3 Lécuyer, *Les droits politiques*, n. 1 above, p. 99.

4 D J Harris, E Bates, M O'Boyle, C Warbrick and C Buckley, *Law of the European Convention on Human Rights* (OUP: Oxford 2009), p. 712, n. 10.

5 *X* v *Federal Republic of Germany* (1967) 10 Ybk 336.

6 *W, X, Y and Z* v *Belgium* (1975) 2 DR 114, 30 May 1975.

7 *Mathieu-Mohin and Clerfayt* v *Belgium* (1987) 10 EHRR 1.

8 S. 51. Although the right is limited to legislative elections and, indeed, only the popularly elected chamber in a two-chamber system (para. 53). The concurring opinion of Judge Pinheiro Farinha added some important qualifications as to the issue of elections for a two-chamber legislature: the majority of the members of the legislature should be elected and the unelected chamber should not have greater powers than the elected chamber.

9 *Zdanoka* v *Latvia* (2006) 45 EHRR 17, paras 105–6.

10 *Mathieu-Mohin and Clerfayt* v *Belgium* (1987) 10 EHRR 1, s. 52.

> has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate . . . In particular, such conditions must not thwart "the free expression of the opinion of the people in the choice of the legislature".[11]

The ECtHR was also careful to stress the wide margin of appreciation available to states in designing an electoral system, especially given the often competing, almost incompatible aims of electoral systems, which have to both "reflect fairly faithfully the opinions of the people" and "promote the emergence of a sufficiently clear and coherent political will".[12] In particular, while any elections must be free, at reasonable intervals, secret and assure the "free expression of the opinion of the people", the protocol said nothing about whether majoritarian or proportional systems should be used.[13] The reference to "free expression of the opinion of the people" referred primarily to freedom of expression and equality.[14] The Court concluded its general statement of principles by stressing that these principles must be understood in a context sensitive manner and:

> assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another.[15]

While *Mathieu-Mohin* established that P1-3 recognised individual rights to run for election and to vote, P1-3 case law continued to be somnolent for much of the 1980s and 1990s. No doubt this was partly due to the wide margin of appreciation reflecting the Court's evident awareness of the political sensitivities of interfering in matters concerning the election of a legislature – matters which go to the heart of the question "Who governs?" Only in the last decade has the jurisprudence become "much richer" with judgments and indeed several important Grand Chamber judgments.[16] Harris et al. note that there have been important Grand Chamber judgments on the right of prisoners in the UK to vote[17] and on the possibility for a newly democratic state to ban persons associated with the previous undemocratic regime from running for election.[18] To this may also be added recent cases, such as the decision on the consociational arrangements in Bosnia-Herzegovina.[19]

With this rise in case law, involving sometimes very significant issues, it will be important to consider the question of how intensely the Court should scrutinise national situations. In other words, how narrow or wide a margin of appreciation should the Court recognise? This may be especially important if the Court has to deal with claims involving more than merely changing the law and involving positive obligations to resources or new institutions or procedures.

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11 *Mathieu-Mohin and Clerfayt* v *Belgium* (1987) 10 EHRR 1. For later citation, see *Gitonas* v *Greece* App. Nos 68/1996/687/877–9, 1 July 1997, s. 39.

12 *Mathieu-Mohin and Clerfayt* v *Belgium* (1987) 10 EHRR 1, s. 54.

13 Ibid.

14 Ibid. In particular, the Court did not believe "that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory". Thus, no electoral system can eliminate "wasted votes".

15 Ibid.

16 Harris et al., *Law of the European Convention*, n. 4 above, p. 711.

17 *Hirst* v *United Kingdom (No 2)* (2005) 42 EHRR 41.

18 *Zdanoka* v *Latvia* (2006) 45 EHRR 17.

19 *Sejdic* v *Bosnia and Herzegovina* (2009) 22 BHRC 201.

Arguments for narrowing the margin of appreciation

While these recent cases demonstrate a greater willingness to find violations in P1-3 cases, there are still references to a wide margin of appreciation in the case law. Harris et al. suggest that one should not be too critical of the ECtHR case law in this area, pointing to a speech by the Court's President[20] emphasising that the ECtHR should not be in the business of redesigning the unique democratic structure of each state.[21] This caution is understandable, however, there are certain circumstances where the ECtHR should be more willing to intervene and if necessary make use of positive obligations.[22]

First, closer scrutiny is justified to protect vulnerable and disadvantaged groups. The representative political process may serve the interests of the majority of the population very well. However, there are dangers that the political process may overlook the interests of minorities or other disadvantaged groups.[23] The ECHR protects the rights of everyone and the ECtHR should be particularly sensitive to claims that the political process marginalises minorities and other disadvantaged groups. The ECHR Preamble rightly stresses the importance of an "effective political democracy" in maintaining "fundamental freedoms". This can only work if those groups who are likely to see their freedoms threatened are enabled to participate in the political process.

Second, apart from vulnerable and disadvantaged groups, other groups are likely to be disfavoured in the political process: those parties and politicians that are not politically dominant. The ECtHR should be sensitive to the fact that the rules of the political system are drawn up and sometimes enforced by the very parties who secure victory in the political process. This means that politicians and political parties have a vested interest in how they design and enforce the political process.[24] Where politicians design institutions and enforce rules that maintain their own advantages, then the ECtHR should look closely to see whether incumbent parties are abusing their power and seeking unfair political advantage.

This second type of situation is more difficult than the first. This is because there are legitimate reasons for treating larger parties differently from smaller parties. The ECtHR recognises that an electoral system needs to balance different objectives, including the objective in streamlining representation so that reasonably coherent political viewpoints emerge.[25] There is a legitimate interest in recognising that one party is more popular than others. For these reasons, the ECtHR has rejected arguments challenging the first-past-the-post electoral system in the UK,[26] or the 10 per cent threshold to obtain seats in the Turkish parliament.[27] However, these considerations cannot justify dominant political parties controlling aspects of the political system, such as deciding who can run for election.

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20 Judge Costa, "The links between democracy and human rights under the case-law of the European Court of Human Rights", 5 June 2008, Helsinki.

21 Harris et al., *Law of the European Convention*, n. 4 above, p. 733.

22 The following arguments derive from John Hart Ely, *Democracy and Distrust* (Cambridge, Mass: Harvard University Press 1980) and Carlos S Nino, "A philosophical reconstruction of judicial review" (1993) 14 *Cardozo Law Review* 798.

23 There are numerous criticisms of representative democracy. I am assuming that there is nevertheless merit in representative democracy and trying to improve it, without suggesting that representative democracy is the only or best form of democracy.

24 Samuel Issacharoff, Pamela S Karlan and Richard H Pildes, *The Law of Democracy: Legal structure of the political process* (New York: Foundation Press Thomson/West 2007), p. 2.

25 *Mathieu-Mohin and Clerfayt* v *Belgium* (1987) 10 EHRR 1, s. 56.

26 *Liberal Party* v *UK* (1980) 21 D & R 211.

27 *Yumak and Sadak* v *Turkey* (2009) 48 EHRR 4 (GC).

It is legitimate for the Court to scrutinise decisions closely when they affect a vulnerable and disadvantaged group or unfairly benefit dominant political groups. Recent Strasbourg case law supports these principles. *Tänase* v *Moldova* concerned a Moldovan law that prohibited candidates from having dual nationality. The law disproportionately affected members of the opposition parties and impacted disproportionately on Moldovans of Romanian ethnicity. The Grand Chamber found a violation of P1-3, stressing that the Court will be very careful about examining measures that seem to disadvantage opposition parties and minorities.[28]

These points, about vulnerable and disadvantaged groups and the possible abuse by dominant parties, are closely connected to the idea of positive obligations. The danger in each case is that an existing situation disadvantages either minorities or disfavoured political groups. Such situations are unlikely to be rectified only by non-interference; an insistence on non-interference (without positive obligations) might "distort" democracy.[29] To rectify any of these situations states may need to take active steps.

Having identified the background to the interpretation of P1-3 and suggested that there are circumstances where a narrower margin of appreciation is justified, the next sections explore some of the specific obligations under P1-3 relating to the rights to vote and stand for election, and the regulation of political parties. The sections will identify possible further positive obligations that may be developed, either by reference to well-recognised positive obligations in other areas of the case law, or the principles of protecting minorities and preventing dominant parties abusing their position.

Right to vote

This section starts by outlining the right to vote case law and highlights several positive obligations that the Court could impose by analogy with existing positive obligations. The section then discusses how the Court could make the right to vote more effective for members of vulnerable and disadvantaged groups.

The right to vote case law

A freely elected legislature representing the free expression of the opinion of the people requires recognition of the right to vote. There is an implied right to vote in P1-3. For this to be effective there must be an electoral law in place that provides an effective legal framework for the exercise of this right. Such an electoral law would need to specify who is entitled to vote, any requirements as to registration, any procedural requirements as to how the vote should be exercised, and how the secrecy of the ballot should be protected.

The Court has already dealt with situations where someone has been denied a right to vote due to an express legislative prohibition. Whilst the Commission and Court have been generally accepting of "traditional" prohibitions or regulations based on age, residence, or citizenship, more recently the Court has subjected a blanket ban on prisoners in the UK from voting to a searching proportionality inquiry.[30] As these cases involve legislative

28 *Tänase* v *Moldova* App. No 7/08, 27 April 2010 (GC), paras 167–9, 179. On "vulnerable minorities", see also *Alajos Kiss* v *Hungary* App. No 38832/06, 20 May 2010.

29 Fredman argues that judicial policies of protecting negative but not positive rights end up distorting the democratic process; her argument concerns mainly social and economic rights; Sandra Fredman, *Human Rights Transformed: Positive rights and positive duties* (Oxford: OUP 2008), p. 96. See also Anne Smith and Rory O'Connell "Transition, equality and non-discrimination" in Antoine Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the ECHR: Justice, politics and rights* (Cambridge: CUP 2010 forthcoming).

30 *Hirst* v *United Kingdom (No 2)* (2005) 42 EHRR 41. See also *Frodl* v *Austria* App. No 20201/04, 8 April 2010.

exclusions from a general law, it is easy to apply a proportionality test to assess whether the exclusion is justified.

The Court has confirmed the *Hirst* approach in *Alajo Kiss* v *Hungary*, where the Hungarian Constitution disenfranchised adult persons who were under the guardianship of another due to reasons of their mental capacity.[31] The ECtHR held that where a legislative provision disenfranchises "a particularly vulnerable group in society", then the margin of appreciation must be considered to be narrower and the state must offer very weighty reasons for its decisions.[32] As in *Hirst*, the automatic nature of the disenfranchisement violated the Convention.

Both *Hirst* and *Alajo Kiss* concerned the state's negative obligations. The situation was more complicated in *Aziz* v *Cyprus*, where legislation permitted the applicant to vote but, in practice, he could not.[33] As a Turkish Cypriot, he was only entitled to register on a list of Turkish Cypriot voters and to vote for a Turkish Communal chamber, but these had not existed since 1963. Consequently, he could not vote at all. This complete exclusion from the franchise was a violation of P1-3. This meant that a failure to legislate to address the situation led to the violation.

The Strasbourg institutions have, until recently, regularly rejected arguments that states should take legislative and administrative steps to extend the right to vote to citizens living abroad.[34] According to the Commission, a residence requirement was justified because of the need to ensure voters had a connection with the country, the difficulty in candidates presenting their manifesto abroad, the lack of influence of non-resident citizens and, finally, the close connection between residence and being affected by the laws of a legislature.[35] The ECtHR has generally confirmed this reasoning,[36] though a recent judgment suggests circumstances when it will uphold right of citizens resident abroad to vote. In *Sitaropoulos* v *Greece*, the Court affirmed the general principle that P1-3 does not require that citizens abroad be allowed to vote.[37] However, in that case, the Greek Constitution provided that the legislature could adopt legislation providing for the right of citizens resident abroad to vote. This was due to a provision that was adopted in 1975. The ECtHR identified three relevant considerations. First, the Court explained that such a provision could not be allowed to lapse in to desuetude.[38] Second, the ECtHR suggested that there was a growing consensus on the need to provide for the right to vote of nationals resident abroad.[39] Finally, the Court noted that a narrower margin of appreciation applied in the right to vote

31 *Alajos Kiss* v *Hungary* App. No 38832/06, 20 May 2010.

32 Ibid. para. 41.

33 *Aziz* v *Cyprus* (2005) 41 EHRR 11.

34 The ECtHR does not seem to have addressed the situation of someone resident within a state but who happens to be abroad on polling day. Interestingly, the Hungarian Constitutional Court has ruled that there must be legislation in place to address such a situation. *Citizens Abroad Voting* case decision 32/2004, www.mkab.hu/admin/data/file/690_32_2004.pdf (accessed 21 March 2010).

35 *Luksch* v *Germany* App. No 35385/97, 21 May 1997.

36 *Hilbe* v *Liechtenstein* App. No 31981/96, 7 September 1999. The ECtHR has accepted that allowing non-resident citizens to vote for up to a period of 15 years after leaving the UK was compatible with the Convention: *Doyle* v *UK* App. No 30158/06, 6 February 2007. The UN Human Rights Committee has rejected as inadmissible a challenge to a residence requirement, but the committee did not address the substantive question: *O Colchuin* v *Ireland Communication* No 1038/2001: Ireland, 17 April 2003. For an extreme case of a residence requirement (10 years) being accepted, see *Py* v *France* (2005) 42 EHRR 26.

37 *Sitaropoulos and Others* v *Greece* App. No 42202/07, 8 July 2010, para. 41.

38 Ibid.

39 Ibid. paras 44–5.

cases than in the right to run for election cases.[40] Due to the combined force of these reasons, the failure to adopt legislation giving effect to the constitutional provision was a violation of the Convention.[41]

This case is not yet final. It is troubling since the Greek Constitution did not explicitly require that nationals resident abroad be allowed to vote. Considering the inverse case – non-nationals resident in a state – the Court has not found any obligation to allow them to vote, but arguably there is a stronger case for insisting that such non-nationals be allowed to vote in the country where they reside.[42]

Sitaropoulos demonstrates that the Court is willing to recognise positive obligations (in this case to adopt a law) in P1-3 cases. There are other positive obligations that the ECtHR could develop relating to the right to vote, often drawing on some of the obligations well established in other areas of ECtHR jurisprudence. These are the obligations to protect, to provide information and to investigate.

The positive obligation or duty to protect is relevant. Voters might be subject to threats, intimidation, bribery and other forms of undue pressure. The electoral law should provide sanctions to deter these sorts of activity, and there may be an *Osman*-type duty to take operational measures to protect persons from interference with their voting rights.[43]

One could envisage positive obligations to provide information in relation to elections.[44] One might imagine at least three ways in which such a duty would operate. First, there might be a duty to provide information about the electoral system generally. Second, there might be a duty to provide information about the formalities and practicalities required to vote in any particular election. Third, there might be a duty to provide information about the different candidates, parties and positions involved in any election. Fourth, the state needs to publish full results of the election.

Finally, there are circumstances when a positive obligation to investigate may come into play. The duty to investigate cases has mainly concerned alleged violations of the non-derogable rights in Articles 2, 3 and 4. However, duties to investigate have started to appear in relation to other rights, for example, duties to investigate allegations of racial bias in jury deliberations[45] and duties to investigate allegations of discriminatory motivations in criminal cases (this is usually in connection with Article 2 or Article 3).[46] This leaves open the argument that there may be a duty to investigate allegations of systematic denial of the right to vote.[47]

These duties to protect, provide information and to investigate may be especially pertinent when the issue is the exclusion of members of a disadvantaged minority from the

40 *Sitaropoulos and Others* v *Greece* App. No 42202/07, 8 July 2010, para. 46.

41 Ibid. para. 47.

42 Ruth Rubio-Marin and Rory O'Connell, "The European Convention and the relative rights of resident aliens" (1999) 5 *European Law Journal* 4. More generally on the rights of non-nationals, see Ruth Rubio-Marin, *Immigration as a Democratic Challenge* (Cambridge: CUP 2000).

43 *Osman* v *United Kingdom* (1999) 29 EHRR 245. For instance, the state has a duty to protect demonstrators and maintain order: *Christian Democratic People's Party* v *Moldova (No 2)* App. No 25196/04, 2 February 2010. See also *Ollinger* v *Austria* (2008) 46 EHRR 38.

44 The ECtHR found inadmissible (due to non-exhaustion of domestic remedies) a complaint from an NGO that it was not given access to information held by an electoral commission: *Geraguyn Khorhurd Patgamavorakan Akumb* v *Armenia* App. No 11721/04, 11 May 2009.

45 *Sander* v *UK* (2001) 31 EHRR 1003.

46 *97 members of the Gldani Congregation of Jehovah's Witnesses* v *Georgia* (2007) 46 EHRR 30.

47 Indeed, the Court has said that the failure to make use of investigatory powers available to an electoral commission may be arbitrary: *Georgian Labour Party* v *Georgia* (2009) 48 EHRR 14, para. 130.

electoral process. The next sub-section looks at the right to vote for vulnerable and disadvantaged minorities.

Positive obligations and the right to vote for vulnerable and disadvantaged minorities

As noted above, the Court has already condemned national rules that exclude vulnerable minorities from the right to vote. This is welcome, but to realise the right to vote there may be a need to recognise positive obligations. Most notably, there are cases where individuals may not be able to comply with the procedural requirements involved in exercising the right to vote. These may include people with disabilities who cannot access a polling booth; people with literacy problems who may not be able to read a ballot paper; prisoners and other persons in places of detention; or people who live in remote localities and who may not be able to access a polling booth. So far, the Court has not considered many of these types of cases. And the one case raising such facts was dealt with unsatisfactorily.

This case was *Molka* v *Poland*.[48] The applicant, a wheelchair user, had been driven to a polling station where he planned to vote in local and provincial elections. The station was not wheelchair accessible and the applicant could only have voted if a stretcher could have been provided to carry him in (which he would have refused to allow). The Court concluded that P1-3 was not applicable as the bodies being elected did not have legislative power. The ECtHR went on to consider whether the public authority's failure to facilitate access violated Article 8 rights. The Court concluded that such an argument was plausible, but had to be assessed in the context of the wide margin of appreciation involved when resources are being distributed. The Court thought the national authorities were better placed to decide how to devote the relevant resources. The Court was influenced by the facts that this was an isolated case, that the applicant could have been assisted by other persons into the building and that Poland had adopted legislative measures providing for access, including specifically for access to venues for national elections – this demonstrated the state was "not oblivious to the plight of disabled voters".

That the state is "not oblivious to" these difficulties does not set a very high standard. While the ECtHR may have been concerned about the possibility of applicants using Article 8 as a springboard for claims to many resources, this concern does not apply in relation to the exercise of the right to vote. Given the importance of the right to vote, the state should enable everyone who is entitled to vote to do so. This requires an effective legal framework but also requires the deployment of resources.

Saying that everyone should be facilitated in voting is perhaps a very sweeping requirement. There may be difficulties in facilitating everyone who is temporarily away from home, or abroad, or disinclined to vote, or who gets lost on the way to vote! Furthermore, there are genuine competing interests against facilitating everyone – there is an argument that an election is a public event and that people should vote (if possible) on the same day and in the same venue to emphasise the public nature of what is being done. In such cases, the ECtHR needs to continue to bear in mind these competing interests that may justify a wide margin of appreciation.

However, there is one situation where the ECtHR should narrow the margin of appreciation and investigate even more anxiously. These are cases where the applicant belongs to a group that may be systematically excluded from political participation, or at least a group that is under-represented in the political process and faces specific challenges

48 *Molka* v *Poland* App. No 56550/00, 11 April 2006.

to participating in that process. Arguably, what human rights law does best is ensuring that such marginalised groups are enabled to enjoy fully their rights on an equal footing with all.

Thanks to its Article 14 (non-discrimination) jurisprudence, the ECtHR already has the conceptual tools to develop positive obligations for these groups. There are four (somewhat related) conceptual tools in the Article 14 jurisprudence that can be used to further participation for disadvantaged groups. First, the ECtHR applies a sliding scale approach to the justification test in Article 14, recognising that certain types of distinction call for more rigorous scrutiny than others. Second, the ECtHR has indicated that the Convention requires special protection be offered to members of a "disadvantaged and vulnerable minority".[49] Third, the ECtHR has now developed an indirect discrimination test. Where a general rule disproportionately disadvantages a group, then the state must show that it is justified.[50] Further, the ECtHR is willing to recognise specific positive obligations to achieve equality.[51] A way forward would be for litigants to rely on P1-3 in combination with Article 14's prohibition of discrimination.

Applying these discrimination principles in right to vote cases would proceed as follows. If it can be shown that general rules and procedures about voting have a disproportionate impact on members of certain groups, then the burden switches to the state to justify the rules or procedures. Where the disadvantaged group is one that suffers from systematic discrimination and disadvantage, then the burden of justification should be a very onerous one. Such groups would include racial and ethnic minorities, but also other disadvantaged groups that may be disproportionately affected by voting rules and procedures, such as people with physical or mental disabilities, people with literacy problems, persons in hospitals or places of detention, carers, and, perhaps, the elderly and the young. Other examples of disadvantaged groups might include prisoners and non-nationals. In such cases, the state should show a strong justification for the rules or procedures. Failing this, the state may need to change the rules or procedures or adopt specific positive obligations to allow the exercise of the right to vote on equal terms. This might entail a mere change in the law, but it could also entail deployment of resources. Positive obligations could include education about the importance of voting,[52] the use of postal voting, voting by proxy, special polling stations in prisons and other places of detention, and ballot papers with photographs and emblems as well as text. These are some mechanisms that would assist in making political democracy "effective" for members of disadvantaged groups, at least in right to vote cases. Right to run for election cases may be more complicated.

Right to run for election

As well as the right to vote, P1-3 also protects the right to run for elections, sometimes labelled the "passive" aspect of the P1-3 right. Again, the Court has accepted limitations on this right and has been more accepting of limitations of this aspect of the right than of the right to vote.

One of the problems in P1-3 cases is delineating any sharp line between negative and positive obligations. This is in line with the Strasbourg Court's own view that it is not possible or desirable to insist on too sharp a distinction between these types of

49 *DH* v *Czech Republic* (2008) 47 EHRR 3 (GC), para. 182.

50 Ibid. para. 175.

51 *Oršuš and Others* v *Croatia* App. No 15766/03, 16 March 2010 (GC).

52 The ECtHR has recognised a positive obligation to educate Roma parents about the importance of education: *Oršuš and Others* v *Croatia* App. No 15766/03, 16 March 2010 (GC), para. 177.

obligations.[53] Therefore, some of these comments on the right to run for election may be analysed either as a question of whether there has been a lawful, legitimate and proportionate interference with the right to run for election, or as to whether there exists an effective legal framework for the enjoyment of P1-3 rights.

Under P1-3, states must adopt rules on the right to run for election that are stable, clear and reasonably certain. There must be a legal basis for decisions about registering candidates. Vague references to the "spirit of the law" do not suffice.[54] The law must be reasonably clear: if an electoral authority wishes to disqualify someone for not having registered their details accurately, then the electoral law must make clear what details need to be registered.[55] Similarly, legislation allowing for votes at a particular station to be discounted in certain specific cases or in "other circumstances" is too wide.[56] A prohibition on "professional clergymen" running for election is only acceptable if it is established who falls under this description.[57] The law must be reasonably certain: the Court has found, for instance, that sudden, unexpected changes in the judicial interpretation of the electoral law may violate the Convention.[58] Finally, the law should be stable. Last-minute changes by the legislature of the electoral law may be suspect.[59]

Apart from these requirements as to the existence and quality of the legal framework, the ECtHR has identified process-related obligations. There is a very important passage on matters of process in one of the key P1-3 decisions. In *Podkolzina* v *Latvia*, the ECtHR stressed that the rights in the Convention had to be given a "practical and effective" interpretation, not a "theoretical and illusory one". The right to run for election would be illusory if one could be deprived of it arbitrarily. Therefore, any decision to rule a candidate ineligible must be made by "a body which can provide a minimum of guarantees of its impartiality"; the discretion open to such a body "must be circumscribed, with sufficient precision, by the provisions of domestic law"; finally, the procedure must be "fair and objective" and "prevent any abuse of power".[60] *Podkolzina* requires that decisions about allowing someone to run should be made by an impartial body, acting according to legal guidance and accompanied by procedural safeguards.

The Court has developed this process further in *Grosaru* v *Romania*. The ECtHR found a procedural violation because the bodies that could hear an electoral dispute were largely composed of politicians belonging to parties other than the applicant's. This was a failure to

53 The ECtHR has said this in property and free expression cases: *Broniowski* v *Poland* (2005) 40 EHRR 21, para. 144; *VGT Verein Gegen Tierfabriken Schweiz* v *Switzerland* App. No 32772/02, 30 June 2009, para. 82.

54 *Krasnov and Skuratov* v *Russia* (2007) 47 EHRR 46, para. 60.

55 Ibid. para. 60.

56 *Kovach* v *Ukraine* App. No 39424/02, 7 February 2008, paras 58–60.

57 *Seyidzade* v *Azerbaijan* App. No 37700/05, 3 December 2009, paras 33–5.

58 *Lykourezos* v *Greece* (2008) 46 EHRR 7; *Paschalidis Koutmeridis and Zaharakis* v *Greece* App. Nos 27863/05, 28422/05 and 28028/05, 10 April 2008.

59 *Tänase and Chirtoaca* v *Moldova* App. No 7/08, 18 November 2008. Electoral legislation had been changed less than a year before the next election; further the legislation went counter to the spirit of liberalising legislation that had allowed people to choose to have dual nationality. In a case from Bulgaria, the electoral law had been changed two months before the election: *Petkov and Others* v *Bulgaria* App. Nos 77568/01 178/02 and 505/02, 11 June 2009.

60 *Podkolzina* v *Latvia* App. No 46726/99, 9 April 2002, para. 35. The UN Human Rights Committee has also found that Latvia has denied people the right to run for election in procedurally dubious ways: *Ignatane* v *Latvia* Communication No 884/1999, 25 July 2001. More broadly, the Human Rights Committee has concluded that there must be access to an independent and impartial body to challenge decisions of electoral authorities: *Sinitsin* v *Belarus* Communication No 1047/2002, 30 November 2006.

provide for an independent body, especially when there was no recourse to a court.[61] On the other hand, the Court rejected a challenge in the *Georgian Labour Party* case, where an electoral commission had a high representation from the President's party; however, there was no specific evidence of wrongdoing.[62] Nevertheless, *Grosaru* requires that there be an independent body to hear election disputes. This procedural obligation is important as the ECtHR has decided that election disputes do not attract the protection of Article 6 ECHR.[63] Even more relevantly, this is the type of situation where a suspicion may arise that successfully elected politicians and parties might be able to take advantage of the electoral process. As argued above, it is in cases like this that the ECtHR should be prepared to intervene.

These obligations to create independent bodies to deal with questions about registration and electoral disputes are important precedents. They reflect a restrained procedural solution to problems before the Court. The ECtHR may sometimes[64] be reluctant for good reasons to be drawn into disputes about whether a candidate should have been allowed to run or other electoral disputes; chief amongst these is the danger of being drawn in to the "political thicket". However, it is more straightforward for the ECtHR to insist that the state should establish an independent body to make decisions on these matters. This approach might be useful in other electoral matters. For instance, the ECtHR has not to date dealt with questions about the drawing of electoral constituency boundaries.[65] This is another type of question where judicially manageable standards may be rare, and where there is a danger of getting embroiled in political disputes. It is also a situation where dominant political parties might be tempted to redraw constituency boundaries in a partisan way. A plausible solution, suggested by these cases, would be to insist that an independent body does any drawing of electoral boundaries.

Minority groups and women

Cases like *Podkolzina* and *Grosaru* indicate that the ECtHR is aware of the dangers of states (political parties) controlling certain aspects of the political process. However, there is also a danger that the political process may serve the interests of the majority of the population very well, but marginalise the interests of minorities.

The approach of the Strasbourg authorities does not indicate a great sensitivity to this problem. Rules that formally exclude minorities will be open to challenge.[66] However, the Commission and Court have not shown themselves to be suspicious of measures that fall short of a formal exclusion. The Commission considered that as long as minority members were entitled to vote and run for election like everyone else, then minority members could not complain of a violation of P1-3 even though they "have no secured representation for

61 *Grosaru* v *Romania* App. No 78039/01, 2 March 2010, paras 54–5.

62 *Georgian Labour Party* v *Georgia* (2008) 48 EHRR 14, para. 110. Two judges dissented on this issue, Judge Mularoni highlighting criticisms of the OSCE/ODIHR election monitoring body.

63 *Pierre-Bloch* v *France* (1997) 26 EHRR 202; *Taipe* v *France* App. No 32258/96, 13 January 1997.

64 Not always – the ECtHR has sometimes found that a refusal to register someone as a candidate was a violation; see e.g. *Melnychenko* v *Ukraine* (2006) 42 EHRR 39.

65 By contrast, there is a large body of case law on this in the USA.

66 *Sejdic and Finci* v *Bosnia and Herzegovina* App. Nos 27996/06 and 34836/06, 22 December 2009 (GC).

themselves".[67] The ECtHR's approach to this question would seem to be permissive of state decisions; it seems neither to require nor prohibit special representation.[68]

The ECtHR has addressed language issues in relation to elections. It has rejected challenges to the system of consociationalism in Belgium, where mechanisms are designed to secure equal participation of linguistic groups in the political system. Its attitude on language questions seems likely to be permissive of state decisions in this area thanks to the margin of appreciation. Thus, while the Court accepts the creation of special systems to recognise linguistic communities, it does not require any special provisions for speakers of minority languages.[69] This broadly permissive attitude is apparent in *Podkolzinia* where the Court accepted that it was simply a matter of political choice as to what the working language of a legislature should be. Further, the ECtHR did not investigate the possibilities of accommodating minority language speakers using translators or other mechanisms. These cases do not suggest that the ECtHR will require special representation for minorities.

A special case is the representation of women. There is considerable contemporary debate about ensuring balanced gender representation in the political process.[70] This being so, it is perhaps surprising that the issues of gender quotas, parity laws and the like have not come up in the contentious decisions of the Court. However, the Court has handed down an advisory opinion that suggests that rather than requiring positive action to secure equal gender representation, the Court may be somewhat wary of the idea. The opinion concerned the process by which the ECtHR judges themselves are selected.[71] The Parliamentary Assembly of the Council of Europe (PACE) elects ECtHR judges on the basis of lists put forward by each state party to the ECtHR. Each state can put forward a list with three names on it; the list may include persons not of the nominating state's nationality. In 2004 and 2005, PACE decided that it would only consider lists that included at least one woman, in an effort to redress the gender imbalance on the Court. The Committee of Ministers asked the Court for an Advisory Opinion on this. The Court ruled that the policy was incompatible with the Convention. It accepted that PACE could try to address gender imbalance and that much of the policy was acceptable. Where the policy went astray was in being an absolute rule. It did not make any exception for small countries where the number of qualified female legal professionals is extremely small. The Court did not believe such states should be forced to nominate a non-national female candidate. Translating this to the context of elections, one might predict that the Court will permit policies to promote greater gender equality, provided there is some possibility for an exception in special cases. This is speculation of course, and does not give any indication as

67 *G and E* v *Norway* (1983) 35 DR 30.

68 In *Grosaru* v *Romania* App. No 78039/01, 2 March 2010, para. 48, the Court commented that Romania had provided special representation for minority candidates and that it was the country that had the largest number of minority representatives. The Court, however, does not seem to have commented on whether this was required by, compatible or incompatible with the ECHR.

69 The Commission rejected a complaint by a Frisian party that it had not been allowed to submit registration documents in Frisian: *Fryske Nasjonale Patrij* v *Netherlands* (1985) 45 DR 240. Similarly, the Commission rejected as inadmissible a complaint by French-speaking Belgians living in Flanders that they had to vote for persons willing to take an oath in Dutch: *Clerfayt* v *Belgium* App. No 27120/95, 8 September 1997.

70 See e.g. B Rodriguez Ruiz and R Rubio-Marin, "The gender of representation" (2008) 6 *International Journal of Constitutional Law* 287.

71 Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights, 12 February 2008.

to what the Court might think of policies such as all-women shortlists as permitted in UK law,[72] or the parity law in France.[73]

From these cases, the ECtHR's attitude to minority representation seems to be broadly permissive. States may adopt special representation measures but there does not seem any obligation to do so. This is a question where more judicial restraint is justified than in right to vote cases. This is because the standards are not so clear in addressing problems of under-representation among representatives. First, there is an argument that it is overly essentialist to suggest that people can only be represented by candidates sharing a characteristic with them. Even those who are sympathetic to ideas of group representation are uneasy about this argument.[74] However, the ECtHR Grand Chamber in *Tänase* has already indicated that voters have a "right to be represented by MPs who reflect their concerns and political views", referring to voters with dual nationality.[75] Second, it is sometimes unclear whether a minority's interests are served by having a representative who shares a characteristic, or a number of representatives who, even if they do not share the characteristic, will be concerned to win votes from the minority. Third, there is a wide variety of mechanisms to facilitate minority representation, often involving questions of institutional design.[76]

Finally, minority representation may be affected by the choice and design of the electoral system: majoritarian systems, or proportional systems with high national thresholds, may allocate a disproportionately small number of seats to minority parties. Traditionally, the ECtHR has accorded a wide margin of appreciation in cases involving the choice of electoral system.[77] Most recently, the ECtHR upheld the 10 per cent quota for a party to be elected to the Turkish Parliament in *Yumak* v *Turkey*.[78] This high threshold (5 per cent is more common) meant that 45 per cent of voters were left unrepresented in parliament. While the Grand Chamber did not find a violation of P1-3, there were indications of a less deferential approach to questions of choice and design of electoral system. Four judges dissented, while even the majority acknowledged that the exclusion of 45 per cent of voters was "hardly consistent with the crucial role played in a representative democracy by parliament".[79] The majority still found no violation, partly because of the unusual circumstances in which the election took place, the overall context of elections in Turkey, the fact that parties could find ways to circumvent the threshold rule, and, finally, that the Turkish Constitutional Court exercised some review of the threshold rule.[80]

Apart from cases involving the sensitive question of choice and design of electoral systems, there are situations where positive obligations might be appropriate to facilitate minority representation. This is so particularly in light of the comment in *Tänase* that voters have a right to be represented by candidates who share their views. In situations like

72 Sex Discrimination (Election Candidates) Act 2002.

73 While France is famous for its parity law, it is noteworthy that the French Constitutional Council originally declared such a Bill to be contrary to the Constitution: Constitutional Council Decision 82-146 on the Law Amending the Electoral Code, 18 November 1982.

74 Melissa Williams, "The uneasy alliance of group representation and deliberative democracy" in William Kymlicka and Wayne Norman (eds), *Citizenship in Diverse Societies* (Oxford: OUP 2000).

75 *Tanase* v *Moldova* App. No 7/08, 27 April 2010 (GC), para. 174.

76 See, for instance, the range of options canvassed in the OSCE's Lund Recommendations (1999), www.osce.org/documents/hcnm/1999/09/2929_en.pdf (accessed 31 May 2010).

77 *Liberal Party* v *United Kingdom* (1980) 21 DR 211.

78 *Yumak and Sadak* v *Turkey* (2008) 48 EHRR 4 (GC).

79 Ibid. para. 140.

80 Ibid. paras 141–6.

Podkolzina, the ECtHR could consider whether the provision of simultaneous translation in parliament, for instance, would facilitate minority representation. If the problem is that members of an impoverished group are unable to raise a deposit to run, then there could be a positive obligation to make an exception in such cases. If the problem is discrimination by political parties, the ECtHR might conclude that the state should adopt laws to prohibit such discrimination. This last point concerns the regulation of political parties and it is to this issue we now turn.

Regulation of political parties

The ECtHR has developed a considerable body of case law on the rights of political parties, mostly concerned with reviewing decisions to restrict the activities of a party or even to ban them. However, there is also scope for the ECtHR to impose positive obligations on states in relation to political parties. Indeed, the ECtHR has already recognised positive obligations, for instance, to protect politicians and political parties when they are exercising free assembly rights.[81] The next sub-sections consider possible positive obligations in relation to money and broadcasts, party proscription and questions of internal party democracy and transparency.

Money and broadcasts

A vexed question in any democracy is how to regulate the role of money in politics, in the context of large expenditures by political parties, especially during election time. Some national constitutional courts have developed extensive jurisprudence in this area, as, for example, in Germany. The German Constitutional Court has held that tax exemptions for party donations are unconstitutional and suggests that state financing of political parties, given their constitutional role, is appropriate.[82] Since then there has been considerable litigation in Germany on the financing system.[83] The German system of state funding has been upheld in Strasbourg,[84] but the ECtHR is unlikely to direct states to establish public financing of political parties.

Nevertheless, while the ECHR may not require party financing, it is still possible for a party to argue that a state has violated its ECHR rights by failing to extend financing to it. The ECtHR has already considered one such case. The French National Basque Party (PNB) was denied state funding because it received funding from a foreign entity (the Spanish Basque National Party). The ECtHR concluded that it was justifiable to ban donations by foreign companies, but it was not so obvious that it was justifiable to ban donations by foreign political parties. Still, it fell within the margin of appreciation.[85] Similarly, the ECtHR has rejected the suggestion that P1-3 in itself requires the allocation of time on radio or television to a political party during an election period, unless there is a manifest arbitrariness or discrimination.[86] The UK courts have already considered such an argument. Political parties in Westminster receive "policy development grants" (PDGs) but only if the party's MPs take their seats in parliament. This had the effect of denying

81 *Christian Democratic People's Party* v *Moldova (No 2)* App. No 25196/04, 2 February 2010, para. 25.

82 *Party Tax Deduction* case [1958] 8 BVerfGE 51, referred to in Donald Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany* (Durham and London: Duke University Press 1997), p. 201.

83 Kommers, *Constitutional Jurisprudence*, n. 82 above, pp. 204–15.

84 *X* v *Federal Republic of Germany* (1976) DR 90.

85 *Parti Nationaliste Basque* v *France* (2008) 47 EHRR 47, para. 47. Judge Rozakis dissented as he believed the majority should have made allowance for the role of political parties within the EU.

86 *Partija "Jaunie Demokrati" and Partija "Musu Zeme"* v *Latvia* App. Nos 10547/07 and 34049/07, 29 November 2007.

PDGs to Sinn Fein, who argued this violated the ECHR.[87] The Northern Irish Courts ruled that Sinn Fein was not in an analogous position to other parties (since Sinn Fein MPs did not sit in parliament) and so there was no discrimination. While the applicants ultimately failed in these cases, the courts treated the claims as arguable, allowing for the finding of a violation in a suitable case. Therefore, both the ECtHR and UK cases suggest that discrimination-type arguments are plausible.

Similarly, as regards free electoral broadcasts, while there may not be an argument that the state should provide for free electoral broadcasts or other electioneering opportunities, there is a strong argument that any such benefits should be provided on a non-discriminatory basis. If the rules on election broadcasts were discriminatory, one might imagine an argument that a party or individual excluded from the benefits of free election broadcasts or funded electioneering material might argue that the benefit be extended. The ECtHR should look at the situation to ensure that any such distinction is justified. It may be possible to justify discrimination in such cases if, for instance, the distinction is based on differing levels of support as expressed in election outcomes. Similarly, it may be possible to justify a distinction if a party supports violence or is fundamentally opposed to human rights. This latter situation is the problem posed in "militant democracy" cases and the next sub-section considers this in more detail.

Prohibition of parties?

One aspect of positive obligations that may be somewhat troubling is the idea that there may be a positive obligation to prohibit certain types of party. Both Article 11(2) and Article 17 ECHR allow for the possibility that a party or individual may be banned,[88] either as a proportionate response to a threat to one of the Article 11(2) legitimate interests, or in extreme cases because the party or individual is aiming at the "destruction" of the rights and freedoms in the Convention. Provided certain conditions are met, these provisions permit a state to ban a political party.

Is there then a positive obligation to ban certain parties? Fox and Nolte floated the suggestion that any international law right to democracy might include just such a positive obligation, before concluding that the decision to ban a party was such a fact-sensitive and political decision that it would be impractical to have an international law obligation of this nature.[89] More recently, Brems has emphasised Article 4 of the Convention on the Elimination of Racial Discrimination (CERD), which *requires* states to proscribe racist organisations, a requirement which presumably includes political organisations.[90]

Until recently, the position of the ECHR has been the one sketched above – any decision by a state to ban a party must be justified under Article 11(2).[91] However, in the *Batasuna* cases, the ECtHR seems to envisage the possibility that there may be a positive obligation to ban certain parties.[92] The cases concerned the Spanish law allowing for the

87 *Sinn Fein's Application for Judicial Review* [2003] NIQB 27, 10 April 2003 and in the Court of Appeal [2004] NICA 4, 4 February 2004.

88 The Court has rejected a challenge by a Belgian politician who was banned from running for election for 10 years after he disseminated racist electioneering literature: *Feret* v *Belgium* App. No 15615/07, 16 July 2009.

89 Gregory Fox and Georg Nolte, "Intolerant democracies" (1995) 36 *Harvard International Law Journal* 1, pp. 63–8.

90 E Brems, "Freedom of political association and the question of party closures" in Wojciech Sadurski (ed.), *Political Rights Under Stress in 21st Century Europe* (Oxford and New York: OUP 2006), p. 131.

91 Lécuyer seems to suggest that Zdanoka, Refah Partisi and other cases may support a positive obligation to defend democracy: Lécuyer, *Les droits politiques*, n. 1 above, pp. 414, 418–9.

92 *Herri Batasuna* v *Spain* App. Nos 25803/04 and 25817/04, 30 June 2009.

proscription of a political party because of its support of political violence. The ECtHR accepted that there was evidence of support for political violence as to make the proscription a proportionate response. However, it also went on to indicate that such a conclusion was in accordance with the state's positive obligations.[93] Too much should not be read into this passage. The Court does not quite say that there is a positive obligation to ban a political party. Nevertheless, the language leaves open the possibility to argue that the state may have a duty to ban certain political parties.

Apart from possible cases such as Article 4 CERD where the state has accepted such an obligation, this would seem to be a positive obligation too far. Fox and Nolte were right to stress the fact-sensitive and political nature of such judgments. Other scholars too have stressed the need for political actors to make very careful decisions when deciding how to react to undemocratic political parties.[94] It is difficult to see how a court – especially a supranational court – would be in a position to make such judgments.

Internal party democracy and transparency

Apart from these examples of positive obligations, there are arguments supporting positive obligations to promote internal party democracy and to support transparency regarding party finances.

Mersel has argued for a duty to promote internal democracy within political parties. This is necessary to support the "representative and participatory functions" of democracy and to counteract oligarchy, among other reasons.[95] While this is a novel suggestion, some constitutions impose requirements on political parties.[96] Indeed, one of the most famous constitutional decisions in this area – the German Federal Constitutional Court's decision to ban the Socialist Reich Party – was explicitly based on that party's undemocratic hierarchical ordering.[97] There are even examples of this in the United States Supreme Court. The Supreme Court was able to apply constitutional standards to the Democratic Party in the South to prohibit all-white party primaries.[98] Given the importance the ECtHR attaches to the protection of minorities, a positive obligation on the state to prohibit

93 "Selon la Cour, un tel pouvoir d'intervention préventive de l'Etat est également en conformité avec les obligations positives pesant sur les Parties contractantes dans le cadre de l'article 1 de la Convention pour le respect des droits et libertés des personnes relevant de leur juridiction. Ces obligations ne se limitent pas aux éventuelles atteintes pouvant résulter d'actions ou d'omissions imputables à des agents de l'Etat ou survenues dans des établissements publics, mais elles visent aussi des atteintes imputables à des personnes privées dans le cadre de structures qui ne relèvent pas de la gestion de l'Etat. Un Etat contractant à la Convention, en se fondant sur ses obligations positives, peut imposer aux partis politiques, formations destinées à accéder au pouvoir et à diriger une part importante de l'appareil étatique, le devoir de respecter et de sauvegarder les droits et libertés garantis par la Convention ainsi que l'obligation de ne pas proposer un programme politique en contradiction avec les principes fondamentaux de la démocratie . . ." ; *Herri Batasuna* v *Spain* App. Nos 25803/04 and 25817/04, 30 June 2009, para. 82.

94 G Capoccia, *Defending Democracy: Reactions to political extremism in inter-war Europe* (Baltimore: Johns Hopkins University 2002).

95 Yigal Mersel, "The dissolution of political parties: the problem of internal democracy" (2006) 4 *International Journal of Constitutional Law* 84, pp. 96–8.

96 Mersel cites Poland's requirement that parties respect equality and participation, while other states ban secret or paramilitary parties or religiously based parties: Ibid. p. 110.

97 *Socialist Reich Party* case 2 BVerfGE 1 (1952), referred to in Kommers, *Constitutional Jurisprudence*, n. 82 above, p. 218.

98 *Smith* v *Alright* (1944) 321 U.S. 649; *Terry* v *Adams* (1953) 345 US 461.

discrimination by political parties in terms of their membership and selection of candidacy rules is one possible avenue for litigants to pursue.[99]

Finally, there may be positive obligations to ensure that the financing of political parties is transparent. The promotion of transparency regarding the finances and property of parties and candidates is a legitimate aim on the Convention, so states may require parties and individual candidates to disclose information about these matters. A step further would be to oblige the state to compel disclosure – is there Convention support for this? An admittedly imperfect analogy may be with the environmental rights cases like *Lopez Ostra*, *Guerra* and *Oneryildiz*.[100] When a private enterprise is engaged in hazardous activity and the state has knowledge of that activity, the state is under a duty to provide information to individuals affected so they may vindicate their rights. To develop the analogy, political parties and individuals are looking for voters to vote for them. So that the voters might exercise their rights intelligently and so that the free (informed) opinion of the people might be ascertained, there may be an obligation to insist on transparency about the financing of political parties and individuals contesting elections. This is, indeed, the conclusion to which the Venice Commission[101] and the Parliamentary Assembly of the Council of Europe have come.[102]

Conclusion

This paper has highlighted some of the positive obligations identified by the ECtHR in relation to P1-3. It has also discussed some possible positive obligations which may be developed in the future. Some of these may be developed by analogy to positive obligations already recognised in other parts of the ECtHR jurisprudence (duty to protect, investigate, perhaps provide information). Beyond this, realising the ECHR's vision of an "effective political democracy" requires the Court to be attentive to the needs of minorities and non-dominant parties. In these cases, the ECtHR should adopt a more intense scrutiny and consider the use of positive measures.

There is a unifying theme to many of these positive obligations. Whether it comes to ensuring that members of minority groups are registered to vote, ensuring that party finance rules are non-discriminatory, or preventing dominant parties from unfairly abusing a position of power, the underlying value is equality. As long ago as the *Mathieu-Mohin* case, the ECtHR recognised the importance of political equality. This article has suggested some positive measures that are necessary to realise the promise of equal political rights.

99 See e.g. the recent challenge by the British Equality and Human Rights Commission to the legality of the British National Party: Equality and Human Rights Commission, "Court ruling in legal challenge to BNP's constitution", press release, 28 January 2010.

100 *Lopez Ostra* v *Spain* (1994) 20 EHRR 277; *Guerra* v *Italy* (1998) 26 EHRR 357; *Oneryildiz* v *Turkey* (2005) 41 EHRR 20.

101 European Commission for Democracy through Law (Venice Commission), *Guidelines on the Financing of Political Parties* (Strasbourg: Council of Europe 2001).

102 Parliamentary Assembly Recommendation 1516 (2001) on the financing of political parties 2001.

NILQ 61(3): 281–94

Supplementing the European Convention on Human Rights: legislating for positive obligations

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Introduction

Effective enforcement and implementation is a concern for any human rights legislation. Deciding where the obligations lie to promote, protect and fulfil rights and, in particular, what the reach of those obligations ought to be with respect to both public and private organisations are issues of crucial importance. Without these decisions having been taken, the scope of application of the legislation may be open to challenge and those with a duty to uphold rights may be ignorant of their responsibilities, or at the very least be less likely to interrogate what their obligations are in a meaningful sense. An equally important decision relates to the nature and extent of obligations and, in particular, what level of responsibilities should be imposed upon those who bear a duty to uphold rights. Here, too, the risk is that if the obligations imposed on duty-bearers are not explained clearly enough then there may be less diligence afforded to protecting human rights and so violations are ultimately more likely to occur. In this paper, I consider how the European Convention on Human Rights (ECHR) can help provide us with answers to these two questions. Who should be obliged to uphold rights? And what actions do those obligations require?

In theory, the Convention is a framework that is primarily concerned – although not exclusively so – with defending human rights conceived as negative liberties and that, therefore, requires governments to act as the guarantors of non-interference in the free choices exercised by individuals.[1] However, a principled reading of the Convention combined with case law from the European Court of Human Rights (ECtHR) allows us to make a convincing argument showing that the Convention offers much more than a defence of negative liberty. In particular, such an argument shows that the Convention should also be understood as a framework that is concerned with promoting human rights as positive obligations requiring duty-bearers to take certain actions to uphold our liberties. This point has been too often overlooked. The thesis in support of positive obligations remains underdeveloped and this has diminished the effectiveness of the Convention and its application within the domestic jurisdictions of contracting states.

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1 This is not to deny acceptable qualifications and limitations introduced by a democratic government, for example, to balance competing rights or to protect the broader public interest.

By applying a principled approach which reads the Convention as imposing some positive obligations, it is possible to arrive at a position where human rights can be better protected. Since positive obligations highlight the responsibilities that governments and other executive agencies have to take pro-active measures to protect rights, it follows that their introduction means that duty-bearers will in practice need to make interventions to pre-empt human rights violations and provide necessary redress whenever violations occur. Utilising this approach, I will illustrate in the following paper how innovative solutions can be developed to answer the questions of who should be obliged to uphold rights and what actions those obligations require. Central to my argument will be the idea of "context-sensitive legislation". Such legislation is required in the respective jurisdictions of contracting states so as to spell out the sorts of positive obligations that might have purchase for people and that will resonate with their experience of everyday life.

On the face of it, of course, there appears to be an obvious contradiction here. On the one hand, this paper will examine the general principles that support reading the Convention as a text that asserts positive obligations, while, on the other, the paper will argue in favour of a context-sensitive approach. But while this might sound contradictory, it is not. At one level, I will argue that we can identify general principles that underpin a reading of the Convention that includes positive obligations. Yet, when it comes to seeing how those principles play out in particular jurisdictions, I will also argue that we are compelled to shift from a theoretical level of reasoning to a level of reasoning that is much more sensitive to conditions on the ground.

One should not draw a bright line between these two arguments. How general principles play out in practice will contribute to and inform our ongoing theoretical reflections. In this sense, the paper assumes that theory and practice are mutually implicating – general principles imply practical questions, just as practical questions require us to take a reflexive attitude toward our general principles. By way of illustration, I use the case of Northern Ireland, where deliberations have recently taken place on supplementing the Convention with a Bill of Rights. In particular, I show how an argument can be made to include a wider range of public and private organisations as duty-bearers by extending the scope of application. Once this has been achieved, I will demonstrate how it becomes possible to point towards a typology for positive obligations, one that reflects and further develops the general principles that underpin it.

A principled approach

The scheme of the ECHR is to set out rights and freedoms and then determine the circumstances, if any, in which they may be restricted. For the most part, this approach is concerned with shielding individuals from undue interference by the state and its representatives, with limited qualifications. What Isaiah Berlin referred to as "negative liberty" is therefore a central value of the Convention as it seeks to guarantee that human rights are framed as a safeguard against arbitrary government.[2] It is, in sum, a treaty that appears at first to be underpinned by a particular concept of liberty definable in terms of a requirement of non-interference on behalf of contracting states. The obligation on governments to resist the introduction of obstacles, barriers or constraints that would prevent individuals from exercising their rights without justifiable cause and, even then, only in certain pre-determined circumstances, is in many respects the Convention's mantra.[3]

2 I Berlin, "Two concepts of liberty" in H Hardy (ed.), *Liberty* (Oxford: OUP 2002).

3 For further discussion, see J G Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester University Press 1993), p. 103, and D Feldman, *Civil Liberties and Human Rights in England and Wales* 2nd edn (Oxford: OUP 2002), p. 53.

The actual jurisprudence of the ECtHR suggests, however, that duties imposed by the Convention are much wider than a concept of negative liberty could alone provide for. In the process of protecting and promoting rights and freedoms, due regard must, we are told, be afforded to the "special character" of the Convention as "a treaty for the collective enforcement of human rights".[4] Such regard depends for its success on a further determination that the Convention should operate as a guarantee for the enforcement of rights that are not theoretical or illusory but "practical and effective".[5] This in turn has been interpreted by the Court to mean that states are not only required "to refrain from action" that would amount to an undue or unjustifiable interference in an individual's exercising of his or her rights, but also to recognise that the Convention imposes upon governments the positive obligation "to take action" in order to protect rights in ways that enable claimants to realise them in practice.[6]

A requirement to take action is perhaps most readily identifiable when it comes to ensuring the right to a fair trial. Article 6(3), which guarantees that everyone charged with a criminal offence receives state assistance, amounts to much more than a duty to uphold the concept of negative liberty. It also demands that procedures and resources – including financial support such as legal aid – should be introduced by governments to ensure that individual claimants have the capacity to exercise their rights in a meaningful sense. While positive obligations are therefore expressly defined within the text, this is not typical of the Convention as a whole. Instead, positive obligations to take action have more usually evolved as a consequence of judicial interpretation rather than express reference. So, for example, the right to life has been interpreted to include a duty to take proactive measures to prevent a violation from occurring[7] and to effectively investigate suspicious deaths.[8]

It is important, however, not to overstate this point. While the ECtHR has declined to expressly develop any normative standards, Keir Starmer has argued that there are sufficient grounds, nonetheless, drawing from both the text and case law, to identify a set of principles that support the dominant judicial view of the Convention as a framework for the imposition of positive obligations.[9] The first of these principles requires contracting states to take actions to secure Convention rights for everyone within their jurisdiction. Premised upon Article 1, it necessitates, amongst other actions, the creation of domestic legal frameworks which can provide effective protection for Convention rights. It also includes a duty to allocate resources to individuals in order to prevent violations of their rights and the provision of information and advice on both the content of the Convention itself and on issues (such as government policies or the activities of private organisations) the consequences of which might adversely impact individual claimants.[10]

A second principle, which I have already mentioned briefly, requires actions to guarantee that rights are both practical and effective. This is premised on case law[11] and demands the

4 *Soering* v *UK* (1989) 11 EHRR 439, para. 87.

5 *Artico* v *Italy* (1980) 3 EHRR 1. See also, K Starmer, *European Human Rights Law* (London: LAG Education and Service Trust Ltd 1999), pp. 158–9.

6 *Gül* v *Switzerland* (1996) 22 EHRR 93, dissenting opinion of Judge Martens, para. 7.

7 *McCann and Others* v *UK* (1995) 21 EHRR 97, paras 146–7; *Osman* v *UK* (2000) 29 EHRR 245, para. 151; *Anguelova* v *Bulgaria* (2004) 38 EHRR 31, para. 109.

8 *Kelly and Others* v *UK* App. No 30054/96, 4 May 2001, para. 154; *Ergi* v *Turkey* (2001) 32 EHRR 18, para. 98; *Salman* v *Turkey* (2000) 34 EHRR 425, para. 123; *McKerr* v *UK* (2002) 34 EHRR 20, para. 111.

9 Starmer, *European Human Rights Law*, n. 5 above, pp. 193–209.

10 Ibid. pp. 196–9, 202–4.

11 A Mowbray, *The Development of Positive Obligation under the Eurpoean Convention on Human Rights by the Eurpoean Court of Human Rights* (Oxford and Portland, Oregon: Hart Publishing 2004).

introduction of preventative and proactive measures that are designed to protect individuals from the actions of other individuals or those of public and private organisations. Such a requirement has resource implications. As Rabinder Singh notes:

> [P]rotection has a price. The right of access to the courts would be meaningless if there were no courts, or if they were not properly financed, or if only a few people could get to them owing to a lack of money.[12]

Still, the reach of this principle, as I have indicated, goes far beyond the realisation of Article 6 and could easily be read into much of the Convention, as well as changing our understanding of the text. So, for example, the Court has determined that:

> the Convention must be interpreted in light of present day conditions . . . [I]t is designed to safeguard the individual in a real and practical way as regards those areas with which its deals. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature.[13]

The third principle identified by Starmer requires actions to be taken to secure effective remedies in the event of there being a violation of human rights. Premised on Article 13, the demand made in this instance is one of compliance by guaranteeing that where a violation has occurred the individual claimant will "have an effective remedy before a national authority".[14] This point is significant. While the first principle – securing Convention rights for everyone within the jurisdiction – may be interpreted as requiring the introduction of a domestic legal framework, it remains in many respects a minimum requirement. There is no obligation, for example, following this first principle, to incorporate the Convention directly into domestic law. By comparison, the third principle does impose an express duty to give domestic force to Article 13. This has been interpreted to include not only the payment of compensation when a violation has taken place, but also the execution of an effective investigation leading to criminal prosecutions where appropriate.[15]

Taken together, the three principles as I have outlined them are useful in assisting us to identify the sorts of actions that, *at a general or theoretical level*, might be used in order to give the Convention meaning as an enforceable human rights framework.[16] In a sense, one might argue, as Starmer has done, that the principles themselves amount to positive obligations. Certainly, once attached through an interpretative exercise to existing human rights, it becomes possible to formulate a series of associated responsibilities to take actions deemed necessary to guarantee that the rights in question are practical and effective. This may, admittedly, shine a light on areas of law that are in need of further definition. Yet, the approach adopted by the Court of imposing positive obligations as a consequence of interpretation is less than optimal. Let me explain why.

When a case is presented before the ECtHR, the Court has often ruled on how and to what extent a government is obligated to take action. This activity is, on one reading, entirely fit for purpose. But judicial behaviour of this sort can never be a sum total and should only be considered legitimate when it is understood to be part of a broader

12 R Singh, *The Future of Human Rights in the United Kingdom: Essays on law and practice* (Oxford and Portland, Oregon: Hart Publishing 1997).

13 Merrills, *Development*, n. 3 above, p. 102.

14 Article 13 ECHR.

15 K Starmer, "Positive obligations under the convention" in J Jowell and J Cooper (eds), *Understanding Human Rights Principles* (Oxford and Portland, Oregon: Hart Publishing 2001), p. 156.

16 It is an open question as to whether these principles would also be the appropriate for a legislature to decide how to enforce the convention, but in essence this is precisely the question I am attempting to answer in this paper.

democratic process. If one were to leave it entirely to a court to decide who should be obliged to uphold rights and what actions those obligations require, then we would be left with, as Albert Weale suggests, "a large penumbra of uncertainty surrounding individual legal obligations".[17] This is not because legal judgments lack clarity. It is because a court can only react to social problems once they have emerged, rather than anticipate them. A court may be able to pass judgments on individual claims, but as Weale goes on to argue, it "lacks the capacity to deal with the cumulative, unintended effects of individual behaviour".[18] More generally still, a court can only indirectly shape the social backdrop within a society, against which claims of rights violations emerge, but is not itself well placed directly or pre-emptively to change that backdrop; it is simply not part of a court's remit to engage in acts of societal interpretation on this ontological scale (although, of course, it may contribute to such interpretation indirectly or on a smaller scale). All of this is just to say that, if we wish fully to address the questions of who should be obliged to uphold rights and what actions those obligations require, then we cannot simply look to what the ECtHR has said.

Addressing questions raised by the debate on positive obligations requires us to take a broader democratic view. It would be unsatisfactory to focus solely upon the judiciary. But that is not to deny the proper role of the Court, it is merely to recognise that, although the Convention has been interpreted to include positive obligations, to appreciate fully what positive obligations involve we need to look beyond the Court. Starmer, at the beginning of his essay, recognises that there may no longer be any question of whether the Convention imposes positive obligations, but there certainly are questions of when and to what extent.[19] Case law provides some of the answers to these questions, but it cannot provide all of them. In fact, it may not be the best way of going about the task at hand.

In short, if it were possible to know in advance the kind of things that the Court would have to deal with, then it seems reasonable to assume that, in principle at least, domestic legislatures would make attempts to introduce laws and policies that might pre-empt and prevent human rights violations from occurring. In other words, they would voluntarily spell out positive obligations and give them legal effect. Naturally, this is not to suggest that domestic legislatures are a foolproof mechanism: they most certainly are not. But the point remains that a democratic society needs a legislature, or a legislative function, even if that function will also need to be scrutinised by the courts. It would arguably be much better and preferable, therefore, if contracting states and, in particular, their legislative and executive agencies, applied Starmer's principles and in doing so created practical and effective human rights frameworks within their respective jurisdictions from the off. This is precisely what the Belfast (Good Friday) Agreement envisaged happening in the case of Northern Ireland when it called for the Convention to be supplemented with a regional Bill of Rights. The process of creating such a Bill would require further definition to be provided both in terms of who should be obliged to uphold rights and what actions those obligations require. Each of these I would now like to consider in turn.

Where the burden of responsibility should fall

While Starmer has provided principles for thinking about positive obligations, the fact is, as I have explained, that they present little more than general guidance for thinking about how human rights ought to be applied. They can help us to understand, for example, the views adopted by the ECtHR when it has interpreted the Convention, but we are still left

17 A Weale, *Democracy: Issues in political theory* (Basingstoke: Palgrave 1999), p. 51.

18 Ibid. p. 5.

19 K Starmer, "Positive obligations", n. 15 above, p. 140.

wondering how positive obligations might play themselves out within particular jurisdictions. For instance, the domestic legislative framework for implementing and enforcing the ECHR within the United Kingdom, and hence within Northern Ireland, is the Human Rights Act 1998. Since the Act came into force in 2000, it has been applied vertically and therefore imposes a direct duty to protect rights only upon those organisations defined as public authorities.[20] This includes "a court or tribunal and any person certain of whose functions are functions of a public nature".[21] What constitutes a public authority for the purposes of the Act has, however, been a subject of some dispute.

Attempts have been made, as noted by Ian Leigh and Roger Masterman, to extend the scope of application of the Human Rights Act so as to include private, community and voluntary organisations that have entered into contractual arrangements to deliver frontline public services and that are to that extent controlled by government departments, executive agencies or local authorities.[22] On the one hand, this move has emerged in response to the practical impacts of privatisation, the introduction of public–private partnerships, and the increased tendering out of responsibilities for public service provision. But it has also crucially followed in the wake of the judiciary's demonstrable tendency to interpret the definition of a public authority more narrowly than appears to have been intended by the Westminster Parliament.[23] So, for example, the decision in the *YL* case in 2007 that private nursing care-homes did not constitute public authorities[24] was quickly followed with a legislative correction included in the Health and Social Care Act 2008 to ensure that vulnerable older people would not be adversely impacted as the consequence of a privatised public service.[25]

Related to the problem of defining a public authority has been a second debate concerned with determining at what point public and private organisations must take cognisance of their responsibilities. This too has been narrowly interpreted, with the House of Lords ruling that the focus must be outcome-based.[26] Provided the practical effect – the outcome – of public authority decisions complies with those aspects of the Convention included in the Human Rights Act, it has been deemed unnecessary for public authorities to prove that they have given due regard to their obligations in the process of making those decisions. This ruling stands, despite the fact that the courts have previously found in favour not only of outcome-based obligations, but also those that are process-based and which therefore require consideration of human rights compliance during the period of deliberation prior to a decision being made.[27] An outcome-based focus, rather than process-based one, lessens the burden of responsibility. It leans towards a negative liberty interpretation of human rights in general, whereby those representing the state need only

20 This is not to deny the fact that indirect horizontal application has also been afforded on occasion as a consequence of the courts' developing the common law in line with convention rights.

21 Human Rights Act 1998, s. 6(3).

22 Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in its first decade* (Oxford and Portland, Oregon: Hart Publishing 2008), p. 134.

23 See, for example, HC Debs, col. 773, 16 February 1998, where Mr Jack Straw, during the second reading of the Human Rights Bill, noted that: "The Bill had to have a definition of a public authority that . . . took account of the fact that, over the past 20 years, an increasingly large number of private bodies, such as companies or charities, have come to exercise public functions that were previously exercised by public authorities."

24 *YL* v *Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

25 Health and Social Care Act 2008, s. 145 (1).

26 *Belfast City Council* v *Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420; *R (Begum)* v *Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100.

27 See e.g. *AR* v *Homefirst Community Trust* [2005] NICA 8; *Miss Behavin' Ltd* v *Belfast City Council* [2005] NICA 35.

be concerned with ensuring that their actions do not unjustifiably interfere with individual freedoms, as opposed to taking actions with a view to increasing the capacity of claimants to exercise their rights in the first place.

Question marks over the scope of application of rights, as I have just described them, highlight the importance of creating domestic legal frameworks which can provide effective protection for Convention rights and remedies when violations occur, in line with Starmer's principles as previously discussed. The experience of how the Human Rights Act – and, in particular, the obligations that flow from it – has been interpreted by courts in the United Kingdom is indicative of a wider concern that requires us to recognise the need for contextualised legislation. To ensure that they are practical and effective we must first acknowledge that human rights operate, as Jürgen Habermas suggests, within legal systems that are "also the expression of . . . particular form[s] of life and not merely a reflection of the universal content of basic rights".[28] This was a point expressly recognised by the Belfast (Good Friday) Agreement when it provided the Northern Ireland Human Rights Commission (NIHRC) with a mandate to:

> advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the [Convention] – to constitute a Bill of Rights for Northern Ireland.[29]

Because a Bill of Rights for Northern Ireland must be progressive and build upon the Convention, it has presented an opportunity to deal with some of the issues that I have raised concerning the scope of application of rights. Here, the first point to be made is that, while the responsibilities of public authorities to uphold the Human Rights Act is narrowly outcome-focused, the Northern Ireland legal system within which the Act is situated more generally includes laws that require process-based compliance. Duties to eliminate discrimination found, for example, in the equality and good relations provisions of the Northern Ireland Act 1998 and Race Relations (Northern Ireland) Order 1997 contain strong procedural elements.[30] They are, in other words, positive obligations that require actions to be taken. Schedule 9 to the Northern Ireland Act, in particular, includes a programmatic requirement that public authorities produce statutory schemes to be submitted to the Equality Commission for Northern Ireland. These schemes must demonstrate how the authority intends to implement the obligation to promote equality of opportunity and must cover arrangements for policy appraisal, including an assessment of impact on relevant groups, public consultation, public access to information and services, monitoring and timetables.[31]

Further reflecting upon the observation made by Habermas – that human rights must be rendered effective within particular legal systems and will be coloured by that broader legal context – we should note that both the Belfast (Good Friday) Agreement and the Northern Ireland Act provide direction as to where the burden of responsibility should fall

28 Jürgen Habermas, "Struggles for recognition in the democratic constitutional state" in A Gutmann (ed.), *Multiculturalism* (Princeton, New Jersey: Princeton University Press 1994), p. 124.

29 The Agreement: Agreement reached in the multi-party negotiations (1998), pp. 16–17. For further discussion of this point see e.g. C Harvey and D Russell, "A new beginning for human rights protection in Northern Ireland?" (2009) *EHRLR* 748.

30 Northern Ireland Act 1998, s. 75; Race Relations (NI) Order 1997, Article 71(1).

31 Northern Ireland Act 1998, Sch. 9.

for protecting, promoting and fulfilling human rights. The Agreement stipulates that the Northern Ireland Assembly, its Executive Committee and all other Northern Ireland public authorities must be bound by both the Convention and any Bill of Rights supplementing it.[32] The mandate for a Bill of Rights also expressly states that, when determining the possible content, consideration must be given to the inclusion of "a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors".[33] Finally, because a Bill would be a regional instrument within part of the United Kingdom, it follows that consideration would need to be given to the relationship between it and all government institutions that have a competency in respect of the jurisdiction. There are three categories of government competence provided for by the Northern Ireland Act. First are "transferred matters", over which the devolved administration exercises power. Second are "reserved matters", over which Westminster exercises power, but which may be transferred with the consent of the Secretary of State. Third are "excepted matters", for which only Westminster can legislate, including areas such as the armed forces, immigration and electoral law.[34]

Considering this context, there is a compelling case to argue that, at a minimum, all public authorities in Northern Ireland would need to be obligated to act compatibly with a Bill of Rights that supplemented the Convention in order to ensure practical and effective legislation. It would also be necessary, given the experience of the Human Rights Act, to define a public authority so as to capture private, community and voluntary organisations that have entered into contractual arrangements to deliver frontline public services. For this reason, the NIHRC was correct in 2008 when it recommended that a public authority should include "any person or body performing a public function".[35] When it comes to transferred matters, as mentioned above, it seems reasonable to conclude that the Northern Ireland Assembly must be bound by a Bill of Rights. Similarly, it is important that reserved and excepted matters are both dealt with effectively, meaning that both the Westminster Parliament and central government public authorities should also be obliged to comply with a Bill. At present, designated public authorities that have a remit to carry out functions throughout the entirety of the United Kingdom, such as the Electoral Commission,[36] must, when operating in or in relation to Northern Ireland, adhere to the requirement of s. 75 of the Northern Ireland Act 1998.[37] By extension, and taking cognisance of the wider legal system, there are good grounds to suggest that, in so far as they perform their functions either in Northern Ireland or in relation to Northern Ireland, similar obligations should apply to both the Westminster Parliament and central government public authorities in respect of a Bill of Rights.

When determining the scope of application of rights and the point at which public and private organisations must take cognisance of their responsibilities, it is equally important to deal with the questions of where and when the burden of responsibility does *not* fall. Contextualised legislation that is effective must treat these issues in the round. There is a need to provide clarity on the questions raised and part of this will necessarily involve giving some reassurance that the responsibilities of public authorities will not be unduly onerous.

32 The Agreement, n. 29 above, s. 3 (5).

33 Ibid. s. 6 (4).

34 Northern Ireland Act 1998, s. 4.

35 *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (Belfast: NIHRC 2008), p. 149.

36 Northern Ireland Act 1998 (Designation of Public Authorities) Order 2004, Article 2.

37 See also Northern Ireland Act 1998 (Designation of Public Authorities) Order 2001 and Northern Ireland Act 1998 (Designation of Public Authorities) Order 2003.

To this end, the text of the Convention would first need to be supplemented by making clear, as I have argued previously, that any proposed obligations are only attributable where an organisation defined as a public authority has competence to make a decision or devise a policy. It would be unreasonable, for example, to demand that a private sector company contracted for a specific purpose by government, such as hospital cleaning services or provision of public housing tenancies, be designated for all of their commercial activities. Second, what might be considered unreasonable should, as far as possible, be identified in advance through the introduction of qualifying clauses that aim, where appropriate, to reduce the burden of responsibility. This was certainly the approach adopted by the NIHRC in 2008. For example, the recommendation to supplement Article 2 of Protocol 1 to the Convention with a right that would enable everyone belonging to a linguistic minority "to learn or be educated in and through their minority language" also made clear that the concomitant obligation should accord with the viability test of there being a "substantial number of users and sufficient demand".[38] Once the scope of application is defined both in terms of when there is a duty to uphold human rights and when there is not it becomes possible to consider the types of positive obligations that could be introduced.

Towards a typology for positive obligations

Because the text of the Convention is by and large a guarantor for human rights conceived as negative liberties, an obvious way of supplementing its protections is by building upon the work of the ECtHR that, as I have already explained, has established case law that interprets the Convention as a treaty that requires governments "to take action" in order to protect rights and enable individual claimants to realise them in practice.[39] It is most appropriate for domestic legislatures considering how to supplement the Convention, therefore, to attempt to spell out what some of these actions should involve and then move to enshrine them as free-standing protections. The justification for doing so is at least twofold. First, it would reflect the idea that practical and effective human rights need to be more than universal in character, or need to be premised upon more than general principles: they ought also to fit the particular contexts within which they are to operate.[40] Second, it would afford domestic legislatures their rightful place to serve the interests of people residing within their jurisdictions by introducing laws that might pre-empt and perhaps even prevent the violation of existing human rights.

Drawing upon the advice given to the UK government on a proposed Bill of Rights for Northern Ireland by the NIHRC, I would like to suggest four ways in which positive obligations might be legislated for. First are directives, by which I mean duties laid down in legislation that require a government to take further legislative or policy actions in order to address a specific issue of concern and that are, therefore, outcome-based. Second are procedural duties, where public authorities are obligated to implement a process with the aim of creating the conditions where individual claimants are better placed to exercise their existing rights as they see fit. Third are programmatic duties, where the core of a positive obligation is outcome-focused, but its realisation is dependent upon a further requirement for the introduction of statutory schemes, such as impact assessments. Fourth is progressive realisation, which refers to those duties where deliberate concrete and targeted steps are required on behalf of duty-bearers, the aim being to increase over time both the level of obligation and the associated outcome. These formulations are not mutually exclusive nor

38 *A Bill of Rights*, n. 35 above, p. 104.

39 *Gül* v *Switzerland* (1996) 22 EHRR 93, dissenting opinion of Judge Martens, para. 7.

40 Habermas, "Struggles for recognition", n. 28 above, p. 124.

are they exhaustive. In principle one, all or, indeed, any combination of these obligations could be introduced depending on the context.

Directives

Directives require a government to take either legislative or policy actions to address a specific issue of concern. They are outcome-based to the extent that they demand a particular designated action to be taken with a view to achieving a specific objective. Significantly, the practical impact of a directive can also be process-based. Obligations of this sort may give rise, for example, to the introduction of statutory schemes for which a number of public authorities could hold collective responsibility. Crucially, though, those schemes would, given the nature of the obligation, be time-bound and focused upon achieving a pre-determined and measurable target. There are two examples of this approach that have been proposed for a Bill of Rights for Northern Ireland that can be pointed to by way of illustration. The first is a recommended provision that would direct the UK government to supplement Article 2 of the ECHR by legislating so as to ensure that all violations "relating to the conflict in Northern Ireland are effectively investigated".[41] The second is a provision that would direct the government to address the needs of victims of the conflict through the introduction of legislation designed to "ensure that their rights are protected . . . including rights to redress and to appropriate material, medical, psychological and social assistance".[42]

In both of these instances, the positive obligations in question are associated with the specific task of introducing enabling legislation. Once that legislation was on the statute book, the respective obligations would be fulfilled and, hence, the individual provisions would no longer be a focus per se for exercising the rights that lie at the core of the issues which are to be addressed. Crucially, however, the positive obligations would remain as benchmarks against which the success or failure of any implementation processes could be tested. The Convention itself does not contain obligations of this sort, but useful precedents can be found in other international instruments. South Africa's Bill of Rights, for example, contains a number of directives. Article 25 states that:

> A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.[43]

Similarly, Article 32 calls for legislation to be enacted to give effect to the right to access "any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights".[44]

Procedural duties

Procedural duties refer to circumstances where public authorities are obligated to implement a process with the aim of creating the conditions where individual claimants are better placed to exercise their existing rights as they see fit. This type of obligation can already be found within the Convention and has been further developed by the case law of the ECtHR. Article 6(3), as I have previously explained, is a good example of a procedural duty. The requirement that contracting states ensure the right to a fair trial carries with it an

41 *A Bill of Rights*, n. 35 above, pp. 61–2.

42 Ibid. pp. 108–9.

43 Constitution of the Republic of South Africa 1996, s. 25(6).

44 Ibid. Article 32(1) and (2).

obligation to formulate processes that will create the necessary conditions under which this right can be fulfilled. So, for example, it is important to ensure that everyone charged with a criminal offence can consult with a legal representative.[45] There are a number of examples of a procedural approach recommended for inclusion in a Bill of Rights for Northern Ireland that further illustrate how duties of this sort can be constructed. In the case of children, it has been suggested that the Convention might be supplemented by including a provision aimed at ensuring that:

> every child alleged to, accused of, or proven to have infringed the criminal law has the right to be treated in a manner that pays due regard to the child's age, understanding, and needs and is directed towards the child's reintegration in society.[46]

In many cases, procedural duties may already be afforded protection within a broader legal framework. But, even when this is the case, there can be strong reasons for spelling out what a particular obligation is understood to mean in practice. The Convention and jurisprudence have gone some way toward developing procedural duties already, but it is also possible to draw examples from other international instruments. The provision of special assistance for children during a criminal trial recommended for inclusion in the Bill of Rights for Northern Ireland draws upon the UN's Convention on the Rights of the Child, which states in Article 37 that:

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.[47]

It also makes reference to the UN's International Covenant on Civil and Political Rights, Article 14 of which demands on ground of equality before a court that juveniles are subjected to procedures that "take account of their age and the desirability of promoting their rehabilitation".[48]

Programmatic duties

Programmatic duties are those where the core of a positive obligation is outcome-focused, but its realisation is dependent upon a further requirement for the introduction of statutory schemes such as impact assessments. Here, a clear statement that sets out the nature of the duty in question and, in particular, the responsibilities that are attached to it are important. This is because the reach of programmatic duties can vary considerably. The difference between demanding that public authorities take all appropriate measures, have due regard, or have regard to the desirability of promoting, protecting and fulfilling an obligation cannot be overstated. Where an obligation requires "all appropriate measures" to be taken or indicates that public authorities "must" carry out an action, the fulfilment of the duty is an immediate requirement. By contrast, where the duty is to "have due regard", there is arguably a greater flexibility when it comes to a public authority initiating a programme for implementation.

Similar to procedural duties, programmatic duties may already be situated within the context of a broader legal framework. However, whereas the purpose of introducing a procedural duty is to enable the better exercising of other existing rights, a programmatic

45 See e.g. *Averill* v *UK* (2001) 31 EHRR 36 ECHR, paras 57–8 and *Murray* v *UK* (1996) 22 EHRR 29, paras 72–4.

46 *A Bill of Rights*, n. 35 above, pp. 68–9.

47 Article 37(c).

48 Article 14(4).

duty is a good in itself. So, when the NIHRC recommended including in a Bill of Rights for Northern Ireland a provision that:

> public authorities must encourage a spirit of tolerance and dialogue, taking effective measures to promote mutual respect, understanding and co-operation among all persons living in Northern Ireland, irrespective of those persons' race, ethnicity, language, religion or political opinion[49]

it did so in the knowledge that a similar – but narrower and less rigorous – obligation was already contained within the Northern Ireland Act 1998. The commission was minded nonetheless to recommend enshrining a duty of this sort, given that the particular circumstances of Northern Ireland meant that it would serve an important public interest.[50]

Once again, useful precedents can be found in a number of international instruments. The commission's recommendation that I have used here by way of example is analogous to Article 6 of the Council of Europe's Framework Convention for the Protection of National Minorities, which requires contracting states to:

> encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

The commission itself refers in its advice to Article 1 of the UN's Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which requires protection to be given to "the existence and the national or ethnic, cultural, religious and linguistic identity of minorities" and encouragement of "conditions for the promotion of that identity".

Progressive realisation

Progressive realisation refers to those duties where "deliberate, concrete and targeted"[51] steps are required on behalf of duty-bearers, the aim being to increase over time both the level of obligation and associated outcome. Some human rights, notably those that are social or economic in character, such as health, education and work, may require extra resource commitments on the part of a government before they can be fully realised in practice. But those resources will not always be readily available. It is a challenge for any democratic government to balance its response when faced with competing priorities and a limited budget. For this reason, progressive realisation does not require that the results sought from enshrining a particular right be achieved immediately, but instead demands that all appropriate measures be taken towards meeting that objective, moving as expeditiously and effectively as possible. It is important to note that whilst some rights may be realised over time, crucially this does not render void the associated obligations of a substantive meaning. Each right which is subject to progressive realisation will always contain what has been described as a "minimum core obligation" that is immediately enforceable. Furthermore,

49 *A Bill of Rights*, n. 35 above, p. 103.

50 Northern Ireland Act 1998, s. 75(2). This recommendation would widen the reach of s. 75 from three categories (race, religion and political opinion) to five, adding ethnicity and language. It would also raise the level of the obligation. Rather than having due regard to the desirability of implementing the duty as currently conceived by s. 75, public authorities would be required to demonstrate effective measurable outcomes. The status of the good relations duty would therefore change from something that has often been seen as a bolt-on to equality of opportunity to become instead a positive obligation with independent standing.

51 UN Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990) on the Nature of States Parties' Obligations, para. 2.

that core should demonstrably increase with the passage of time and a government should report on a regular basis in a public forum as to how this is being achieved.[52]

In the case of Northern Ireland, a number of social and economic rights recommended for inclusion in a regional Bill of Rights include obligations for progressive realisation. For example, it has been proposed that everyone should have "the right to adequate accommodation appropriate to their needs" and that "public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right".[53] It is also suggested that:

> [w]here rights are subject to progressive realisation, the Northern Ireland Executive shall report annually to the Northern Ireland Assembly, and the [UK] Government shall report annually to Parliament, on the progress made during the previous year in realising these rights in Northern Ireland.[54]

Although the Convention does not itself contain obligations of this type, once again useful examples can be found by examining other international instruments. Article 2 of the UN's International Covenant on Economic, Social and Cultural Rights calls upon each contracting state to:

> take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[55]

South Africa's Bill of Rights also contains a number of such obligations, including Article 26 which states that "[e]veryone has the right to have access to adequate housing" and that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right".[56]

Conclusion

In this paper I have sought to demonstrate how we can identify principles that underpin, at a general level, a reading of the ECHR to include positive obligations. Keir Starmer's principles are general requirements that any government would have to adhere to in order to uphold the Convention as a text supportive of positive obligations. But I also believe that these same principles could apply to any human rights framework: a government would need to take actions to secure equal rights for everyone within its jurisdiction, it would have to take actions to guarantee that those rights were both practical and effective, and it would have to secure effective remedies when violations occur. However, I have argued that these general principles need to be applied in a context-sensitive manner, and that we therefore need to move from the general level to the particular. I have also argued that the task of

52 See e.g. the reporting requirements for progressive realisation imposed on contracting states by the UN's International Covenant on Economic, Social and Cultural Rights, Part IV.

53 *A Bill of Rights*, n. 35 above, pp. 118–19.

54 Ibid. p. 165. An interesting observation is that Northern Ireland may be strongly positioned as a consequence of the practical operation of devolution to implement positive obligations of this sort. Because the devolved administration publishes a Programme for Government, the delivery framework for which includes robust and effective monitoring, there is an already established foundation from which the executive could report annually to the Assembly on a Bill of Rights and those provisions that include progressive realisation. See, Northern Ireland Executive, *Building a Better Future – Programme for Government 2008–2011* (2008).

55 Article 2(1).

56 Article 26(6).

determining positive obligations should not be left to the courts, but should be a matter of legislative concern.

Northern Ireland demonstrates why a context-sensitive approach to positive obligations is necessary, what that might mean in practice, and why legislation is the best means of achieving a satisfactory outcome. In this example, the general principles of securing equal rights for everyone, guaranteeing that those rights are practical and effective, and securing effective remedies have been manifested in the call for a regional Bill of Rights. The need to extend the scope of application of rights to include a wider definition of public authority and to provide a clearer indication of where the burden of responsibility ought to lie to promote, protect and fulfil human rights is demonstrable. But perhaps most interesting of all in the case of Northern Ireland is that, by thinking through a context-sensitive approach that seeks to supplement the ECHR, it has been possible to reflect back upon the general principles which underpin positive obligations and to identify how we can build upon those principles and develop them still further. A typology that stems from a single case study, but one that has been informed by a principled reading of the Convention, that draws upon international instruments and legislation from other jurisdictions, is a strong basis for future discussion. What is at any rate clear is that there is a great deal more work to be done in thinking about positive obligations. But, since there is so much at stake, there is every reason to pursue this agenda further.